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Contents

Federal Register

Vol. 65, No. 135

Thursday, July 13, 2000

Agricultural Marketing Service

RULES

Pork promotion, research, and consumer information order, 43497–43525

PROPOSED RULES

Reports and guidance documents; availability, etc.:

National list of substances allowed and prohibited in organic production and handling; substances evaluation for inclusion and removal; petitions, 43259–43261

Agriculture Department

See Agricultural Marketing Service

See Farm Service Agency

Army Department

NOTICES

Privacy Act:

Systems of records, 43300–43301

Census Bureau

NOTICES

Agency information collection activities:

Proposed collection; comment request, 43285–43286
43286–43287

Submission for OMB review; comment request, 43287–43288

Centers for Disease Control and Prevention

NOTICES

Grants and cooperative agreements; availability, etc.:

Breast and Cervical Cancer Early Detection Activities Program, 43374–43376

Meetings:

Disease, Disability, and Injury Prevention and Control Special Emphasis Panels, 43376–43377

Coast Guard

RULES

Ports and waterways safety:

New York Harbor, western Long Island Sound, and East and Hudson Rivers, NY; safety zones, 43236–43244

Staten Island, Arthur Kill, NY; safety zones, 43244–43246

NOTICES

Meetings:

Chemical Transportation Advisory Committee, 43395
Houston/Galveston Navigation Safety Advisory Committee, 43400–43401

Commerce Department

See Census Bureau

See Export Administration Bureau

See Foreign-Trade Zones Board

See International Trade Administration

See National Institute of Standards and Technology

See Technology Administration

Consumer Product Safety Commission

NOTICES

Meetings; Sunshine Act, 43297–43298

Defense Department

See Army Department

See Defense Logistics Agency

See Navy Department

NOTICES

Meetings:

Science Board task forces, 43298

Privacy Act:

Systems of records, 43298–43299

Senior Executive Service:

Performance Review Board; membership, 43299–43300

Defense Logistics Agency

NOTICES

Privacy Act:

Systems of records, 43301–43307

Education Department

NOTICES

Grants and cooperative agreements; availability, etc.:

Elementary School Counseling Demonstration Program, 43309

Employment and Training Administration

RULES

Aliens:

Labor certification and petition process for temporary employment of nonimmigrant aliens in U.S. agriculture; Labor Department adjudication authority, 43537–43544

PROPOSED RULES

Aliens:

Labor certification and petition process for temporary employment of nonimmigrant aliens in U.S. agriculture; fee structure modification, 43544–43583

Energy Department

See Federal Energy Regulatory Commission

NOTICES

Presidential permit applications:

Brownsville Public Utilities Board, 43309

Environmental Protection Agency

RULES

Hazardous waste program authorizations:

Texas, 43246–43251

Water programs:

Water quality planning and management and National Pollutant Discharge Elimination System program; total maximum daily loads, 43585–43670

PROPOSED RULES

Hazardous waste program authorizations:

Texas, 43284

NOTICES

Meetings:

Endocrine Disruptor Screening Program; priority-setting workshop, 43325–43326

Pesticide, food, and feed additive petitions:

Zeneca Ag. Products, 43326–43329

Toxic and hazardous substances control:

Test guidelines; availability and comment request, 43329–43331

Executive Office of the President

See Presidential Documents

Export Administration Bureau**RULES**

Export licensing:

Commerce Control List; revisions and clarifications
Correction, 43406**NOTICES**Committees; establishment, renewal, termination, etc.:
Technical Advisory Committees, 43288**Farm Service Agency****NOTICES**

Agency information collection activities:

Proposed collection; comment request, 43285

Federal Aviation Administration**RULES**

Airworthiness directives:

Boeing, 43217–43230

Empresa Brasileira de Aeronautica S.A.; correction, 43406

Saab, 43215–43217

Class E airspace; correction, 43406

Standard instrument approach procedures, 43230–43233

PROPOSED RULES

Airworthiness directives:

McDonnell Douglas, 43265–43269

Class D airspace; correction, 43406

Existing regulations review, 43265

NOTICES

Advisory circulars; availability, etc.:

Export airworthiness approval procedures, 43396

Exemption petitions; summary and disposition, 43397
43397–43399**Federal Communications Commission****RULES**

Common carrier services:

Numbering resource optimization

Effective date, 43251

Truth-in-billing and billing format; principles and
guidelines, 43251–43258**NOTICES**

Common carrier services:

Personal communications services—

Ex parte and other presentations on broadband rules;
deadline extension, 43331Reciprocal compensation; inter-carrier compensation for
ISP-bound traffic, 43331–43333

Telecommunications Act of 1996; implementation—

Broadcast services; radio and television stations;
biennial reviews report, 43333–43349

Wireless telecommunications services—

747-762 and 777-792 MHz bands; licenses auction;
package bidding procedures, 43361–43372800 MHz specialized mobile radio service licenses
auction; lower 80 channels, 43349–43361Antenna structure clearance procedure; streamlining,
43349

Meetings:

America Online, Inc. and Time Warner, Inc.; transfer of
control; en banc hearing, 43372Rulemaking proceedings; petitions filed, granted, denied,
etc., 43372**Federal Deposit Insurance Corporation****NOTICES**

Meetings; Sunshine Act, 43372

Federal Election Commission**NOTICES**

Meetings; Sunshine Act, 43372–43373

Federal Energy Regulatory Commission**NOTICES**

Electric rate and corporate regulation filings:

Entergy Gulf States, Inc., et al., 43320–43323

Environmental statements; availability, etc.:

Haida Corp., 43323

Hydroelectric applications, 43323–43325

Applications, hearings, determinations, etc.:

ANR Pipeline Co., 43309–43310

Columbia Gas Transmission Corp., 43310

Dominion Transmission, Inc., 43310–43311

El Paso Natural Gas Co., 43311

Koch Gateway Pipeline Co., 43312

MIGC, Inc., 43312

Northern Border Pipeline Co., 43312

Northern Natural Gas Co., 43312–43313

Panhandle Eastern Pipe Line Co., 43313–43314

PG&E Gas Transmission, Northwest Corp., 43314

Southern Natural Gas Co., 43314–43315

Southwest Gas Storage Co., 43315

Texas Eastern Transmission Corp., 43315

Texas Gas Transmission Corp., 43315–43316

TransColorado Gas Transmission Co., 43316–43317

Transcontinental Gas Pipe Line Corp., 43317

Trunkline Gas Co., 43317–43318

Trunkline LNG Co., 43318 43318

Tuscarora Gas Transmission Co., 43318–43319

Williston Basin Interstate Pipeline Co., 43319

Federal Housing Finance Board**PROPOSED RULES**

Federal home loan bank system:

Capital structure requirements, 43407–43447

Federal Maritime Commission**NOTICES**

Agreements filed, etc., 43373

Ocean transportation intermediary licenses:

Logistics Advantages, Inc., et al., 43373

Federal Reserve System**NOTICES**

Banks and bank holding companies:

Formations, acquisitions, and mergers, 43373–43374

Financial Management Service*See* Fiscal Service**Fiscal Service****NOTICES**

Surety companies acceptable on Federal bonds:

Allstate Insurance Co. et al.; termination, 43403–43404

Credit General Insurance Co. et al.; termination, 43404

Frontier Pacific Insurance Co. et al.; termination, 43404

Redland Insurance Co.; termination, 43404–43405

Fish and Wildlife Service**PROPOSED RULES**

Endangered and threatened species:

Gray wolf, 43449–43496

NOTICESEndangered and threatened species permit applications,
43380

Food and Drug Administration**RULES**

Human drugs:

New drug applications—

Court decisions, ANDA approvals, and 180-day
exclusivity, 43233–43235**PROPOSED RULES**

Food additives:

Food contact substance notification system, 43269–43284

NOTICES

Reports and guidance documents; availability, etc.:

Food-contact substance notification system, 43377

Foreign-Trade Zones Board**NOTICES***Applications, hearings, determinations, etc.:*

Florida, 43288–43289

Maryland, 43289

Puerto Rico

Caribbean Petroleum Corp./Caribbean Petroleum

Refining, Inc; oil refinery complex, 43289–43290

Health and Human Services Department*See* Centers for Disease Control and Prevention*See* Food and Drug Administration*See* National Institutes of Health**NOTICES**

Meetings:

Complementary and Alternative Medicine Policy, White
House Commission, 43374**Immigration and Naturalization Service****RULES**

Nonimmigrant classes:

Aliens coming temporarily to U.S. to perform agricultural
labor or services; H-2A classification petitions;
adjudication delegated to Labor Department, 43527–
43534**PROPOSED RULES**

Nonimmigrant classes:

Temporary agricultural worker (H-2A) petitions;
processing procedures, 43534–43537**Interior Department***See* Fish and Wildlife Service*See* Land Management Bureau*See* National Park Service**International Trade Administration****NOTICES**

Antidumping:

Heavy forged hand tools from—

China, 43290–43292

Preserved mushrooms from—

Chile, 43292–43293

Sparklers from—

China, 43293–43294

International Trade Commission**NOTICES**

Import investigations:

Circular seamless stainless steel hollow products from—
Japan, 43381**Justice Department***See* Immigration and Naturalization Service**Labor Department***See* Employment and Training Administration**Land Management Bureau****NOTICES**

Meetings:

Resource Advisory Councils—

Lower Snake River District, 43380

Maritime Administration**NOTICES**

Coastwise trade laws; administrative waivers:

SPICE, 43400

National Institute of Standards and Technology**NOTICES**

National Fire Codes:

Fire safety standards, 43294–43296

Technical committee reports, 43296–43297

National Institutes of Health**NOTICES**

Meetings:

Advisory Committee to Director, 43378

National Institute of Child Health and Human
Development, 43379National Institute of Diabetes and Digestive and Kidney
Diseases, 43379–43380

National Institute of Mental Health, 43379

National Institute of Neurological Disorders and Stroke,
43378

National Institute on Aging, 43378–43379

National Institute on Drug Abuse, 43378

National Park Service**NOTICES**

Telecommunications facilities; construction and operation:

Lake Meade National Recreation Area, NV, 43380–43381

Navy Department**NOTICES**

Privacy Act:

Systems of records, 43307–43308

Nuclear Regulatory Commission**NOTICES**

Agency information collection activities:

Submission for OMB review; comment request, 43381–
43382Enforcement actions; significant actions resolved; document
availability on website, 43383–43384

Environmental statements; availability, etc.:

Northern States Power Co., 43384–43385

Meetings:

High burn-up fuel behavior under postulated accident
conditions; experts, 43385

Reactor Safeguards Advisory Committee, 43385

Applications, hearings, determinations, etc.:

Maine Yankee Atomic Power Co., 43382

Moab Mill Reclamation Trust, 43382

Public Service Electric & Gas Co., 43382–43383

Sacramento Municipal Utility District, 43383

Personnel Management Office**RULES**

Prevailing rate systems, 43215

Presidential Documents**PROCLAMATIONS**President Lincoln and Soldiers' Home National Monument
(Proc. 7329), 43673–43675

ADMINISTRATIVE ORDERS

Korea and Thailand; transfer of obsolete or surplus defense articles (Memorandum of July 5, 2000), 43213

Public Debt Bureau

See Fiscal Service

Public Health Service

See Centers for Disease Control and Prevention

See Food and Drug Administration

See National Institutes of Health

Securities and Exchange Commission**NOTICES**

Meetings:

Auditor independence requirements; hearings, 43385–43386

Self-regulatory organizations; proposed rule changes:

American Stock Exchange LLC, 43386–43388

Boston Stock Exchange, 43388–43390

Small Business Administration**PROPOSED RULES**

Disaster loan program:

Military reservist economic injury disaster loans, 43261–43265

State Department**NOTICES**

Art objects; importation for exhibition:

La Divine Comtesse, Photographs of the Countess de Castiglione, 43390

Grants and cooperative agreements; availability, etc.:

Near East and North Africa Democracy Initiative, 43390–43393

Vietnam; Writer's Perspective on Contemporary Social Issues in United States, 43393–43395

Surface Transportation Board**NOTICES**

Motor carriers:

Finance applications—
Laidlaw Inc. et al., 43395–43396

Technology Administration**NOTICES**

Agency information collection activities:

Submission for OMB review; comment request, 43297

Transportation Department

See Coast Guard

See Federal Aviation Administration

See Maritime Administration

See Surface Transportation Board

Treasury Department

See Fiscal Service

NOTICES

Agency information collection activities:

Submission for OMB review; comment request, 43401–43403

Separate Parts In This Issue**Part II**

Federal Housing Finance Board, 43407–43447

Part III

Department of Interior, Fish and Wildlife Service, 43449–43496

Part IV

Department of Agriculture, Agricultural Marketing Service, 43497–43525

Part V

Department of Justice and Department of Labor,
Employment and Training Administration, 43527–43583

Part VI

Environmental Protection Agency, 43585–43670

Part VII

The President, 43671–43675

Reader Aids

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

CFR PARTS AFFECTED IN THIS ISSUE

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

3 CFR**Administrative Orders:**

Memorandums:

July 5, 2000 43213

Proclamations:

7329 43673

5 CFR

532 43215

7 CFR

1230 43498

Proposed Rules:

205 43259

8 CFR

103 43528

214 43528

Proposed Rules:

103 43527

214 43527

248 43527

264 43527

12 CFR**Proposed Rules:**

917 43408

925 43408

930 43408

931 43408

932 43408

933 43408

956 43408

960 43408

13 CFR**Proposed Rules:**

123 43261

14 CFR

39 (7 documents) 43215,

43217, 43219, 43221, 43223,

43228, 43406

71 43406

97 (2 documents) 43230,

43232

Proposed Rules:

Ch. 1 43265

39 43265

71 43406

15 CFR

774 43406

20 CFR

655 43539

Proposed Rules:

655 43547

21 CFR

314 43233

Proposed Rules:

20 43269

58 43269

170 43269

171 43269

174 43269

179 43269

33 CFR

165 (2 documents) 43236,

43244

40 CFR

9 43586

122 43586

123 43586

124 43586

130 43586

271 43246

Proposed Rules:

271 43284

47 CFR

52 43251

64 43251

50 CFR**Proposed Rules:**

17 43450

Presidential Documents

Title 3—

Memorandum of July 5, 2000

The President

Delegation of Responsibilities Under Section 1232 of the Foreign Relations Authorization Act, Fiscal Years 2000 and 2001 (Public Law 106–113)**Memorandum for the Secretary of State [and] the Secretary of Defense**

By the authority vested in me by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, I hereby delegate to the Secretary of Defense the duties and responsibilities vested in the President by section 1232 of the Foreign Relations Authorization Act for Fiscal Years 2000 and 2001 (the “Act”) (Public Law 106–113), to transfer from War Reserve Allies Stockpiles in Korea and Thailand to the Republic of Korea and the Kingdom of Thailand, respectively, in return for concessions to be negotiated by the Secretary of Defense, with the concurrence of the Secretary of State, any or all of the items described in paragraph (a)(2) of section 1232 of the Act, subject to the conditions, requirements, and limitations set forth in section 1232 of the Act.

Any reference in this memorandum to the provisions of any Act shall be deemed to be a reference to such Act or its provisions as may be amended from time to time.

The authority delegated to the Secretary of Defense may be redelegated in writing within the Department of Defense.

The Secretary of Defense is authorized and directed to publish this memorandum in the **Federal Register**.



THE WHITE HOUSE,
Washington, July 5, 2000.

Rules and Regulations

Federal Register

Vol. 65, No. 135

Thursday, July 13, 2000

This section of the FEDERAL REGISTER contains regulatory documents having general applicability and legal effect, most of which are keyed to and codified in the Code of Federal Regulations, which is published under 50 titles pursuant to 44 U.S.C. 1510.

The Code of Federal Regulations is sold by the Superintendent of Documents. Prices of new books are listed in the first FEDERAL REGISTER issue of each week.

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 532

RIN 3206-AJ05

Prevailing Rate Systems; Change in the Survey Cycle for the Orleans, LA, Nonappropriated Fund Wage Area

AGENCY: Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The Office of Personnel Management is issuing a final rule to change the timing of local wage surveys in the Orleans, Louisiana, nonappropriated fund (NAF) Federal Wage System (FWS) wage area. This change will help even out the local wage survey workload for the Department of Defense and improve the amount and quality of data it collects during annual local wage surveys in the Orleans wage area.

DATES: *Effective Date:* This regulation is effective on August 14, 2000.

FOR FURTHER INFORMATION CONTACT: Jennifer Hopkins, (202) 606-2848, FAX: (202) 606-0824, or email jdhopkin@opm.gov.

SUPPLEMENTARY INFORMATION: On March 23, 2000, the Office of Personnel Management (OPM) published an interim rule (65 FR 15521) to change the timing of local wage surveys in the Orleans, Louisiana, nonappropriated fund (NAF) Federal Wage System (FWS) wage area. Full-scale wage surveys currently begin in February of each odd-numbered fiscal year. Full-scale wage surveys will now begin in June of each even-numbered fiscal year. Under section 532.207 of title 5, Code of Federal Regulations, the scheduling of wage surveys takes into consideration the best timing in relation to wage adjustments in the principal local private enterprise establishments,

reasonable distribution of workload of the lead agency, timing of surveys for nearby or selected wage areas, and scheduling relationships with other pay surveys.

The Department of Defense asked OPM to change the starting time for local wage surveys in the Orleans wage area to June of even fiscal years to help spread out its survey workload. In addition, this change will avoid annual Mardi Gras festivities in New Orleans during the month of February. DOD will conduct a full-scale wage survey in the Orleans wage area in June 2000. DOD will update the data collected in the full-scale wage survey during a "wage change" survey in June 2001.

The Federal Prevailing Rate Advisory Committee, the national labor-management committee responsible for advising OPM on matters concerning the pay of FWS employees, reviewed and concurred by consensus with this change. The interim rule had a 30-day public comment period, during which OPM did not receive any comments.

Regulatory Flexibility Act

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

List of Subjects in 5 CFR Part 532

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

Accordingly, under the authority of 5 U.S.C. 5343, the interim rule (65 FR 15521) amending 5 CFR part 532 published on March 23, 2000, is adopted as final with no changes.

U.S. Office of Personnel Management.

Janice R. Lachance,
Director.

[FR Doc. 00-17720 Filed 7-12-00; 8:45 am]

BILLING CODE 6325-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000-NM-23-AD; Amendment 39-11812; AD 2000-14-03]

RIN 2120-AA64

Airworthiness Directives; Saab Model SAAB SF340A and SAAB 340B Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Saab Model SAAB SF340A and SAAB 340B series airplanes, that requires replacing the smoke detectors in the cargo compartment with new, improved smoke detectors. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified by this AD are intended to prevent false smoke warnings from the cargo compartment smoke detectors, which could result in aborted takeoffs, diversions of flight routes, and emergency evacuation of flight crew and passengers.

DATES: Effective August 17, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 17, 2000.

ADDRESSES: The service information referenced in this AD may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S-581.88, Linköping, Sweden. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM-116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2110; fax (425) 227-1149.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal

Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to certain Saab Model SAAB SF340A and SAAB 340B series airplanes was published in the **Federal Register** on March 27, 2000 (65 FR 16158). That action proposed to require replacing the smoke detectors in the cargo compartment with new, improved smoke detectors.

Comment Received

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the single comment received.

Request for Delay in AD Issuance

One commenter, the vendor for the existing (Fenwall) smoke detector, states that the proposed AD was not warranted, and requests that issuance of the final rule be delayed a minimum of 90 days. The commenter disagrees with the proposed requirement to replace the existing smoke detectors with another vendor's (Cerberus) smoke detector. As background, the commenter notes that the existing Fenwall smoke detector was susceptible to false alarms due to high humidity conditions; and, in response, Fenwall Safety Systems initiated a product improvement via Service Bulletin #9701 to correct the problem. The commenter states that about 1,000 #9701 kits have been installed to date, and a recent polling of operators indicates that the humidity problem is no longer a significant concern; i.e., the existing smoke detector performs adequately after this modification. The commenter requests the 90-day delay to resolve this issue with the airplane manufacturer and the Luftfartsverket (LFV), the airworthiness authority for Sweden.

The FAA does not concur. Based on historical and current data received from the LFV and the airplane manufacturer, false (nuisance) warnings from the existing smoke detector continue to be a significant safety concern. The FAA acknowledges the commenter's statement that modification of the existing smoke detector via Fenwall Service Bulletin #9701 has resulted in some improvement in reliability. However, the commenter did not provide data to substantiate this statement. Additionally, the LFV advises that bench and field tests conducted with both the modified Fenwall smoke detector and the Cerberus smoke detector have shown the Cerberus unit to have a much higher reliability with respect to nuisance warnings. The Cerberus smoke detector incorporates

new technology, i.e., a microprocessor intended to better distinguish between smoke conditions and high humidity conditions. With this information, the FAA has determined that installation of the Cerberus smoke detectors is necessary to adequately address the identified unsafe condition, and does not consider it necessary to delay issuance of the final rule. No change is made to the final rule.

Conclusion

After careful review of the available data, including the comment noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

The FAA estimates that 289 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required actions, and that the average labor rate is \$60 per work hour. Required parts will cost between \$2,011 and \$4,022 per airplane. Based on these figures, the cost impact of the AD on U.S. operators is estimated to be between \$2,131 and \$4,142 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2000-14-03 SAAB Aircraft AB:

Amendment 39-11812. Docket 2000-NM-23-AD.

Applicability: Model SAAB SF340A series airplanes, manufacturer's serial numbers 004 through 159 inclusive; and Model SAAB 340B series airplanes, manufacturer's serial numbers 160 through 459 inclusive; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent false smoke warnings from the cargo compartment smoke detectors, which could result in aborted takeoffs, diversions of flight routes, and emergency evacuation of flight crew and passengers, accomplish the following:

Replacement

(a) Within 2 years after the effective date of this AD, replace the smoke detectors in the cargo compartment with new, improved smoke detectors, in accordance with Saab Service Bulletin 340-26-023, dated December 21, 1999.

Alternative Methods of Compliance

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager,

International Branch, ANM-116, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, International Branch, ANM-116.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the International Branch, ANM-116.

Special Flight Permits

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(d) The actions shall be done in accordance with Saab Service Bulletin 340-26-023, dated December 21, 1999. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S-581.88, Linköping, Sweden. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Note 3: The subject of this AD is addressed in Swedish airworthiness directive 1-151, dated December 28, 1999.

(e) This amendment becomes effective on August 17, 2000.

Issued in Renton, Washington, on July 3, 2000.

Vi L. Lipski,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00-17300 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000-NM-209-AD; Amendment 39-11811; AD 2000-14-02]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 737-600, -700, and -800 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Boeing Model 737-600, -700, and -800 series airplanes.

This action requires installation of placards on the P3-1 panel. This action is necessary to prevent loss of communication between the flight crew and Air Traffic Control; this situation could result in the flight crew being unaware of an unsafe scenario when the airplane is on the ground. This action is intended to address the identified unsafe condition.

DATES: Effective July 28, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 28, 2000.

Comments for inclusion in the Rules Docket must be received on or before September 11, 2000.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2000-NM-209-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: 9-anm-iarcment@faa.gov. Comments sent via fax or the Internet must contain "Docket No. 2000-NM-209-AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC. **FOR FURTHER INFORMATION CONTACT:** Jay Yi, Aerospace Engineer, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-1013; fax (425) 227-1181.

SUPPLEMENTARY INFORMATION: The FAA has received reports of several incidents in which the flight crew lost communication with Air Traffic Control (ATC) while the airplane was taxiing or on hold for takeoff. These incidents occurred on Boeing Model 737-700 series airplanes. Investigation revealed that the loss of communication is due to the location of the very high frequency

(VHF) VHF-1 and VHF-2 antennas. This condition, if not corrected, could result in loss of communication between the flight crew and ATC; this situation could result in the flight crew being unaware of an unsafe scenario when the airplane is on the ground.

The VHF-1 and VHF-2 antennas on certain Model 737-700 series airplanes are identical to those installed on certain Model 737-600 and 737-800 series airplanes. Therefore, all of these models may be subject to the same unsafe condition.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Alert Service Bulletin 737-23A1170, dated April 27, 2000, which describes procedures for installation of placards on the P3-1 panel. The placards instruct the flight crew to use the VHF radio that is connected to the upper antenna for ATC communications when the airplane is on the ground.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other Boeing Model 737-600, -700, and -800 series airplanes of the same type design, this AD is being issued to prevent loss of communication between the flight crew and ATC, which could result in the flight crew being unaware of an unsafe scenario when the airplane is on the ground. This AD requires accomplishment of the action specified in the service bulletin described previously, except as discussed below.

Differences Between the Proposed AD and Relevant Service Information

Operators should note that, although the service bulletin recommends accomplishing the installation within 10 days (from receipt of the service bulletin), the FAA has determined that an interval of 60 days would address the identified unsafe condition in a timely manner. In developing an appropriate compliance time for this AD, the FAA considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, the average utilization of the affected fleet, parts availability, and the time necessary to perform the installation (less than one hour). The FAA has verified that the lead time for obtaining the required placards will exceed the 10-day compliance time recommended in the subject service bulletin. In light of all of these factors, the FAA finds a 60-day compliance time will accommodate the

time necessary for affected operators to order, obtain, and install the placards, without adversely affecting safety.

Interim Action

This is considered to be interim action until final action is identified, at which time the FAA may consider further rulemaking.

Determination of Rule's Effective Date

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments

submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2000-NM-209-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2000-14-02 Boeing: Amendment 39-11811. Docket 2000-NM-209-AD.

Applicability: Model 737-600, -700, and -800 series airplanes, as listed in Boeing

Alert Service Bulletin 737-23A1170, dated April 27, 2000; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (b) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent loss of communication between the flight crew and Air Traffic Control (ATC), which could result in the flight crew being unaware of an unsafe scenario when the airplane is on the ground, accomplish the following:

Installation of Placards

(a) Within 60 days after the effective date of this AD, install placards on the P3-1 panel in accordance with Boeing Alert Service Bulletin 737-23A1170, dated April 27, 2000.

Alternative Methods of Compliance

(b) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(c) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(d) The installation shall be done in accordance with Boeing Alert Service Bulletin 737-23A1170, dated April 27, 2000. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(e) This amendment becomes effective on July 28, 2000.

Issued in Renton, Washington, on July 3, 2000.

Vi L. Lipski,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00-17301 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 39**

[Docket No. 2000-NM-206-AD; Amendment 39-11813; AD 2000-14-04]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to all Boeing Model 747 series airplanes. This action requires a one-time inspection of the fuselage skin adjacent to the drag splice fitting to detect cracking, and follow-on actions, if necessary. This action is necessary to detect and correct fatigue cracking of the fuselage skin, which could result in reduced structural integrity of the fuselage, and consequent rapid depressurization of the airplane.

DATES: Effective July 28, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 28, 2000.

Comments for inclusion in the Rules Docket must be received on or before September 11, 2000.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2000-NM-206-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: 9-anm-iarcomment@faa.gov. Comments sent via fax or the Internet must contain "Docket No. 2000-NM-206-AD" in the

subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Rick Kawaguchi, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-1153; fax (425) 227-1181.

SUPPLEMENTARY INFORMATION: The FAA has received reports indicating that, during regular maintenance of certain Boeing Model 747 series airplanes, operators detected cracking of certain areas of the fuselage skin adjacent to the drag splice fitting. One operator reported finding four skin cracks, which ranged in length from 0.19 to 1.37 inches, under the drag splice fitting of the right side underwing. On another airplane, an 8.5-inch long crack under the drag splice fitting of the left side was detected. Another operator found a 25-inch long diagonal crack between body station (BS) 982 and BS 990 at stringers 37L through 38L. The lower drag splice angle and stringer 38L also were cracked, and the BS 1000 bulkhead ring chord was severed. Such conditions, if not corrected, could result in reduced structural integrity of the fuselage, and consequent rapid depressurization of the airplane.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Service Bulletin 747-53A2444, Revision 1, dated June 15, 2000, which describes procedures for a one-time external detailed visual inspection of the fuselage skin adjacent to the drag splice fitting to detect cracking. If no cracking is detected, the service bulletin describes procedures for repetitive ultrasonic, high frequency eddy current (HFEC), and internal detailed visual inspections. The service bulletin also describes procedures for a secondary inspection to detect additional cracking, if cracking is outside certain limits.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other Model 747 series airplanes of the same type design, this AD is being issued to detect and correct fatigue cracking of certain areas of the fuselage skin, which could result in reduced structural integrity of the fuselage, and consequent rapid depressurization of the airplane. This AD requires a one-time inspection of the fuselage skin adjacent to the drag splice fitting to detect cracking, and repair, if necessary. This AD also requires a follow-on inspection to detect additional cracking, if cracking is outside certain limits.

Interim Action

This is considered to be interim action until final action is identified. At this time the FAA is considering a separate rulemaking action to address the procedures for repetitive ultrasonic, HFEC, and internal detailed visual inspections of the fuselage skin adjacent to the drag splice fitting to detect additional cracking, and repair of any cracking detected, as described in the service bulletin. However, the planned compliance time for these actions is sufficiently long so that notice and opportunity for prior public comment will be practicable.

Due to the urgency of the need to inspect the fleet and repair any cracking, this AD will address only the sections in the service bulletin that pertain to an initial detailed visual inspection of the fuselage skin adjacent to the drag splice fitting to detect cracking, repair of any cracking detected, and accomplishment of a secondary inspection to detect additional cracking, if necessary.

Differences Between Service Bulletin and This AD

Operators should note that the service bulletin recommends accomplishing the initial detailed visual inspection within 60 days (after the release of the service bulletin) for airplanes with more than 13,000 flight cycles. The FAA has determined, however, that limiting the inspection to airplanes with more than 13,000 flight cycles would not address all affected airplanes, in light of the fact that the unsafe condition is likely to exist or develop on other Model 747 series airplanes. In developing an appropriate compliance time for all airplanes that are affected by this AD, the FAA considered not only the manufacturer's recommendation, but the degree of urgency associated with

addressing the subject unsafe condition, the average utilization of the affected fleet, and the time necessary to perform the required inspection (approximately 2 hours). In light of all of these factors, the FAA finds that, for all Model 747 series airplanes, a compliance time of, "Prior to the accumulation of 13,000 total flight cycles, or within 60 days after the effective date of this AD" for initiating the required inspection is warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Determination of Rule's Effective Date

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the AD is being requested.
- Include justification (e.g., reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by

interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2000-NM-206-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2000-14-04 Boeing: Amendment 39-11813. Docket 2000-NM-206-AD.

Applicability: All Model 747 series airplanes, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (d) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracking of certain areas of the fuselage skin, which could result in reduced structural integrity of the fuselage, and consequent rapid depressurization of the airplane; accomplish the following:

One-Time Detailed Visual Inspection

(a) Prior to the accumulation of 13,000 total flight cycles or within 60 days after the effective date of this AD, whichever occurs later: Perform a one-time external detailed visual inspection of the fuselage skin adjacent to the drag splice fitting as illustrated in Figure 2 of Boeing Service Bulletin 747-53A2444, Revision 1, dated June 15, 2000. If no cracking is detected, no further action is required by this AD.

Note 2: For the purposes of this AD, a detailed visual inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc., may be used. Surface cleaning and elaborate access procedures may be required."

Corrective Action

(b) If any cracking is detected during any inspection required by this AD, prior to further flight, repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate; or in accordance with data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the approval letter must specifically reference this AD.

Secondary Inspection

(c) For airplanes on which cracking is detected during the inspection required by paragraph (a) of this AD, prior to further flight after accomplishment of paragraph (b) of this AD: Determine if a secondary inspection of adjacent structure is required, using the Logic Diagram illustrated in Figure 1 of Boeing Service Bulletin 747-53A2444, Revision 1, dated June 15, 2000. If required, prior to further flight, accomplish the inspection in accordance with the service bulletin.

Note 3: Inspections and repairs accomplished prior to the effective date of this AD in accordance with Boeing Alert Service Bulletin 747-53A2444, dated May 25, 2000, are considered acceptable for compliance with the applicable action specified in this amendment.

Alternative Methods of Compliance

(d) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(e) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(f) The inspections shall be done in accordance with Boeing Service Bulletin 747-53A2444, Revision 1, dated June 15, 2000. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(g) This amendment becomes effective on July 28, 2000.

Issued in Renton, Washington, on July 3, 2000.

Vi L. Lipski,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00-17299 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2000-NM-155-AD; Amendment 39-11814; AD 2000-14-05]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 777 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that is applicable to certain Boeing Model 777 series airplanes. This action requires a one-time measurement of the electrical bonding resistance between the wing spar connectors of the fuel quantity indicating system (FQIS) and the spar structure, installation of bonding jumpers, a one-time operational check of the FQIS system, and corrective action, if necessary. This action is necessary to ensure adequate electrical bonding between the wing spar connectors of the FQIS and the spar structure. Inadequate electrical bonding, in the event of a lightning strike, could cause electrical arcing and ignition of fuel vapor in the main or center fuel tank, which could result in a fuel tank explosion. This action is intended to address the identified unsafe condition.

DATES: Effective July 28, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of July 28, 2000.

Comments for inclusion in the Rules Docket must be received on or before September 11, 2000.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 2000-NM-155-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: 9-anm-iarcomment@faa.gov. Comments sent via fax or the Internet must contain "Docket No. 2000-NM-155-AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must

be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Larry Reising, Aerospace Engineer, Propulsion Branch, ANM-140S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2683; fax (425) 227-1181.

SUPPLEMENTARY INFORMATION: The FAA has received data from the manufacturer indicating the results of tests conducted during the High Intensity Radiated Field Lightning Assurance Plan test program. One test revealed that the electrical bonding of the wing spar connectors of the fuel quantity indicating system (FQIS) was not adequate to meet the bonding limit required for lightning protection. This was because the bonding resistance of all six FQIS connectors exceeded the required limit. Investigation revealed that the faying surface of the adapter that bonds the connector to the spar structure was contaminated with fuel tank sealant or O-ring lubricant. Inadequate electrical bonding, in the event of a lightning strike, could cause electrical arcing, and ignition of fuel vapor in the main or center fuel tank, which could result in a fuel tank explosion.

Explanation of Relevant Service Information

The FAA has reviewed and approved Boeing Alert Service Bulletin 777-28A0019, dated April 27, 2000, which describes procedures for a one-time measurement of the electrical bonding resistance between the wing spar connectors of the FQIS and the spar structure, installation of bonding jumpers to create a redundant bonding path between the connector and the spar structure, and a one-time operational check of that installation. The service bulletin references Boeing 777 Airplane Maintenance Manual, Chapter 28-41-00, as the appropriate source for accomplishment of the operational check and repair instructions if any discrepancy is found. Accomplishment of the actions specified in the alert service bulletin is intended to adequately address the identified unsafe condition.

Explanation of the Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other Model 777 series airplanes of the same type design, this AD is being issued to ensure adequate electrical bonding between the wing spar connectors of the FQIS and the spar structure. This AD requires a one-time measurement of the electrical bonding resistance between the wing spar connectors of the FQIS and the spar structure, installation of bonding jumpers, a one-time operational check of that installation, and corrective action, if necessary. The actions are required to be accomplished in accordance with the service bulletin described previously, except as discussed below.

Difference Between the Alert Service Bulletin and This AD

Operators should note that, although the service bulletin recommends accomplishing the specified actions within 24 months (after the release of the service bulletin), the FAA has determined that an interval of 24 months would not address the identified unsafe condition in a timely manner. In developing an appropriate compliance time for this AD, the FAA considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, the average utilization of the affected fleet, and the time necessary to perform the required actions (approximately 6 hours). In light of all of these factors, the FAA finds a 90-day compliance time for completing the required actions to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Determination of Rule's Effective Date

Since a situation exists that requires the immediate adoption of this regulation, it is found that notice and opportunity for prior public comment hereon are impracticable, and that good cause exists for making this amendment effective in less than 30 days.

Comments Invited

Although this action is in the form of a final rule that involves requirements affecting flight safety and, thus, was not preceded by notice and an opportunity for public comment, comments are invited on this rule. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the

Rules Docket number and be submitted in triplicate to the address specified under the caption **ADDRESSES**. All communications received on or before the closing date for comments will be considered, and this rule may be amended in light of the comments received. Factual information that supports the commenter's ideas and suggestions is extremely helpful in evaluating the effectiveness of the AD action and determining whether additional rulemaking action would be needed.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule that might suggest a need to modify the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report that summarizes each FAA-public contact concerned with the substance of this AD will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this rule must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 2000-NM-155-AD." The postcard will be date stamped and returned to the commenter.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

The FAA has determined that this regulation is an emergency regulation that must be issued immediately to correct an unsafe condition in aircraft, and that it is not a "significant regulatory action" under Executive Order 12866. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is

determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket. A copy of it, if filed, may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new airworthiness directive:

2000-14-05 Boeing: Amendment 39-11814. Docket 2000-NM-155-AD.

Applicability: Model 777 series airplanes as listed in Boeing Alert Service Bulletin 777-28A0019, dated April 27, 2000; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (c) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To ensure adequate electrical bonding between the wing spar connectors of the fuel quantity indicating system (FQIS) and the spar structure in the event of a lightning strike, accomplish the following:

One-Time Measurement and Installation

(a) Within 90 days after the effective date of this AD: Perform a one-time

measurement of the electrical bonding resistance between the wing spar connectors of the FQIS and the spar structure, record the measurements, and install bonding jumpers, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 777-28A0019, dated April 27, 2000.

Operational Check and Corrective Action

(b) Prior to further flight after accomplishment of the installation required by paragraph (a) of this AD: Perform an operational check in accordance with Boeing Alert Service Bulletin 777-28A0019, dated April 27, 2000, and correct any discrepancy detected.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(d) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(e) The actions shall be done in accordance with Boeing Alert Service Bulletin 777-28A0019, dated April 27, 2000. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(f) This amendment becomes effective on July 28, 2000.

Issued in Renton, Washington, on July 3, 2000.

Vi L. Lipski,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.
[FR Doc. 00-17298 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-NM-192-AD; Amendment 39-11815; AD 2000-14-06]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 747 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 747 series airplanes, that currently requires a one-time inspection to determine the part number of the fuel shutoff spar valve for the outboard engines. That AD also requires replacement of certain valves with new valves, or modification of the spar valve body assembly, and various follow-on actions. This amendment adds new requirements to accomplish those actions on additional airplanes; and requires a one-time inspection of the maintenance records of certain airplanes to determine if the fuel shutoff spar valve for the outboard engines has ever been replaced, and various follow-on actions. This amendment is prompted by reports indicating that, due to high fuel pressure, certain fuel system components of the outboard engines have failed. The actions specified by this AD are intended to prevent such high fuel pressure, which could result in failure of the fuel system components; this situation could result in fuel leakage, and, consequently, lead to an engine fire.

DATES: Effective August 17, 2000.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 17, 2000.

The incorporation by reference of certain other publications, as listed in the regulations, was approved previously by the Director of the Federal Register as of November 20, 1998 (63 FR 55517, October 16, 1998).

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207; or ITT Aerospace Controls, 28150 Industry Drive, Valencia, California 91355. This information may be examined at the

Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Dionne M. Krebs, Aerospace Engineer, Propulsion Branch, ANM-140S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2250; fax (425) 227-1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 98-21-29, amendment 39-10837 (63 FR 55517, October 16, 1998); which is applicable to Boeing Model 747-100, -200, -300, -400, 747SP, and 747SR series airplanes, having line numbers 629 through 1006 inclusive, and powered by General Electric or Rolls-Royce engines; was published in the **Federal Register** on November 26, 1999 (64 FR 66419). The action proposed to continue to require a one-time inspection to determine the part number of the fuel shutoff spar valve for the outboard engines, replacement of certain valves with new valves or modification of the spar valve body assembly, and various follow-on actions. The action proposed to add new requirements to accomplish those actions on additional airplanes; and require a one-time inspection of the maintenance records of certain airplanes to determine if the fuel shutoff spar valve for the outboard engines has ever been replaced, and various follow-on actions.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Support for the Proposal

Three commenters concur with the intent of the proposed rule.

Request to Clarify Airplanes Subject to Paragraph (e)

Two commenters request that paragraph (e) of the proposed rule be revised to clarify that it applies to all affected airplanes (as identified in Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999). One

commenter points out that paragraph (d) of the proposed rule instructs operators to check maintenance records on airplanes having line numbers 1 through 628 inclusive, to determine if the left- and right-hand outboard fuel shutoff spar valves have been replaced. If either valve has been replaced, paragraph (d)(2) instructs operators to accomplish paragraph (e) for that valve. However, paragraph (e) does not state that it applies to airplanes having line numbers 1 through 628. The commenter states that this has been confusing for several operators. The other commenter points out that paragraph (e) of the proposed rule addresses airplanes having line numbers 1 through 1006 inclusive powered by General Electric (GE) or Rolls-Royce engines, but paragraph (a) also refers to airplanes having line numbers 629 through 1006 inclusive powered by GE or Rolls-Royce engines. Paragraphs (a) and (e) require similar actions. The commenter states that this could result in unnecessary duplicate inspections for some airplanes.

The FAA concurs with the commenters' request for clarification of the airplanes subject to paragraph (e) of this AD. The intent of this AD is that airplanes having line numbers 1 through 628 inclusive that had or may have had fuel shutoff spar valves replaced are subject to paragraph (e) of this AD, as specified in paragraph (d) of this AD. In addition, airplanes having line numbers 629 through 1006 inclusive powered by Pratt & Whitney engines are also subject to the requirements in paragraph (e). As pointed out by the commenter, the actions described in paragraph (e) are equivalent to those required by paragraph (a); therefore, the FAA has revised this final rule to remove the airplanes having line numbers 629 through 1006 powered by GE or Rolls-Royce engines from the applicability of paragraph (e) of this AD. To address the commenters' request, paragraphs (d)(1) and (d)(2) of this AD have been revised as follows:

- Paragraph (d)(1) reads, "If the maintenance record inspection establishes that neither valve has been replaced, no further action is required by this AD."
- Paragraph (d)(2) reads, "If either valve has been replaced, or if the maintenance record inspection does not clearly establish that neither valve has been replaced, prior to further flight, accomplish paragraph (e)(1), (e)(2), or (e)(3), as applicable."
- Paragraph (e) reads, "For airplanes having line numbers 629 through 1006 inclusive and powered by Pratt & Whitney engines, or for airplanes having line numbers 1 through 628 inclusive on

which a fuel shutoff spar valve has been, or may have been, replaced:

* * *

Request to Refer to Wet Motor Leak Check

One commenter requests that, if the FAA finds it necessary to require a fuel leak check of the engine, the requirement should refer specifically to a wet motor leak check. The commenter points out that paragraphs (b) and (c), including "NOTE 3," of the proposed rule specify accomplishment of a leak check per Aircraft Maintenance Manual (AMM) procedures or per Boeing Service Bulletin 747-28A2199, Revision 2. The applicable AMM procedures describe an idle leak check, while the service bulletin describes a wet motor leak check. The commenter also notes that paragraphs (f) and (g) of the proposed rule specify a leak check in accordance with the service bulletin (that is, a wet motor leak check).

The FAA does not concur with the commenter's request. The FAA recognizes that the idle leak checks identified in "NOTE 3" and the wet motor leak check identified in the service bulletin are not identical. However, because both checks involve the pressurization of the fuel lines and components between the fuel shutoff spar valve and the engine fuel shutoff valve, either check meets the intent of the requirement. Therefore, the FAA finds that paragraphs (b) and (c) of this AD are acceptable as written because they allow either type of check. Also, the FAA has determined that it is appropriate to add a new "NOTE 4" to this final rule, to state that the idle leak checks are acceptable for compliance with the actions specified in paragraphs (f) and (g) of this AD. (All subsequent "NOTES" have been renumbered accordingly.)

Request to Expand Applicability of Proposed AD

One commenter requests that the FAA expand the applicability of the proposed AD to include all Model 747 series airplanes delivered prior to the effective date of the AD. The commenter states that Model 747 series airplanes with line numbers higher than 1006 may have improper fuel shutoff spar valves installed. The commenter's rationale is that, although the proper valves were installed during production, it is possible that, during maintenance, one of the original valves has been replaced with an improper valve.

The FAA does not concur with the commenter's request. The airplane manufacturer has informed the FAA that, at the time the airplane having line number 1007 was delivered, the

engineering drawings (including drawing notes regarding spare parts) limited the fuel shutoff spar valve installed at the outboard engine positions to an acceptable part number (S343T003-40). Therefore, operators have not been allowed to replace a fuel shutoff spar valve installed at the outboard position with an earlier fuel shutoff spar valve since delivery on Model 747 series airplanes with line number 1007 and subsequent. No change to the final rule is necessary in this regard.

Request to Extend Compliance Time

Several commenters request extension of the compliance time. Two commenters request that the compliance time be extended from 18 to 36 months; another requests a compliance time of four years for Model 747-100 and -200 series airplanes and six years for Model 747-400 series airplanes. The commenters state that an extension would allow operators to schedule the inspection during airplane checks when internal access to the fuel tanks is available. One commenter states that the 18-month compliance time would force it to perform unscheduled fuel tank entries. Another commenter notes that, due to the reduced interchangeability of valves having part numbers 60B92406-(x), additional spare valves will be required, or all valves will have to be upgraded to the latest configuration on an attrition basis.

The FAA infers that the commenters are referring to the compliance time for the one-time inspection to determine the part number of fuel shutoff spar valve for the left- and right-hand outboard engines. The FAA does not concur with the commenters' requests to extend the compliance time. In the final rule for AD 98-21-29, which this AD supersedes, the FAA agreed to extend the compliance time from 12 to 18 months to allow the inspection to be accomplished during a regularly scheduled maintenance visit for the majority of the affected fleet. This would allow airplanes to be inspected at a location where special equipment and trained personnel would be readily available, if necessary. A compliance time of 18 months corresponds to most operators' scheduled "C"-checks and, therefore, accommodates the majority of operators' maintenance schedules while not adversely affecting flight safety. Because the compliance time has already been extended in this way, the FAA has determined that it is inappropriate to extend it further. No change to the final rule is necessary in this regard.

Request to Make Restatement of Requirements Consistent With New Requirements

One commenter requests that paragraph (a)(1) of the proposed AD be revised to be consistent with paragraph (e)(2) of the proposed AD. The commenter notes that paragraph (a) of the proposed rule instructs operators to inspect the part number of the left- and right-hand outboard fuel shutoff (spar) valves on airplanes having line numbers 629 through 1006 inclusive powered by General Electric (GE) or Rolls-Royce engines, and paragraph (a)(1) identifies the acceptable fuel shutoff spar valve part number as S343T003-43. The commenter also notes that paragraph (e)(2) of the proposed rule lists additional modified valve part numbers that are acceptable for installation. The commenter suggests that paragraph (a)(1) be revised to be consistent with paragraph (e)(2) with regard to acceptable part numbers.

The FAA does not concur with the commenter's request. The FAA infers that the part number in paragraph (a)(1) to which the commenter refers is S343T003-40 (not S343T003-43). The FAA acknowledges that the restatement of requirements of AD 98-21-29 in paragraph (a) of the proposed rule identifies fuel shutoff spar valve part number S343T003-40 only, though paragraph (e)(2) lists other acceptable part numbers. The additional part numbers in paragraph (e)(2) have been included in this AD because the FAA incorporated an existing approved alternative method of compliance (AMOC) to AD 98-21-29 into this AD. Because paragraphs (a), (b), and (c) of this AD are a restatement of the requirements of AD 98-21-29 (and are labeled as such), the FAA finds that it is unnecessary and potentially confusing to operators to incorporate the part numbers referenced in paragraph (e)(2) of this AD into paragraph (a)(1) of this AD. No change to the final rule is necessary in this regard.

Request to Eliminate Requirement for Fuel Leak Check

One commenter requests that the fuel leak check specified in paragraphs (b), (c), (f), and (g) of the proposed rule be eliminated. The commenter states that a fuel leak check of the engine, as identified in these paragraphs, is not necessary. The commenter acknowledges that the leak checks are intended to identify damage to components between the fuel shutoff spar valve and the engine fuel shutoff valve, resulting from a fuel overpressure condition. The commenter states that all

known in-service occurrences of the failure of components associated with this AD have been "ultimate" failures and not "fatigue-type" failures. The commenter asserts that a fuel leak would be evident upon engine installation, when a fuel leak check is required as part of post-installation tests, or during normal in-service operation.

The FAA does not concur with the commenter's request. The FAA acknowledges that a fuel leak may become evident upon engine installation, during a post-installation fuel leak check, or during normal operation. However, because the unsafe condition associated with this AD is fuel leakage that could result in an engine fire, the FAA considers it necessary to verify the integrity of any replaced fuel shutoff spar valves and fuel system components that may have been previously exposed to high-pressure fuel. In the case of design deficiencies that could lead to engine fires, the FAA considers it necessary to prevent such events from occurring on in-service airplanes. Therefore, no change to the final rule is necessary in this regard.

Request to Revise Cost Estimate

Two commenters request that the FAA revise the cost impact estimate in the proposed rule to reflect the estimate of 75 work hours given in Boeing Service Bulletin 747-28A2199, Revision 2. One of the commenters points out that, for Model 747-100, -200, and -300 series airplanes, a removable rib must be taken out to gain access to the fuel shutoff spar valves. The other commenter states that the estimate in the proposal is considerably too low and does not include the work hours or cost of materials necessary for modification of the valves, which the commenter estimates to be 3 work hours and \$200 per valve.

The FAA does not concur with the commenters' request. The cost impact information in AD rulemaking actions describes only the "direct" costs of the specific actions required by this AD. The cost information typically does not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions. The FAA recognizes that, in accomplishing the requirements of any AD, operators may incur "incidental" costs in addition to the "direct" costs. Because incidental costs may vary significantly from operator to operator, they are almost impossible to calculate.

With regard to the comment that the proposed rule does not account for the

time necessary to modify each valve, the proposed rule only requires installation of a fuel shutoff spar valve with an acceptable part number. Though operators may choose to modify a discrepant fuel shutoff spar valve to create an acceptable part, the AD does not actually require this modification. Therefore, the cost of the modification is not included in the cost impact estimate. No change to the final rule is necessary in this regard.

Request to Confirm AMOC Approval

One commenter requests that the FAA confirm that AMOC's approved for AD 98-21-29 will be acceptable for compliance with the proposed rule. The commenter has previously received FAA approval of an AMOC for AD 98-21-29.

The FAA concurs that AMOC's previously approved in accordance with AD 98-21-29 are approved for compliance with paragraphs (a), (a)(1), (a)(2), (a)(2)(i), (b), and (c) of this AD. Paragraph (h)(2) of the proposed rule, and this final rule, states this approval. No change to the final rule is necessary in this regard.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule with the changes previously described. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

Cost Impact

There are approximately 987 Model 747 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 208 airplanes of U.S. registry will be affected by this AD.

The one-time inspection to determine the part number of the valve that is currently required by AD 98-21-29 and retained in this AD affects approximately 59 airplanes of U.S. registry, and takes approximately 4 work hours per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of this currently required inspection on U.S. operators is estimated to be \$14,160, or \$240 per airplane.

Should an operator be required to accomplish the one-time inspection to detect leaks and cracks (after replacement of the valve or modification of the assembly) that is currently required by AD 98-21-29 and retained in this AD, it will take approximately 16

work hours per airplane, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of this inspection is estimated to be \$960 per airplane.

The new one-time inspection of the maintenance records of the airplane that is required by this AD action affects approximately 149 airplanes of U.S. registry, and takes approximately 2 work hours per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of this required inspection on U.S. operators is estimated to be \$17,880, or \$120 per airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Should an operator elect to modify the valve body assembly of the fuel system rather than replace a discrepant valve, it would take approximately 20 work hours per airplane, at an average labor rate of \$60 per work hour. Required parts would cost approximately \$404 (2 kits) per airplane. Based on these figures, the cost impact of this modification is estimated to be \$1,604 per airplane.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39-10837 (63 FR 55517, October 16, 1998), and by adding a new airworthiness directive (AD), amendment 39-11815, to read as follows:

2000-14-06 Boeing: Docket 99-NM-192-AD. Amendment 39-11815. Supersedes AD 98-21-29, Amendment 39-10837.

Applicability: Model 747 series airplanes, line numbers 1 through 1006 inclusive, certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (h)(1) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent high fuel pressure in components between the fuel shutoff spar valve and the engine fuel shutoff valve, which could result in failure of the fuel system components, lead to fuel leakage, and, consequently, lead to a possible engine fire, accomplish the following:

Restatement of Actions Required By AD 98-21-29, Amendment 39-10837:

One-Time Inspection

(a) For airplanes having line numbers 629 through 1006 inclusive and powered by

General Electric or Rolls-Royce engines: Within 18 months after November 20, 1998 (the effective date of AD 98-21-29, amendment 39-10837), perform a one-time inspection to determine the part number of the fuel shutoff spar valve for the left-and right-hand outboard engines, in accordance with Boeing Alert Service Bulletin 747-28A2199, dated August 1, 1996; Boeing Service Bulletin 747-28A2199, Revision 1, dated October 1, 1998; or Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999.

Replacement

(1) If a valve having part number (P/N) S343T003-40 (ITT P/N 125334D-1) is installed, no further action is required by this AD.

(2) If a valve having P/N S343T003-40 (ITT P/N 125334D-1) is not installed, prior to further flight, accomplish either paragraph (a)(2)(i) or (a)(2)(ii) of this AD.

(i) Replace the valve with a new valve, in accordance with the service bulletin.

Prior to further flight following accomplishment of the replacement, align the valve(s), perform a check to detect leaks, and correct any discrepancy, in accordance with the service bulletin. Or

(ii) Modify the valve body assembly of the fuel system in accordance with ITT

Service Bulletin SB125120-28-01, ITT Service Bulletin SB107970-28-01, and ITT Service Bulletin SB125334-28-01; all dated July 15, 1996.

Inspection

(b) For airplanes having line numbers 629 through 1006 inclusive and powered by General Electric or Rolls-Royce engines: Except as provided in paragraph (c) of this AD, prior to further flight following accomplishment of paragraph (a)(2) of this AD, perform a one-time general visual inspection to detect fuel leaks of the components between the fuel shutoff spar valve and the engine fuel shutoff valve on all four engines, in accordance with the applicable section that pertains to Rolls-Royce RB211 series engines or General Electric CF6-80C and CF6-45/50 series engines in Chapter 71 of the Boeing 747 Airplane Maintenance Manual (AMM), or Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999. If any leak is detected, prior to further flight, replace the part with a serviceable part. No further action is required by this AD.

Note 2: For the purposes of this AD, a general visual inspection is defined as:

"A visual examination of an interior or exterior area, installation, or assembly to detect obvious damage, failure, or irregularity. This level of inspection is made under normally available lighting conditions such as daylight, hangar lighting, flashlight, or drop-light, and may require removal or

opening of access panels or doors. Stands, ladders, or platforms may be required to gain proximity to the area being checked.”

(c) For airplanes having line numbers 629 through 1006 inclusive, powered by General Electric or Rolls-Royce engines, and having maintenance records that positively demonstrate that the inboard engines have never been located in the outboard position:

Prior to further flight following accomplishment of paragraph (a)(2) of this AD, perform a one-time general visual inspection to detect fuel leaks of the components between the fuel shutoff spar valve and the engine fuel shutoff valve on the outboard engines only, in accordance with the applicable section that pertains to Rolls-Royce RB211 series engines or General Electric CF6-80C and CF6-45/50 series engines in Chapter 71 of the Boeing 747 AMM, or Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999. If any leak is detected, prior to further flight, replace the part with a serviceable part. No further action is required by this AD.

Note 3: Accomplishment of the actions specified in AMM 71-00-00/501, Test No. 2, “Fuel and Oil Leak Check,” for Rolls-Royce RB211 series engines, and AMM 71-00-00/501, Test No. 3, “Ground Test—Idle Leak Check (or Idle Power),” for General Electric CF6-80C and CF6-45/50 series engines, is acceptable for compliance with the actions specified by paragraphs (b) and (c) of this AD.

New Actions Required By This AD:

Inspection

(d) For airplanes having line numbers 1 through 628 inclusive: Within 18 months after the effective date of this AD, perform a one-time inspection of the maintenance records of the airplane to determine if the fuel shutoff spar valve for the left-and right-hand outboard engines has ever been replaced, in accordance with Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999.

(1) If the maintenance record inspection establishes that neither valve has been replaced, no further action is required by this AD.

(2) If either valve has been replaced, or if the maintenance record inspection does not clearly establish that neither valve has been replaced, prior to further flight, accomplish paragraph (e)(1), (e)(2), or (e)(3), as applicable.

(e) For airplanes having line numbers 629 through 1006 inclusive and powered by Pratt & Whitney engines, or for airplanes having line numbers 1 through 628 inclusive on

which a fuel shutoff spar valve has been, or may have been, replaced: Within 18 months after the effective date of this AD, perform a one-time inspection to determine the part number of the fuel shutoff spar valve for the left-and right-hand outboard engines, as applicable, in accordance with Boeing Alert Service Bulletin 747-28A2199, dated August 1, 1996; Boeing Service Bulletin 747-28A2199, Revision 1, dated October 1, 1998; or Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999.

Replacement

(1) If a valve having P/N S343T003-40 (ITT P/N 125334D-1) is installed, no further action is required by this AD.

(2) If a valve having P/N 60B92406-161 (ITT P/N 125334-1), P/N 60B92406-81 (ITT P/N 125120-1), or P/N 60B92406-201 (ITT P/N 107970-1) is installed, accomplish either paragraph (f) or (g) of this AD, as applicable.

(3) If a valve having P/N S343T003-40 (ITT P/N 125334D-1), P/N 60B92406-161 (ITT P/N 125334-1), P/N 60B92406-81 (ITT P/N 125120-1), or P/N 60B92406-201 (ITT P/N 107970-1) is not installed, prior to further flight, accomplish either paragraph (e)(3)(i) or (e)(3)(ii), and either paragraph (f) or (g) of this AD, as applicable.

(i) Replace the valve with a new valve, in accordance with the service bulletin. Prior to further flight following accomplishment of the replacement, align the valve(s), perform a check to detect leaks, and correct any discrepancy, in accordance with the service bulletin. Or

(ii) Modify the valve body assembly of the fuel system in accordance with ITT

Service Bulletin SB125120-28-01, ITT Service Bulletin SB107970-28-01, and ITT Service Bulletin SB125334-28-01; all dated July 15, 1996.

Inspection

(f) Expect as provided in paragraph (g) of this AD, prior to further flight following accomplishment of paragraph (e) of this AD, perform a one-time general visual inspection to detect fuel leaks of the components between the fuel shutoff spar valve and the engine fuel shutoff valve on all four engines, in accordance with Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999. If any leak is detected, prior to further flight, replace the part with a serviceable part.

(g) For airplanes having maintenance records that positively demonstrate that the inboard engines have never been located in the outboard position: Prior to further flight following accomplishment of paragraph (e) of this AD, perform a one-time general visual inspection to detect fuel leaks of the

components between the fuel shutoff spar valve and the engine fuel shutoff valve on the outboard engines only, in accordance with Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999. If any leak is detected, prior to further flight, replace the part with a serviceable part.

Note 4: Accomplishment of the actions specified in AMM 71-00-00/501, Test No. 2, “Fuel and Oil Leak Check,” for Rolls-Royce RB211 series engines, and AMM 71-00-00/501, Test No. 3, “Ground Test—Idle Leak Check (or Idle Power),” for General Electric CF6-80C and CF6-45/50 series engines, is acceptable for compliance with the actions specified by paragraphs (f) and (g) of this AD.

Alternative Methods of Compliance

(h)(1) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

(2) Alternative methods of compliance, approved previously in accordance with AD 98-21-29, amendment 39-10837, are approved as alternative methods of compliance with paragraph (a), (a)(1), (a)(2), (a)(2)(i), (b), and (c) of this AD.

Note 5: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(i) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Incorporation by Reference

(j) Except as provided by paragraphs (b) and (c) of this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 747-28A2199, dated August 1, 1996; Boeing Service Bulletin 747-28A2199, Revision 1, dated October 1, 1998; Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999; ITT Service Bulletin SB125120-28-01, dated July 15, 1996; ITT Service Bulletin SB107970-28-01, dated July 15, 1996; or ITT Service Bulletin SB125334-28-01, dated July 15, 1996; as applicable.

(1) The incorporation by reference of Boeing Service Bulletin 747-28A2199,

Revision 1, dated October 1, 1998; and Boeing Service Bulletin 747-28A2199, Revision 2, dated July 8, 1999; is approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Boeing Alert Service Bulletin 747-28A2199, dated August 1, 1996; ITT Service Bulletin SB125120-28-01, dated July 15, 1996; ITT Service Bulletin SB107970-28-01, dated July 15, 1996; and ITT Service Bulletin SB125334-28-01, dated July 15, 1996; was approved previously by the Director of the Federal Register as of November 20, 1998 (63 FR 55517, October 16, 1998).

(3) Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207; or ITT Aerospace Controls, 28150 Industry Drive, Valencia, California 91355. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(k) This amendment becomes effective on August 17, 2000.

Issued in Renton, Washington, on July 3, 2000.

Vi L. Lipki,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00-17297 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-U

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-NM-75-AD; Amendment 39-11816; AD 2000-14-07]

RIN 2120-AA64

Airworthiness Directives; Boeing Model 727 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 727 series airplanes, that currently requires repetitive inspections to detect cracking of the rear spar web or fuel leakage of the wing center section, and repair, if necessary. That action also provides for an optional modification of the rear spar web that constitutes terminating action for the repetitive inspections. This amendment requires accomplishment of the previously optional terminating action. The actions specified by this AD are intended to prevent cracking of the rear spar web, which could permit fuel

leakage into the airflow multiplier, and could result in an electrical short that could cause a fire.

DATES: Effective August 17, 2000.

The incorporation by reference of Boeing Service Bulletin 727-57A0182, Revision 1, dated February 25, 1999, as listed in the regulations, is approved by the Director of the Federal Register as of August 17, 2000.

The incorporation by reference of Boeing Alert Service Bulletin 727-57A0182, dated September 18, 1997, as listed in the regulations, was approved previously by the Director of the Federal Register as of December 29, 1997 (62 FR 65355, December 12, 1997).

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT:

Walter Sippel, Aerospace Engineer, Airframe Branch, ANM-120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2774; fax (425) 227-1181.

SUPPLEMENTARY INFORMATION:

A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 97-25-15, amendment 39-10239 (62 FR 65355, December 12, 1997), which is applicable to certain Boeing Model 727 series airplanes, was published in the **Federal Register** on October 6, 1999 (64 FR 54246). The action proposed to require repetitive inspections to detect cracking of the rear spar web or fuel leakage of the wing center section; repair, if necessary; and modification of the rear spar web, which would constitute terminating action for the repetitive inspections.

Comments

Interested persons have been afforded an opportunity to participate in the making of this amendment. Due consideration has been given to the comments received.

Support for the Proposal

One commenter supports the proposed rule.

Request To State Grace Period in Calendar Time

One commenter requests that the FAA revise the grace period in the proposed rule from 3,000 flight cycles to 4 years after the effective date of this AD. The commenter notes that Boeing Alert Service Bulletin 727-57A0182 is listed in Boeing Document D6-54860, dated March 31, 1989, which is currently required by AD 90-06-09, amendment 39-6488 (55 FR 8370, March 7, 1990) and AD 94-05-04, amendment 39-8842 (59 FR 13442, March 22, 1994). The commenter states that these AD's currently state a compliance threshold of 60,000 total flight cycles, with a grace period of 4 years after the effective date of the AD. The commenter requests that the proposed rule allow the same grace period allowed by the existing AD's for the actions specified in Boeing Alert Service Bulletin 727-57A0182.

The FAA does not concur with the commenter's request. Boeing Document D6-54860 addresses service problems related to both corrosion (which is a function of time) and fatigue (which is a function of flight cycles). Although Boeing Alert Service Bulletin 727-57A0182 is listed in that document, this AD is a standalone AD concerned with fatigue cracking of the rear spar web, which is related to flight cycles. As a result, the FAA has determined that a grace period stated in flight cycles is more appropriate than one stated in calendar time. No change to the final rule is necessary in this regard.

Conclusion

After careful review of the available data, including the comments noted above, the FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 970 Model 727 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 659 airplanes of U.S. registry will be affected by this AD: 641 "Group 1" airplanes and 18 "Group 2" airplanes, as listed in the service bulletin.

The inspection that is currently required by AD 97-25-15 takes approximately 2 work hours per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be \$79,080, or \$120 per airplane, per inspection cycle.

The new modification that is required in this AD action takes approximately 60 work hours per airplane to accomplish, at an average labor rate of \$60 per work hour. Required parts cost approximately \$6,434 per airplane for "Group 1" airplanes, and \$6,689 per airplane for "Group 2" airplanes. Based on these figures, the cost impact of the new modification required by this AD on U.S. operators is estimated to be \$6,616,996, or \$10,034 per "Group 1" airplane and \$10,289 per "Group 2" airplane.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Regulatory Impact

The regulations adopted herein will not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this final rule does not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this action (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–10239 (62 FR 65355, December 29, 1997), and by adding a new airworthiness directive (AD), amendment 39–11816, to read as follows:

2000–14–07 Boeing: Amendment 39–11816. Docket 99–NM–75–AD. Supersedes AD 97–25–15, Amendment 39–10239.

Applicability: Model 727 series airplanes having line numbers 858 through 864 inclusive, 867 through 869 inclusive, 872 through 883 inclusive, and 885 through 1832 inclusive; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (e)(1) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To prevent cracking of the rear spar web, which could permit fuel leakage into the airflow multiplier, and could result in an electrical short that could cause a fire, accomplish the following:

Restatement of the Requirements of AD 97–25–15

Inspections

(a) Prior to the accumulation of 15,000 total flight cycles, or within 300 flight cycles after December 27, 1997 (the effective date of AD 97–25–15, amendment 39–10239), whichever occurs later: Accomplish the inspections specified in either paragraph (a)(1) or (a)(2) of this AD, in accordance with Boeing Alert Service Bulletin 727–57A0182, dated September 18, 1997, or Boeing Service Bulletin 727–57A0182, Revision 1, dated February 25, 1999. For purposes of the AD, the access panels specified in the alert service bulletin need not be removed; the access panels need only be opened.

Note 2: The fuel tank of the wing center section may be filled with fuel to assist in detecting cracking or fuel leakage during the accomplishment of the visual inspections required by this AD.

(1) Perform a visual inspection using a borescope or mirror to detect cracking of the rear spar web and/or fuel leakage of the wing center section between right body buttock line (BBL) 40 and left BBL 40, in accordance with Part I of the Accomplishment Instructions of the service bulletin. Thereafter, repeat this inspection at intervals not to exceed 300 flight cycles. Or

(2) Perform an ultrasonic and high frequency eddy current (HFEC) inspection to detect cracking of the rear spar web of the wing center section between right BBL 40 and left BBL 40, in accordance with Part II of the Accomplishment Instructions of the service bulletin. Thereafter, repeat this inspection at intervals not to exceed 3,000 flight cycles.

Repair

(b) If any cracking of the rear spar web and/or fuel leakage of the wing center section is detected between right BBL 40 and left BBL 40 near the upper machined land radius, prior to further flight, repair in accordance with Part III of the Accomplishment Instructions in Boeing Alert Service Bulletin 727–57A0182, dated September 18, 1997, or Boeing Service Bulletin 727–57A0182, Revision 1, dated February 25, 1999. Accomplishment of this repair constitutes terminating action for the repetitive inspection requirements of this AD.

(c) If any cracking of the rear spar web and/or fuel leakage of the wing center section is detected that is outside the area specified in paragraph (b) of this AD, prior to further flight, repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate; or in accordance with data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For a repair method to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

New Requirements of This AD

Modification

(d) Prior to the accumulation of 60,000 total flight cycles, or within 3,000 flight cycles after the effective date of this AD, whichever occurs later, accomplish an ultrasonic and HFEC inspection in accordance with the requirements of paragraph (a)(2) of this AD.

(1) If no cracking is detected, prior to further flight, modify the rear spar web of the center section of the fuel tank between right BBL 40 and left BBL 40, in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 727–57A0182, dated September 18, 1997, or Boeing Service Bulletin 727–57A0182, Revision 1, dated February 25, 1999. Accomplishment of this modification constitutes terminating action for the repetitive inspection requirements of this AD.

(2) If any cracking is detected, prior to further flight, repair and modify the rear spar web in accordance with the Accomplishment Instructions of Boeing Alert Service Bulletin 727–57A0182, dated September 18, 1997, or Boeing Service Bulletin 727–57A0182, Revision 1, dated February 25, 1999. Accomplishment of this modification constitutes terminating action for the repetitive inspection requirements of this AD.

Alternative Methods of Compliance

(e)(1) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

(2) Alternative methods of compliance, approved previously in accordance with AD 97-25-15, amendment 39-10239, are approved as alternative methods of compliance with this AD.

Note 3: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

(f) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished, provided the limitations specified in paragraphs (f)(1) through (f)(6) of this AD are included in the special flight permit:

“(1) Required trip and reserve fuel must be carried in the No. 1 and No. 3 outer wing tanks.

(2) Wing center tank No. 2 must be empty of fuel.

(3) The fuel system must be checked for normal operation prior to flight by verifying that all boost pumps are operational; configuring the fuel system by turning on all boost pumps in the No.'s 1 and 3 outer wing tanks and by opening all crossfeed valve selectors; and by confirming that fuel is not bypassing tank No. 2 check valves by observing that there is not leakage into tank No. 2.

(4) Maintain a minimum of 5,300 pounds of fuel in tanks No. 1 and No. 3 to prevent uncovering the fuel bypass valve.

(5) The fuel quantity indication system must be operational in all three tanks.

(6) The effects of loading fuel only in the wing tanks on the airplane weight and balance must be considered and accounted for.”

Incorporation by Reference

(g) Except as provided by paragraph (c) of this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 727-57A0182, dated September 18, 1997; or Boeing Service Bulletin 727-57A0182, Revision 1, dated February 25, 1999.

(1) The incorporation by reference of Boeing Service Bulletin 727-57A0182, Revision 1, dated February 25, 1999, is approved by the Director of the Federal Register, in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

(2) The incorporation by reference of Boeing Alert Service Bulletin 727-57A0182, dated September 18, 1997, was approved previously by the Director of the Federal Register as of December 29, 1997 (62 FR 65355, December 12, 1997).

(3) Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124-2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

Effective Date

(h) This amendment becomes effective on August 17, 2000.

Issued in Renton, Washington, on July 3, 2000.

Vi L. Lipski,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 00-17296 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration****14 CFR Part 97**

[Docket No. 30108; Amdt. No. 2000]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference—approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matter incorporated by reference in the amendment is as follows:

For Examination.—

1. FAA Rules Docket, FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which affected airport is located; or

3. The Flight Inspection Area Office which originated the SIAP.

For Purchase—Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA-200), Faa Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

By Subscription—Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, US Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT:

Donald P. Pate, Flight Procedure Standards Branch (AMCAFS-420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954-4164.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description on each SIAP is contained in the appropriate FAA Form 8260 and the National Flight Data Center (FDC)/Permanent (P) Notices to Airmen (NOTAM) which are incorporated by reference in the amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation's Regulations (FAR). Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction of charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes SIAPs. For safety and timeliness of change considerations, this amendment incorporates only specific changes contained in the content of the following FDC/P NOTAMs for each SIAP. The SIAP information in some previously designated FDC/Temporary (FDC/T) NOTAMs is of such duration as to be permanent. With conversion to FDC/P NOTAMs, the respective FDC/T NOTAMs have been canceled.

The FDC/P NOTAMs for the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these chart changes to SIAPs by FDC/P NOTAMs, the TERPS criteria were applied to only these specific conditions existing at the affected airports. All SIAP amendments in this rule have been previously issued by the FAA in a National Flight Data Center (FDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for all these SIAP amendments requires making them effective in less than 30 days.

Further, the SIAPs contained in this amendment are based on the criteria contained in the TERPS. Because of the close and immediate relationship

between these SIAPs and safety in air commerce, I find that notice and public procedure before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making these SIAPs effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR part 97

Air Traffic Control, Airports, Navigation (Air).

Issued in Washington, DC on July 7, 2000.

L. Nicholas Lacey,

Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 is revised to read as follows:

Authority: 49 U.S.C. 40103, 40113, 40120, 44701; 49 U.S.C. 106(g); and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33 and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

Effective Upon Publication

FDC Date	State	City	FDC number	SIAP
06/01/00	IL	Champaign/Urbana	University of Illinois—Willard	FDC 0/5785 GPS RWY 19 ORIG... CORRECTED
06/22/00	CA	Oakland	Metropolitan Oakland Intl	FDC 0/6866 ILS RWY 29 (CAT I, II, III) AMDT 23A...
06/22/00	CA	Watsonville	Watsonville Muni	FDC 0/6865 LOC RWY 2 AMDT 2B...ADD...
06/22/00	TX	Morristown	Moore—Murrell	FDC 0/6851 NDB OR GPS RWY 5, AMDT 4...
06/23/00	CA	San Martin	South County Arpt of Santa Clara County.	FDC 0/6892 GPS RWY 32 ORIG...
06/23/00	OH	Columbus	Port Columbus Intl	FDC 0/6907 ILS RWY 28L, AMDT 27A...
06/23/00	TN	Morristown	Moore—Murrell	FDC 0/6885 NDB OR GPS RWY 5, AMDT 4...
06/26/00	GA	Lawrenceville	Gwinnett County—Briscoe Field	FDC 0/6960 GPS—A, ORIG...
06/26/00	IL	Chicago	Chicago—O'Hare Intl	FDC 0/6979 ILS RWY 14R THIS REPLACES 0/6419 VOR/DME OR TACAN RWY 31, AMDT 8A...
06/26/00	NE	Beatrice	Beatrice Muni	FDC 0/6993 THIS REPLACES 0/5950 VOR RWY 35, AMDT 6A...
06/27/00	IL	Carbondale— Murphysboro.	Southern Illinois	FDC 0/7037 ILS RWY 18L AMDT 12B...
06/27/00	LA	Lafayette	Lafayette Regional	FDC 0/7041 ILS RWY 22L, AMDT 4...
06/27/00	TX	Sherman/Denison	Grayson County	FDC 0/7026 VOR/DME RNAV RWY 35R, ORIG...
06/28/00	MO	Ft. Leonard Wood	Waynesville Regional Arpt at Forney Field.	FDC 0/7107 VOR RWY 32, ORIG A...
06/28/00	WA	Pullman—Moscow	Pullman—Moscow Regional	FDC 0/7104 VOR/DME OR GPS—A ORIG...
06/28/00	WY	Gillette	Gillette—Campbell Co	FDC 0/7118 NDB RWY 34 ORIG—B...
06/28/00	WY	Gillette	Gillette—Campbell Co	FDC 0/7119 VOR OR GPS RWY 16, AMDT 6B...

FDC Date	State	City	FDC number	SIAP
06/28/00	WY	Gillette	Gillette—Campbell Co	FDC 0/7120 VOR/DME OR GPS RWY 34, ORIG—B...
06/29/00	MO	Neosho	Neosho Hugh Robinson	FDC 0/7170 VOR/DME RNAV OR GPS RWY 19, AMDT 6A...
06/29/00	MO	Neosho	Neosho Hugh Robinson	FDC 0/7171 VOR OR GPS—A, AMDT 6A...
06/29/00	UT	Salt Lake City	Salt Lake City Intl	FDC 0/7146 ILS RWY 35, AMDT 1B...
06/30/00	GA	Lawrenceville	Gwinnett County—Briscoe Field	FDC 0/7192 VOR/DME OR GPS RWY 7, AMDT 1A...
06/30/00	MO	Lee's Summit	Lee's Summit Muni	FDC 7/7205 VOR—A ORIG...
06/30/00	OK	Oklahoma City	Wiley Post	FDC 0/7188 VOR RWY 35R, AMDT 3...
06/30/00	SD	Huron	Huron Regional	FDC 0/7195 LOC/DME BC RWY 30, AMDT 11A...
07/03/00	MO	Kaiser Lake Ozark	Lee C. Fine Memorial	FDC 0/7285 VOR OR GPS RWY 3, AMDT 5...
07/03/00	MO	Kaiser Lake Ozark	Lee C. Fine Memorial	FDC 0/7286 LOC/DME RWY 21, AMDT 1A...
07/30/00	MO	Kaiser Lake Ozark	Lee C. Fine Memorial	FDC 0/7289 GPS RWY 21, ORIG—A...

[FR Doc. 00–17788 Filed 7–12–00; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 97

[Docket No. 30107; Amdt. No. 1999]

Standard Instrument Approach Procedures; Miscellaneous Amendments

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This amendment establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs) for operations at certain airports. These regulatory actions are needed because of the adoption of new or revised criteria, or because of changes occurring in the National Airspace System, such as the commissioning of new navigational facilities, addition of new obstacles, or changes in air traffic requirements. These changes are designed to provide safe and efficient use of the navigable airspace and to promote safe flight operations under instrument flight rules at the affected airports.

DATES: An effective date for each SIAP is specified in the amendatory provisions.

Incorporation by reference—approved by the Director of the Federal Register on December 31, 1980, and reapproved as of January 1, 1982.

ADDRESSES: Availability of matters incorporated by reference in the amendment is as follows:

For Examination—

1. FAA Rules Docket, FAA Headquarters Building, 800

Independence Avenue, SW., Washington, DC 20591;

2. The FAA Regional Office of the region in which the affected airport is located; or

3. The Flight Inspection Area Office which originated the SIAP.

*For Purchase—*Individual SIAP copies may be obtained from:

1. FAA Public Inquiry Center (APA–200), FAA Headquarters Building, 800 Independence Avenue, SW., Washington, DC 20591; or

2. The FAA Regional Office of the region in which the affected airport is located.

*By Subscription—*Copies of all SIAPs, mailed once every 2 weeks, are for sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

FOR FURTHER INFORMATION CONTACT:

Donald P. Pate, Flight Procedure Standards Branch (AMCAFS–420), Flight Technologies and Programs Division, Flight Standards Service, Federal Aviation Administration, Mike Monroney Aeronautical Center, 6500 South MacArthur Blvd., Oklahoma City, OK 73169 (Mail Address: P.O. Box 25082, Oklahoma City, OK 73125) telephone: (405) 954–4164.

SUPPLEMENTARY INFORMATION: This amendment to part 97 of the Federal Aviation Regulations (14 CFR part 97) establishes, amends, suspends, or revokes Standard Instrument Approach Procedures (SIAPs). The complete regulatory description of each SIAP is contained in official FAA form documents which are incorporated by reference in this amendment under 5 U.S.C. 552(a), 1 CFR part 51, and § 97.20 of the Federal Aviation Regulations (FAR). The applicable FAA Forms are identified as FAA Forms 8260–3, 8260–4, and 8260–5. Materials incorporated by reference are available for examination or purchase as stated above.

The large number of SIAPs, their complex nature, and the need for a special format make their verbatim publication in the **Federal Register** expensive and impractical. Further, airmen do not use the regulatory text of the SIAPs, but refer to their graphic depiction on charts printed by publishers of aeronautical materials. Thus, the advantages of incorporation by reference are realized and publication of the complete description of each SIAP contained in FAA form documents is unnecessary. The provisions of this amendment state the affected CFR (and FAR) sections, with the types and effective dates of the SIAPs. This amendment also identifies the airport, its location, the procedure identification and the amendment number.

The Rule

This amendment to part 97 is effective upon publication of each separate SIAP as contained in the transmittal. Some SIAP amendments may have been previously issued by the FAA in a National Flight Data Center (NFDC) Notice to Airmen (NOTAM) as an emergency action of immediate flight safety relating directly to published aeronautical charts. The circumstances which created the need for some SIAP amendments may require making them effective in less than 30 days. For the remaining SIAPs, an effective date at least 30 days after publication is provided.

Further, the SIAPs contained in this amendment are based on the criteria contained in the U.S. Standard for Terminal Instrument Procedures (TERPS). In developing these SIAPs, the TERPS criteria were applied to the conditions existing or anticipated at the affected airports. Because of the close and immediate relationship between these SIAPs and safety in air commerce, I find that notice and public procedure

before adopting these SIAPs are impracticable and contrary to the public interest and, where applicable, that good cause exists for making some SIAPs effective in less than 30 days.

Conclusion

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

List of Subjects in 14 CFR Part 97

Air Traffic Control, Airports, Navigation (Air).

Issued in Washington, DC on July 7, 2000.

L. Nicholas Lacey,
Director, Flight Standards Service.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me, part 97 of the Federal Aviation Regulations (14 CFR part 97) is amended by establishing, amending, suspending, or revoking Standard Instrument Approach Procedures, effective at 0901 UTC on the dates specified, as follows:

PART 97—STANDARD INSTRUMENT APPROACH PROCEDURES

1. The authority citation for part 97 is revised to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120, 44701; and 14 CFR 11.49(b)(2).

2. Part 97 is amended to read as follows:

§§ 97.23, 97.25, 97.27, 97.29, 97.31, 97.33, and 97.35 [Amended]

By amending: § 97.23 VOR, VOR/DME, VOR or TACAN, and VOR/DME or TACAN; § 97.25 LOC, LOC/DME, LDA, LDA/DME, SDF, SDF/DME; § 97.27 NDB, NDB/DME; § 97.29 ILS, ILS/DME, ISMLS, MLS, MLS/DME, MLS/RNAV; § 97.31 RADAR SIAPs; § 97.33 RNAV SIAPs; and § 97.35 COPTER SIAPs, identified as follows:

. . . *Effective August 10, 2000*

Tallulah/Vicksburg, LA, Vicksburg Tallulah Regional, GPS RWY 18, CANCELLED

Tallulah/Vicksburg, LA, Vicksburg Tallulah Regional, RNAV RWY 18, Orig
Tallulah/Vicksburg, LA, Vicksburg Tallulah Regional, RNAV RWY 36, Orig
Three Rivers, MI, Three Rivers Muni Dr Haines, RNAV RWY 27, Orig
Owatonna, MN, Owatonna Degner, Regional, RNAV RWY 12, Orig
Southern Pines, NC, Moore County, VOR OR GPS-A, Amdt 4, CANCELLED
Mooreland, OK, Mooreland Muni, NDB RWY 17, Amdt 4, CANCELLED

. . . *Effective September 7, 2000*

St. Louis, MO, Lambert-St. Louis Intl, VOR RWY 6, Orig
St. Louis, MO, Lambert-St. Louis Intl, VOR RWY 24, Orig
Lake City, SC, Lake City Muni CJ Evans Field, NDB OR GPS-A, Amdt 1B, CANCELLED

. . . *Effective October 5, 2000*

Gustavus, AK, Gustavus, NDB OR GPS-A, Amdt 3A, CANCELLED
Kenai, AK, Kenai Muni, VOR/DME RWY 1L, Amdt 6
Sacramento, CA, Sacramento Intl, NDB RWY 16R, Amdt 10A
Sacramento, CA, Sacramento Intl, NDB RWY 16L, Amdt 1A
Sacramento, CA, Sacramento Intl, NDB OR GPS RWY 34R, Orig-A
Sacramento, CA, Sacramento Intl, NDB OR GPS RWY 34L, Amdt 4A
Bridgeport, CT, Igor I. Sikorsky Memorial, VOR OR GPS RWY 24, Amdt 15
Hartford, CT, Hartford-Brainard, LDA RWY 2, Amdt 1D
Hartford, CT, Hartford-Brainard, NDB RWY 2, Amdt 2B
Tallahassee, FL, Tallahassee Regional, GPS RWY 9, Orig-A
Rota Island, MP, Rota Intl, GPS RWY 9, Orig-A
Edenton, NC, Northeastern Regional, NDB RWY 5, Amdt 5
Edenton, NC, Northeastern Regional, NDB RWY 19, Amdt 6
Edenton, NC, Northeastern Regional, GPS RWY 1, Orig-B, CANCELLED
Edenton, NC, Northeastern Regional, RNAV RWY 1, Orig
Edenton, NC, Northeastern Regional, RNAV RWY 5, Orig
Edenton, NC, Northeastern Regional, RNAV RWY 19, Orig
Winston Salem, NC, Smith Reynolds, VOR/DME RWY 15, Amdt 1B
Winston Salem, NC, Smith Reynolds, NDB RWY 33, Amdt 25B
Winston Salem, NC, Smith Reynolds, GPS RWY 15, Orig-B
Winston Salem, NC, Smith Reynolds, GPS RWY 33, Orig-B
Millersburg, OH, Holmes County, NDB RWY 27, Amdt 5A, CANCELLED
Toledo, OH, Toledo Express, VOR/DME OR GPS RWY 34, Amdt 7
Providence, RI, Theodore Francis Green State, VOR/DME OR GPS RWY 23L, Amdt 6C
Providence, RI, Theodore Francis Green State, VOR/DME RWY 34, Amdt 5A
Springfield, VT, Hartness State (Springfield), LOC/DME RWY 5, Amdt 3B

Suffolk, VA, Suffolk Muni, LOC RWY 4, Amdt 1B
Suffolk, VA, Suffolk Muni, NDB RWY 4, Amdt 1B
Suffolk, VA, Suffolk Muni, GPS RWY 4, Orig-B
Eau Claire, WI, Chippewa Valley Regional, LOC/DME BC RWY 4, Amdt 8

The FAA published an Amendment in Docket No. 30088, Amdt. No. 1997 to Part 97 of the Federal Aviation Regulations (Vol 65 FR No. 125 Page 39795; dated June 28, 2000) under section 97.33 effective August 10, 2000, which is hereby amended as follows:

Detroit/Grosse, MI, Grosse Ile Muni, RNAV RWY 22, Orig, should read
Detroit/Grosse Ile, MI, Grosse Ile Muni, RNAV RWY 22, Orig.

[FR Doc. 00-17787 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 314

[Docket No. 85N-0214]

Court Decisions, ANDA Approvals, and 180-Day Exclusivity

AGENCY: Food and Drug Administration, HHS.

ACTION: Interim rule; opportunity for public comment.

SUMMARY: The Food and Drug Administration (FDA) is issuing an interim rule to amend its regulations governing the definition of court decisions that affect the timing of certain abbreviated new drug application (ANDA) approvals and the beginning of 180-day exclusivity under the Federal Food, Drug, and Cosmetic Act (the act). The interim rule eliminates the current definition of the court decision. This change is necessitated by recent court decisions on these issues.

DATES: This interim rule is effective July 18, 2000. Submit written comments by October 11, 2000.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852.

FOR FURTHER INFORMATION CONTACT: Virginia G. Beakes, Center for Drug Evaluation and Research (HFD-7), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-594-2041.

SUPPLEMENTARY INFORMATION:

I. Background

The Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98-417) (the Hatch-Waxman Amendments) amended the act. The Hatch-Waxman Amendments created section 505(j) of the act (21 U.S.C. 355(j)), which established the ANDA approval procedures. These procedures allow for the approval and marketing of lower priced generic drug products through a process that includes, among other elements, a listing of innovator drug patents, a procedure for certification to listed patents and judicial review of patent claims, and a period of 180 days of marketing exclusivity for certain ANDA applicants who challenge innovator patents.

FDA's interpretation of two provisions of section 505(j) of the act have been affected by recent court decisions interpreting the phrase "decision of a court" or "court decision." Section 505(j)(5)(B)(iii) of the act governs the approval of ANDA's when a patent owner or new drug application (NDA) holder has brought a timely patent infringement action in response to an ANDA applicant's notice of filing of a paragraph IV certification to a listed patent. Section 505(j)(5)(B)(iv) of the act governs the eligibility for and timing of 180-day exclusivity. The regulations implementing these statutory provisions are found in § 314.107 (21 CFR 314.107). Certain aspects of these regulations have been successfully challenged in *TorPharm, Inc., v. Shalala*, No. 97-1925, 1997 U.S. Dist. LEXIS 21983 (D.D.C. Sept. 15, 1997), appeal withdrawn and remanded, 1998 U.S. App. LEXIS 4681 (D.C. Cir. Feb. 5, 1998); vacated No. 97-1925 (D.D.C. Apr. 9, 1998); and *Mylan Pharmaceuticals, Inc., v. Shalala*, No. 99-2995, slip op. (D.D.C. Jan. 4, 2000). In response to this litigation, FDA is issuing this interim rule withdrawing from § 314.107 the definitions related to court decisions.

The statutory provisions at issue in the *TorPharm* and *Mylan* cases apply the concept of a court decision to the timing of certain ANDA approvals and to the start of 180-day exclusivity. There is a 30-month statutory bar to approval of an ANDA that is the subject of patent infringement litigation except if "before the expiration of such period the court decides that such patent is invalid or not infringed, the approval will be made effective on the date of the *court decision*" (section 505(j)(5)(B)(iii)(I) of the act (emphasis added)). In implementing this provision in current § 314.107(e)(1), FDA interpreted "court"

to mean "the court that enters final judgment from which no appeal can be or has been taken." The agency's reasons for adopting this interpretation are discussed in the preambles to the proposed and final rules implementing the 1984 Drug Price Competition and Patent Term Restoration Act (54 FR 28872 at 28893 through 28895, July 10, 1989, and 59 FR 50338 at 50352 through 50354, October 3, 1994).

Certain court decisions are also important for 180-day generic drug exclusivity. FDA's interpretation of "court" in the court decision described in section 505(j)(5)(B)(iii)(I) of the act was influenced by the role such a decision plays in 180-day exclusivity. The 180-day period of exclusivity can begin on either: (1) The date of first commercial marketing; or (2) "the date of a *decision of a court*" * * * holding the patent which is the subject of the [paragraph IV] certification to be invalid, or not infringed, whichever is earlier" (section 505(j)(5)(B)(iv) of the act (emphasis added)). As described in the preambles to the implementing regulations (54 FR 28893 through 28895, and 59 FR 50352 through 50354), FDA believed that for the 180-day exclusivity to have real meaning for the eligible ANDA the court decision triggering the exclusivity must be the one that finally resolves the patent infringement litigation related to the ANDA. Therefore, for purposes of section 505(j)(5)(B)(iv) of the act, FDA determined that "court" means "the court that enters final judgment from which no appeal can be or has been taken," as stated in current § 314.107(e)(1).

FDA's interpretation of the term "court" has been successfully challenged in the context of both the timing of ANDA approvals and the commencement of 180-day exclusivity. In *TorPharm v. Shalala*, the D.C. District Court found FDA's interpretation not supported by the statute and directed FDA to approve an ANDA upon a decision of the district court finding a patent invalid, unenforceable, or not infringed. When the case became moot, FDA's appeal of that decision was withdrawn, and the district court opinion was vacated. In the period since the *TorPharm* decision, FDA has continued to apply the definition of "court" set out at § 314.107(e). Recently, in *Mylan Pharmaceuticals, Inc., v. Shalala*, the D.C. District Court found FDA's interpretation of court as used in the 180-day exclusivity context inconsistent with the statute's plain meaning. However, the court also determined that the applicant who relied in good faith on FDA's

interpretation of the 180-day exclusivity provision should not be punished by losing its exclusivity. The court therefore refused to order FDA to begin the running of 180-day exclusivity upon the decision of the district court in the patent litigation at issue.

These recent decisions add considerable uncertainty to FDA's implementation of the ANDA approval and 180-day generic drug exclusivity programs. These regulatory programs already have been disrupted by the changes in eligibility for 180-day exclusivity necessitated by *Mova Pharmaceutical Corp., v. Shalala*, 140 F.3d 1060 (D.C. Cir. 1998), and *Granutech, Inc., v. Shalala*, 46 U.S.P.Q.2d 1398 (4th Cir. 1998). Therefore, in determining its response to the *TorPharm* and *Mylan* decisions, a primary concern for the agency has been to identify an approach that will minimize further disruption and provide the regulated industry with reasonable guidance for making future business decisions.

The government has not appealed the *Mylan* decision and will follow that court's interpretation of the statute in approving ANDA's and calculating the commencement of 180 days of exclusivity. Although the agency believes that the statutory provisions at issue may properly be interpreted as FDA set out in § 314.107(e), the agency nonetheless has determined that because of the confusion and uncertainty created by the repetitive litigation of these issues, it is in the interest of the regulated industry and the agency to accept the interpretation of the *TorPharm* and *Mylan* courts. The agency will incorporate the *TorPharm* and *Mylan* courts' interpretation of the statute into the final rule implementing the changes in 180-day exclusivity proposed in the **Federal Register** of August 6, 1999 (64 FR 42873).

In the period before the final rule implementing changes in 180-day exclusivity is completed, the agency is issuing this interim rule to remove § 314.107(e)(1) through (e)(2)(iii). FDA issued a guidance for industry stating that the agency would continue to apply the interpretation set out in § 314.107(e)(1) through (e)(2)(iii) in certain circumstances, and that the interpretation urged by the courts would be applied prospectively.¹ This

¹ Guidance for industry, "Court Decisions, ANDA Approvals, and 180-Day Exclusivity Under the Hatch-Waxman Amendments to the Federal Food, Drug, and Cosmetic Act," March 2000. This guidance is available on the Internet at <http://www.fda.gov/cder/guidance/index.htm>.

guidance will apply until revoked or revised by the agency.

II. Environmental Impact

The agency has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental impact assessment nor an environmental impact statement is required.

III. Analysis of Impacts

FDA has examined the impacts of the interim rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including having an annual effect on the economy of \$100 million or adversely affecting in a material way a sector of the economy, competition, or jobs, or if it raises novel legal or policy issues. The agency believes that this interim rule is consistent with the regulatory philosophy and principles identified in the Executive Order. In addition, the interim rule is not a significant regulatory action as defined by the Executive Order and so is not subject to review under the Executive Order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact of a rule on small entities. Because good cause exists under 5 U.S.C. 553(d)(3) for making this interim rule effective in less than 30 days, the agency is not required to analyze regulatory options under the Regulatory Flexibility Act (see 5 U.S.C. 604(a)). Therefore, under the Regulatory Flexibility Act, no further analysis is required.

Section 202(a) of the Unfunded Mandates Reform Act requires that agencies prepare a written statement of anticipated costs and benefits before proposing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million in any one year (adjusted annually for inflation). The elimination of the definition of “court” in § 314.107(e)(1)

through (e)(2)(iii) will not result in any significant increased expenditures by State, local, and tribal governments or the private sector. The Unfunded Mandates Reform Act does not require FDA to prepare a statement of costs and benefits for the interim rule, because the interim rule is not expected to result in any 1-year expenditure that would exceed \$100 million adjusted for inflation. The current inflation-adjusted statutory threshold is \$110 million.

This interim rule is intended to bring FDA’s regulations into conformance with the *TorPharm* and *Mylan* court decisions. The agency believes that this interim rule is necessary and that: (1) It is consistent with the principles of Executive Order 12866, (2) it is not a significant regulatory action under that Order, (3) an analysis is not required under the Regulatory Flexibility Act, and (4) it is not likely to result in an annual expenditure in excess of \$100 million.

IV. Federalism

FDA has analyzed this interim rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the interim rule does not contain policies that have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Accordingly, the agency has concluded that the interim rule does not contain policies that have federalism implications as defined in the order and, consequently, a federalism summary impact statement is not required.

V. Paperwork Reduction Act of 1995

This interim rule contains no collections of information, and clearance by the Office of Management and Budget under the Paperwork Reduction Act of 1995 (Public Law 104–13) is not required.

VI. Effective Date

The agency is issuing these amendments as an interim rule effective July 18, 2000. This action is being taken to remove the provisions of § 314.107(e)(1) through (e)(2)(iii), which were determined by the *TorPharm* and *Mylan* courts to be unsupported by the act. These decisions have rendered the regulatory provisions unenforceable, and the agency can find no good reasons to retain the provisions in the regulations. For the foregoing reasons, FDA finds, for good cause, that notice and public procedure would be impracticable, unnecessary, and

contrary to the public interest. Therefore a public comment period before the establishment of this interim rule may be dispensed with under 5 U.S.C. 553(b)(3)(B) and § 10.40(e)(1) (21 CFR 10.40(e)(1)). In addition, the Commissioner of Food and Drugs finds good cause under 5 U.S.C. 553(d)(3) and § 10.40(c)(4)(ii) for making this interim rule effective in less than 30 days.

VII. Opportunity for Public Comment

Interested persons may submit to the Dockets Management Branch (address above) written comments regarding this interim rule, on or before October 11, 2000. FDA will use any comments received to determine whether this interim rule should be modified or revoked. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 314

Administrative practice and procedure, Confidential business information, Drugs, Reporting and recordkeeping requirements.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 314 is amended as follows:

PART 314—APPLICATIONS FOR FDA APPROVAL TO MARKET A NEW DRUG

1. The authority citation for 21 CFR part 314 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 355, 371, 374, 379e.

2. Section 314.107 is amended by removing paragraphs (e)(1) through (e)(2)(iii); by redesignating paragraph (e)(2)(iv) as paragraph (e); and by revising the heading for newly redesignated paragraph (e) to read as follows:

§ 314.107 Effective date of approval of a 505(b)(2) application or abbreviated new drug application under section 505(j) of the act.

* * * * *

(e) *Notification of court actions.*

* * *

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Dated: June 27, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00–17652 Filed 7–12–00; 8:45 am]

BILLING CODE 4160–01–F

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01-00-004]

RIN 2115-AA97

Safety Zone: New York Harbor, Western Long Island Sound, East and Hudson Rivers Fireworks

AGENCY: Coast Guard, DOT.

ACTION: Final rule.

SUMMARY: The Coast Guard is establishing 19 permanent safety zones for fireworks displays located on New York Harbor, western Long Island Sound, the East River, and the Hudson River. This action is necessary to provide for the safety of life on navigable waters during the events. This action establishes permanent exclusion areas that are only active prior to the start of the fireworks display until shortly after the fireworks display is completed, and is intended to restrict vessel traffic in a portion of New York Harbor, western Long Island Sound, the East and Hudson Rivers.

DATES: This rule is effective August 14, 2000.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01-00-004) and are available for inspection or copying at room 205, Coast Guard Activities New York, 212 Coast Guard Drive, Staten Island, NY 10305, between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant M. Day, Waterways Oversight Branch, Coast Guard Activities New York (718) 354-4012.

SUPPLEMENTARY INFORMATION:**Regulatory Information**

On May 11, 2000, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone: New York Harbor, Western Long Island Sound, East and Hudson Rivers Fireworks in the **Federal Register** (65 FR 30376). We received no letters commenting on the proposed rule. No public hearing was requested, and none was held.

Background and Purpose

The Coast Guard is establishing 19 permanent safety zones that will be activated for fireworks displays occurring throughout the year that are not held on an annual basis but are normally held in one of these 19

locations. The 19 locations are Coney Island in New York Harbor; Elizabeth, New Jersey on the Arthur Kill; Peningo Neck, Satans Toe, Larchmont, Manursing Island, Glen Island, Twin Island, Davenport Neck, and two locations in Hempstead Harbor in western Long Island Sound; Pier 14, Manhattan, and Wards Island in the East River; The Battery, Battery Park City, and Pier 90, Manhattan; Yonkers, Hastings-on-Hudson, and Pier D, Jersey City in the Hudson River. The Coast Guard received 30 applications for fireworks displays in these areas from 1998 to 1999. In 1997, the Coast Guard received 10 applications for fireworks displays in these locations. In the past, temporary safety zones were established with limited notice for preparation by the U.S. Coast Guard and limited opportunity for public comment. Establishing permanent safety zones by notice and comment rulemaking gave the public the opportunity to comment on the proposed zone locations, size, and length of time the zones will be active. The Coast Guard has received no prior notice of any impact caused by the previous events. Marine traffic will still be able to transit around the safety zones. Additionally, vessels will not be precluded from mooring at or getting underway from commercial or recreational piers in the vicinity of the safety zones.

This rule revises 33 CFR 165.168, which was published in the **Federal Register** on January 7, 2000 (65 FR 1065). It adds 19 permanent safety zones to the five existing ones in 33 CFR 165.168, and it lists all 24 by the body of water in which they are located.

The sizes of these safety zones were determined using National Fire Protection Association and New York City Fire Department standards for 6-12 inch mortars fired from a barge or shore, combined with the Coast Guard's knowledge of tide and current conditions in these areas. Barge and land site locations, and mortar sizes were adjusted to try and ensure the safety zone locations would not interfere with any known marinas or piers. The 19 safety zones are:

New York Harbor

The safety zone in Lower New York Bay includes all waters of Lower New York Bay within a 250-yard radius of the fireworks land shoot located on the south end of Steeplechase Pier, Coney Island, in approximate position 40°34'11" N 073°59'00" W (NAD 1983). The safety zone prevents vessels from transiting a portion of Lower New York Bay, and is needed to protect boaters from the hazards associated with

fireworks launched from shore in the area. Marine traffic will still be able to transit through Lower New York Bay during the event. Additionally, Steeplechase Pier does not accept marine traffic and there are no commercial or recreational piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone on the Arthur Kill includes all waters of the Arthur Kill within a 150-yard radius of the fireworks land shoot located in Elizabeth, New Jersey, in approximate position 40°38'50" N 074°10'58" W (NAD 1983), about 675 yards west of Arthur Kill Channel Buoy 20 (LLNR 36780). The safety zone prevents vessels from transiting a portion of the Arthur Kill, and is needed to protect boaters from the hazards associated with fireworks launched from shore in the area. Marine traffic will still be able to transit through the southern 90 yards of the Arthur Kill opposite the display site in Elizabeth, New Jersey during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

Western Long Island Sound

The safety zone at Peningo Neck includes all waters of western Long Island Sound within a 300-yard radius of the fireworks barge in approximate position 40°56'21" N 073°41'23" W (NAD 1983), about 525 yards east of Milton Point, Peningo Neck. The safety zone prevents vessels from transiting a portion of western Long Island Sound and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through western Long Island Sound during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone east of Satans Toe includes all waters of western Long Island Sound within a 360-yard radius of the fireworks barge in approximate position 40°55'21" N 073°43'41" W (NAD 1983), about 635 yards northeast of Larchmont Harbor (East Entrance) Light 2 (LLNR 25720). The safety zone prevents vessels from transiting a portion of western Long Island Sound and is needed to protect boaters from

the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through western Long Island Sound during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone off Larchmont, west of the entrance to Horseshoe Harbor includes all waters of western Long Island Sound within a 240-yard radius of the fireworks barge in approximate position 40°54'45" N 073°44'55" W (NAD 1983), about 450 yards southwest of the entrance to Horseshoe Harbor. The safety zone prevents vessels from transiting a portion of western Long Island Sound and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through western Long Island Sound during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone south of Manursing Island includes all waters of western Long Island Sound within a 360-yard radius of the fireworks barge in approximate position 40°57'47" N 073°40'06" W (NAD 1983), about 380 yards north of Rye Beach Transport Rock Buoy 2 (LLNR 25570). The safety zone prevents vessels from transiting a portion of western Long Island Sound and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through western Long Island Sound during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone east of Glen Island includes all waters of western Long Island Sound within a 240-yard radius of the fireworks barge in approximate position 40°53'12" N 073°46'33" W (NAD 1983), about 350 yards east of the northeast corner of Glen Island. The safety zone prevents vessels from transiting a portion of western Long Island Sound and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through western Long Island

Sound during the event. Additionally, vessels will not be precluded from mooring at or getting underway from commercial or recreational piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone around the southeast corner of Twin Island includes all waters of western Long Island Sound within a 200-yard radius of the fireworks land shoot in approximate position 40°52'10" N 073°47'07" W (NAD 1983), at the east end of Orchard Beach. The safety zone prevents vessels from transiting a portion of western Long Island Sound and is needed to protect boaters from the hazards associated with fireworks launched from shore in the area. Marine traffic will still be able to transit through western Long Island Sound during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone off Davenport Neck includes all waters of western Long Island Sound within a 360-yard radius of the fireworks barge in Federal Anchorage No. 1-A, in approximate position 40°53'46" N 073°46'04" W (NAD 1983), about 360 yards northwest of Emerald Rock Buoy (LLNR 25810). The safety zone prevents vessels from transiting a portion of Federal Anchorage No. 1-A and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will be able to anchor in the unaffected northern and southern portions of Federal Anchorage No. 1-A. Federal Anchorage No. 1-B, to the north, and Federal Anchorage No. 1, to the south, are also available for vessel use. Marine traffic will still be able to transit through western Long Island Sound during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone in northern Hempstead Harbor, Long Island Sound, includes all waters of Hempstead Harbor within a 360-yard radius of the fireworks barge in approximate position 40°51'58" N 073°39'34" W (NAD 1983), about 500 yards northeast of Glen Cove Breakwater Light 5 (LLNR 27065). The safety zone prevents vessels from transiting a portion of Hempstead

Harbor and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through Hempstead Harbor during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone in southern Hempstead Harbor, Long Island Sound, includes all waters of Hempstead Harbor within a 180-yard radius of the fireworks barge in approximate position 40°49'50" N 073°39'12" W (NAD 1983), about 190 yards north of Bar Beach. The safety zone prevents vessels from transiting a portion of Hempstead Harbor and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through Hempstead Harbor during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

East River

The safety zone southeast of Pier 14, Manhattan, includes all waters of the East River within a 180-yard radius of the fireworks barge in approximate position 40°42'07.5" N 074°00'06" W (NAD 1983), about 250 yards southeast of Pier 14, Manhattan. The safety zone prevents vessels from transiting a portion of the East River and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will be able to transit through the eastern 100 yards and the western 70 yards of the 530-yard wide East River during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone at Wards Island includes all waters of the East River within a 150-yard radius of the fireworks land shoot in approximate position 40°46'55.5" N 073°55'33" W (NAD 1983), about 200 yards northeast of the Triborough Bridge. The safety zone prevents vessels from transiting a portion of the East River and is needed to protect boaters from the hazards associated with fireworks launched from shore in the area. Marine traffic

will still be able to transit through the eastern 150 yards of the 300-yard wide East River during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

Hudson River

The safety zone south of The Battery, Manhattan, includes all waters of the Hudson River and Anchorage Channel within a 360-yard radius of the fireworks barge in approximate position 40°42'00" N 074°01'17" W (NAD 1983), about 500 yards south of The Battery. The safety zone prevents vessels from transiting a portion of the Hudson River and Anchorage Channel and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through the western 675 yards of the 1500-yard wide Hudson River and through the eastern 350 yards of the 1200-yard wide Anchorage Channel during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone southwest of North Cove Yacht Harbor, Manhattan, includes all waters of the Hudson River within a 360-yard radius of the fireworks barge in approximate position 40°42'39" N 074°01'21" W (NAD 1983), about 480 yards southwest of North Cove Yacht Harbor. The safety zone prevents vessels from transiting a portion of the Hudson River and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through the western 470 yards of the 1215-yard wide Hudson River during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone west of Pier 90, Manhattan, includes all waters of the Hudson River within a 300-yard radius of the fireworks barge in approximate position 40°46'12" N 074°00'18" W (NAD 1983), about 425 yards west of the west end of Pier 90, Manhattan. The safety zone prevents vessels from transiting a portion of the Hudson River and is needed to protect boaters from

the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through the western 175 yards and the eastern 140 yards of the 915-yard wide Hudson River during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone west of Yonkers includes all waters of the Hudson River within a 360-yard radius of the fireworks barge in approximate position 40°56'14.5" N 073°54'33" W (NAD 1983), about 475 yards northwest of Yonkers Municipal Pier. The safety zone prevents vessels from transiting a portion of the Hudson River and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through the western 715 yards and eastern 115 yards of the 1550 yard-wide Hudson River during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone west of Hastings-on-Hudson includes all waters of the Hudson River within a 360-yard radius of the fireworks barge in approximate position 40°59'44.5" N 073°53'28" W (NAD 1983), about 425 yards west of Hastings-on-Hudson, NY. The safety zone prevents vessels from transiting a portion of the Hudson River and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through the western 675 yards and eastern 60 yards of the 1315 yard-wide Hudson River during the event. Additionally, vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The safety zone southeast of Pier D, Jersey City, includes all waters of the Hudson River within a 360-yard radius of the fireworks barge in approximate position 40°42'57.5" N 074°01'34" W (NAD 1983), about 375 yards southeast of Pier D, Jersey City. The safety zone prevents vessels from transiting a portion of the Hudson River and is needed to protect boaters from the

hazards associated with fireworks launched from a barge in the area. Marine traffic will still be able to transit through the eastern 440 yards of the 1120-yard wide Hudson River during the event. Additionally, Pier D does not accept marine traffic and vessels will not be precluded from mooring at or getting underway from any piers in the vicinity of the safety zone. The Captain of the Port does not anticipate any negative impact on vessel traffic due to this safety zone.

The actual dates that these safety zones will be activated are not known by the Coast Guard at this time. Coast Guard Activities New York will give notice of the activation of each safety zone by all appropriate means to provide the widest publicity among the affected segments of the public. This will include publication in the Local Notice to Mariners. Marine information broadcasts will also be made for these events beginning 24 to 48 hours before the event is scheduled to begin. Facsimile broadcasts may also be made to notify the public. The Coast Guard expects that the notice of the activation of each permanent safety zone in this rulemaking will normally be made between thirty and fourteen days before the zone is actually activated. Fireworks barges used in the locations stated in this rulemaking will also have a sign on the port and starboard side of the barge labeled "FIREWORKS BARGE". This will provide on-scene notice that the safety zone the fireworks barge is located in is or will be activated on that day. This sign will consist of 10" high by 1.5" wide red lettering on a white background. Displays launched from shore sites will have a sign labeled "FIREWORKS SITE" with the same size requirements. There will also be a Coast Guard patrol vessel on scene 30 minutes before the display is scheduled to start until 15 minutes after its completion to enforce each safety zone.

The effective period for each safety zone is from 8 p.m. (e.s.t.) to 1 a.m. (e.s.t.). However, vessels may enter, remain in, or transit through these safety zones during this time frame if authorized by the Captain of the Port New York, or designated Coast Guard patrol personnel on scene, as provided for in 33 CFR 165.23. Generally, blanket permission to enter, remain in, or transit through these safety zones will be given except for the 45-minute period that a Coast Guard patrol vessel is present.

Discussion of Comments and Changes

We received no letters commenting on the proposed rule, but we did make one change to it. The proposed safety zone at Hunters Point on the East River

(§ 165.168(c)(2)) is being removed. The Coast Guard is planning to establish a safety zone at Hunters Point in a future rulemaking. The East River safety zones in § 165.168(c) are renumbered because of this. Figure 3 is also revised to show this change.

Regulatory Evaluation

This rule is not a “significant regulatory action” under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979).

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

This finding is based on the minimal time that vessels will be restricted from the zones, and all of the zones are in areas where the Coast Guard expects insignificant adverse impact on all mariners from the zones’ activation. Vessels may also still transit through Lower New York Bay, the Arthur Kill, western Long Island Sound, the East and Hudson Rivers, and Anchorage Channel during these events. Vessels will not be precluded from getting underway, or mooring at, any piers or marinas currently located in the vicinity of the safety zones. Advance notifications will also be made to the local maritime community by the Local Notice to Mariners and marine information broadcasts. Facsimile broadcasts may also be made to notify the public. Additionally, the Coast Guard anticipates that there will only be 20–25 total activations of these safety zones per year.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic impact on a substantial number of small entities. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small

entities: the owners or operators of vessels intending to transit or anchor in a portion of the Port of New York/New Jersey and western Long Island Sound during the times these zones are activated.

These safety zones will not have a significant economic impact on a substantial number of small entities for the following reasons: Vessel traffic can transit around all 19 safety zones. Vessels will not be precluded from getting underway, or mooring at, any piers or marinas currently located in the vicinity of the safety zones. Before the effective period, we will issue maritime advisories widely available to users of the Port of New York/New Jersey by local notice to mariners and marine information broadcasts. Facsimile broadcasts may also be made.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency’s responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520.).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that Order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government’s having first provided the

funds to pay those costs. This rule will not impose an unfunded mandate.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Environment

We considered the environmental impact of this rule and concluded that, under figure 2–1, paragraph 34(g), of Commandant Instruction M16475.1C, this rule is categorically excluded from further environmental documentation. This rule fits paragraph 34(g) as it establishes 19 safety zones. A “Categorical Exclusion Determination” is available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR Part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, 160.5; 49 CFR 1.46.

2. Revise § 165.168 to read as follows:

§ 165.168 Safety Zones: New York Harbor, Western Long Island Sound, East and Hudson Rivers Fireworks.

(a) *New York Harbor.* Figure 1 of this section displays the safety zone areas in paragraphs (a)(1) through (a)(6).

(1) *Liberty Island Safety Zone:* All waters of Upper New York Bay within a 360-yard radius of the fireworks barge in approximate position 40°41′16.5″ N

074°02'23" W (NAD 1983), located in Federal Anchorage 20–C, about 360 yards east of Liberty Island.

(2) *Ellis Island Safety Zone*: All waters of Upper New York Bay within a 360-yard radius of the fireworks barge located between Federal Anchorages 20–A and 20–B, in approximate position 40°41'45" N 074°02'09" W (NAD 1983), about 365 yards east of Ellis Island.

(3) *South Beach, Staten Island Safety Zone*: All waters of Lower New York Bay within a 360-yard radius of the fireworks barge in approximate position 40°35'11" N 074°03'42" W (NAD 1983), about 350 yards east of South Beach, Staten Island.

(4) *Raritan Bay Safety Zone*: All waters of Raritan Bay in the vicinity of the Raritan River Cutoff and Ward Point Bend (West) within a 240-yard radius of the fireworks barge in approximate position 40°30'04" N 074°15'35" W (NAD 1983), about 240 yards east of Raritan River Cutoff Channel Buoy 2 (LLNR 36595).

(5) *Coney Island Safety Zone*: All waters of Lower New York Bay within a 250-yard radius of the fireworks land shoot located on the south end of Steeplechase Pier, Coney Island, in approximate position 40°34'11" N 073°59'00" W (NAD 1983).

(6) *Arthur Kill, Elizabeth, New Jersey Safety Zone*: All waters of the Arthur Kill within a 150-yard radius of the fireworks land shoot located in Elizabeth, New Jersey, in approximate position 40°38'50" N 074°10'58" W (NAD 1983), about 675 yards west of Arthur Kill Channel Buoy 20 (LLNR 36780).

(b) *Western Long Island Sound*. Figure 2 of this section displays the safety zone areas in paragraphs (b)(1) through (b)(9).

(1) *Penning Neck, Western Long Island Sound Safety Zone*: All waters of western Long Island Sound within a 300-yard radius of the fireworks barge in approximate position 40°56'21" N 073°41'23" W (NAD 1983), about 525 yards east of Milton Point, Penning Neck, New York.

(2) *Satans Toe, Western Long Island Sound Safety Zone*: All waters of western Long Island Sound within a 360-yard radius of the fireworks barge in approximate position 40°55'21" N 073°43'41" W (NAD 1983), about 635 yards northeast of Larchmont Harbor (East Entrance) Light 2 (LLNR 25720).

(3) *Larchmont, Western Long Island Sound Safety Zone*: All waters of western Long Island Sound within a 240-yard radius of the fireworks barge in approximate position 40°54'45" N 073°44'55" W (NAD 1983), about 450 yards southwest of the entrance to Horseshoe Harbor.

(4) *Manursing Island, Western Long Island Sound Safety Zone*: All waters of western Long Island Sound within a 360-yard radius of the fireworks barge in approximate position 40°57'47" N 073°40'06" W (NAD 1983), about 380 yards north of Rye Beach Transport Rock Buoy 2 (LLNR 25570).

(5) *Glen Island, Western Long Island Sound Safety Zone*: All waters of western Long Island Sound within a 240-yard radius of the fireworks barge in approximate position 40°53'12" N 073°46'33" W (NAD 1983), about 350 yards east of the northeast corner of Glen Island, New York.

(6) *Twin Island, Western Long Island Sound Safety Zone*: All waters of western Long Island Sound within a 200-yard radius of the fireworks land shoot in approximate position 40°52'10" N 073°47'07" W (NAD 1983), at the east end of Orchard Beach, New York.

(7) *Davenport Neck, Western Long Island Sound Safety Zone*: All waters of western Long Island Sound within a 360-yard radius of the fireworks barge in Federal Anchorage No. 1–A, in approximate position 40°53'46" N 073°46'04" W (NAD 1983), about 360 yards northwest of Emerald Rock Buoy (LLNR 25810).

(8) *Glen Cove, Hempstead Harbor Safety Zone*: All waters of Hempstead Harbor within a 360-yard radius of the fireworks barge in approximate position 40°51'58" N 073°39'34" W (NAD 1983), about 500 yards northeast of Glen Cove Breakwater Light 5 (LLNR 27065).

(9) *Bar Beach, Hempstead Harbor Safety Zone*: All waters of Hempstead Harbor within a 180-yard radius of the fireworks barge in approximate position 40°49'50" N 073°39'12" W (NAD 1983), about 190 yards north of Bar Beach, Hempstead Harbor, New York.

(c) *East River*. Figure 3 of this section displays the safety zone areas in paragraphs (c)(1) and (c)(2).

(1) *Pier 14, East River Safety Zone*: All waters of the East River within a 180-yard radius of the fireworks barge in approximate position 40°42'07.5" N 074°00'06" W (NAD 1983), about 250 yards southeast of Pier 14, Manhattan, New York.

(2) *Wards Island, East River Safety Zone*: All waters of the East River within a 150-yard radius of the fireworks land shoot in approximate position 40°46'55.5" N 073°55'33" W (NAD 1983), about 200 yards northeast of the Triborough Bridge.

(d) *Hudson River*. Figure 4 of this section displays the safety zone areas in paragraphs (d)(1) through (d)(7).

(1) *Pier 60, Hudson River Safety Zone*: All waters of the Hudson River within a 360-yard radius of the fireworks barge

in approximate position 40°44'49" N 074°01'02" W (NAD 1983), about 500 yards west of Pier 60, Manhattan, New York.

(2) *The Battery, Hudson River Safety Zone*: All waters of the Hudson River and Anchorage Channel within a 360-yard radius of the fireworks barge in approximate position 40°42'00" N 074°01'17" W (NAD 1983), about 500 yards south of The Battery, Manhattan, New York.

(3) *Battery Park City, Hudson River Safety Zone*: All waters of the Hudson River within a 360-yard radius of the fireworks barge in approximate position 40°42'39" N 074°01'21" W (NAD 1983), about 480 yards southwest of North Cove Yacht Harbor, Manhattan, New York.

(4) *Pier 90, Hudson River Safety Zone*: All waters of the Hudson River within a 300-yard radius of the fireworks barge in approximate position 40°46'12" N 074°00'18" W (NAD 1983), about 425 yards west of the west end of Pier 90, Manhattan, New York.

(5) *Yonkers, New York, Hudson River Safety Zone*: All waters of the Hudson River within a 360-yard radius of the fireworks barge in approximate position 40°56'14.5" N 073°54'33" W (NAD 1983), about 475 yards northwest of the Yonkers Municipal Pier, New York.

(6) *Hastings-on-Hudson, New York, Hudson River Safety Zone*: All waters of the Hudson River within a 360-yard radius of the fireworks barge in approximate position 40°59'44.5" N 073°53'28" W (NAD 1983), about 425 yards west of Hastings-on-Hudson, New York.

(7) *Pier D, Hudson River Safety Zone*: All waters of the Hudson River within a 360-yard radius of the fireworks barge in approximate position 40°42'57.5" N 074°01'34" W (NAD 1983), about 375 yards southeast of Pier D, Jersey City, New Jersey.

(e) *Notification*. Coast Guard Activities New York will cause notice of the activation of these safety zones to be made by all appropriate means to effect the widest publicity among the affected segments of the public, including publication in the local notice to mariners, marine information broadcasts, and facsimile. Fireworks barges used in these locations will also have a sign on their port and starboard side labeled "FIREWORKS BARGE." This sign will consist of 10" high by 1.5" wide red lettering on a white background. Fireworks launched from shore sites will display a sign labeled "FIREWORKS SITE" with the same dimensions.

(f) *Effective Period*. This section is effective from 8 p.m. (e.s.t.) to 1 a.m.

(e.s.t.) each day a barge with a "FIREWORKS BARGE" sign on the port and starboard side is on-scene or a "FIREWORKS SITE" sign is posted in a location listed in paragraphs (a) through (d) of this section. Vessels may enter, remain in, or transit through these safety zones during this time frame if authorized by the Captain of the Port

New York or designated Coast Guard patrol personnel on scene.

(g) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) All persons and vessels shall comply with the instructions of the Coast Guard Captain of the Port or the designated on-scene-patrol personnel.

These personnel comprise commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a U. S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

BILLING CODE 4910-15-C

Figure 1
§ 165.168(a) New York
Harbor Fireworks Safety
Zones drawn to scale.

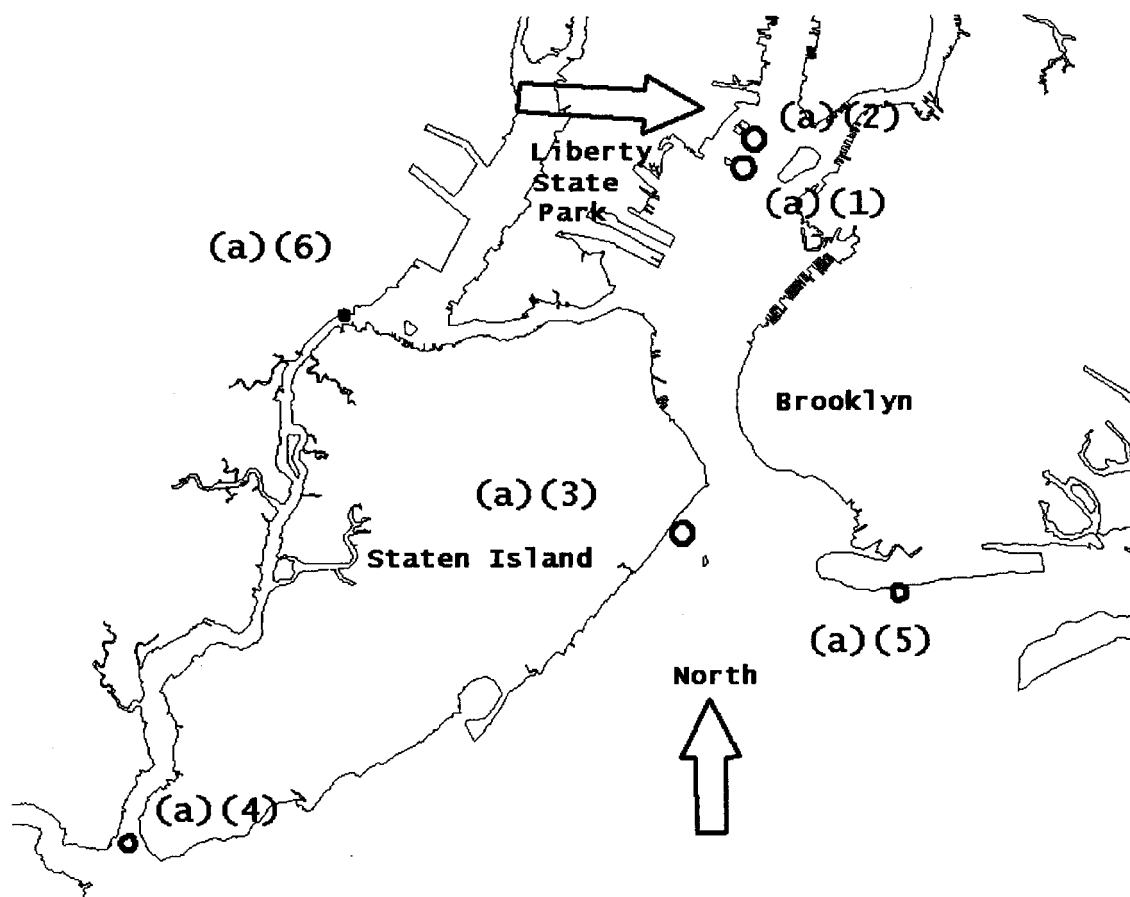


Figure 2
§ 165.168(b) Western Long
Island Sound Fireworks
Safety Zones drawn to scale.

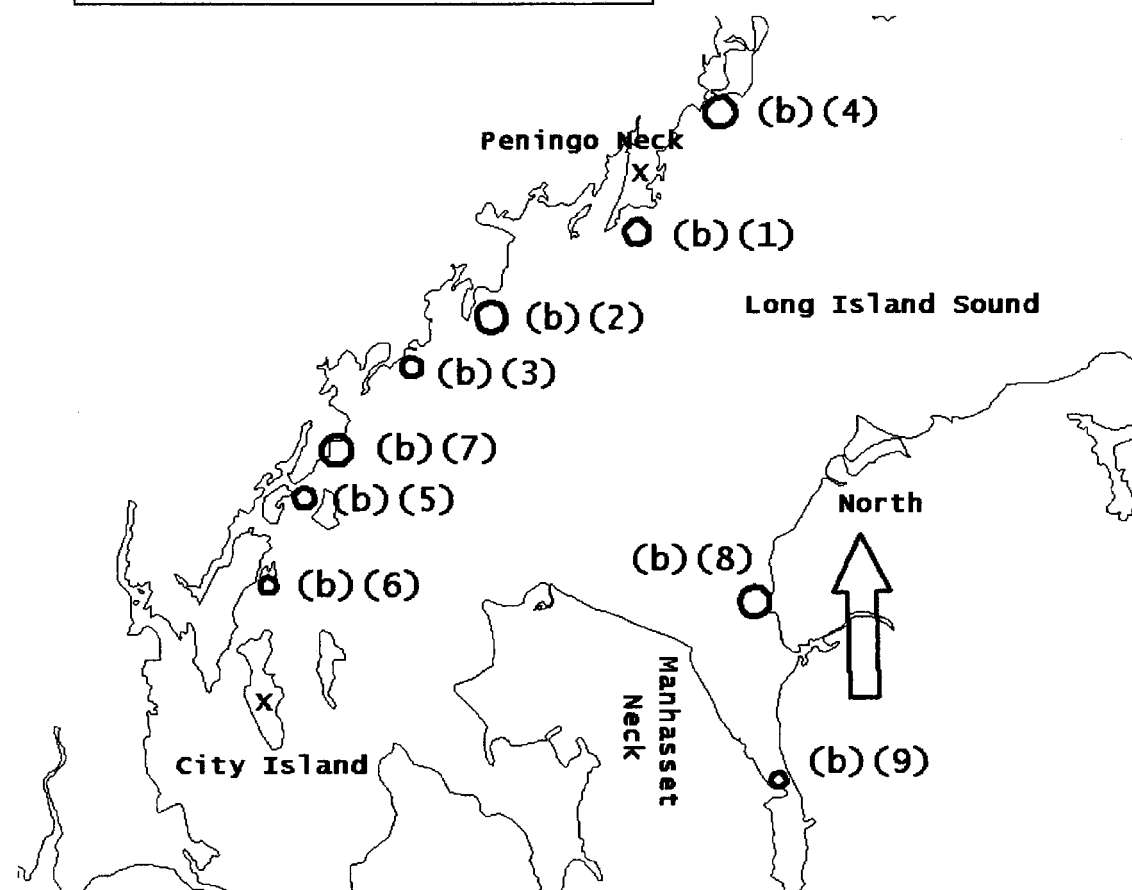
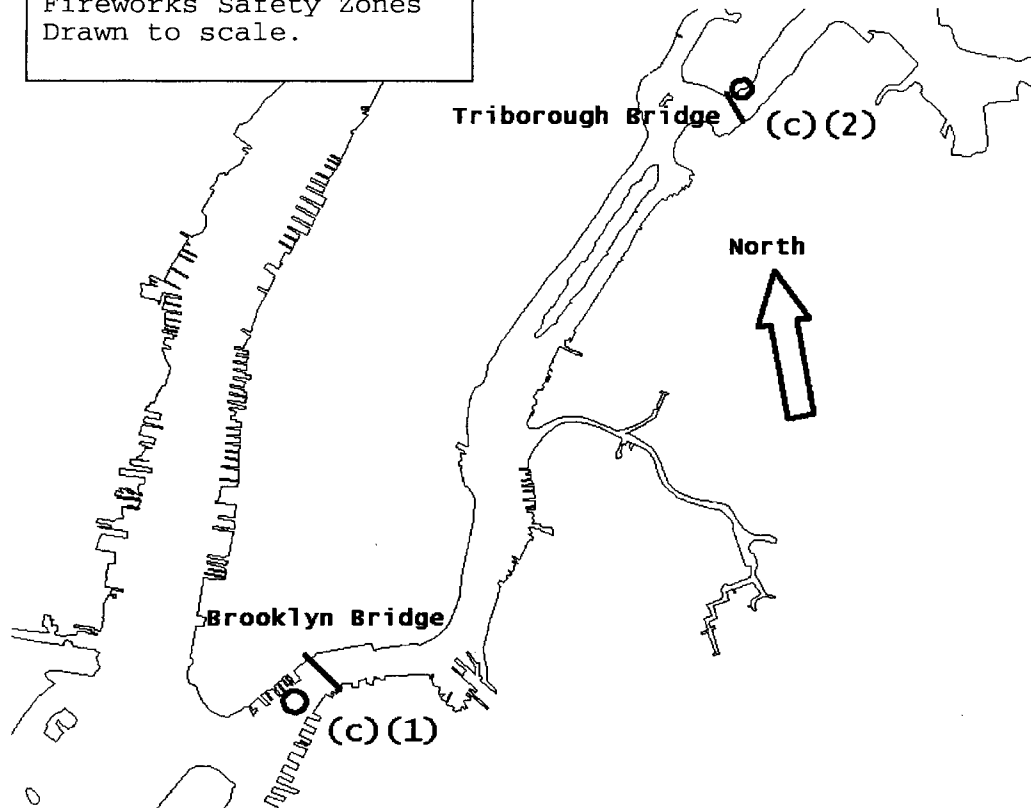
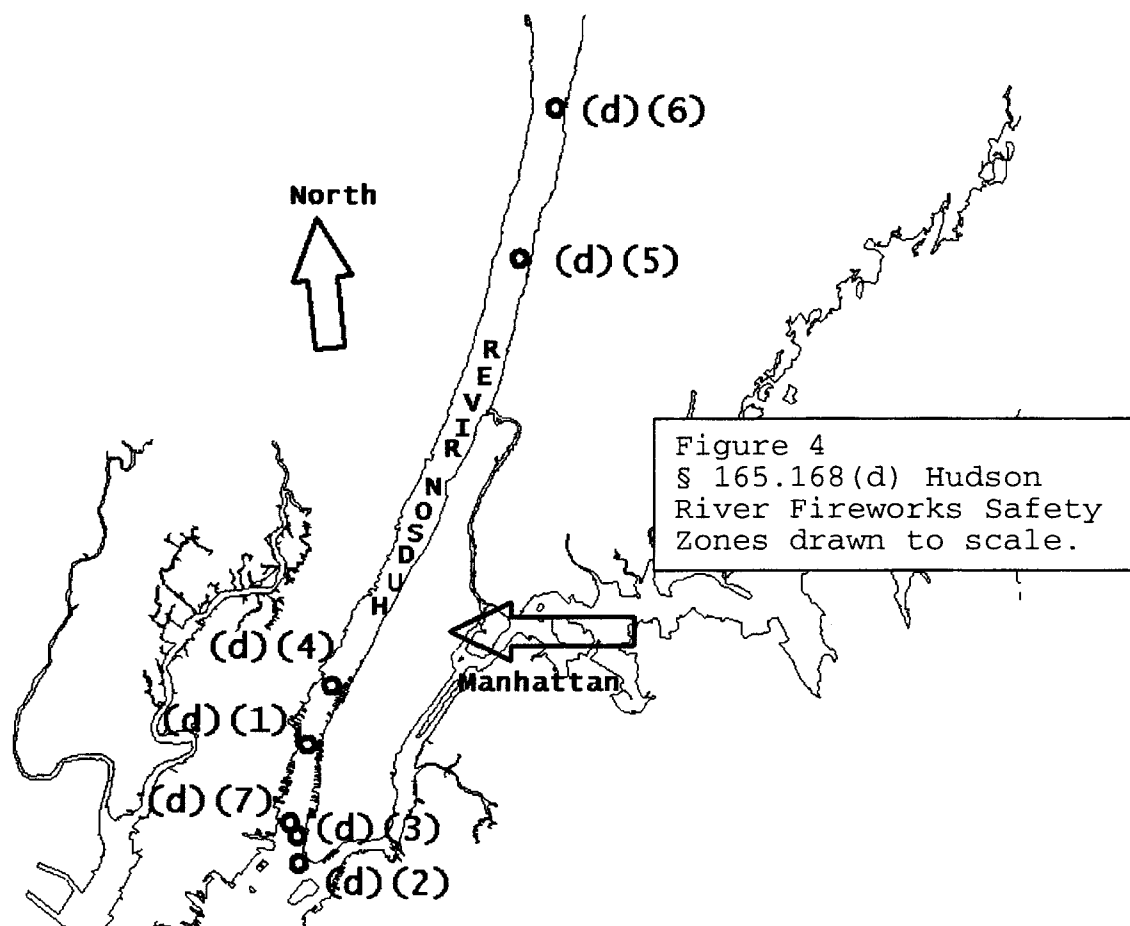


Figure 3
§ 165.168(c) East River
Fireworks Safety Zones
Drawn to scale.





Dated: June 27, 2000.

R.E. Bennis,

Captain, U.S. Coast Guard, Captain of the Port, New York.

[FR Doc. 00-17677 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-15-P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01-00-015]

RIN 2115-AA97

Safety Zone: Staten Island Fireworks, Arthur Kill

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing two temporary safety zones on the Arthur Kill for two Borough of Staten Island Fireworks displays. This action is necessary to provide for the safety of life on navigable waters during the events. This action is intended to restrict vessel traffic on a portion of the Arthur Kill.

DATES: This rule is effective July 2, 2000 until September 3, 2000.

ADDRESSES: Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, are part of docket (CGD01-00-015) and are available for inspection or copying at Coast Guard Activities New York, 212 Coast Guard Drive, room 204, Staten Island, New York 10305, between 8 a.m. and 3 p.m., Monday through Friday, except federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant M. Day, Waterways Oversight Branch, Coast Guard Activities New York (718) 354-4012.

SUPPLEMENTARY INFORMATION:

Regulatory Information

On April 24, 2000, we published a notice of proposed rulemaking (NPRM) entitled Safety Zone: Staten Island Fireworks, Arthur Kill in the **Federal Register** (65 FR 21686). We received no letters commenting on the proposed rule. No public hearing was requested, and none was held. On May 4, 2000, we published a correction notice in the **Federal Register** (65 FR 25980). This

corrected the position of the fireworks barge location in the Arthur Kill.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds that good cause exists for making this rule effective less than 30 days after publication in the **Federal Register**. This is due to the following reasons: they are locally supported, annual events, the zones are only in effect for 1½ hours, commercial facilities in the Arthur Kill and the Sandy Hook Pilots Association were notified of this proposal by Local Notice to Mariners number 019 and 023, the NPRM and chart of the area were also e-mailed to the Hudson River Pilots Association, recreational vessels will be able to transit through the western 50 yards of the Arthur Kill during the event, recreational vessels will not be precluded from getting underway, or mooring at, any piers or marinas currently located in the vicinity of the safety zone, and advance notifications which will be, and have been made to the local maritime community by the Local Notice to Mariners, and marine information broadcasts. Additionally, commercial vessels will normally be precluded from entering the zone for only a 45-minute period during the effective period of the safety zone.

Background and Purpose

The Coast Guard is establishing a temporary safety zone in all waters of the Arthur Kill, Ward Point Bend (West), and the Raritan River Cutoff, within a 300-yard radius of the fireworks barge in approximate position 40°30'18" N 074°15'30" W (NAD 1983), about 250 yards northwest of Raritan Bay Channel Buoy 60 (LLNR 36319). The safety zone is in effect from 8:15 p.m. (e.s.t.) until 9:45 p.m. (e.s.t.) on July 2, and September 2, 2000. If either event is cancelled due to inclement weather, then this safety zone will be effective from 8:15 p.m. (e.s.t.) until 9:45 p.m. (e.s.t.) on July 3, and September 3, 2000. The safety zone prevents vessels from transiting a portion of the Arthur Kill, Ward Point Bend (West), and the Raritan River Cutoff for approximately 45 minutes of the 90 minute long event, and is needed to protect boaters from the hazards associated with fireworks launched from a barge in the area. Public notifications have been and will be made prior to the events via local notice to mariners, and marine information broadcasts.

Discussion of Comments and Changes

The Coast Guard received no letters commenting on the proposed rulemaking. No changes were made to this rulemaking.

Regulatory Evaluation

This rule is not a "significant regulatory action" under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. The Office of Management and Budget has not reviewed it under that Order. It is not "significant" under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040, February 26, 1979).

We expect the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

Although this regulation prevents traffic from transiting a portion of the Arthur Kill during the event, the effect of this regulation will not be significant for several reasons: commercial facilities in the Arthur Kill and the Sandy Hook Pilots Association were notified of this event by Local Notice to Mariners number 019 and 023, the NPRM and chart of the area were also e-mailed to the Hudson River Pilots Association, recreational vessels will be able to transit through the western 50 yards of the Arthur Kill during the event, recreational vessels will not be

precluded from getting underway, or mooring at, any piers or marinas currently located in the vicinity of the safety zone, and advance notifications which have been and will be made to the local maritime community by the Local Notice to Mariners, and marine information broadcasts. Additionally, commercial vessels will normally be precluded from entering the zone for only a 45-minute period during the effective period of the safety zone.

The size of this safety zone was determined using National Fire Protection Association and New York City Fire Department Standards for 10 inch mortars fired from a barge, combined with the Coast Guard's knowledge of tide and current conditions in the area.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612), we considered whether this rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The Coast Guard certifies under 5 U.S.C. 605(b) that this rule will not have a significant economic impact on a substantial number of small entities.

This rule will affect the following entities, some of which might be small entities: the owners or operators of vessels intending to transit a portion of the Arthur Kill, Ward Point Bend (West), and the Raritan River Cutoff during the time this zone is activated.

This safety zone will not have a significant economic impact on a substantial number of small entities for the following reasons: commercial facilities in the Arthur Kill and the Sandy Hook Pilots Association were notified of this rule by the Local Notice to Mariners numbers 019 and 023, the NPRM and chart of the area were also e-mailed to the Hudson River Pilots Association, recreational vessels will be able to transit through the western 50 yards of the Arthur Kill during these times. Recreational vessels will not be precluded from getting underway, or mooring at, any piers or marinas currently located in the vicinity of the safety zone. Additionally, commercial vessels will normally be precluded from entering the zone for only a 45-minute period during the effective period of the safety zone.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we offered to assist small entities in understanding the rule so that they could better evaluate its effects on them and participate in the rulemaking process. However, we received no requests for assistance from small entities.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agricultural Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1–888–REG–FAIR (1–888–734–3247).

Collection of Information

This rule calls for no new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501–3520).

Federalism

We have analyzed this rule under Executive Order 13132 and have determined that this rule does not have implications for federalism under that Order.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) governs the issuance of Federal regulations that require unfunded mandates. An unfunded mandate is a regulation that requires a State, local, or tribal government or the private sector to incur direct costs without the Federal Government's having first provided the funds to pay those unfunded mandate costs. This rule will not impose an unfunded mandate.

Taking of Private Property

This rule will not effect a taking of private property or otherwise have taking implications under Executive Order 12630, Governmental Actions and Interference with Constitutionally Protected Property Rights.

Civil Justice Reform

This rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

Protection of Children

We have analyzed this rule under Executive Order 13045, Protection of Children from Environmental Health Risks and Safety Risks. This rule is not an economically significant rule and does not concern an environmental risk to health or risk to safety that may disproportionately affect children.

Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under figure 2-1, paragraph 34(g), of Commandant Instruction M16475.1C, this rule is categorically excluded from further environmental documentation. This rule fits paragraph 34(g) as it establishes a safety zone. A "Categorical Exclusion Determination" is available in the docket where indicated under ADDRESSES.

List of Subjects in 33 CFR Part 165

Harbors, Marine safety, Navigation (water), Reporting and recordkeeping requirements, Security measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard proposes to amend 33 CFR Part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

1. The authority citation for Part 165 continues to read as follows:

Authority: 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1(g), 6.04-1, 6.04-6, 160.5; 49 CFR 1.46.

2. Add temporary § 165.T01-015 to read as follows:

§ 165.T01-015 Safety Zone: Staten Island Fireworks, Arthur Kill.

(a) *Location.* The following area is a safety zone: All waters of the Arthur Kill within a 300-yard radius of the fireworks barge in approximate position 40°30'18" N 074°15'30" W (NAD 1983), about 250 yards northwest of Raritan Bay Channel Buoy 60 (LLNR 36319).

(b) *Enforcement Period.* This section will be enforced from 8:15 p.m. (e.s.t.) until 9:45 p.m. (e.s.t.) on July 2, and September 2, 2000. If the event is cancelled due to inclement weather, this section will be enforced from 8:15 p.m. (est) until 9:45 p.m. (est) on July 3, and September 3, 2000.

(c) *Effective Date.* This section is effective on July 2, 2000 until September 3, 2000.

(d) *Regulations.* (1) The general regulations contained in 33 CFR 165.23 apply.

(2) All persons and vessels shall comply with the instructions of the

Captain of the Port or the designated on-scene-patrol personnel. These personnel comprise commissioned, warrant, and petty officers of the Coast Guard. Upon being hailed by a U. S. Coast Guard vessel by siren, radio, flashing light, or other means, the operator of a vessel shall proceed as directed.

Dated: June 28, 2000.

R.E. Bennis,

Captain, U.S. Coast Guard, Captain of the Port, New York.

[FR Doc. 00-17679 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-15-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 271

[FRL-6730-8]

Texas: Final Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Immediate final rule.

SUMMARY: The State of Texas has applied for Final authorization of the changes to its Hazardous Waste Program under the Resource Conservation and Recovery Act. (RCRA). The EPA has determined that these changes satisfy all requirements needed to qualify for final authorization, and is authorizing the State's changes through this immediate final action. The EPA is publishing this rule to authorize the changes without a prior proposal because we believe this action is not controversial and do not expect comments that oppose it. Unless we get written comments which oppose this authorization during the comment period, the decision to authorize the State of Texas's changes to their hazardous waste program will take effect as provided below. If we get comments that oppose this action, we will publish a document in the **Federal Register** withdrawing this rule before it takes effect and a separate document in the proposed rules section of this **Federal Register** will serve as a proposal to authorize the changes.

DATES: This final authorization will become effective on September 11, 2000 unless EPA receives adverse written comment by August 14, 2000. If EPA receives such comment, it will publish a timely withdrawal of this immediate final rule in the **Federal Register** and inform the public that this authorization will not take effect.

ADDRESSES: Written comments, referring to Docket Number TX-00-01, should be

sent to Alima Patterson Region 6 Regional Authorization Coordinator, Grants and Authorization Section (6PD-G), Multimedia Planning and Permitting Division, EPA Region 1145 Ross Avenue, Dallas, Texas 75202-2733. Copies of the Texas program revision application and the materials which EPA used in evaluating the revision are available for inspection and copying from 8:30 a.m. to 4 p.m. Monday through Friday at the following addresses: Texas Natural Resource Conservation Commission, 12100 Park S. Circle, Austin TX 78753-3087, (512) 239-1121 and EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, (214) 665-6444.

FOR FURTHER INFORMATION CONTACT:

Alima Patterson (214) 665-8533.

SUPPLEMENTARY INFORMATION:

A. Why Are Revisions to State Programs Necessary?

States which have received final authorization from EPA under RCRA section 3006(b), 42 U.S.C. 6926(b), must maintain a hazardous waste program that is equivalent to, consistent with, and no less stringent than the Federal Hazardous Waste Program. As the Federal program changes, States must change their programs and ask EPA to authorize the changes. Changes to State programs may be necessary when Federal or State statutory or regulatory authority is modified or when certain other changes occur. Most commonly, States must change their programs because of changes to EPA's regulations in 40 CFR parts 124, 260-266, 268, 270, 273, and 279.

B. What Is the Effect of Today's Authorization decision?

The effect of this decision is that a facility in Texas subject to RCRA will now have to comply with the authorized State requirements (in RCRA Cluster VI listed in this document) instead of the equivalent Federal requirements in order to comply with RCRA. Texas has enforcement responsibilities under its state hazardous waste program for violations of such program, but EPA retains its authority under RCRA sections 3007, 3008, 3013, and 7003, which include, among others, authority to: (1) do inspections, and require monitoring, tests, analyses or reports; (2) enforce RCRA requirements and suspend or revoke permits; and (3) take enforcement actions regardless of whether the State has taken its own actions. This action does not impose additional requirements on the regulated community because the regulations for which Texas is being

authorized by today's action are already effective, and are not changed by today's action.

C. What Has The State Of Texas Previously Been Authorized For?

Texas received final authorization to implement its Hazardous Waste Management Program on December 12, 1984, effective December 26, 1984 (49 FR 48300). This authorization was clarified in a notice published in the FR on March 26, 1985 (50 FR 11858). Texas received final authorization for revisions to its program in notices published in the **Federal Register** (FR) on January 31, 1986, effective October 4, 1985 (51 FR 3952); on December 18, 1986, effective February 17, 1987 (51 FR 45320). We authorized the following revisions: March 1, 1990, effective March 15, 1990 (55 FR 7318); on May 24, 1990, effective July 23, 1990 (55 FR 21383); on August 22, 1991, effective October 21, 1991 (56 FR 41626); on October 5, 1992, effective December 4, 1992 (57 FR 45719); on April 11, 1994, effective June 27, 1994, (59 FR 16987); on April 12, 1994, effective June 27, 1994 (59 FR 17273); September 12, 1997, effective November 26, 1997, (62 FR 47947); and on August 18, 1999, (64 FR 44836) effective October 18, 1999. Effective December 3, 1997 (62 FR 49163) and effective October 1999 (64 FR 49673), EPA incorporated by reference the State of Texas Base Program and additional program revisions in (RCRA Clusters III and IV) into the CFR.

On November 15, 1999, Texas submitted a final complete program revision application, seeking authorization of its program revision in accordance with 40 CFR 271.21. The State of Texas has also adopted the regulations for Import and Export of Hazardous Waste. However, the requirements of the Import and Export regulations will be administered by the EPA and not the State because the exercise of foreign relations and international commerce powers is

reserved to the Federal government under the United States Constitution.

In 1991, Texas Senate Bill 2 created the Texas Natural Resource Conservation Commission (TNRCC) which combined the functions of the former Texas Water Commission and the former Texas Air Control Board. The transfer of functions to the TNRCC from the two agencies became effective on September 1, 1993.

Under the Texas Solid Waste Disposal Act (codified in Chapter 361 of the Texas Health and Safety Code), the TNRCC has primary responsibility for administration of laws and regulations concerning hazardous waste. The TNRCC is authorized to administer the RCRA program. However, under the Texas Natural Resources Code, Title 3, and Texas Water Code, Chapter 27, waste (both hazardous and nonhazardous) resulting from activities associated with the exploration, development, or production of oil, gas, or geothermal resources, is regulated by the Railroad Commission of Texas (RRC). A list of activities that generate wastes that are subject to the jurisdiction of the RRC is found at 16 Texas Administrative Code (TAC) § 3.8(a)(30) and at 30 TAC § 335.1. Such wastes are termed "oil and gas wastes." The TNRCC has responsibility to administer the RCRA program, however, hazardous waste generated at natural gas or natural gas liquids processing plants or reservoir pressure maintenance or repressurizing plants are subject to the jurisdiction of the TNRCC until the RRC is authorized by EPA to administer the RCRA. When the RRC is authorized by EPA to administer the RCRA program for these wastes, jurisdiction over such hazardous waste will transfer from the TNRCC to the RRC. The EPA has designated the TNRCC to be the lead agency to coordinate RCRA activities between the two agencies. The EPA is responsible for the regulation of hazardous waste for which TNRCC has not been previously authorized.

Further clarification of the jurisdiction between the TNRCC and the RRC can be found in a separate document. The document which is the Memorandum of Understanding (MOU) was signed effective May 31, 1998. The MOU clarified the jurisdiction between the agencies for waste associated with exploration, development, production and refining of oil and gas.

The TNRCC has rules necessary to implement EPA's RCRA Cluster VI revisions to the Federal Hazardous Waste Program made from July 1, 1995, to June 30, 1996. The TNRCC authority to incorporate Federal rules by reference can be found at Texas Government Code Annotated § 311.027 and adoption of the hazardous waste rules in general are pursuant to the following statutory provisions: (1) Texas Water Code Annotated § 5.103 (Vernon 1988 & Supplement 1998 and Supp. 1999), effective September 1995, as amended; (2) Texas Health and Safety Code Annotated § 361.024 (Vernon 1992 & supplement 1998 & 1999), effective September 1, 1995, as amended; and (3) Texas Health and Safety Code Annotated § 361.078 (Vernon 1992), effective September 1, 1989.

D. What Changes Are We Authorizing With Today's Action?

The State of Texas applied for final approval of its revision to its complete program in accordance with 40 CFR 271.21. Texas' revisions consist of regulations which specifically govern Federal Hazardous Waste promulgated from July 1, 1995, to June 30, 1996 (RCRA Cluster VI). Texas requirements are included in a chart with this document. The EPA is now making an immediate final decision, subject to receipt of written comments that oppose this action, that Texas' Hazardous Waste Program revision satisfies all of the requirements necessary to qualify for final authorization. Therefore, we grant Texas final authorization for the following program revisions:

Federal citation	State analog
1. Liquids in Landfills III, [60 FR 35703–35706] July 11, 1995. (Checklist 145).	Texas Water Code Annotated (TWCA) § 5.103 (Vernon 1988 & Supplement (Supp.) and Supp. 1999), effective September 1, 1995, as amended; § 5.105 (Vernon 1988) effective September 1, 1985; Texas Health and Safety Code Annotated (THSCA) § 361.017 (Vernon 1992 & Supp. 1998 & Supp. 1999), effective September 1, 1995, as amended, THSCA § 361.024 (Vernon 1992 & Supp. 1999), effective September 1, 1995, as amended, 30 TAC §§ 335.125(e) and 335.175(e), effective November 20, 1996, as amended. The State law is more stringent than Federal law. Since 1985, TNRCC rules have not allowed the option of using sorbent to treat free liquids to be disposed of in landfills. Therefore the federal regulations in Checklist 145 concerning the nonbiodegradability of sorbent to be used to treat free liquids to be disposed in landfills have no applicability under state rules.

Federal citation	State analog
2. RCRA Expanded Public Participation [60 FR 63417–63434] December 11, 1995. (Checklist 148).	TWCA 5.103 (Vernon 1988 & Supp. 1999), effective September 1, 1995, as amended; TWCA 5.105 (Vernon 1988) effective September 1, 1985, TWCA 5.501 (Vernon Supp. 1999), effective September 1, 1997, as amended; 26.011 (Vernon 1988 & Supp. 1999), effective March 28, 1991, as amended; THSCA §§361.017 (Vernon 1992 & Supp. 1999), effective September 1, 1995, as amended; THSCA 361.024 (Vernon 1992 & Supp. 1999), effective September 1, 1995, as amended; 30 TAC §39.103, effective August 8, 1999, as amended; 30 TAC §305.2 effective August 8, 1999 as amended; 30 TAC §305.30, TAC §35.402(e) effective December 10, 1998; 30 TAC §305.50 (4)(A), effective November 20, 1996 as amended, TAC §305.125, TAC §305.172, TAC §305.174, TAC §305.572, and TAC §305.573 effective August 8, 1999 as amended. §305.2, effective August 8, 1999, as amended; §305.50, effective November 20, 1996, as amended; §§305.125, 305.172, 305.174, 305.572, and 305.573, effective August 8, 1999, as amended.
3. Amendments to the Definition of Solid Waste; Amendment II [61 FR 13103–13106] March 26, 1996. (Checklist 150).	TWCA 5.103 (Vernon 1988 & Supp. 1999), September effective 1, 1995, as amended; TWCA 5.105 (Vernon 1988) effective September 1, 1985, as amended; THSCA §§361.017 (Vernon 1992 & Supp. 1999), effective September 1, 1995, as amended; THSCA 361.024 (Vernon 1992 & Supp. 1999), effective September 1, 1995, as amended; 30 TAC §335.1(119), effective April 4, 1999, as amended.
4. Land Disposal Restrictions Phase III—Decharacterized Wastewater, Carbamate Waste, and Spent Potliners [61 FR 15566–15660] April 8, 1996. (Checklist 151).	TWCA 5.103 (Vernon 1988 & Supp. 1999), effective September 1, 1995, as amended; TWCA 5.105 (Vernon 1988) effective September 1, 1985, as amended; THSCA §§361.017 (Vernon 1992 & Supp. 1999), effective September 1, 1995, as amended; THSCA 361.024 (Vernon 1992 & Supp. 1999), effective September 1, 1995, as amended; 30 TAC §335.431, effective April 4, 1999, as amended. State law is more stringent than Federal law. State law has no provision equivalent to 40 CFR part 268.44(a), under which EPA may issue a variance from an applicable treatment standard.

E. What Decisions Have We Made?

We conclude that Texas' application to revise its authorized program meets all of the statutory and regulatory requirements established by RCRA. Therefore, we grant Texas final authorization to operate its hazardous waste program with the changes described in the authorization application. Texas has responsibility for permitting treatment, storage, and disposal facilities within its borders (except in Indian Country) and for carrying out the aspects of the RCRA program described in its revised program application, subject to the limitations of the Hazardous and Solid Waste Amendments of 1984 (HSWA). New Federal requirements and prohibitions imposed by Federal regulations that EPA promulgates under the authority of HSWA take effect in authorized States before they are authorized for the requirements. Thus, EPA will implement those requirements and prohibitions in Texas, including issuing permits, until the State is granted authorization to do so.

F. How Do the Revised State Rules Differ From the Federal Rules?

The EPA considers the following State requirement to be more stringent than the Federal: The State § 335.175(e) and 335.125(e) analogous to 40 CFR 264.314(e)(2)(ii), 40 CFR

264.314(e)(2)(iii), 40 CFR 265.314(f)(2)(ii) and 40 CFR 265.314(f)(2)(iii), since 1985, the TNRC rules have not allowed the option of using sorbent to treat free liquids to be disposed of in landfills. Therefore, the Federal regulations in Checklist 145 (Liquids in Landfills III) concerning the nonbiodegradability of sorbent to be used to treat free liquids to be disposed in landfills have no applicability under State rules. Texas does not have provision equivalent to 40 CFR 268.44(a), under which EPA may issue variance from an applicable treatment standard. In this authorization of the State of Texas' program revisions for RCRA Cluster VI, there are no broader in scope provisions. Broader in scope requirements are not part of the authorized program and EPA cannot enforce them.

G. Who Handles Permits After This Authorization Takes Effect?

The State will issue permits for all the provisions for which it is authorized and will administer the permits it issues. The EPA will continue to administer any RCRA hazardous waste permits or portions of permits which we issued prior to the effective date of this authorization. Upon authorization of the State program, EPA will suspend issuance of Federal permits for hazardous waste treatment, storage, and

disposal facilities for which the State is receiving authorization. We will not issue any more new permits or new portions of permits for the provisions listed in the Table above after the effective date of this authorization. The EPA will continue to implement and issue permits for HSWA requirements for which Texas is not yet authorized.

H. Why Wasn't There A Proposed Rule Before Today's Notice?

The EPA is authorizing the State's changes through this immediate final action and is publishing this rule without a prior proposal to authorize the changes because EPA believes it is not controversial and does not expect comments that oppose this action. The EPA is providing an opportunity for public comment in the proposed rules section of today's **Federal Register**, where we are publishing a separate document that proposes to authorize the State changes. If EPA receives comments which oppose this authorization, that document will serve as a proposal to authorize the changes.

I. Where Do I Send My Comments And When Are They Due?

You should send written comments to Alima Patterson, Regional Authorization Coordinator, Grants and Authorization Section (6PD–G), Multimedia Planning and Permitting Division, EPA Region 6,

1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–8533. Please refer to Docket Number TX–00–1. We must receive your comments by August 14, 2000. You may not have an opportunity to comment again. If you want to comment on this action. You must do so at this time.

J. What Happens If EPA Receives Comments Opposing This Action?

If EPA receives comments which oppose this authorization, we will withdraw this rule by publishing a document in the **Federal Register** before the rule becomes effective. The EPA will base any further decision on the authorization of the State program changes on the proposal mentioned in the previous paragraph. We will then address all public comments in a later final rule. You may not have another opportunity to comment. If you want to comment on this authorization, you must do so at this time.

K. When Will This Approval Take Effect?

Unless EPA receives comments that oppose this action, this final authorization approval will become effective without further notice on September 11, 2000.

L. Where Can I Review The State's Applications?

You can view and copy the State of Texas' application from 8:30 a.m. to 4:00 p.m. Monday through Friday at the following addresses: Texas Natural Resource Conservation Commission, 12100 Park 3 S Circle, Austin TX 78753–3087, (512) 239–1121 and EPA, Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–6444. For further information contact Alima Patterson, Regional Authorization Coordinator, Grants and Authorization Section (6PD–G), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 665–8533.

M. How Does Today's Action Affect Indian Country In Texas?

Texas is not authorized to carry out its Hazardous Waste Program in Indian country within the State. This authority remains with EPA. Therefore, this action has no effect in Indian country.

N. What Is Codification?

Codification is the process of placing the State's statutes and regulations that comprise the State's authorized Hazardous Waste Program into the CFR. The EPA does this by referencing the authorized State rules in 40 CFR part 272. The EPA reserves the amendment

of 40 CFR Part 272, subpart SS for this codification of Texas' program changes until a later date.

Regulatory Requirements

Compliance with Executive Order 12866

The Office of Management and Budget (OMB) has exempted this rule from the requirements of section 3 of Executive Order 12866.

Compliance Executive Order 13045

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" applies to any rule that: (1) the OMB determines is "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that the EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This rule is not subject to Executive Order 13045 because it is not an economically significant rule as defined by Executive Order 12866, and because it does not involve decisions based on environmental health or safety risks.

National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law No. 104–113, § 12(d) (15 U.S.C. 272 note) directs the EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs the EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

This action does not involve technical standards. Therefore, the EPA did not consider the use of any voluntary consensus standards.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) Public Law (P.L.) 104–4, establishes requirements for Federal agencies to assess the effects

of their regulatory actions on State, local, and tribal governments and the private sector.

Under section 202 of the UMRA, the EPA must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State, local and tribal governments, in the aggregate or to the private sector, of \$100 million or more in any one year. Before promulgating EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objective of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that sections 202 and 205 requirements do not apply to today's action because this rule does not contain a Federal mandate that may result in annual expenditures of \$100 million or more for State, local and/or tribal governments in the aggregate, or the private sector. Costs to State, local and/or tribal governments already exist under the State of Texas' program, and today's action does not impose any additional obligations on regulated entities. In fact EPA's approval of State programs generally may reduce, not increase, compliance costs for the private sector. Further, as it applies to the State, this action does not impose a Federal intergovernmental mandate because UMRA does not include duties arising from participation in a voluntary federal program.

The requirements of section 203 of UMRA also do not apply to today's action because this rule contains no

regulatory requirements that might significantly or uniquely affect small governments. Although small governments may be hazardous waste generators, transporters, or own and/or operate of Treatment, Storage, Disposal, Facilities, they are already subject to the regulatory requirements under the existing State laws that are being authorized by EPA, and thus, are not subject to any additional significant or unique requirements by virtue of this program approval.

Certification Under the Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 USC 601 et seq.

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

For purposes of assessing the impacts of today's action on small entities, small entity is defined as: (1) A small business as specified in the Small Business Administration regulations; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of this action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This action does not impose any new requirements on small entities because small entities that are hazardous waste generators, transporters, or that own and/or operate treatment, storage, disposal, facilities are already subject to the regulatory requirements under the State laws which EPA is now authorizing. This action merely authorizes for the purpose of RCRA 3006 those existing State requirements.

Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must

submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the United States prior to publication of the rule in today's **Federal Register**. This rule is not a "major rule" defined by 5 U.S.C. 804(2).

Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, Federal agencies must consider the paperwork burden imposed by any information request contained in a proposed rule or a final rule. This rule will not impose any information requirements upon the regulated community.

Executive Order 13084 Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance cost incurred by the tribal governments. If EPA complies with consulting, Executive Order 13084 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

This rule is not subject to Executive Order 13084 because it does not significantly or uniquely affect the communities of Indian governments. The State of Texas is not authorized to implement the RCRA hazardous waste program in Indian country. This action has no effect on the hazardous waste program that EPA implements in the Indian country within the State.

Executive Order 13132 Federalism

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10,

1999) requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that impose substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

This action does not have federalism implication. It will not have a substantial direct effect on States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, because it affects only one State. This action simply approves Texas' proposal to be authorized for updated requirements of the hazardous waste program that the State has voluntarily chosen to operate. Further, as a result of this action, those newly authorized provisions of the State's program now apply in the State of Texas in lieu of the equivalent Federal program provisions implemented by EPA under HSWA. Affected parties are subject only to those authorized State provisions, as opposed to being subject to both Federal and State regulatory requirements. Thus, the requirements of section 6 of the Executive Order do not apply.

List of Subjects in 40 CFR Part 271

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous materials transportation, Hazardous waste, Indian lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control, Water supply.

Authority: This notice is issued under the authority of sections 2002(a), 3006, and 7004(b) of the Solid Waste Disposal Act as amended, 42 U.S.C. 6912(a), 6926, 6974(b).

Dated: June 14, 2000.

Jerry Clifford,

Acting Regional Administrator.

[FR Doc. 00-17488 Filed 7-12-00; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 52

[CC Docket No. 99-200; FCC 00-104]

Numbering Resource Optimization

AGENCY: Federal Communications Commission.

ACTION: Final rule; announcement of effective date.

SUMMARY: The Federal Communications Commission (Commission) implemented numbering resource optimization measures that will minimize the negative impact on consumers of premature area code exhausts; ensure sufficient access to numbering resources for all service providers to enter into or to compete in telecommunications markets; avoid, or at least delay, exhaust of the North American Number Plan (NANP) and the need to expand the NANP; impose the least societal cost possible, and ensure competitive neutrality, while obtaining the highest benefit; ensure that no class of carrier or consumer is unduly favored or disfavored by our optimization efforts; and minimize the incentives for carriers to build and carry excessively large inventories of numbers. Section 52.15(f) of the Commission's rules, which imposes new information collection requirements, becomes effective on July 17, 2000.

EFFECTIVE DATE: The amendment to 47 CFR 52.15(f) published at 65 FR 37703, June 16, 2000, becomes effective on July 17, 2000.

FOR FURTHER INFORMATION CONTACT:

Aaron N. Goldberger, Attorney Advisor, Common Carrier Bureau, Network Services Division, (202) 418-2320 or via e-mail at agoldber@fcc.gov.

SUPPLEMENTARY INFORMATION: On March 17, 2000, the Commission adopted a Report and Order implementing administrative and technical measures that will allow it to monitor more closely the way numbering resources are used within the NANP. See 65 FR 37703, June 16, 2000. Section 52.15(f) of the Commission's rules imposes new information collection requirements.

Section 52.15(f) provides that for purposes of forecast and utilization reports, reporting shall commence August 1, 2000. In the **Federal Register** publication, we stated that "§ 52.15(f) * * * contains information collection requirements that have not been approved by the Office of Management and Budget (OMB)." See 65 FR 37703, June 16, 2000. OMB approved the information collections on June 23, 2000. See OMB No. 3060-0895. This publication satisfies our statement that the Commission would publish a document in the **Federal Register** announcing the effective date of § 52.15(f).

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00-17669 Filed 7-12-00; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 64

[CC Docket No. 98-170; FCC 00-111]

Truth-in-Billing and Billing Format

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document concerning Truth-in Billing and Billing Format, we grant, in part, petitions for reconsideration of the requirements that telephone bills highlight new service providers and prominently display inquiry contact numbers. We deny all other petitions seeking reconsideration, but provide clarification with respect to certain issues. We note that several petitioners make arguments substantially similar to those addressed previously in the Truth-in-Billing Order and offer no new information to persuade us that our decisions in the Truth-in-Billing Order were erroneous. This document addresses only those new arguments raised in the petitions that we have not already considered and rejected.

DATES: Effective July 13, 2000 except for the amendments to §§ 64.2401(a), (d), and (e), which contain information collection requirements that are not effective until approved by the Office of Management Budget (OMB). The Commission will publish a document in the **Federal Register** announcing the effective date of these sections.

FOR FURTHER INFORMATION CONTACT:

Michele Walters, Associate Division Chief, Accounting Policy Division,

Common Carrier Bureau, (202) 418-7400.

SUPPLEMENTARY INFORMATION: This is a summary of a Commission's Order on Reconsideration in CC Docket No. 98-170 released on March 29, 2000. The full text of this document is available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 Twelfth Street, SW, Washington, DC, 20554.

I. Introduction and Background

1. In this Order, we address several petitions for reconsideration or clarification of the principles and guidelines contained in *Truth-in-Billing and Billing Format*, First Report and Order (TIB Order), 64 FR 34487 (June 25, 1999), 64 FR 55163 (October 12, 1999), 64 FR 56177 (October 18, 1999). In the *TIB Order*, we adopted principles and guidelines designed to reduce telecommunications fraud such as slamming and cramming by making telephone bills easier for consumers to read and understand, and thereby, making such fraud easier to detect and report. Our truth-in-billing principles and guidelines require common carriers to: (1) Identify the telecommunications service provider, separate charges on bills by service provider, and notify customers when a new entity has begun providing service; (2) provide on telephone bills brief, clear, non-misleading, plain language descriptions of services rendered; and (3) provide a toll-free number for customers to call to lodge a complaint or to obtain information about any charge contained in the bill. Carriers also must identify on bills those charges for which failure to pay will not result in disconnection of the customer's basic, local service. Finally, we held that carriers must use standardized labels on bills to refer to certain line item charges relating to federal regulatory activity, such as the PICC, local number portability, and subscriber line charge.

2. Six parties filed petitions for reconsideration and/or clarification of the principles and guidelines adopted in the *TIB Order*. In this Order, we grant, in part, petitions for reconsideration of the requirements that telephone bills highlight new service providers and prominently display inquiry contact numbers. We deny all other petitions seeking reconsideration, but provide clarification with respect to certain issues. We note that several petitioners make arguments substantially similar to those addressed previously in the *TIB Order* and offer no new information to persuade us that our decisions in the *TIB Order* were erroneous. This Order

addresses only those new arguments raised in the petitions that we have not already considered and rejected.

II. Discussion

A. Identification of New Service Providers

3. In the *TIB Order*, we adopted rules requiring that telephone bills “provide clear and conspicuous notification of any change in service provider, including notification to the customer that a new provider has begun providing service.” We concluded in that order that such a requirement would act as an important tool in deterring both slamming and cramming by enabling consumers to detect more readily charges for unauthorized services. On reconsideration, we retain the fundamental aspects of this requirement. In response to arguments raised by some Petitioners, however, we modify this rule to apply only to subscribed services for which the provider will (absent a decision by the subscriber to terminate) continue to place periodic charges on the subscriber’s bill. Thus, for example, preferred carrier changes would be subject to this rule, as would charges for other services where a continuing month-to-month relationship exists. By contrast, services that are billed solely on a per-transaction basis, such as dial-around and directory assistance services, would not be subject to the rule. As explained, however, these services would continue to be subject to the requirement that charges be separated by provider. We conclude that this modification substantially addresses the concerns raised by Petitioners, without significantly impairing the effectiveness of this rule in protecting consumers.

4. In light of the modification to our rules described, we are otherwise unpersuaded by carrier assertions that highlighting of new service providers will be costly and difficult. Petitioners argue that compliance with this rule will require the construction of expensive “stare and compare” databases to compare current providers with those that have provided service in the past. The record demonstrates, however, that development of such a database is not necessary in order to comply with our rules, particularly as clarified in this Order. In particular, we clarify that local exchange carriers and other billing agents may satisfy this obligation by requiring the parties for which they bill to include, as part of the electronic billing information submitted to the billing agent, information identifying the provider as a new

provider subject to this rule with respect to a particular customer. We note that the industry already has taken steps to facilitate provision of this information by service providers to billing agents by agreeing to modify the standard industry electronic billing documentation and notification to include this information. Accordingly, LECs and other billing entities will be able to comply with the modified requirements to highlight new providers in a low-cost and effective manner.

5. As modified by this order, our rule requiring highlighting of new service providers will apply only to providers that have continuing arrangements with the subscriber that result in periodic charges on the subscriber’s telephone bill. Thus, changes in a subscriber’s presubscribed local and long-distance service providers clearly would be subject to the rule. Additionally, charges on telephone bills for such services as voice mail and internet access would also be subject to the rule because these services typically involve monthly or other periodic charges on an ongoing basis until the service is cancelled. On the other hand, our modified rule excludes services billed solely on a per transaction basis, such as dial-around interexchange access service, operator service, directory assistance, and non-recurring pay-per-call services. These services typically are ordered intermittently with no formal, ongoing relationship between the carrier and the customer. Because they are used just for occasional convenience, such a carrier is and will always be a “new” provider with regard to a consumer using its services. Highlighting of such providers, in fact, might confuse consumers into thinking that the provider is a new presubscribed carrier. We also note that, with regard to pay-per-call services, the Commission’s pay-per-call rules already require specific disclosures that accomplish many of the same goals as the requirement to highlight new service providers. Although the modification we adopt in this order restrict somewhat the application of our rule requiring highlighting of new services, we emphasize that these other services remain subject to the rules adopted in the *TIB Order* requiring charges to be separated by provider. As we explained in the *TIB Order*, this obligation, like the highlighting requirement, also serves to help consumers identify unauthorized charges on their bills. Taking into consideration the additional costs of highlighting these intermittent services, as asserted by Petitioners, we conclude that our modified rule draws an appropriate balance between the needs

of consumers and any impact on the industry.

6. Finally, we have modified slightly the language in the rule concerning when the highlighting requirement is triggered. The original rule states that the highlighting requirement is triggered if a provider “did not bill for services on the previous billing statement.” Under the revised rule, the highlighting requirement is triggered if a provider “did not bill for services, in its last billing cycle, with respect to a particular subscriber.” This modification recognizes that the billing cycles of service providers often may be different from the billing cycles of their billing agents. For example, if a voicemail provider bills quarterly through a LEC, the voicemail provider’s charges will only appear on every third monthly LEC bill. Under the original rule, the voicemail provider would be highlighted as a new provider every cycle, even though it was not a new provider, because the subscriber’s last monthly bill would not have contained voicemail charges. Under the revised rule, the voicemail provider would not be highlighted as a new provider because the subscriber was billed during the voicemail provider’s last billing cycle, even if that charge was not reflected on the subscriber’s last monthly LEC bill. We make this modification in order to minimize the burden on service providers and billing agents, as well as to reduce possible consumer confusion.

B. Identification of Deniable and Non-Deniable Charges

7. We retain our requirement that carriers distinguish on telephone bills those charges that consumers may refuse to pay without jeopardizing the provision of basic, local service, and charges for which non-payment may result in such disconnection. As we noted in the *TIB Order*, distinguishing between such charges on consumers’ bills protects consumers from paying contestable, unauthorized charges because they believe that they will lose basic telephone service for non-payment. We are unpersuaded by U S West’s argument that compliance with this rule will be costly because it would require the creation and maintenance of a database containing the necessary information. We note that, even absent the Commission’s truth-in-billing requirements, carriers need such a database to remain knowledgeable about state law requirements regarding disconnection of customers for non-payment.

8. Equally important, we find that compliance with this truth-in-billing

requirement need not involve an expensive or complicated billing process. In the *TIB Order*, we refrained from mandating any particular method of distinguishing between deniable and non-deniable charges in order to give carriers maximum flexibility in complying with our rules. Because of the concerns raised in the petitions for reconsideration and/or clarification, however, we clarify that a carrier need not label every charge as either deniable or non-deniable. For example, SNET's bill, complies with the rule by listing the total amount due, the amount of charges owed for deniable, basic local service, and includes an explanatory statement that basic, local service can only be disconnected for failure to pay the charges for basic, local service. Although SNET's bill does not label each individual charge as either deniable or non-deniable, we find that its format appropriately places consumers on notice that they may dispute the non-deniable portion of their bills without fear that their local service will be cut off for failure to pay such charges. While we approve of SNET's approach, we reiterate that carrier's retain broad flexibility to use other methods on telephone bills that adequately provide this essential information to consumers. We also note that, upon customer inquiry, a carrier's customer service personnel must explain this distinction to customers.

C. Bundled Services

9. Section 64.2401(a)(2) of our rules provides that, where charges for two or more telephone companies appear on the same bill, the charges must be separated by service provider. SBC seeks clarification on the applicability of § 64.2401(a)(2) to bundled services. Bundled services are various types of services, such as telephone, cable, and Internet services, that are offered and billed by a single entity, even though they may be provisioned by multiple carriers. We clarify that, where an entity bundles a number of services (some of which may be provided by various carriers) as a single package offered by a single company, such offering may be listed on the telephone bill as a single offering, rather than listed as separate charges by provider. Carriers providing bundled services in this manner must, however, make sure that an inquiry contact number or numbers appears on the bill for customer questions or complaints concerning the services provided through the bundle, as required by § 64.2401(d).

D. Clear Identification of Providers

10. We decline to reconsider the timetable for implementation of the requirement to identify each provider. We note that we have already delayed implementation of this requirement for certain carriers, and we find further delay to be unwarranted. We clarify, however, that this guideline may be satisfied by listing the carrier's trade name, rather than its precise corporate or corporate subsidiary name. That is, the carrier name on the telephone bill should be the name by which such company is known to its consumers for the provision of the respective service.

E. Toll Free Contact Numbers

11. Section 64.2401(d) of the Commission's rules requires that common carriers prominently display on each bill a toll-free number or numbers by which consumers may inquire about or dispute charges on their bills. While agreeing that it is reasonable to expect carriers to provide adequate inquiry information to their customers, MCIW requests that carriers be permitted to provide means other than toll-free numbers for consumers to access a carrier's customer service. MCIW specifically notes that some carriers offer customer service via a web site or e-mail. We decline to modify the generally applicable requirement adopted in the *TIB Order* that carriers include toll-free numbers on their bills for customers to inquire about or dispute charges. Since the bills at issue are for telephone service, it naturally follows that those questioning these charges will have telephone access; on the other hand, Internet access remains far from universally available. We will, however, modify this requirement by creating a limited exception where the customer does not receive a paper copy of his or her telephone bill, but instead accesses that bill only by e-mail or Internet. Under such circumstance, we find it reasonable to expect that customers can adequately resolve their inquiries and disputes through e-mail or web site communications. As MCI recognizes in its Petition, consumers contacting a service provider through such means continue to be entitled to have their communications reach and be responded to by an individual with the necessary information and authority to timely resolve their inquiry or dispute. We also note that any carrier may provide on customers' bills other means for consumers to make inquiries, such as an e-mail address, in addition to the toll-free number required by the rule.

F. Regulatory Flexibility Analysis in the TIB Order

12. We reject NTCA's contention that we failed to perform adequately our regulatory flexibility analysis in the *TIB Order* because we did not give sufficient consideration to the needs of small carriers. We conclude that the regulatory flexibility analysis in the *TIB Order* adequately addressed the concerns of small carriers. In the *TIB Order*, we noted that, in order to decrease the economic impact of our rules on small carriers, we declined to adopt several proposals made in the Notice of Proposed Rulemaking and gave carriers considerable discretion in implementing our guidelines. Moreover, the modifications in this *Order* and the extensions of time that we have granted to carriers provide evidence of our continuing concern for the impact of our guidelines on small carriers.

13. USTA requests that we find that small ILECs constitutes small businesses under the definition of the United States Small Business Administration (SBA). We have included small ILECs in this RFA analysis. A "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small ILECs are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small ILECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

III. Procedural Matters

A. Effective Date of Existing Rules

14. Our existing truth-in-billing rules took effect on November 18, 1999 with compliance required as of April 1, 2000. Thus, absent action on our part, carriers would be bound by the existing rules as of April 1, despite the fact that today we amend those rules to become effective upon OMB approval. In view of these circumstances, we stay the portions of the existing § 64.2401 detailed below for which compliance was required as of April 1, 2000 until such time as today's amendments of § 64.2401 become effective. The portions of the existing § 64.2401 that are subject to this stay are: (1) That portion of § 64.2401(a)(2) that requires that each carrier's "telephone bill must provide clear and conspicuous notification of any change in service provider, including

notification to the customer that a new provider has begun providing service,” (2) § 64.2401(a)(2)(ii) and (3) § 64.2401(d). The existing provisions of §§ 64.2401(a)(1), (a)(2)(i) and the portion of (a)(2) requiring “[w]here charges for two or more carriers appear on the same telephone bill, the charges must be separated by service provider,” will continue to take effect on April 1, 2000. Nothing in this order modifies the effective dates of existing §§ 64.2401(b) and (c). Upon their effective date, the rules, as amended, will supercede the existing rules. We take this action because we find that requiring carriers to comply with the existing rules for a short time prior to the effective date of today’s amendments would be unduly burdensome and that it could result in the very sort of consumer confusion that today’s amendments seek to avoid.

B. Final Supplemental Regulatory Flexibility Act Analysis

15. As required by the Regulatory Flexibility Act (RFA), an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice in Truth-in-Billing and Billing Format*. The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The comments received are discussed. The *TIB Order* included a Final Regulatory Flexibility Analysis (FRFA) that conformed to the RFA. The Supplemental FRFA included herein addresses only the modifications adopted in this Order on Reconsideration, and conforms with RFA.

1. Need for and Objectives of This Order and the Rules Adopted Herein

16. Section 258 of the Act makes it unlawful for any telecommunications carrier “to submit or execute a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.” Accordingly, the Commission adopted in the *TIB Order* principles to ensure that consumers receive thorough, accurate, and understandable bills from their telecommunications carriers. First, consumer telephone bills must be clearly organized, clearly identify the service provider, and highlight any new providers; second, bills must contain full and non-misleading descriptions of charges that appear therein; and third, bills must contain clear and conspicuous disclosure of any information the consumer may need to make inquiries about, or contest

charges, on the bill. Additionally, the Commission adopted minimal, basic guidelines that explicate carriers’ obligations pursuant to these broad principles. These principles and guidelines are designed to prevent the types of consumer fraud and confusion evidenced in the tens of thousands of complaints that this Commission, and state commissions, receive each year. In enacting the principles and guidelines contained in the *TIB Order*, our goal was to implement the provisions of sections 201(b) and 258 to prevent telecommunications fraud, as well as to encourage full and fair competition among telecommunications carriers in the marketplace. This Order on Reconsideration seeks to respond to requests for modification and clarification received by certain carriers in response to the *TIB Order*. Specifically, we modify our rule concerning highlighting of new service providers to apply only to subscribed services for which a provider will continue to place periodic charges on the subscriber’s bill.

2. Summary of the Significant Issues Raised by the Public Comments in Response to the IRFA

17. In the IRFA, we found that the rules we proposed to adopt in this proceeding may have a significant impact on a substantial number of small businesses as defined by 5 U.S.C. 601(3). The IRFA solicited comment on the number of small businesses that would be affected by the proposed regulations and on alternatives to the proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding.

18. PCIA, Liberty, RTG and others argued that the cost of compliance faced by smaller carriers would be particularly burdensome. PCIA asserted that medium- and small-sized carriers will be less likely to have billing systems in place that “can simply be ‘tweaked’ to produce the required modifications.” Indeed, PCIA stated that smaller carriers may be forced to replace their entire billing systems in order to comply with the format and content mandates proposed in the *NPRM*. RTG agreed, arguing that rural carriers are particularly sensitive to increased regulatory requirements with significant costs.

19. The Office of Management and Budget (OMB) received a large number of comments in response to the *NPRM*. The commenters generally agreed that new charges or services need to be easily identifiable on customer bills; that definitions of services and other terms are difficult to reach and could be

counterproductive; that more information, including point of contact toll-free numbers for service providers or billing agents needs to be included in billing materials; that materials should be clear, concise, and relatively simple; that the Commission must account for costs of any changes to bills that will be passed on to consumers in making decisions; that CMRS and other wireless firms that provide services only to businesses should be exempt from most new requirements that would be imposed on wireline carriers; that every effort should be made so that billing standards are uniform across the nation; that reseller information should be included; and that, where possible, market-based solutions should be adopted unless there is conclusory evidence that the Commission must enact regulations that affect billing practices. As a result, OMB recommended that we not impose undue burdens on wireless providers and small wireline services, and urged that flexibility be given to small companies that may experience significant cost and managerial issues related to implementation of billing requirements. Moreover, OMB recommended that the Commission allow companies sufficient time to address their necessary Year 2000-related modifications to their computer systems as well as modifying their billing systems to meet any new requirements. OMB also recommended that the Commission make a concerted effort to work with the industry to establish voluntary guidelines in lieu of mandatory requirements that restrict the ability of firms to tailor their billing to meet the needs of customers.

20. The *TIB Order* considered these comments and found that we appropriately balanced the concerns of carriers that detailed rules may increase their costs against our goal of protecting consumers against fraud. We exempted CMRS carriers from certain of our requirements on grounds that the requirements may be inapplicable or unnecessary in the CMRS context. Moreover, we considered our principles and guidelines to be flexible enough that carriers will be able to comply with them without incurring unnecessary expense. Since the modifications adopted in this Order were made in response to requests from carriers, and are designed to ease any burden on such carriers from implementing our rules, we find that nothing we have done in this Order causes us to reconsider our previous evaluation of this issue. Specifically, in response to petitions from various carriers, we have modified

our rule concerning highlighting of new service providers to apply only to subscribed services for which a provider will continue to place periodic charges on the subscriber's bill. Thus, the rule will apply to a narrower range of charges than contemplated in the original rule, thereby reducing the compliance costs on small businesses and other entities.

3. Description and Estimates of the Number of Small Entities to Which the Rules Adopted in the Order in CC Docket No. 98–170 May Apply

21. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the rules. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

22. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the numbers of commercial wireless entities, appears to be data the Commission publishes annually in its Telecommunications Industry Revenue report, regarding the Telecommunications Relay Service (TRS). According to data in the most recent report, there are 3,459 interstate carriers. These carriers include, *inter alia*, local exchange carriers, wireline carriers and service providers, interexchange carriers, competitive access providers, operator service providers, pay telephone operators, providers of telephone toll service, providers of telephone exchange service, and resellers.

23. The SBA has defined establishments engaged in providing “Radiotelephone Communications” and “Telephone Communications, Except Radiotelephone” to be small businesses when they have no more than 1,500 employees. We discuss the total estimated number of telephone companies falling within the two categories and the number of small businesses in each, and we then attempt to refine further those estimates to correspond with the categories of telephone companies that are commonly used under our rules.

24. We have included small incumbent LECs in this present RFA analysis. As noted, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.” The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope. We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on FCC analyses and determinations in other, non-RFA contexts.

25. *Total Number of Telephone Companies Affected.* The U.S. Bureau of the Census (“Census Bureau”) reports that, at the end of 1992, there were 3,497 firms engaged in providing telephone services, as defined therein, for at least one year. This number contains a variety of different categories of carriers, including local exchange carriers, interexchange carriers, competitive access providers, cellular carriers, mobile service carriers, operator service providers, pay telephone operators, personal communications services providers, covered specialized mobile radio providers, and resellers. It seems certain that some of those 3,497 telephone service firms may not qualify as small entities or small ILECs because they are not “independently owned and operated.” For example, a PCS provider that is affiliated with an interexchange carrier having more than 1,500 employees would not meet the definition of a small business. It is reasonable to conclude that fewer than 3,497 telephone service firms are small entity telephone service firms or small ILECs that may be affected by our principles and guidelines.

26. *Wireline Carriers and Service Providers.* The SBA has developed a definition of small entities for telephone communications companies except radiotelephone (wireless) companies. The Census Bureau reports that there were 2,321 such telephone companies in operation for at least one year at the end of 1992. According to the SBA’s definition, a small business telephone company other than a radiotelephone company is one employing no more than 1,500 persons. All but 26 of the 2,321 non-radiotelephone companies listed by the Census Bureau were reported to have fewer than 1,000 employees. Thus, even if all 26 of those companies had more than 1,500

employees, there would still be 2,295 non-radiotelephone companies that might qualify as small entities or small ILECs. We do not have data specifying the number of these carriers that are not independently owned and operated, and thus are unable at this time to estimate with greater precision the number of wireline carriers and service providers that would qualify as small business concerns under the SBA’s definition. Consequently, we estimate that fewer than 2,295 small telephone communications companies other than radiotelephone companies are small entities or small ILECs that may be affected by our principles and guidelines.

27. *Local Exchange Carriers.* Neither the Commission nor the SBA has developed a definition for small providers of local exchange services (LECs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent *Telecommunications Industry Revenue* data, 1,371 carriers reported that they were engaged in the provision of local exchange services. We do not have data specifying the number of these carriers that are either dominant in their field of operations, are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of LECs that would qualify as small business concerns under the SBA’s definition. Consequently, we estimate that fewer than 1,371 providers of local exchange service are small entities or small ILECs that may be affected by our principles and guidelines.

28. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to providers of interexchange services (IXCs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent *Telecommunications Industry Revenue* data, 143 carriers reported that they were engaged in the provision of interexchange services. We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of IXCs that would qualify as small business concerns under the SBA’s definition. Consequently, we estimate that there are fewer than 143 small entity IXCs that

may be affected by our principles and guidelines.

29. *Competitive Access Providers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to competitive access services providers (CAPs). The closest applicable definition under the SBA rules is for telephone communications companies other than radiotelephone (wireless) companies. According to the most recent *Telecommunications Industry Revenue* data, 109 carriers reported that they were engaged in the provision of competitive access services. We do not have data specifying the number of these carriers that are not independently owned and operated, or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of CAPs that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 109 small entity CAPs that may be affected by our principles and guidelines.

30. *Resellers (including debit card providers).* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to resellers. The closest applicable SBA definition for a reseller is a telephone communications company other than radiotelephone (wireless) companies. According to the most recent *Telecommunications Industry Revenue* data, 339 reported that they were engaged in the resale of telephone service. We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of resellers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 339 small entity resellers that may be affected by our principles and guidelines.

31. *Rural Radiotelephone Service.* The Commission has not adopted a definition of small entity specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems. We will use the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the SBA's definition.

32. *International Services.* The Commission has not developed a

definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is generally the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC). This definition provides that a small entity is expressed as one with \$11.0 million or less in annual receipts. According to the Census Bureau, there were a total of 848 communications services providers, NEC, in operation in 1992, and a total of 775 had annual receipts of less than \$9,999 million. The Census report does not provide more precise data.

33. *Telex.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to telex. The most reliable source of information regarding the number of telegraph service providers of which we are aware is the data the Commission collects in connection with the *International Telecommunications Data*. According to our most recent data, 5 facilities based and 2 resale provider reported that they engaged in telex service. Consequently, we estimate that there are 7 or fewer telex providers that may be affected by our principles and guidelines.

34. *Message Telephone Service.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to message telephone service. The most reliable source of information regarding the number of message telephone service providers of which we are aware is the data the Commission collects in connection with the *International Telecommunications Data*. According to our most recent data, 1,092 carriers reported that they engaged in message telephone service. Consequently, we estimate that there are fewer than 1,092 message telephone service providers that may be affected by our principles and guidelines.

35. *Cellular Licensees.* Neither the Commission nor the SBA has developed a definition of small entities applicable to cellular licensees. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone (wireless) companies. This provides that a small entity is a radiotelephone company employing no more than 1,500 persons. According to the Bureau of the Census, only twelve radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all twelve of these firms were cellular telephone companies, nearly all cellular carriers were small businesses under the SBA's definition. In addition, we note that

there are 1,758 cellular licenses; however, a cellular licensee may own several licenses. In addition, according to the most recent *Telecommunications Industry Revenue* data, 804 carriers reported that they were engaged in the provision of either cellular service or Personal Communications Service (PCS) services, which are placed together in the data. We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of cellular service carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 804 small cellular service carriers that may be affected by the proposed rules, if adopted.

36. *220 Mhz Radio Services.* Because the Commission has not yet defined a small business with respect to 220 MHz services, we will utilize the SBA definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. With respect to 220 MHz services, the Commission has proposed a two-tiered definition of small business for purposes of auctions: (1) For Economic Area licensees, a firm with average annual gross revenues of not more than \$6 million for the preceding three years and (2) for regional and nationwide licensees, a firm with average annual gross revenues of not more than \$15 million for the preceding three years. Given that nearly all radiotelephone companies under the SBA definition employ no more than 1,500 employees (as noted), we will consider the approximately 1,500 incumbent licensees in this service as small businesses under the SBA definition.

37. *Private and Common Carrier Paging.* The Commission has proposed a two-tier definition of small businesses in the context of auctioning licenses in the Common Carrier Paging and exclusive Private Carrier Paging services. Under the proposal, a small business will be defined as either (1) An entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million, or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. Because the SBA has not yet approved this definition for paging services, we will utilize the SBA's definition applicable to radiotelephone companies, *i.e.*, an entity employing no more than 1,500 persons. At present,

there are approximately 24,000 Private Paging licenses and 74,000 Common Carrier Paging licenses. According to the most recent *Telecommunications Industry Revenue* data, 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services, which are placed together in the data. We do not have data specifying the number of these carriers that are not independently owned and operated or have more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of paging carriers that would qualify as small business concerns under the SBA's definition. Consequently, we estimate that there are fewer than 172 small paging carriers that may be affected by the proposed rules, if adopted. We estimate that the majority of private and common carrier paging providers would qualify as small entities under the SBA definition.

38. *Mobile Service Carriers.* Neither the Commission nor the SBA has developed a definition of small entities specifically applicable to mobile service carriers, such as paging companies. As noted in the section concerning paging service carriers, the closest applicable definition under the SBA rules is that for radiotelephone (wireless) companies, and the most recent *Telecommunications Industry Revenue* data shows that 172 carriers reported that they were engaged in the provision of either paging or "other mobile" services. Consequently, we estimate that there are fewer than 172 small mobile service carriers that may be affected by the proposed rules, if adopted.

39. *Broadband Personal Communications Service.* The broadband PCS spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission defined "small entity" for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years. For Block F, an additional classification for "very small business" was added and is defined as an entity that, together with their affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years. These regulations defining "small entity" in the context of broadband PCS auctions have been approved by the SBA. No small businesses within the SBA-approved definition bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 small and very small business bidders won approximately 40% of the

1,479 licenses for Blocks D, E, and F. Based on this information, we conclude that the number of small broadband PCS licensees will include the 90 winning C Block bidders and the 93 qualifying bidders in the D, E, and F blocks, for a total of 183 small entity PCS providers as defined by the SBA and the Commission's auction rules.

40. *Cable Service Providers.* The SBA has developed a definition of small entities for cable and other pay television services that includes all such companies generating no more than \$11 million in revenue annually. This definition includes cable systems operators, closed circuit television services, direct broadcast satellite services, multipoint distribution systems, satellite master antenna systems, and subscription television services. According to the Census Bureau, there were 1,758 total cable and other pay television services and 1,423 had less than \$11 million in revenue. We note that cable system operators are included in our analysis due to their ability to provide telephony.

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

41. In this Order on Reconsideration, we have responded to petitions from various carriers by modifying the rules adopted in the *TIB Order* concerning highlighting of new service providers to apply only to subscribed services for which a provider will continue to place periodic charges on the subscriber's bill. The modified rule will apply to a narrower range of charges than contemplated in the original rule, thereby reducing the compliance costs on small businesses and other entities.

5. Steps Taken To Minimize the Significant Economic Impact of This Order on Small Entities and Small Incumbent LECs, Including the Significant Alternatives Considered

42. In this Order, we make minor modifications to our previously adopted rules on Truth-In-Billing. Specifically, we modify our rule concerning highlighting of new service providers to apply only to subscribed services for which a provider will continue to place periodic charges on the subscriber's bill. The modified rule will apply to a narrower range of charges than contemplated in the original rule, thereby reducing the compliance costs on small businesses and other entities. The modifications adopted herein were made at the request of carriers, and are specifically intended to reduce the burden on such entities in

implementing the previously adopted rules. Accordingly, adoption of these rules should actually reduce the economic impact of our Truth-In-Billing rules on these entities.

6. Report to Congress

43. The Commission will send a copy of the Order on Reconsideration, including this Supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. In addition, the Commission will send a copy of the Order on Reconsideration, including the Supplemental FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order on Reconsideration and Supplemental FRFA (or summaries thereof) will also be published in the **Federal Register**.

C. Paperwork Reduction Act Analysis

44. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 and found to impose new or modified reporting and recordkeeping requirements or burdens on the public. These rules contain information collections which have not been approved by OMB. The Commission will publish a document in the **Federal Register** announcing the effective date of these rules.

IV. Ordering Clauses

45. Pursuant to the authority contained in sections 1, 4(i), 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), and § 1.429 of the Commission's rules, the petitions for reconsideration and/or clarification filed by AT&T Corp., MCI WorldCom, Inc., National Telephone Cooperative Association, SBC Communications, Inc., United States Telephone Association, U S West Communications, Inc. are granted in part and denied in part to the extent discussed.

46. (1) That portion of § 64.2401(a)(2) that requires that each carrier's "telephone bill must provide clear and conspicuous notification of any change in service provider, including notification to the customer that a new provider has begun providing service," (2) § 64.2401(a)(2)(ii), and (3) § 64.2401(d) of the existing rules took effect November 12, 1999 with compliance required as of April 1, 2000 are stayed until such time as the amendments adopted herein are effective. The amendments to § 64.2401 of the Commission's rules, 47 CFR 64.2401(a), (d), and (e), set forth are effective upon OMB approval but no

sooner than 30 days following publication of these rules in the **Federal Register**. The Commission will publish a document announcing the effective date of these rules.

47. The Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this Order on Reconsideration, including the Supplemental Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in Part 64

Claims, Communications common carrier, Computer technology, Consumer protection, Reporting and recordkeeping requirements, Telephone.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

Final Rules

Part 64 of title 47 of the Code of Federal Regulations is amended as follows:

PART 64—[AMENDED]

Subpart Y—Truth-in-Billing Requirements for Common Carriers

1. The authority citation for part 64 continues to read as follows:

Authority: 47 U.S.C. 151, 154, 201, 202, 205, 218–220, and 332 unless otherwise noted. Interpret or apply sections 201, 218, 225, 226, 227, 229, 332, 48 Stat. 1070, as amended. 47 U.S.C. 201–204, 208, 225, 226, 227, 229, 332, 501 and 503 unless otherwise noted.

2. Subpart Y of Part 64 consists of § 64.2400 and § 64.2401. The heading

for Subpart Y is added to read as set forth above.¹

3. A Note is added to § 64.2401 as set forth below effective July 13, 2000.

4. In § 64.2401, revise paragraphs (a) and (d), and add paragraph (e) to read as follows:

§ 64.2401 Truth-in-Billing Requirements

Note to § 64.2401: The following provisions, for which compliance would have been required as of April 1, 2000, have been stayed until such time as the amendments to § 64.2401(a), (d), and (e) become effective (following their approval by the Office of Management and Budget and the publication by the Commission of a document in the **Federal Register** announcing the effective date of these amended rules) and will be superceded by the amended rules: (1) That portion of § 64.2401(a)(2) that requires that each carrier's "telephone bill must provide clear and conspicuous notification of any change in service provider, including notification to the customer that a new provider has begun providing service," (2) § 64.2401(a)(2)(ii), and (3) § 64.2401(d).

(a) *Bill organization.* Telephone bills shall be clearly organized, and must comply with the following requirements:

(1) The name of the service provider associated with each charge must be clearly and conspicuously identified on the telephone bill.

(2) Where charges for two or more carriers appear on the same telephone bill, the charges must be separated by service provider.

(3) The telephone bill must clearly and conspicuously identify any change in service provider, including identification of charges from any new

service provider. For purpose of this subparagraph "new service provider" means a service provider that did not bill the subscriber for service during the service provider's last billing cycle. This definition shall include only providers that have continuing relationships with the subscriber that will result in periodic charges on the subscriber's bill, unless the service is subsequently canceled.

* * * * *

(d) *Clear and conspicuous disclosure of inquiry contacts.* Telephone bills must contain clear and conspicuous disclosure of any information that the subscriber may need to make inquiries about, or contest, charges on the bill. Common carriers must prominently display on each bill a toll-free number or numbers by which subscribers may inquire or dispute any charges on the bill. A carrier may list a toll-free number for a billing agent, clearinghouse, or other third party, provided such party possesses sufficient information to answer questions concerning the subscriber's account and is fully authorized to resolve the consumer's complaints on the carrier's behalf. Where the subscriber does not receive a paper copy of his or her telephone bill, but instead accesses that bill only by e-mail or internet, the carrier may comply with this requirement by providing on the bill an e-mail or web site address. Each carrier must make a business address available upon request from a consumer.

(e) *Definition of clear and conspicuous.* For purposes of this section, "clear and conspicuous" means notice that would be apparent to the reasonable consumer.

[FR Doc. 00–17719 Filed 7–12–00; 8:45 am]

BILLING CODE 6712–01–P

¹ See 64 FR 34497 (June 25, 1999); 64 FR 55163 (October 12, 1999); 64 FR 56177 (October 18, 1999); 65 FR 36637 (June 9, 2000).

Proposed Rules

Federal Register

Vol. 65, No. 135

Thursday, July 13, 2000

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 205

[TM-00-04]

RIN 0581-AA40

Submission of Petitions for Evaluation of Substances for Inclusion on or Removal From the National List of Substances Allowed and Prohibited in Organic Production and Handling

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Notice of Guidelines and Call for National List Petitions.

SUMMARY: The Organic Foods Production Act of 1990, as amended, (Act) requires the Secretary of Agriculture (Secretary) to establish a National List of Allowed and Prohibited Substances (National List) which identifies the synthetic substances that may be used, and the nonsynthetic substances that cannot be used, in organic production and handling operations. The Act authorizes the National Organic Standards Board (NOSB) to develop and forward to the Secretary a recommended Proposed National List, and subsequent proposed amendments to it. The Act provides that persons may petition the NOSB to evaluate a substance for inclusion on or removal from the National List. This notice explains who can submit a petition, for what substances a petition can be submitted, and the information that should be included in a submitted petition. All submitted petitions will be evaluated by the Department of Agriculture's (USDA) National Organic Program (NOP) for completeness. If there is incomplete information, petitioners will be given a reasonable opportunity to provide the missing information. Petitioners should realize that providing incomplete information may increase the evaluation time or result in no substance evaluation. This notice also provides the name and

address of the person to whom a petition should be submitted.

ADDRESSES: Petitions should be submitted in duplicate to: National Organic Standards Board, c/o Robert Pooler, Agricultural Marketing Specialist, USDA/AMS/TM/NOP, Room 2510-So., Ag Stop 0268, P.O. Box 96456, Washington, D.C. 20090-6456. Phone: 202/720-3252. Fax: 202/205-7808. e-mail: nlpetition@usda.gov. Petitioners are encouraged to submit the required information through one system of submission (mail, fax or e-mail).

FOR FURTHER INFORMATION CONTACT: Keith Jones, Program Manager, National Organic Program, USDA/AMS/TM/NOP, Room 2945-So., Ag Stop 0268, P.O. Box 96456, Washington, D.C. 20090-6456. Phone: 202/720-3252. Fax: 202/690-3924. e-mail: keith.jones@usda.gov.

SUPPLEMENTARY INFORMATION: To help readers better understand the petition process, we have provided answers to some frequently asked questions about the National List and the petition process.

What Is the Purpose and Timing of This Notice?

The NOSB submitted a Proposed National List to the Secretary that was subsequently published on March 13, 2000, as part of the NOP proposed rule, 65 FR 13512-13658, (2000). Based on information supplied to the NOSB by trade associations, certification organizations and other organic industry sources, there are many substances currently used in organic production and handling that have not been evaluated by the NOSB for inclusion on the National List. Evaluations of these materials must be expedited to prevent the disruption of many well-established and accepted production, handling and processing systems. The NOP and the NOSB will be developing a workplan to process the potential evaluation of the numerous substances which may be presented to the NOSB and the NOP. Therefore, the organic industry is encouraged to initiate notification to the NOSB and the NOP on which substances should receive priority for evaluation. Substances that are petitioned and under evaluation by the NOSB will be announced on the NOP website: www.ams.usda.gov/nop. Interested individuals or groups can provide information or commentary to

the NOSB or NOP for any substance being evaluated by the NOSB.

How Are National List Decisions Made?

The NOSB reviews information from various sources in evaluating substances for inclusion on or removal from the National List. Sources include Technical Advisory Panels (TAP), the Environmental Protection Agency, the Food and Drug Administration, the National Institute of Environmental Health Studies, and the testimony of the public.

TAP reviews assist the NOSB in evaluating substances being considered for addition to or removal from the National List. The NOP, on behalf of the NOSB, establishes contracts to conduct the TAP with qualified individuals or organizations who have specialized knowledge of the petitioned substances. These reviewers have expertise in such fields as organic production and handling, veterinary medicine, chemistry, or food handling and preparation. All contractors, whether an individual or an organization, must meet USDA contract requirements including the prevention of conflict of interest. Recent TAP reviews conducted for the NOSB have been performed under contract by the Organic Materials Review Institute (OMRI). However, the NOP on behalf of the NOSB may contract with any individual or organization having the necessary technical expertise to conduct TAP reviews for NOSB substance evaluations.

TAP reports and the NOSB recommendations for each substance are submitted to the Secretary. The Secretary evaluates the recommendations and other documentation regarding each substance for inclusion on or removal from the National List.

The Act requires that the initial Proposed National List and subsequent proposed amendments to it be published in the **Federal Register** for public comment.

How Long Can a Substance Appear on the National List and Will the List Change?

The Act (7 U.S.C. 6517(e)) requires that substances appearing on the National List be reviewed by the NOSB and the Secretary at least once every 5 years following implementation of the NOP. Once a substance evaluation is

completed and a recommendation is forwarded to the Secretary, the NOSB will not reevaluate its decision within the 5 year period unless substantive new information becomes available.

What Criteria Does the NOSB Use to Evaluate Petitioned Substances?

The Act (7 U.S.C. 6518(m)) requires that the NOSB consider the following criteria for each substance evaluated:

(1) The potential of such substances for detrimental chemical interactions with other materials used in organic farming systems;

(2) The toxicity and mode of action of the substance and of its breakdown products or any contaminants, and their persistence and areas of concentration in the environment;

(3) The probability of environmental contamination during manufacture, use, misuse or disposal of such substance;

(4) The effect of the substance on human health;

(5) The effects of the substance on biological and chemical interactions in the agroecosystem, including the substance's physiological effects on soil organisms (including the salt index and solubility of the soil), crops and livestock;

(6) The alternatives to using the substance in terms of practices or other materials; and,

(7) Its compatibility with a system of sustainable agriculture.

How Does the NOSB Evaluate Substances Such as Processing Aids or Adjuvants?

In addition to the criteria cited in the Act, the NOSB developed internal guidelines for evaluating processing substances such as synthetic processing aids or adjuvants for inclusion on or removal from the National List during their February 1999 meeting. For specific information about these guidelines, please refer to the USDA NOP website: www.ams.usda.gov/nop/nosbf99.html, or write the Program Manager, National Organic Program, USDA/AMS/TM/NOP, Room 2945-So, Ag Stop 0268, PO Box 96456, Washington, D.C. 20090-6456. Phone: 202/720-3252. Fax: 202/690-3924. e-mail: keith.jones@usda.gov.

When Can the NOSB be Petitioned?

The NOSB can be petitioned at any time for substances not previously evaluated by the NOSB. For substances receiving a prior recommendation by the NOSB restricting or prohibiting its use, a petition may be filed only when significant new information may alter the established NOSB recommendation. However, the NOSB and the NOP

expects that amending the National List will be a continuous process. For instance, the National List may need to be amended to accommodate development of new substances or technologies in organic production or handling of foods. Recommendations to amend the National List result from the review and deliberation of the TAP reports and other information by the NOSB Committees (Crop, Livestock, Processing or Materials). These committees forward their recommendations to the entire NOSB which considers, then accepts, modifies or rejects these recommendations during scheduled public meetings or conferences conducted periodically, as needed.

Who Can Submit a Petition?

Any person may submit a petition. Each substance to be evaluated must be submitted in a separate petition.

To Whom Should a Petition be Submitted?

Petitions should be submitted in duplicate to: National Organic Standards Board, c/o Robert Pooler, Agricultural Marketing Specialist, USDA/AMS/TM/NOP, Room 2510-So., Ag Stop 0268, P.O. Box 96456, Washington, D.C. 20090-6456. Phone: 202/720-3252. Fax: 202/205-7808. e-mail: nlpetition@usda.gov.

What Are the Substances for Which a Petition May be Submitted?

Only single substances or ingredients may be petitioned for evaluation. Formulated products cannot appear on the National List. Substances that appear on USDA's current Proposed National List, 65 Fed. Reg. 13626-13628 (2000), should not be petitioned for inclusion on the National List.

What Information Has to be Included in the Petition?

A petition seeking evaluation of a substance must indicate within which of the following categories the substance is being petitioned for inclusion on or removal from the National List:

(1) Synthetic substance's allowed for use in organic crop production;

(2) Nonsynthetic substances prohibited for use in organic crop production;

(3) Synthetic substances allowed for use in organic livestock production;

(4) Nonsynthetic substances prohibited for use in organic livestock production; and

(5) Nonagricultural (nonorganic) substances allowed in or on processed products labeled as "organic" or "made with organic (specified ingredients)."

The petition must also include, as applicable, the following information:

1. The substance's common name.

2. The manufacturer's name, address and telephone number.

3. The intended or current use of the substance such as use as a pesticide, animal feed additive, processing aid, nonagricultural ingredient, sanitizer or disinfectant.

4. A list of the crop, livestock or handling activities for which the substance will be used. If used for crops or livestock, the substance's rate and method of application must be described. If used for handling (including processing), the substance's mode of action must be described.

5. The source of the substance and a detailed description of its manufacturing or processing procedures from the basic component(s) to the final product. Petitioners with concerns for confidential business information can follow the guidelines in the Instructions for Submitting Confidential Business Information (CBI) listed in #13.

6. A summary of any available previous reviews by State or private certification programs or other organizations of the petitioned substance.

7. Information regarding EPA, FDA, and State regulatory authority registrations, including registration numbers.

8. The Chemical Abstract Service (CAS) number or other product numbers of the substance and labels of products that contains the petitioned substance.

9. The substance's physical properties and chemical mode of action including (a) chemical interactions with other substances, especially substances used in organic production; (b) toxicity and environmental persistence; (c) environmental impacts from its use or manufacture; (d) effects on human health; and, (e) effects on soil organisms, crops, or livestock.

10. Safety information about the substance including a Material Safety Data Sheet (MSDS) and a substance report from the National Institute of Environmental Health Studies.

11. Research information about the substance which includes comprehensive substance research reviews and research bibliographies, including reviews and bibliographies which present contrasting positions to those presented by the petitioner in supporting the substance's inclusion on or removal from the National List.

12. A "Petition Justification Statement" which provides justification for one of the following actions requested in the petition:

When petitioning for the inclusion of a synthetic substance on the National List, the petition should state why the synthetic substance is necessary for the production or handling of an organic product. The petition should also describe the nonsynthetic substances or alternative cultural methods that could be used in place of the petitioned synthetic substance. Additionally, the petition should summarize the beneficial effects to the environment, human health, or farm ecosystem from use of the synthetic substance that support the use of it instead of the use of a nonsynthetic substance or alternative cultural methods.

When petitioning for the removal of a synthetic substance from the National List the petition must state why the synthetic substance is no longer necessary or appropriate for the production or handling of an organic product.

When petitioning for the inclusion on the National List of a nonsynthetic or nonagricultural substance as a prohibited substance the petition must state why the nonsynthetic or nonagricultural substance should not be permitted in the production or handling of an organic product.

When petitioning for the removal from the National List of a nonsynthetic or nonagricultural substance as a prohibited substance the petition must state why the nonsynthetic or nonagricultural substance should be permitted in the production or handling of an organic product.

13. A Commercial Confidential Information Statement which describes the specific required information contained in the petition that is considered to be Confidential Business Information (CBI) or confidential commercial information and the basis for that determination. Petitioners should limit their submission of confidential information to that needed to address the areas for which this notice requests information. Instructions for submitting CBI to the National List Petition process are presented in the instructions below:

(a) Financial or commercial information the applicant does not want disclosed for competitive reasons can be claimed as CBI. Applicants must submit a written justification to support each claim.

(b) "Trade secrets" (information relating to the production process, such as formulas, processes, quality control tests and data, and research methodology) may be claimed as CBI. This information must be (1) commercially valuable, (2) used in the

applicant's business, and (3) maintained in secrecy.

(c) Each page containing CBI material must have "CBI Copy" marked in the upper right corner of the page. In the right margin, mark the CBI information with a bracket and "CBI."

(d) The CBI-deleted copy should be a facsimile of the CBI copy, except for spaces occurring in the text where CBI has been deleted. Be sure that the CBI-deleted copy is paginated the same as the CBI copy. (The CBI-deleted copy of the application should be made from the same copy of the application which originally contained CBI.) Additional material (transitions, paraphrasing, or generic substitutions, etc.) should not be included in the CBI-deleted copy.

(e) Each page with CBI-deletions should be marked "CBI-deleted" at the upper right corner of the page. In the right margin, mark the place where the CBI material has been deleted with a bracket and "CBI-deleted."

(f) If several pages are CBI-deleted, a single page designating the numbers of deleted pages may be substituted for blank pages. (For example, "pages 7 through 10 have been CBI-deleted.")

(g) All published references that appear in the CBI copy should be included in the reference list of the CBI-deleted copy. Published information usually cannot be claimed as confidential.

However, the National List substance evaluations will involve a public and open process. Nonconfidential information will be available for public inspection.

The NOP Program Manager may request additional information from the petitioner following receipt of the petition.

In accordance with the Paperwork Reduction Act of 1980, Public Law 44 U.S.C. 3501 *et seq.*, the information collection requirements contained in this notice have been previously approved by OMB and were assigned OMB control number 0581-0181.

Authority: 7 U.S.C. 6501-6522.

Dated: July 7, 2000.

Sharon Bomer Lauritsen,

Acting Deputy Administrator, Transportation and Marketing.

[FR Doc. 00-17689 Filed 7-12-00; 8:45 am]

BILLING CODE 3410-02-P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 123

Military Reservist Economic Injury Disaster Loans

AGENCY: Small Business Administration (SBA).

ACTION: Notice of proposed rulemaking.

SUMMARY: With this document, SBA proposes to amend its Disaster Loan Program regulations to implement a new program authorized by the Veterans Entrepreneurship and Small Business Development Act of 1999. Under this new program, SBA would make a low interest, fixed rate loan available to a small business employing a military reservist if that reservist is called up to active military duty during a period of military conflict and if he or she is an essential employee critical to the success of the business' daily operation.

DATES: Submit comments on or before August 14, 2000.

ADDRESSES: Written comments should be sent to Bernard Kulik, Associate Administrator, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: Herbert Mitchell, Deputy Associate Administrator, Office of Disaster Assistance, 202-205-6734.

SUPPLEMENTARY INFORMATION: SBA proposes adding Disaster Loan Program regulations to implement the Military Reservist Economic Injury Disaster Loan Program ("program"). This rule proposes the program's requirements, application and loan approval process.

The Military Reservist Economic Injury Disaster Loan Program was authorized by Public Law 106-50, enacted on August 17, 1999. The program will allow SBA to make economic injury disaster loans (EIDL) to small businesses employing military reservists if those employees are called up to active duty during a period of military conflict (call-up) and those employees are essential to the success of the small businesses' daily operations.

Under this proposed rule, to qualify for the Military Reservist EIDL, a business would be required to show that the call-up of an essential employee has caused or will cause the business substantial economic injury. The interest rate for a Military Reservist EIDL would be the same as for other EIDL assistance. At the present time the statutory interest rate may not exceed 4 percent. SBA calculates interest rates quarterly, which could result in a lower rate in the future, but SBA proposes that

the interest rate at the time the Military Reservist EIDL application is filed would be the fixed rate for the entire term of the loan.

Section 123.500 contains program definitions conforming with those in Public Law 106–50.

Section 123.501 sets out the proposed program eligibility requirements including a reference to an “eligible small business as defined in 13 CFR Part 121.” While Public Law 106–50 describes an eligible or “qualified borrower” as a small business that “employs” an eligible reservist, Congress’ intent was that this program also include assistance to a small business sole proprietor who is an essential employee. *See* S. Rep. No. 254, 106th Cong., 1st Sess. 4 (1999). Therefore, SBA proposes to include such a category in the program eligibility requirements. In addition, this section includes the legislative requirement that the program apply only to military conflicts occurring or ending on or after March 24, 1999.

Under § 123.502 of this proposed rule, a small business would not be eligible to apply for a Military Reservist EIDL if it is an enterprise included in any of the categories described in §§ 123.101, 123.201, and 123.301 of this part. These sections include general ineligibility categories applying to all EIDL assistance. For example, a business would not be eligible if a principal owner of the business had been convicted, during the year preceding its application for a Military Reservist EIDL, of a felony during and in connection with a riot or civil disorder. Another example, a business would not be eligible if it is an agricultural enterprise as defined in § 123.201 of this part.

Under § 123.503 of this regulation, a business could not apply for a Military Reservist EIDL in anticipation of a call-up to active duty. It could only apply during a period beginning on the date the essential employee receives a call-up order and ending 90 days after the date the employee is discharged or released from active duty. The call-up of the essential employee would be the basis that triggers SBA’s assistance under this program.

Under proposed § 123.504, the business must submit a copy of the reservist’s call-up orders to show compliance with the statutory requirements described above. Also under this section, as a part of the application, the business owner must certify that the reservist is an essential employee and must detail the employee’s duties and responsibilities. In addition, the employee must indicate

in writing whether he or she concurs with such assessment. The application must also support a determination by SBA that the essential employee’s absence will result in substantial economic injury to the business.

SBA recognizes that the owner of a small business may be an essential employee of that business and may be called up and start active duty before applying for a Military Reservist EIDL. Accordingly, SBA proposes that it would accept a program application from a representative of the reservist if that representative has power of attorney to act on the behalf of the reservist for such matters.

SBA proposes to offer this program, in part, to support individuals who choose to serve the United States as military reservists. These individuals should not be put in a position where a call to military service jeopardizes their employment situation. Therefore, under this proposed rule, SBA would require that the business offer the essential employee the same or similar job upon return from active duty.

Under proposed § 123.506, an eligible small business may borrow from SBA up to \$1,500,000 necessary to meet its obligations as they mature, pay its ordinary and necessary expenses, and enable it to market, produce or provide products or services ordinarily marketed, produced, or provided by the business, which cannot be done as a result of the essential employee’s active military service. This amount may not exceed the amount of working capital the business could have generated had the call-up not occurred. It may not include amounts the business, together with its affiliates and principal owners, could provide without undue hardship. SBA may consider waiving this loan limit if it determines that the conditions identified in § 123.507 are satisfied.

Under § 123.509, this rule proposes prohibitions on the use of loan proceeds. For example, EIDL funds could not be used to:

- (1) Refinance debt which the business incurred before the call up of the essential employee,
- (2) Make payments on loans owned by SBA or another federal agency or a Small Business Investment Company licensed under the Small Business Investment Act,
- (3) Pay any obligations resulting from a tax penalty or any non-tax criminal fine, or penalty for non-compliance with a law, regulation, or order of a federal, state, regional, or local agency or similar matter,
- (4) Repair physical damage, or
- (5) Pay dividends or other disbursements to owners, partners,

officers or stockholders, except for reasonable remuneration directly related to their performance of services for the business.

Compliance With Executive Orders 12866, 12988, 13132, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Paperwork Reduction Act (44 U.S.C. Ch. 35)

The Office of Management and Budget (OMB) reviewed this rule as a “significant” regulatory action under Executive Order 12866.

SBA has determined that this proposed rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612. Since October, 1997, only 19,592 military reservists have been called up for active duty. This figure averages just under 10,000 call-ups per year. Further, 52 percent of the non-farm workforce of this country is employed by businesses that employ 500 or fewer persons. Applying this percentage to the average number of call-ups for the past years indicates that 5,200 of the call-ups affected non-farm businesses with less than 500 employees. Of this figure, SBA estimates that 30 percent of these individuals may be essential employees. This results in an estimate of approximately 1,590 businesses that could be affected by this proposed rule. SBA does not believe that this is a substantial number of small businesses. Furthermore, SBA has taken steps to simplify the loan documentation process for small business owners and permits small business owners to self-certify the designation of essential employees. These steps will substantially reduce any economic impact on small business owners applying for assistance.

For the purposes of the Paperwork Reduction Act, 44 U.S.C. ch. 35, SBA has submitted the Military Reservist Economic Injury Disaster Loan Program Loan Application (application) to OMB for review. SBA is requesting that OMB approves or disapproves of this collection of information 30 days after submission. This application would allow small businesses to apply for Military Reservist EIDLs and would provide SBA with the information necessary to evaluate applicants. The application would request such information as name, address, type of business, management information, organization type, name of essential employee who is a military reservist employed by the small business, explanation of the designation of the employee as “essential” and financial

information to permit SBA to determine repayment ability.

The applicant would complete an application each time it applies for a Military Reservist Economic Injury Disaster Loan. SBA estimates that the time necessary to complete an application for the Military Reservist Economic Injury Disaster Loan Program would average 2 hours.

In addition, SBA is proposing to collect ordinary and usual financial statements before making subsequent loan disbursements under the Military Reservist EIDL Program (see § 123.511). This information will allow SBA to assess the continued need for disbursements under this program.

SBA is seeking comments on: (a) Whether the information SBA proposes to collect is necessary for the proper performance of this program, (b) the accuracy of the burden estimate (time estimated to complete the application), (c) ways to minimize the burden estimate, and (d) ways to enhance the quality of the information being collected. Please send comments regarding this proposed collection to David Rostker, Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, and to Bernard Kulik, Associate Administrator, Office of Disaster Assistance, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

For purposes of Executive Order 13132, SBA has determined that this proposed rule has no federalism implications.

For purposes of Executive Order 12988, SBA certifies that this proposed rule is drafted, to the extent practicable, to be in accordance with the standards set forth in section 3 of that Order.

List of Subjects in 13 CFR Part 123

Disaster assistance, Loan programs—business, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA amends 13 CFR part 123 as follows:

PART 123—DISASTER LOAN PROGRAM

1. The authority citation for part 123 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(b), 636(c) and 636(f); Pub. L. 102–395, 106 Stat. 1828, 1864; Pub. L. 103–75, 107 Stat. 739; Pub. L. 106–50, 113 Stat. 233.

2. In part 123 add the designated centerheading “Military Reservist Economic Injury Disaster Loans” and

§§ 123.500 through 123.512 to read as follows:

Military Reservist Economic Injury Disaster Loans

Sec.

123.500 Definitions.

123.501 When is your business eligible to apply for a Military Reservist Economic Injury Disaster Loan (EIDL)?

123.502 When is your business ineligible to apply for a Military Reservist EIDL?

123.503 When can you apply for a Military Reservist EIDL?

123.504 How do you apply for a Military Reservist EIDL?

123.505 What if you are both an essential employee and the owner of the small business and you started active duty before applying for a Military Reservist EIDL?

123.506 How much can you borrow under the Military Reservist EIDL Program?

123.507 Under what circumstances will SBA consider waiving the \$1.5 million loan limit?

123.508 How can you use Military Reservist EIDL funds?

123.509 What can't you use Military Reservist EIDL funds for?

123.510 What if you don't use your Military Reservist EIDL funds as authorized?

123.511 How will SBA disburse Military Reservist EIDL funds?

123.512 What is the interest rate on a Military Reservist EIDL?

Military Reservist Economic Injury Disaster Loans

§ 123.500 Definitions.

The following terms have the same meaning wherever they are used in §§ 123.500 through 123.512.

(a) *Essential employee* is an individual (whether or not an owner of a small business) whose managerial or technical expertise is critical to the successful day-to-day operations of a small business.

(b) *Military reservist* is a member of a reserve component of the Armed Forces ordered to active duty during a period of military conflict.

(c) *Period of military conflict* means:

(1) A period of war declared by the Congress,

(2) A period of national emergency declared by the Congress or by the President, or

(3) A period of contingency operation, as defined in 10 U.S.C. 101(a).

(d) *Principal owner* is a person, legal entity or affiliate(s) which owns 20 percent or more of the small business.

(e) *Substantial economic injury* means an economic harm to the small business such that it cannot:

(1) Meet its obligations as they mature,

(2) Pay its ordinary and necessary operating expenses, or

(3) Market, produce or provide a product or service ordinarily marketed, produced or provided by the business. Loss of anticipated profits or a drop in sales is not considered substantial economic injury for this purpose.

§ 123.501 When is your business eligible to apply for a Military Reservist Economic Injury Disaster Loan (EIDL)?

Your business is eligible to apply for a Military Reservist EIDL if:

(a) It is a small business as defined in 13 CFR part 121,

(b) The owner of the business is a military reservist and an essential employee or the business employs a military reservist who is an essential employee,

(c) The essential employee has been called-up to active military duty during a period of military conflict existing on or after March 24, 1999, and

(d) The business has suffered or is likely to suffer substantial economic injury as a result of the absence of the essential employee.

§ 123.502 When is your business ineligible to apply for a Military Reservist EIDL?

Your business is ineligible for a Military Reservist EIDL if it, together with its affiliates, is subject to any of the following conditions:

(a) Any of your business' principal owners has been convicted, during the past year, of a felony during and in connection with a riot or civil disorder;

(b) You have assumed the risk associated with employing the military reservist, as determined by SBA (for example, hiring the “essential employee” after the employee has received call-up orders or been notified that they are imminent);

(c) Any of your business' principal owners is presently incarcerated, or on probation or parole following conviction of a serious criminal offense;

(d) Your business is an agricultural enterprise. Agricultural enterprise means a business primarily engaged in the production of food and fiber, ranching and raising of livestock, aquaculture and all other farming and agriculture-related industries. (See 13 CFR 121.107, “How does SBA determine a concern's ‘primary industry?’”) Sometimes a business is engaged in both agricultural and non-agricultural business activities. If the primary business activity of the business is not an agricultural enterprise, it may apply for a Military Reservist EIDL, but loan proceeds may not be used, directly or indirectly, for the benefit of the agricultural enterprises.

(e) Your business is engaged in any illegal activity;

(f) Your business is a government owned entity (except for a business owned or controlled by a Native American tribe);

(g) Your business presents live performances of a prurient sexual nature or derives directly or indirectly more than insignificant gross revenue through the sale of products or services or through the presentation of any depictions or displays, of a prurient sexual nature;

(h) Your business is engaged in lending, multi-level sales distribution, speculation, or investment (except for real estate investment with property held for commercial rental);

(i) Your business is a non-profit or charitable concern;

(j) Your business is a consumer or marketing cooperative;

(k) Your business is not a small business concern;

(l) Your business derives more than one-third of its gross annual revenue from legal gambling activities;

(m) Your business is a loan packager which earns more than one-third of its gross annual revenue from packaging SBA loans;

(n) One of several of your business' principal activities is teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting; or

(o) Your business' principal activity is political or lobbying activities.

§ 123.503 When can you apply for a Military Reservist EIDL?

Your small business can apply for a Military Reservist EIDL any time beginning on the date your essential employee receives official call-up orders and ending 90 days after the date the essential employee is discharged or released from active duty.

§ 123.504 How do you apply for a Military Reservist EIDL?

To apply for a Military Reservist EIDL you must complete a SBA Military Reservist EIDL application package (SBA Form 5R and supporting documentation) including:

(a) A copy of the essential employee's official call-up orders for active duty showing the date of call up, and if known, the date of release from active duty;

(b) A statement from the business owner that the reservist is essential to the successful day-to-day operations of the business (detailing the employee's duties and responsibilities and explaining why these duties and responsibilities can't be completed in the essential employee's absence);

(c) A certification by the essential employee supporting that he or she concurs with the business owner's statement as described in paragraph (b) of this section;

(d) A written explanation and financial estimate of how the call-up of the essential employee has or will result in economic injury to your business;

(e) The steps your business is taking to alleviate the economic injury; and

(f) The business owners' certification that the essential employee will be offered the same or a similar job upon the employee's return from active duty.

§ 123.505 What if you are both an essential employee and the owner of the small business and you started active duty before applying for a Military Reservist EIDL?

If you are both an essential employee and the owner of the small business and you started active duty before applying for an Military Reservist EIDL, a person who has a power of attorney with the authority to borrow and make other related commitments on your behalf, may complete and submit the EIDL loan application package for you.

§ 123.506 How much can you borrow under the Military Reservist EIDL Program?

You can borrow a total loan amount of up to \$1.5 million until normal operations resume regardless of the number of essential employees called to active duty. You can't borrow more than the amount of working capital your business could have generated had the essential employee not been called to active duty.

§ 123.507 Under what circumstances will SBA consider waiving the \$1.5 million loan limit?

SBA will consider waiving the \$1.5 million dollar limit if you can certify to the following conditions and SBA approves of such certification based on the information supplied in your application:

(a) Your small business is a major source of employment. A major source of employment:

(1) Employs 10 percent or more of the work force within the commuting area of the geographically identifiable community (no larger than a county) in which the business employing the essential employee is located, provided that the commuting area does not extend more than 50 miles from such community; or

(2) Employs 5 percent of the work force in an industry within such commuting area and, if the small business is a non-manufacturing small business, employs no less than 50 employees in the same commuting area, or if the small business is a

manufacturing small business, employs no less than 150 employees in the commuting area; or

(3) Employs no less than 250 employees within such commuting area;

(b) Your small business is in imminent danger of going out of business as a result of one or more essential employees being called up to active duty during a period of military conflict, and a loan in excess of \$1.5 million is necessary to reopen or keep open the small business; and

(c) Your small business has used all reasonably available funds from the small business, its affiliates, its principal owners and all available credit elsewhere to alleviate the small business' economic injury. Credit elsewhere means that SBA believes your small business, its affiliates and principal owners could obtain financing from non-Federal sources on reasonable terms given your available cash flow and disposable assets.

§ 123.508 How can you use Military Reservist EIDL funds?

Your small business can use Military Reservist EIDL to:

(a) Meet obligations as they mature,

(b) Pay ordinary and necessary operating expenses, or

(c) Enable the business to market, produce or provide products or services ordinarily marketed, produced, or provided by the business, which cannot be done as a result of the essential employee's military call-up.

§ 123.509 What can't you use Military Reservist EIDL funds for?

Your small business can not use Military Reservist EIDL funds for purposes described in 13 CFR 123.303(b) (See § 123.303, "How can my business spend my economic injury disaster loan?").

§ 123.510 What if you don't use your Military Reservist EIDL funds as authorized?

If your small business does not use Military Reservist EIDL funds as authorized by § 123.509, then § 123.9 applies (See § 123.9, "What happens if I don't use loan proceeds for the intended purpose?").

§ 123.511 How will SBA disburse Military Reservist EIDL funds?

SBA will disburse your funds in quarterly installments (unless otherwise specified in your loan authorization agreement) based on a continued need as demonstrated by comparative financial information. On or about 30 days before your scheduled fund disbursement, SBA will request ordinary and usual financial statements

(including balance sheets and profit and loss statements). Based on this information, SBA will assess your continued need for disbursements under this program. Upon making such assessment, SBA will notify you of the status of future disbursements.

§ 123.512 What is the interest rate on a Military Reservist EIDL?

The interest rate on a Military Reservist EIDL will be 4 percent per annum or less. SBA will publish the interest rate quarterly in the **Federal Register**.

Dated: June 30, 2000.

Aida Alvarez,
Administrator.

[FR Doc. 00-17560 Filed 7-12-00; 8:45 am]

BILLING CODE 8025-01-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Chapter 1

[Docket No. FAA-2000-7623]

Review of Existing Regulations

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Review of regulations; request for comments.

SUMMARY: This notice invites you, as a member of the public, to tell us, the FAA, which regulations now in effect you believe we should amend, eliminate, or simplify. We are publishing this notice in response to Presidential Executive Order No. 12866, directing certain Federal agencies to periodically review their regulations. We need to ensure that they are consistent with statutory authority and are in the public interest. Your comments will assist us in conducting this review and in determining what actions we should take, if any.

DATES: Comments should be submitted on or before October 11, 2000.

ADDRESSES: Comments should be mailed or delivered in duplicate to: U.S. Department of Transportation Dockets, Docket No. [FAA-2000-7623], 400 Seventh Street, SW., Room Plaza 401, Washington, DC 20590. Comments may be filed and examined in Room Plaza 401 between 10 a.m. and 5 p.m. weekdays, except Federal holidays. Comments also may be sent electronically to the Dockets Management System (DMS) at the following Internet address: <http://dms.dot.gov>. Commenters who wish to file comments electronically should

follow the instructions on the DMS web site.

FOR FURTHER INFORMATION CONTACT: Gerri Robinson, ARM-24, Office of Rulemaking, Federal Aviation Administration, 800 Independence Ave. SW., Washington, DC 20591; telephone (202) 267-9678, facsimile (202) 267-5075.

SUPPLEMENTARY INFORMATION: In recent years, the FAA conducted several regulatory reviews. In his 1992 State of the Union address, then-President Bush called for a 90-day moratorium on and review of Federal regulations. We responded by asking for public comments on our regulatory program as part of that overall government review (57 FR 4744, Feb. 7, 1992). Based on comments we received, we revised our regulatory agenda.

In 1994, we did another public review (59 FR 1362, Jan. 10, 1994) responding to recommendations from the National Commission to Ensure a Strong Competitive Airline Industry. We were also responding to Vice President Gore's National Performance Review and acting on Department of Transportation (DOT) and FAA regulatory initiatives. We initiated that review of our regulations to reduce any unjustified burdens and as a result of that review we also revised our regulatory agenda and our priorities. At the same time, we announced a Regulatory Review Program to seek public input every three years (60 FR 44142, Aug. 24, 1995). After each review, we published a disposition of the comments.

The most recent review in the 3-year review cycle was announced in the **Federal Register** on May 15, 1997 (62 FR 26894, May 15, 1997). As a result of the Review of Existing Rules, the FAA identified several issues that it determined would be addressed in future rulemaking projects and concluded the review with a general disposition of comments on October 22, 1998 (63 FR 56539, Oct. 22, 1998).

Three-Year Regulatory Review Program; Request for Comments

As part of this ongoing Regulatory Review Program, you may submit a total of three regulations, in priority order, that you believe should be amended, revised, or eliminated. Our agency's goal is to identify regulations which impose unjustified regulatory burdens or are no longer necessary. We also want to identify regulations that need to be clarified or simplified, or overlap, duplicate, or conflict with other regulations. Also, please identify any regulations that have a significant economic burden on a substantial

number of small entities that you consider no longer justified.

To focus on areas of greatest interest, and to effectively manage FAA resources, we ask that you limit your comments to the issues you consider most urgent, and list them in priority order. We will review the issues addressed by all the commenters in light of our current regulatory agenda (64 FR 64682, November 22, 1999). We will consider your comments and adjust our regulatory priorities consistent with our statutory responsibilities. When we are done reviewing all comments, we will publish a summary and an explanation of how we will act on them, telling you how we will adjust our priorities.

Finally, please give us any specific suggestions where the regulations could be redone to be performance-based rather than prescriptive and submit your suggested language.

Issued in Washington DC, on July 7, 2000.

Thomas E. McSweeney,
Associate Administrator for Regulation and Certification.

[FR Doc. 00-17790 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 99-NM-243-AD]

RIN 2120-AA64

Airworthiness Directives; McDonnell Douglas Model MD-11 and MD-11F Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the superseding of an existing airworthiness directive (AD), applicable to certain McDonnell Douglas Model MD-11 and MD-11F series airplanes, that currently requires opening the circuit breaker of the pneumatic sense line heater tape, installing an inoperative ring, and coiling and stowing the electrical wire to the circuit breaker of the pneumatic sense line heater tape. That AD also provides for an optional inspection, which, if accomplished, constitutes terminating action for deactivation of the pneumatic sense line heater tape. This proposal is prompted by the FAA's determination that the one-time optional terminating inspection in the existing AD does not adequately detect chafing, electrical arcing, or inadequate

clearance of the subject area. The actions specified by the proposed AD are intended to detect and correct such inadequate clearance, which could result in a hole in the fuel feed pipe caused by electrical arcing, and consequent fuel leakage and possible ignition of the fuel vapors. This action would require repetitive inspections of the subject area and corrective actions, if necessary, and would provide for an optional terminating modification(s) for the repetitive inspection requirements.

DATES: Comments must be received by August 28, 2000.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 99-NM-243-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056. Comments may be inspected at this location between 9:00 a.m. and 3:00 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227-1232. Comments may also be sent via the Internet using the following address: 9-anm-nprmcomment@faa.gov. Comments sent via fax or the Internet must contain "Docket No. 99-NM-243-AD" in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Aircraft Group, Long Beach Division, 3855 Lakewood Boulevard, Long Beach, California 90846, Attention: Technical Publications Business Administration, Dept. C1-L51 (2-60). This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the the FAA, Transport Airplane Directorate, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California.

FOR FURTHER INFORMATION CONTACT: Stephen Kolb, Senior Aerospace Engineer, Propulsion Branch, ANM-140L, FAA, Los Angeles Aircraft Certification Office, 3960 Paramount Boulevard, Lakewood, California 90712; telephone (562) 627-5244; fax (562) 627-5210.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall

identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this notice may be changed in light of the comments received.

Submit comments using the following format:

- Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.
- For each issue, state what specific change to the proposed AD is being requested.
- Include justification (*e.g.*, reasons or data) for each request.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the proposed rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket for examination by interested persons. A report summarizing each FAA-public contact concerned with the substance of this proposal will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: "Comments to Docket Number 99-NM-243-AD." The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM-114, Attention: Rules Docket No. 99-NM-243-AD, 1601 Lind Avenue, SW., Renton, Washington 98055-4056.

Discussion

On April 16, 1998, the FAA issued AD 98-08-11, amendment 39-10491 (63 FR 20066, April 23, 1998), applicable to certain McDonnell Douglas Model MD-11 and MD-11F series airplanes, to require opening the circuit breaker of the pneumatic sense line heater tape, installing an inoperative ring, and coiling and stowing the electrical wire to the circuit breaker of the pneumatic sense line heater tape. That AD also provides for an optional inspection, which, if accomplished, constitutes terminating action for deactivation of the pneumatic sense line heater tape. That action was prompted by a report indicating that, while an airplane was

on the ground, fuel was found leaking from the fuel feed pipe of the number 2 engine due to inadequate clearance between the fuel feed pipe and the pneumatic sense line heater tape. The requirements of that AD are intended to detect and correct such inadequate clearance, which could result in a hole in the fuel feed pipe caused by electrical arcing, and consequent fuel leakage and possible ignition of the fuel vapors.

Actions Since Issuance of Previous Rule

Since the issuance of AD 98-08-11, the FAA has determined that the optional one-time inspection provided by that AD does not ensure adequate clearance between the heater tape of the pneumatic sense lines and fuel feed pipe of the number 2 engine, which could result in a hole in the fuel feed pipe caused by electrical arcing, and consequent fuel leakage and possible ignition of the fuel vapors. Because the pneumatic sense lines can move and cause the heater tape to contact the fuel feed pipe of the number 2 engine, the FAA finds that repetitive detailed visual inspections of the subject area are necessary in order to address the identified unsafe condition of this AD.

Explanation of Relevant Service Information

The FAA has reviewed and approved McDonnell Douglas Alert Service Bulletin MD11-36A030, Revision 03, dated December 14, 1999. The alert service bulletin describes procedures for opening the circuit breaker of the pneumatic sense line heater tape, installing an inoperative ring, and coiling and stowing the electrical wire to the circuit breaker of the pneumatic sense line heater tape. Accomplishment of the above actions deactivates the pneumatic sense line heater tape. The alert service bulletin also describes procedures for repetitive detailed visual inspections to detect chafing, electrical arcing, or inadequate clearance of the heater tape of the pneumatic sense lines and fuel feed pipe of the number 2 engine; and corrective actions, if necessary. The corrective actions involve repositioning the pneumatic sense lines, rewinding the insulation on the pneumatic sense lines, and repairing or replacing damaged parts with new parts. Accomplishment of the repetitive inspections eliminates the need for deactivation of the pneumatic sense line heater tape.

The FAA also has reviewed and approved the following optional service bulletins. Accomplishment of the applicable actions specified in these service bulletins eliminates the need for

the repetitive inspections described above.

- McDonnell Douglas Service Bulletin MD11-36-018 R01, Revision 1, dated July 18, 1995, describes, for certain airplanes, procedures for modification of the high stage pilot valve located in the aft accessory compartment (including purging the sense lines and revising wiring of the high stage pilot valve).

- McDonnell Douglas Service Bulletin MD11-36-026, dated September 30, 1996, describes, for certain airplanes, procedures for disconnecting and splicing together the heater tape wires of the pneumatic sense lines for the high stage and fan air valves from the terminal strips in the lower vertical stabilizer.

- McDonnell Douglas Service Bulletin MD11-36-025 R01, Revision 01, dated July 31, 1997, describes, for certain airplanes, modification and reidentification of the pilot pressure regulator valve located in the aft accessory compartment (including purging the sense lines and revising the wiring of the pilot pressure regulator valve).

- McDonnell Douglas Service Bulletin MD11-36-028, dated December 7, 1998, describes, for certain airplanes, procedures for disconnecting the heater tape wires from their respective terminal strips and splicing the wire ends together.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would supersede AD 98-08-11 to require accomplishment of the actions specified in McDonnell Douglas Alert Service Bulletin MD11-36A030, Revision 03, dated December 14, 1999, described previously. The proposed AD also would provide for an optional terminating modification for the repetitive inspection requirements. The proposed AD also would require that operators report results of inspection findings to the FAA.

The FAA is not proposing to mandate the modification specified in paragraph (d)(1), (d)(2), (d)(3), or (d)(4) of this AD for several reasons:

1. Accessing the pneumatic sense lines and fuel feed pipe of the number 2 engine for inspection is easily accomplished.
2. The chafing, electrical arcing, or inadequate clearance of the subject area is easily detectable.
3. The repetitive detailed visual inspections will minimize the

probability of a hole in the fuel feed pipe being caused by electrical arcing, which may result in fuel leakage and possible ignition of the fuel vapor.

Differences Between the Proposed AD and Relevant Service Information

Operators should note that, although McDonnell Douglas Alert Service Bulletin MD11-26A030 recommends accomplishing the repetitive detailed visual inspections at intervals not to exceed 5,000 flight hours, the FAA has determined that an interval of 5,000 flight hours or 18 months, whichever occurs later, would address the identified unsafe condition in a timely manner. In developing an appropriate compliance time for this AD, the FAA considered not only the manufacturer's recommendation, but the degree of urgency associated with addressing the subject unsafe condition, the high utilization of some operator's affected fleet, and the time necessary to perform the inspection (one hour). In light of all of these factors, the FAA finds an interval of 5,000 flight hours or 18 months, whichever occurs later, for the repetitive detailed visual inspections to be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

In addition to the procedures described above, McDonnell Douglas Service Bulletin MD11-36-018 R01, Revision 1, describes procedures for modification of the high stage pilot valve of the left and right wings, and McDonnell Douglas Service Bulletin MD11-36-025 R01, Revision 01, describes procedures for modification and reidentification of the pilot pressure regulator valve of the left and right wings. Accomplishment of these modifications is not necessary to comply with certain optional actions provided by this AD. These particular modifications do not address the identified unsafe condition of this AD.

Cost Impact

There are approximately 174 Model MD-11 and MD-11F series airplanes of the affected design in the worldwide fleet. The FAA estimates that 67 airplanes of U.S. registry would be affected by this proposed AD.

The modification that is currently required by AD 98-08-11, and retained in this proposed AD, takes approximately 1 work hour per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the currently required actions on U.S. operators is estimated to be \$4,020, or \$60 per airplane.

The new inspection that is proposed in this AD action would take approximately 1 work hour per airplane to accomplish, at an average labor rate of \$60 per work hour. Based on these figures, the cost impact of the new inspection proposed by this AD on U.S. operators is estimated to be \$4,020, or \$60 per airplane, per inspection cycle.

The cost impact figures discussed above are based on assumptions that no operator has yet accomplished any of the current or proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this AD were not adopted.

Should an operator elect to accomplish the optional terminating action that would be provided by paragraph (d)(1) of this proposed AD, it would take approximately 4 work hours to accomplish it, at an average labor rate of \$60 per work hour. The cost of required parts would be approximately \$4,500 per airplane. Based on these figures, the cost impact of this optional terminating action would be \$4,740 per airplane.

Should an operator elect to accomplish the optional terminating action that would be provided by paragraph (d)(2) of this proposed AD, it would take approximately 1 work hour to accomplish it, at an average labor rate of \$60 per work hour. The cost of required parts would be approximately \$50 per airplane. Based on these figures, the cost impact of this optional terminating action would be \$110 per airplane.

Should an operator elect to accomplish the optional terminating action that would be provided by paragraph (d)(3) of this proposed AD, it would take approximately 2 work hours to accomplish it, at an average labor rate of \$60 per work hour. The cost of required parts would be approximately \$2,500 per airplane. Based on these figures, the cost impact of this optional terminating action would be \$2,620 per airplane.

Should an operator elect to accomplish the optional terminating action that would be provided by paragraph (d)(4) of this proposed AD, it would take approximately 4 work hours to accomplish it, at an average labor rate of \$60 per work hour. The cost of required parts would be approximately \$50 per airplane. Based on these figures, the cost impact of this optional terminating action would be \$290 per airplane.

Regulatory Impact

The regulations proposed herein would not have a substantial direct effect on the States, on the relationship

between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a "significant regulatory action" under Executive Order 12866; (2) is not a "significant rule" under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration proposes to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) as follows:

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

2. Section 39.13 is amended by removing amendment 39–10491 (63 FR 20066, April 23, 1998), and by adding a new airworthiness directive (AD), to read as follows:

McDonnell Douglas: Docket 99–NM–243–AD. Supersedes AD 98–08–11, Amendment 39–10491.

Applicability: Model MD–11 and MD–11F series airplanes, having manufacturer's fuselage numbers 0447 through 0552 inclusive, and 0554 through 0620 inclusive; certificated in any category.

Note 1: This AD applies to each airplane identified in the preceding applicability provision, regardless of whether it has been modified, altered, or repaired in the area subject to the requirements of this AD. For

airplanes that have been modified, altered, or repaired so that the performance of the requirements of this AD is affected, the owner/operator must request approval for an alternative method of compliance in accordance with paragraph (f) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if the unsafe condition has not been eliminated, the request should include specific proposed actions to address it.

Compliance: Required as indicated, unless accomplished previously.

To detect and correct inadequate clearance between the fuel feed pipe of the number 2 engine and the pneumatic sense line heater tape, which could result in a hole in the fuel feed pipe caused by electrical arcing, and consequent fuel leakage and possible ignition of the fuel vapors, accomplish the following:

Restatement of Requirements of AD 98–08–11

Modification

(a) Within 7 days after April 28, 1998 (the effective date of AD 98–08–11, amendment 39–10491), open the circuit breaker of the pneumatic sense line heater tape, install an inoperative ring, and coil and stow the electrical wire to the circuit breaker of the pneumatic sense line heater tape, in accordance with Phase 1 of the Accomplishment Instructions of McDonnell Douglas Alert Service Bulletin MD11–36A030, dated April 2, 1998; Revision 01, dated September 28, 1998; Revision 02, dated July 27, 1999; or Revision 03, dated December 14, 1999. Accomplishment of these actions deactivates the pneumatic sense line heater tape.

Note 2: The pneumatic sense line heater tape of the number 2 engine has been deactivated. This deactivation may cause a nuisance shutdown of the bleed air system of the number 2 engine at top of descent.

New Requirements of This AD

Repetitive Inspections

(b) Except as provided in paragraph (d) of this AD, within 6 months after the effective date of this AD, perform a detailed visual inspection to detect chafing, electrical arcing, or inadequate clearance of the pneumatic sense lines and fuel feed pipe of the number 2 engine, in accordance with Phase 2 of the Accomplishment Instructions of McDonnell Douglas Alert Service Bulletin MD11–36A030, Revision 03, dated December 14, 1999. Repeat the inspection thereafter at intervals not to exceed 5,000 flight hours or 18 months, whichever occurs later. Accomplishment of the detailed visual inspection constitutes terminating action for the deactivation requirements of paragraph (a) of this AD.

Note 3: For the purposes of this AD, a detailed visual inspection is defined as: "An intensive visual examination of a specific structural area, system, installation, or assembly to detect damage, failure, or irregularity. Available lighting is normally supplemented with a direct source of good lighting at intensity deemed appropriate by the inspector. Inspection aids such as mirror, magnifying lenses, etc. may be used. Surface cleaning and elaborate access procedures may be required."

Note 4: Detailed visual inspections accomplished before the effective date of this AD in accordance with McDonnell Douglas Alert Service Bulletin MD11–36A030, dated April 2, 1998, Revision 01, dated September 28, 1998, or Revision 02, dated July 27, 1999; are considered acceptable for compliance with the requirements of paragraph (b) of this AD.

Corrective Actions

(c) If any discrepancy (*i.e.*, as identified in Conditions 1, 2, 3, 4, and 5 of the Accomplishment Instructions of McDonnell Douglas Alert Service Bulletin MD11–36A030, Revision 03, dated December 14, 1999) is detected during any inspection required by paragraph (b) of this AD, before further flight, perform the applicable corrective actions in accordance with Conditions 1, 2, 3, 4, or 5 of the Accomplishment Instructions of McDonnell Douglas Alert Service Bulletin MD11–36A030, Revision 03, dated December 14, 1999, except as indicated in paragraphs (c)(1) and (c)(2) of this AD.

(1) Accomplishment of the modification of the high stage pilot valve of the left and right wings in accordance with McDonnell Douglas Service Bulletin MD11–36–018 R01, Revision 1, dated July 18, 1995, is NOT necessary to comply with the applicable corrective action in Condition 5 of the Accomplishment Instructions of the service bulletin.

(2) Accomplishment of the modification and reidentification of the pilot pressure regulator valve of the left and right wings in accordance with McDonnell Douglas Service Bulletin MD11–36–025 R01, Revision 01, dated July 31, 1997, is NOT necessary to comply with the applicable corrective action in Condition 5 of the Accomplishment Instructions of the service bulletin.

Optional Actions

(d) Accomplishment of the action(s) specified in paragraphs (d)(1), (d)(2), (d)(3), and (d)(4) of this AD, as applicable, constitutes terminating action for the repetitive inspection requirements of paragraph (b) of this AD.

(1) For airplanes having manufacturer's fuselage numbers 0447 through 0552 inclusive, and 0554

through 0573 inclusive: Before or in conjunction with the actions specified in paragraph (d)(2) of this AD, modify the high stage pilot valve located in the aft accessory compartment (including purging the sense lines and revising wiring of the high stage pilot valve), in accordance with McDonnell Douglas Service Bulletin MD11-36-018 R01, Revision 1, dated July 18, 1995.

Note 5: In addition to the procedures for modification of the high stage pilot valve located in the aft accessory compartment, McDonnell Douglas Service Bulletin MD11-36-018 R01, Revision 1, dated July 18, 1995, also describes procedures for modification of the high stage pilot valve of the left and right wings. Accomplishment of modification of the high stage pilot valve of the left and right wings is NOT necessary to comply with the optional action provided by paragraph (d)(1) of this AD.

Note 6: Modification of the high stage pilot valve of the aft accessory compartment accomplished before the effective date of this AD in accordance with McDonnell Douglas Service Bulletin MD11-36-018, dated March 28, 1995, is considered acceptable for compliance with the actions specified in paragraph (d)(1) of this AD.

(2) For airplanes having manufacturer's fuselage numbers 0447 through 0552 inclusive, and 0554 through 0608 inclusive: Disconnect and splice together the heater tape wires of the pneumatic sense lines for the high stage and fan air valves from the terminals strips in the lower vertical stabilizer, in accordance with McDonnell Douglas Service Bulletin MD11-36-026, dated September 30, 1996.

(3) For airplanes having manufacturer's fuselage numbers 0447 through 0552 inclusive, and 0554 through 0608 inclusive: Before or in conjunction with the actions specified in paragraph (d)(4) of this AD, modify and reidentify the pilot pressure regulator valve located in the aft accessory compartment (including purging the sense lines and revising the wiring of the pilot pressure regulator valve), in accordance with McDonnell Douglas Service Bulletin MD11-36-025 R01, Revision 01, dated July 31, 1997.

Note 7: In addition to the procedures for modification and reidentification of the pilot pressure regulator valve located in the aft accessory compartment, McDonnell Douglas Service Bulletin MD11-36-025 R01, Revision 01, dated July 31, 1997, also describes procedures for modification and reidentification of the pilot pressure regulator valve of the left and right wings. Accomplishment of the modification and reidentification of the pilot pressure regulator valve of the left and right wings is *not* necessary to comply with the optional action provided by paragraph (d)(3) of this AD.

Note 8: Modification and reidentification of the pilot pressure regulator valve of the aft accessory compartment accomplished before the effective date of this AD in accordance with McDonnell Douglas Service Bulletin MD11-36-025, dated February 14, 1997; is considered acceptable for compliance with the actions specified in paragraph (d)(3) of this AD.

(4) For airplanes having manufacturer's fuselage numbers 0447 through 0464 inclusive, 0466 through 0552 inclusive, and 0554 through 0620 inclusive: Disconnect the heater tape wires from their respective terminal strips and splice the wire ends together, in accordance with McDonnell Douglas Service Bulletin MD11-36-028, dated December 7, 1998.

Reporting

(e) Within 10 days after accomplishing any inspection required by paragraph (b) of this AD, submit a report of the inspection results (only negative findings) to the Manager, Los Angeles Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate, 3960 Paramount Boulevard, Lakewood, California 90712-4137; fax (562) 627-5210. Information collection requirements contained in this regulation have been approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 *et seq.*) and have been assigned OMB Control Number 2120-0056.

Alternative Methods of Compliance

(f) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Los Angeles ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Los Angeles ACO.

Note 9: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Los Angeles ACO.

Special Flight Permits

(g) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

Issued in Renton, Washington, on July 7, 2000.

John J. Hickey,

*Manager, Transport Airplane Directorate,
Aircraft Certification Service.*

[FR Doc. 00-17758 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Parts 20, 58, 170, 171, 174, and 179

[Docket No. 99N-5556]

Food Additives: Food Contact Substance Notification System

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to implement the premarket notification process for food contact substances (FCS's) established by the Food and Drug Administration Modernization Act (FDAMA) of 1997. Once implemented, the notification process will be the primary method for authorizing new uses of food additives that are FCS's. FDA is proposing regulations that identify the circumstances under which a food additive petition (FAP) will be required to authorize the use of an FCS; specify the information required in a notification for an FCS; describe the administration of the notification process; and establish the procedure by which the agency may deem a notification to no longer be effective. Additionally, FDA is announcing elsewhere in this issue of the **Federal Register** the availability of an administrative guidance document relating to the preparation of premarket notifications (PMN's).

DATES: Submit written comments by September 26, 2000, except that comments regarding information collection provisions should be submitted by August 14, 2000.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit written comments on the information collection requirements to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Bldg., 725 17th St. NW., rm. 10235, Washington, DC 20503, ATTN: Desk Officer for FDA.

FOR FURTHER INFORMATION CONTACT: Mitchell Cheeseman, Center for Food Safety and Applied Nutrition (HFS-215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3083.

SUPPLEMENTARY INFORMATION:

I. Background

A. History

In 1958, Congress amended the Federal Food, Drug, and Cosmetic Act (the act) to require premarket approval of food additives (sections 201(s), 402(a)(2)(C), and 409 (21 U.S.C. 321(s), 342(a)(2)(C), and 348)). "Food additive" is defined in section 201(s) of the act as "any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food * * *," unless such substance is generally recognized as safe (GRAS) by qualified experts or is prior sanctioned for its intended use. Under section 409 of the act as originally established, food additives require premarket approval by FDA and publication of a regulation authorizing their intended use. Subsequently, in 1995, FDA codified a process, the "threshold of regulation" process (§ 170.39 (21 CFR 170.39)), by which certain food additives may be exempted from the requirement of a listing regulation if the substance is expected to migrate to food at only negligible levels (60 FR 3658, July 17, 1995).

More recently, FDAMA (Public Law 105-115) amended section 409 of the act to establish a PMN process as the primary method for authorizing new uses of food additives that are FCS's. A "Food Contact Substance" is defined in section 409(h)(6) of the act as "any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food." FDA expects most new uses of FCS's that previously would have been regulated by issuance of a listing regulation in response to a FAP or would have been exempted from the requirement of a regulation under the threshold of regulation process will be the subject of PMN's. Historically, FDA has used the term "food contact material" to refer to the "materials" mentioned in the definition of an FCS; a food contact material may consist of one or more food contact substances. For the purposes of this document a food contact material is any material intended for use in contact with food

(e.g., packaging and food processing equipment).

While developing this proposed rule, FDA convened a public meeting on March 12, 1999 (hereinafter referred to as the March 1999 public meeting), to provide interested parties with an opportunity to comment on FDA's current thinking on administration of the PMN process, and on the agency's recommendations on chemistry and toxicology data for PMN's. FDA has considered those comments in developing this proposal. FDA has filed copies of the transcript of the meeting and the comments received from interested parties with the Dockets Management Branch (address above) (Docket No. 99N-0235). The transcript and comments are available for public review at the Dockets Management Branch.

B. Scope of the PMN Process

The FDAMA amendments and their legislative history make clear that the PMN process is to be the preferred process for authorizing new uses of FCS's. Specifically, section 409(h)(3)(A) of the act states that the PMN process shall be utilized for authorizing the marketing of FCS's except where the Secretary of Health and Human Services determines that the submission and review of a petition is necessary to provide adequate assurance of safety, or where FDA and any manufacturer or supplier agree that a petition may be submitted. (See S. Rept. 105-43, 105th Cong., 1st sess. 46 (1997); H. Rept. 105-306, 105th Cong., 1st sess. 19 (1997).) Section 409(h)(3)(B) of the act authorizes FDA to issue regulations to identify those circumstances under which a petition shall be required, considering criteria such as probable exposure to and potential toxicity of the FCS (21 U.S.C. 348(h)(3)(B)). Below, FDA is proposing regulations identifying the circumstances in which a FAP would be required to authorize the use of an FCS.

C. Comparison to the Food Additive Petition Process

Under the FAP process, a petitioner is required to show that the intended use of the food additive, including an FCS, is safe within the meaning of section 409(c)(3)(A) of the act. FAP's must contain information that addresses the identity of the food additive, the manufacture and the intended conditions of use of the food additive, and the safety of the food additive under its intended conditions of use. Within 15 days of receipt of the petition, FDA determines whether the information in the petition is adequate for filing and

notifies the petitioner in writing. If the petition is filed, FDA publishes a notice in the **Federal Register** announcing the filing of the petition. Data and information submitted in a FAP are available for public disclosure once a filing notice for the petition has been published. Once a petition is filed, FDA has up to 180 days to respond to the petition. If the petitioner delivers additional substantive information to the agency, either in response to agency questions or on the petitioner's own initiative, the petition is given a new filing date and the statutory clock begins to run anew. Once the agency concludes its review, the agency publishes an order in the **Federal Register**. Such order either includes a regulation that lists the conditions of use for the food additive FDA has determined to be safe or denies the petition and gives the reasons for the agency's decision. Importantly, regardless of the time that passes after the notice of filing is published, a food additive may not be legally marketed for the petitioned use until FDA publishes an authorizing regulation.

New section 409(h) of the act establishes a different process for food additives that are also FCS's. Under the PMN process for FCS's, a manufacturer or supplier of an FCS must notify FDA at least 120 days before marketing the FCS. The notification must include information on the identity and intended use of the FCS and describe the basis for the notifier's determination that the intended use is safe within the meaning of section 409(c)(3)(A) of the act. As with the FAP process, the burden is on the notifier to demonstrate the safety of the intended use of the FCS. If the information in the notification does not support the notifier's determination of safety, FDA has 120 days from the date of receipt of the notification to object and thereby, to prevent marketing of the substance. If the agency does not object to the notification within the 120 days, the substance may be legally marketed for the notified use. Section 409(h)(4) of the act requires FDA to keep confidential any information submitted in a premarket notification for the 120-day review period. Once the 120-day review period ends, information in the notification is disclosable except for trade secret and confidential commercial information.

The FAP process and the PMN process have two important similarities. First, under both processes, the petitioner or notifier bears the burden of demonstrating that the intended use of the FCS is safe. Second, for both processes, the applicable safety standard

is the standard in section 409(c)(3)(A) of the act.

There are also two important differences between the FAP process and the PMN process. First, in contrast to the petition process, in the PMN process, FDA is not required to publish an order announcing the agency's decision and, if appropriate, an authorizing regulation, in response to a notification. Second, under the petition process, once FDA publishes an authorizing regulation for a specific use of a food additive, any person may legally manufacture and market the food additive for the approved use. In contrast, under section 409(h)(6) of the act, a notification for an FCS is not effective for a similar or identical substance manufactured or prepared by anyone other than the manufacturer identified in the notification. Thus, additional manufacturers who wish to market the same FCS for the same use must also submit a notification to FDA.

II. Proposed Regulations for the Notification Process for Food Contact Substances

This section discusses the regulations that FDA is proposing to implement the notification process for FCS's. Additionally, FDA is announcing elsewhere in this issue of the **Federal Register** the availability of an administrative guidance document relating to the preparation of PMN's. FDA has previously announced the availability of two draft guidance documents on FDA's recommendations for chemistry and toxicology information to be included in PMN's in a notice published in the **Federal Register** of November 12, 1999 (64 FR 61648). Finally, in a direct final rule and companion proposed rule published in the **Federal Register** of May 11, 2000 (65 FR 30352 and 65 FR 30366, respectively), FDA announced that it was amending its regulations on environmental impact considerations to permit notifiers to claim in PMN's the categorical exclusions currently applicable to FAP's and threshold of regulation exemption requests for FCS's.

A. The Definition of a Food Contact Substance

The premarket notification process described in section 409(h) of the act applies only to food additives that are FCS's. As noted in section I.A of this document, an FCS is any substance that is intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in food. FDA is proposing to codify the statutory

definition of an FCS in proposed § 170.3(e)(3). In addition, FDA is proposing to amend the definition in § 170.3(e)(2) *Uses of food additives not requiring a listing regulation* (21 CFR 170.3(e)(2)) to include FCS's that are the subject of effective notifications. Notifications are required only for FCS's that are food additives; FCS's that are prior sanctioned or GRAS for their intended use do not require premarket notification to FDA.

In the past, FDA has informally characterized a food additive as being a "direct additive" if it was intended to have a technical effect in food, a "secondary direct additive" if it was intended to have a technical effect on food during food processing but not in the finished food as consumed, or an "indirect additive" if it was intended to have a technical effect in a food contact material. Even though each of these types of food additives is regulated in separate sections of Title 21 of the Code of Federal Regulations, no definition for direct, secondary direct, or indirect food additives exists in the codified regulations or the statute. PMN's will be accepted for unapproved uses of food additives that meet the definition of an FCS regardless of the location in the Code of Federal Regulations of any related codified approval.

In response to the March 1999 public meeting, FDA received comments from interested persons requesting that the agency accept notifications for two types of mixtures of FCS's. The first type of mixture of FCS's is a food contact substance "formulation" where all the FCS's in the mixture already may be legally marketed for their intended use in contact with food. FDA's current view on notifications for these mixtures, which will be referred to as "formulations," is discussed in section III of this document.

The second type of mixture of FCS's is a finished food contact material containing one or more FCS's that may not be legally marketed for their intended use at the time FDA receives the notification for the mixture, because the substances are unapproved food additives. FDA has tentatively concluded that a notification for a food contact material containing a new FCS may be submitted under section 409(h) of the act. FDA currently believes that a notification for a mixture of FCS's containing one or more new FCS's would be comparable to a FAP for the use of an indirect food additive in combination with a particular polymer or other food contact material. In this case, the types of polymers with which a petitioned substance is regulated for use represent a limitation on the

conditions of use for which the petitioned substance is authorized. Therefore, FDA currently believes that the conditions of use for an FCS that is the subject of a PMN could include detailed specifications on the other FCS's that may be used in combination with the notified FCS. However, FDA is concerned that it could be burdensome for FDA to review within the review period for a PMN a notification for more than one new FCS in a food contact material. Therefore, FDA has tentatively decided that a separate notification must be submitted for each new FCS intended for use in a given food contact material. In other words, a food contact material that includes a new use for two or more FCS's would require the submission of a separate notification for each of the new uses. FDA believes that this approach will permit the agency to better manage its resources and its statutory obligations concerning the review of notifications for FCS's.

B. Notifications for Food Contact Substances: General

Proposed § 170.100 contains the general regulations for submitting a PMN. The agency is proposing in § 170.100(a)(1) that a PMN contain all the information described in proposed § 170.101. In addition, proposed § 170.100(a)(2) states that a notifier may incorporate by reference any information in FDA files that is available to the notifier. This would include publicly disclosable material and material that the submitter of the information has given the notifier permission to reference. Finally, proposed § 170.100(a)(3) requires that a notifier provide all relevant information in English. This latter requirement is comparable to the requirement in 21 CFR 171.1(a) for data submitted in a FAP.

Proposed § 170.100(b) describes the circumstances under which FDA may choose not to accept a PMN. Under proposed § 170.100(b)(1) the submission of a PMN would be prohibited for any use of a substance that is already the subject of a regulation in 21 CFR parts 173 through 189. Under proposed § 170.100(b)(2) submission of a PMN would be prohibited for any use of a substance that is the subject of an exemption under the threshold of regulation process in § 170.39. Authorizations under section 409(b) of the act and exemptions under § 170.39 authorize the use of FCS's without regard to the manufacturer of the substance. Thus, a notification for a use already permitted by a regulation or an exemption would be redundant, and the review of such a notification would be

an inefficient use of agency resources. Moreover, such a notification could not be exclusive to the notifier and is therefore inconsistent with the FDAMA amendment to the statute. Therefore, FDA believes that it is appropriate to prohibit submission of a notification for a use of an FCS that is already permitted by a regulation or by an exemption. However, the agency requests comments regarding the appropriateness of FDA accepting PMN's for uses permitted by existing regulations or threshold of regulation (TOR) exemptions.

Section 409(h)(3)(B) of the act authorizes FDA to issue regulations identifying the circumstances in which a FAP shall be required to provide adequate assurance of safety regarding the use of an FCS. Section 409(h)(3)(B) of the act directs FDA to consider criteria such as the probable consumption of the FCS and its potential toxicity in identifying when a petition shall be required.

Based upon the information currently available, FDA believes that nearly all uses of FCS's would be the subject of PMN's. However, FDA believes there are circumstances in which submission and review of a FAP would be needed to assure safety. Therefore, the agency is proposing in § 170.100(c) a regulation to define the limited circumstances in which a petition would be required. The proposed regulation also provides that if the agency is consulted prior to submission and determines that a notification is more appropriate, a petition would not be required even under the circumstances described in proposed § 170.100(c). Proposed § 170.100(c) lists two circumstances that FDA currently believes should presumptively require the submission of a FAP. These circumstances are as follows: (1) When the use of the FCS will increase the cumulative dietary concentration to the FCS from food uses to a level greater than 1 part per million (ppm) (3 mg/person/day) or, in the case of a biocide, to a level greater than 200 parts per billion (ppb) (0.6 mg/person/day); and (2) when there exists one or more bioassays on the FCS that the agency has not already reviewed and such studies are not clearly negative for carcinogenicity.

Historically, FDA has based its recommendations for toxicity data to support the safe use of food additives on the estimated intake of the food additives. As a general rule, higher estimated intakes of substances in the diet pose both an increased risk of toxicity and a wider range of potential toxic effects. The maximum levels of cumulative dietary concentration identified above are levels at which the

agency has historically requested more comprehensive toxicity testing in order to address a substance's potential to induce diverse toxic effects. To address the risk of these effects, FDA has asked for longer term toxicity studies and toxicity studies that measure a wider variety of toxic endpoints. The agency believes that this approach is sound, in that it has ensured the safety of additives permitted in the food supply. Thus, FDA continues to believe that uses of FCS's that have the potential for inducing diverse toxic effects of consequence to human health generally require longer term and more specialized toxicity testing to support their safe use. Where such toxicity testing is needed, the agency believes that submission, review, and approval of a food additive petition is appropriate because the petition process will afford FDA the time necessary to review the more extensive toxicity data package.

FDA has tentatively concluded that a lower dietary concentration cutoff for PMN's for biocides is appropriate for substances that are toxic by design. Biocides are a class of FCS's that have the potential to raise safety concerns because their intended technical effect is microbial toxicity. Because of this expectation of greater toxicity for biocides, FDA has historically requested longer term and specialized toxicity testing for biocides at a dietary concentration of 200 ppb (0.6 mg/person/day), rather than the 1 ppm (3 mg/person/day) level that would apply to most other FCS's. Consistent with FDA's testing recommendations, FDA is proposing in § 170.100(c)(1) that, for biocides, a petition be required where the maximum cumulative dietary concentration level is 200 ppb. FDA intends that this lower cut-off level would apply to substances used as FCS's primarily for their antimicrobial or fungicidal effects.

The use of carcinogens as food additives is prohibited by the food additives anti-cancer clause in section 409(c)(3)(A) of the act (the so-called Delaney clause). FDA believes that, if data exist that may demonstrate that an FCS is carcinogenic, a thorough review of such data is appropriate and necessary to adequately assure safety and properly administer the statute. Therefore, in proposed § 170.100(c)(2), FDA is proposing to require that the proposed use of an FCS be the subject of a petition when a bioassay on the FCS has not been reviewed by the agency and is not clearly negative for carcinogenicity.

FDA's current view is that in some situations where exposure exceeds 1 ppm (3 mg/person/day) or in the case

of biocides, 200 ppb (0.6 mg/person/day)), the agency's concerns about potential toxicity may be alleviated by other factors, and thus, a notification may be acceptable. For example, if the cumulative estimated daily intake (CEDI) is greater than 1 ppm (3mg/person/day) but the agency has established an applicable acceptable daily intake (ADI) for the substance that is greater than the CEDI, then a notification would likely be acceptable. FDA expects to make publicly available a database of ADI's and CEDI's for regulated, exempted, and notified FCS's to assist potential notifiers in preparing notifications and petitions for FCS's. Based on the above, FDA is proposing that in the situations described in proposed § 170.100(c), a petition would be required unless FDA determines that a petition is not necessary to adequately assure safety even though the criteria of § 170.100(c)(1) or (c)(2) are met. Although sponsors are not required to consult with the agency prior to submitting either a petition or a notification, FDA strongly encourages presubmission discussion of uses that fall within the bounds of those circumstances defined in proposed § 170.100(c).

In order for FDA to be able to contact a notifier to provide an opportunity for the notifier to respond to agency's concerns regarding a PMN, the agency must have current information on the person for whom the notification is effective. Therefore, under proposed § 170.100(d), all notifiers would be required to inform FDA of any change in address.

C. Information Required in a Premarket Notification for an FCS

The FDAMA amendments require that an FCS meet the safety standard for food additives generally that is set out in section 409(c)(3)(A) of the act. Under section 409(h)(1) of the act, a notification shall include the notifier's determination that the intended use of the FCS is safe under the standard of section 409(c)(3)(A), as well as the data and information that forms the basis of such determination and any information required by regulation to be submitted. In light of this safety standard, FDA has tentatively concluded that the information in a premarket notification should be comparable to that required in a FAP for the same use. In addition, because of the short review period for PMN's, FDA is proposing to require in proposed § 170.101(a) that the notifier submit a comprehensive discussion of the data and information in the notification that forms the basis of the notifier's determination that the FCS is

safe. Under proposed § 170.101(a)(1), a discussion is comprehensive if it addresses all safety data in the notification. Although the discussion of every study or test need not be exhaustive, a notifier should include a thorough discussion of safety data that are important to the determination of safety. The notifier should also discuss in detail the notifier's basis for discounting or disregarding any data. To ensure a balanced evaluation of all existing data, FDA is also proposing to require in proposed § 170.101(a)(2) that the notifier address in the comprehensive discussion any information that appears inconsistent with the notifier's determination that the use of the FCS is safe. Under this proposed system, if FDA determines that a notifier's discussion is not sufficiently comprehensive to show that the notifier has considered all relevant data and information, the agency would object to the notification on the basis that the notification does not include all required information.

Proposed § 170.101(b) would require the notifier to submit all data and information relevant to the safety determination for the intended use of the FCS. This requirement is comparable to the requirement in entry E. of the form in 21 CFR 171.1(c) for FAP's concerning detailed data derived from appropriate animal and other biological experiments related to the safety of the additive be submitted in a FAP. Under proposed § 170.101(b), notifiers would be required to submit to FDA all primary biological and chemical data and information relevant to the safety of the intended use of the FCS. For example, notifications would include the primary data from relevant toxicity studies and from migration tests, including validation data. To assist notifiers in determining which data are relevant to the safety determination, in the **Federal Register** of November 12, 1999 (64 FR 61648), FDA announced the availability of two guidance documents on the chemistry and toxicology information recommended for inclusion in PMN's. In addition, FDA is announcing elsewhere in this issue of the **Federal Register** the availability of an administrative guidance document relating to the preparation of PMN's. These guidance documents include general recommendations that will help notifiers to satisfy the requirements of proposed § 170.101(b). For special circumstances not addressed in the guidance, notifiers are encouraged to consult with the agency prior to submitting a notification.

Proposed § 170.101(c) would require that all nonclinical laboratory studies submitted in a premarket notification be performed under good laboratory practices (GLP's) and include, for each study, a signed statement that the study has been performed under GLP's (proposed § 170.101(c)(1)) or a statement identifying the deviations from GLP's that occurred along with an explanation of the reasons for the deviations (proposed § 170.101(c)(2)). This section is comparable to § 171.1(k) (21 CFR 171.1(k)) for FAP's and would ensure that data submitted in support of the safety of the use of an FCS meet appropriate minimum technical standards.

In addition, proposed § 170.101(c)(3) would require that the data in each study conducted since 1978 but not conducted under GLP's be validated by an independent third party prior to submission to FDA. Finally, proposed § 170.101(c)(3) would require a signed certification from such a data validator. FDA has tentatively concluded that the requirement that such data be validated will ensure the reliability of data submitted in support of the safety of the use of an FCS. FDA currently believes that, because of the short time period for the review of notifications, it is necessary that data be validated in advance of submission to FDA.

Under the National Environmental Policy Act (NEPA), FDA must consider the environmental impact of its actions; the effect of this obligation is that for covered actions, either an environmental assessment or a claim of categorical exclusion is required.

In view of this NEPA obligation, FDA is taking two actions. First, in the **Federal Register** of May 11, 2000, FDA published a direct final rule (64 FR 30352) amending the agency's regulations in part 25 (21 CFR part 25), and a companion Notice of Proposed Rulemaking (65 FR 30366) proposing to amend the regulations in part 25. Specifically, the direct final rule amended, and the companion proposal proposed to amend, part 25 by adding to the list of those actions that require an environmental assessment in § 25.20 allowing a notification submitted under section 409(h) of the act to become effective, and by expanding the existing categorical exclusions in § 25.32(i), (j), (k), (q), and (r) to include allowing a notification submitted under section 409(h) of the act to become effective. This will allow notifiers of FCS's to claim the categorical exclusions now available to sponsors of other requests for authorization of FCS's. Second, as part of this rulemaking, FDA is proposing in § 170.101(d) that if the

environmental component of a notification is missing or deficient under § 25.40, the agency will not accept the notification for review. In cases where the agency does not accept a notification based on deficiencies in environmental information, FDA expects to inform the notifier in writing within 30 days of receipt of the submission.

In response to the March 1999 public meeting, FDA received comments requesting that FDA consider incorporating standard forms in the requirements for information in PMN's. Although FDA currently believes that forms cannot replace a comprehensive discussion of the information in the notification or a discussion of the basis for a notifier's determination of safety, FDA tentatively agrees that forms may be useful in preparing and reviewing PMN's. Therefore, FDA is proposing in § 170.101(e) to require the submission of FDA Form No. 3480 with all notifications for FCS's. FDA expects to make this form available via the agency's internet site (<http://vm.cfsan.fda.gov>). FDA Form No. 3480, as well as FDA Form No. 3479 (see section III of this document), are undergoing review by the Office of Management and Budget as part of the paperwork reduction analysis (see section VII below) for this proposed rule.

D. Confidentiality of Information in a Premarket Notification for an FCS

Section 409(h)(4) of the act prohibits FDA from publicly disclosing any information in a PMN for 120 days after submission of the PMN to FDA. FDA is proposing to codify in § 170.102(a) the prohibition against disclosure of information in a notification. FDA currently believes that the intent of section 409(h)(4) of the act is to prevent the agency from disclosing information in a notification prior to completion of the agency's review. Therefore, FDA is proposing to add § 170.102(b) which provides that the information in a notification that is withdrawn within 120 days after receipt, and before the agency has completed its review, will not be publicly available. Similarly, FDA believes that the agency's conclusion regarding a notification should be publicly available at the time such conclusion is reached. Therefore, FDA is proposing in § 170.102(c) to provide that FDA's conclusion regarding a notification would be available at the time the agency's review is completed. However, FDA does not expect to actively disclose its conclusion regarding a notification; rather, FDA anticipates providing this information to

persons who contact the agency (i.e., by telephone, letter, or e-mail) after the conclusion of FDA's review.

The agency is planning to establish a publicly available inventory of effective PMN's (discussed below). FDA has tentatively concluded that the inventory will include the information necessary to describe adequately the substance that is the subject of the notification and the use of that substance for which the notification is effective. Such information may include, but will not necessarily be limited to, the complete chemical identity of the FCS, the maximum use level in food contact materials, any limitations on the types of food that may contact materials containing the substance, and limitations on time and temperature conditions of use for the material containing the substance. FDA believes that the foregoing information is necessary to describe adequately the circumstances under which a given notification is effective and that any claim to confidentiality of such information would hamper the agency's ability to adequately communicate which notifications have become effective. Therefore, as proposed, § 170.102(d) provides that by submitting a notification, the notifier waives any claim of confidentiality to the information required to describe adequately the FCS and the intended conditions of use that are the subject of the notification.

FDA is proposing to codify in § 170.102(e) the types of information in a PMN that will be publicly available once the statutory 120-day review period is completed. The types of information listed in proposed § 170.102(e) are comparable to the types of information contained in or relating to an FAP that generally are publicly available under § 171.1 (h) either at the time the petition is filed or once the agency has rendered a decision on the petition. FDA has tentatively concluded that once the statutory prohibition in section 409 (h) of the act against disclosure of information in a PMN expires, the disclosure of data and information in a PMN should be comparable to the disclosure of similar information when contained in an FAP. FDA specifically requests comments on all of the provisions of proposed § 170.102

E. Withdrawal Without Prejudice

Under proposed § 170.103, FDA is proposing that a notifier may withdraw a PMN at any time during the 120 days after receipt of the notification by FDA, if FDA has not completed its review. For the purpose of this section, FDA's

review is complete when FDA has allowed 120 days to pass without objecting to the PMN, or when FDA has issued an objection letter. FDA tentatively believes that the outcome of the agency's review should be publicly available at the time it issues. As discussed above, FDA is proposing in § 170.102(c) to protect from public disclosure the information in a PMN withdrawn within 120 days of receipt by FDA.

F. Action on a Notification for an FCS

FDA currently plans to conduct an initial review of whether the basic informational items required under proposed § 170.101 are in a notification for an FCS. If, during this initial review, FDA finds that one of the elements required under proposed § 170.101 is missing, FDA believes that the agency should be able to decline to review such notification. Under proposed § 170.104(b)(1), FDA would inform a notifier in writing that a clearly deficient notification has not been accepted. In addition, if a notifier supplements a deficient notification before FDA informs the notifier in writing under proposed § 170.104(b)(1) then the date of receipt of the supplemental information would be the date of receipt of the notification for purposes of section 409(h)(1) of the act.

If FDA accepts a PMN, FDA expects to acknowledge receipt of the PMN in writing within 30 days of receipt (see proposed § 170.104(b)(2)). This acknowledgment would serve two purposes: First, the acknowledgment would inform the notifier of the date of receipt of the notification by FDA, and thereby the effective date of the notification if FDA does not object to the marketing of the substance; second, the acknowledgment would identify the substance and use that FDA understands are the subject of the notification. FDA intends to use this identity and use information in FDA's inventory of effective notifications (discussed below) if the notification becomes effective. If FDA determines during the course of review of a PMN that it is necessary to modify the description of the FCS or its intended use as conveyed in the acknowledgment letter, FDA intends to promptly inform the notifier of any such changes.

If, after reviewing a notification, FDA does not agree that the notifier has demonstrated that the substance is safe under the intended conditions of use, FDA would inform the notifier in writing that FDA objects to the marketing of the substance for the use that is the subject of the notification and would describe the basis for the

objection. Under proposed § 170.104(c)(1), if FDA objects to a PMN, FDA will inform the notifier in writing. FDA has tentatively concluded that the date of the objection letter should be the date that the agency objects to the notification for the purposes of section 409(h)(2)(A) of the act, and has proposed such an arrangement in § 170.104(c)(1). FDA believes that this practice for objection dates will simplify management of the notification process. For purposes of clarity, FDA is also proposing in § 170.104(c)(2) to restate the statutory outcome that, if FDA objects to a notification during the 120-day review period, the notification would not become effective. Under section 409(a) of the act, in the absence of an effective notification, an FCS cannot be lawfully marketed.

FDA currently believes that, if information on which the notifier's determination of safety is based is inadequate to support a safety determination, the agency would object, under section 409(h)(2)(B) of the act, to the notification on the basis that the use of the FCS has not been shown to be safe under the standard of section 409(c)(3)(A). FDA currently believes that, if the notifier's discussion of the data supporting the safety of the use of the FCS is not comprehensive, the agency would consider the notification inadequate to support the safety of the intended use of the FCS and would object to the notification on that basis.

Section 409(h)(5)(A)(i) of the act states that the premarket notification program shall not operate in any fiscal year (FY) for which the program is not funded as described in section 409(h)(5). FDA currently believes that the agency must be able to object to a notification if the notification program ceases to operate before the end of the 120-day period after FDA's receipt of the notification in accordance with section 409(h)(5) of the act. Accordingly, proposed § 170.104(c)(3) would authorize FDA to object to a premarket notification on the basis that some portion of the 120-day review period occurs during a period while the PMN program is not operating. Proposed § 170.104(c)(3) would not, however, require FDA to object. For example, if FDA determines that it can complete its review of a PMN while the PMN program operates, the agency would not object to a notification solely on the basis of proposed § 170.104(c)(3).

Unlike the FAP process, there is no requirement under the PMN process that FDA publish either a filing notice or a final rule in the **Federal Register** in order to authorize the use of an FCS. Moreover, the statute does not require

FDA to issue a letter at the conclusion of the review of a notification, in contrast to the threshold of regulation process under § 170.39. No action by FDA is required for a notification to become effective 120 days after receipt by the agency. However, FDA has considered information provided by the public at the March 1999 public meeting and has tentatively concluded that issuing a letter identifying the notification and the date on which the notification became effective may be valuable in bringing the review process to closure. Such a letter could also clarify the identity or intended use of the FCS if there is a need to do so. Therefore, FDA's current plan is to reissue the acknowledgment letter and to add a statement regarding the date on which the notification became effective and to describe any changes in identity or use of the FCS. Because FDA is concerned that the issuance of a final letter for every PMN may become an administrative burden on the agency, the agency is not proposing to make issuance of such a letter a requirement.

In order to administer the PMN program efficiently, FDA has tentatively concluded that the agency should maintain a publicly available inventory of effective notifications. Such an inventory would permit both the regulated industry and the public readily to determine whether an effective notification exists for use of an FCS. As currently envisioned by the agency, the publicly available inventory would include such information as the identity of the substance, the notified use, the manufacturer identified in the notification, the effective date of the notification, and a tracking number identifying the notification. FDA expects to make the inventory of effective notifications available on the agency's Internet site (<http://vm.cfsan.fda.gov>). FDA is specifically requesting comments on the agency's plan for the inventory of effective notifications and on ways the agency may make the inventory most useful to the public.

As noted, section 409(h)(3)(A) of the act requires that the notification process be utilized for authorizing new uses of food contact substances except where the agency determines that a FAP is necessary to provide adequate assurance of safety or where FDA and a manufacturer or supplier agree that such manufacturer or supplier may submit a petition. FDA currently believes that there may be some instances where a codified regulation may be in the best interest of the public and the agency, and in such cases, the agency would agree to accept a petition. However,

FDA should not be required to review both a petition and a notification for the same use of an FCS. Thus, proposed § 170.104(d) would provide that a premarket notification would be deemed withdrawn if FDA and a notifier agree under section 409(h)(3)(A) of the act that the notifier may submit a FAP proposing the approval of the FCS for the use described in the notification. FDA is also proposing to amend § 171.1(i)(1) to ensure that FDA is not required to file a FAP for the use of an FCS that, under section 409(h)(3)(A) of the act, may be the subject of a notification.

G. Determination That a Premarket Notification Is No Longer Effective

Section 409(i) of the act states that FDA shall by regulation prescribe the procedure by which the agency may deem a premarket notification to no longer be effective. If information becomes available that indicates that the use of an FCS that is the subject of an effective notification may no longer be considered safe, FDA believes that such information must be adequately addressed by the notifier for the notification to continue to be effective. Proposed § 170.105(a) states that FDA may determine that a PMN is no longer effective if the available information demonstrates that the use of an FCS is no longer safe. Proposed § 170.105(b) states that FDA would inform the notifier in writing of the agency's tentative conclusion that a notification is no longer effective, and would provide the basis for that conclusion. In addition, FDA will establish a timeframe for the notifier to respond to the agency's tentative conclusion. Under proposed § 170.105(b) the notifier would be given an opportunity to address FDA's safety concerns. Under proposed § 170.105(c), if the notifier is not able to address adequately FDA's concerns, FDA would publish a notice in the **Federal Register** stating the agency's conclusion that the notification is no longer effective. The date of such notice will be the date after which the notification shall no longer be effective. FDA has tentatively concluded that the agency's determination that a notification is no longer effective shall be the final agency action subject to judicial review (proposed § 170.105(d)).

III. Notifications for Formulations

As discussed above, in response to the March 1999 public meeting, the agency received comments requesting that the agency accept notifications for food contact substance formulations (NFCSF's). Such notifications would be distinct from notifications for FCS's in

two ways. First, NFCSF's would be for a particular mixture of FCS's and would be for more than one FCS. Second, each of the substances in the formulation would already be authorized for its intended use in contact with food. Thus, FDA's evaluation of NFCSF's would be limited to a review of the basis for compliance with section 409 of the act.

Because each substance in an NFCSF would already be authorized for its intended use, such notifications would not be required under section 409 of the act. Nor does the act require FDA to implement and operate such a program. Comments in response to the March 1999 public meeting stated that such notifications would be useful for facilitating trade in both food contact materials and in food, if FDA would choose to accept these notifications under the PMN process. FDA also believes that acceptance and review of NFCSF's will aid the agency in monitoring compliance within the regulated industry and provide the agency with better information on the types of food contact materials in use. Therefore, FDA is proposing, in § 170.106(a), to accept NFCSF's where the notifier can establish that each of the components of the formulation is authorized for its intended use. However, FDA has serious concerns about the potential burden that accepting notifications for formulations could place on the agency. Therefore, proposed § 170.106(b) states that the agency may decline to accept NFCSF's by publishing a notice in the **Federal Register** stating that the agency does not have sufficient resources to review such notifications. FDA believes that this level of notice is appropriate because there is no statutory requirement for FDA to accept NFCSF's.

FDA's current view is that notifications for formulations would not require resubmission of the information supporting the safety of the intended use of each food contact substance in the formulation. FDA has tentatively concluded that a notifier for a formulation would ordinarily submit only a completed FDA Form No. 3479 and any additional information necessary to establish that the specific conditions of use in the formulation for each FCS are authorized. Also, in cases where the basis for compliance of an individual FCS in a formulation is an effective notification, a notifier would need to certify that he could rely on the notification cited. Therefore, under proposed § 170.106(c), FDA would require that a notification for a food contact substance formulation include a completed FDA Form No. 3479 and any additional information to establish that

each of the components of the formulation is authorized for its intended use. FDA is specifically requesting comments on proposed § 170.106.

IV. Transition Policy

At the time the premarket notification program began to operate, the agency had an inventory of pending FAP's for the use of FCS's. FDA also had an inventory of pending TOR exemption requests (submitted under § 170.39). FDA believes that nearly all of these petitions and exemption requests are for uses that would meet the criteria under proposed § 170.100 for premarket notification.

At any time that the PMN program is operational, a petitioner may withdraw a FAP or TOR request for the use of an FCS and resubmit the petition or request as a PMN. If a petitioner does not withdraw a petition and such petitioner submits a PMN for the same use, the petition would be deemed withdrawn under proposed § 171.7(c) for the use or uses described in the notification. In a letter dated October 25, 1999, FDA strongly encouraged petitioners and requesters under the threshold of regulation process to contact the agency prior to withdrawal of a petition or a TOR request to obtain specific guidance on conversion of the petition or request to a PMN. Finally, for some of the FAP's and TOR requests in the agency's inventory when the notification program began to operate, FDA was awaiting the submission of additional information that the agency has considered necessary to the safety determination. Any such information would be necessary to establish the safety of the intended use of the FCS if a petition or request were resubmitted as a notification.

V. Conforming Amendments

FDA is proposing several conforming amendments to the agency's regulations to help to administer the PMN process and to clarify the application of the food additive regulations to FCS's.

Section 20.100 cross-references regulations concerning the public availability of information in specific types of documents submitted to FDA. FDA is proposing to amend this section to cross-reference the regulations on the

disclosure of information in PMN's under proposed § 170.102.

FDA is proposing to amend § 58.3 (21 CFR 58.3) to add PMN's to the list of types of submissions that the agency classifies as "Applications for research or marketing permits." This amendment will make the appropriate provisions of the agency's GLP regulations applicable to PMN's.

FCS's that are the subject of PMN's will not be listed in the food additive regulations for their intended uses. Therefore, FDA proposes to amend §§ 174.5(d) and 179.25(c) (21 CFR 174.5(d) and 179.25(c)) to provide appropriate cross references for the use of an FCS that is the subject of an effective PMN.

VI. Paperwork Reduction Act of 1995

This proposed rule contains information collection provisions that are subject to review OMB under the Paperwork Reduction Act of 1995 (the PRA) (44 U.S.C. 3501-3520). A description of these provisions is given below with an estimate of the annual reporting burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

FDA invites comments on the following: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Title: Food Contact Substances Notification System

Description: Section 409(h) of the act establishes a premarket notification process for FCS's. Section 409(h)(6) of the act defines a "food contact substance" as "any substance intended for use as a component of materials used

in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food." Section 409(h)(3) of the act requires that the notification process be utilized for authorizing the marketing of FCS's except where FDA determines that the submission and premarket review of a FAP under section 409(b) of the act is necessary to provide adequate assurance of safety. Section 409(h)(1) of the act requires that a notification include information on the identity and the intended use of the food contact substance and the basis for the notifier's determination that the food contact substance is safe under the intended conditions of use. Because section 409(h)(1) of the act references the general safety standard for food additives, the data in a PMN should be comparable to the data in a FAP. FDA is proposing regulations necessary to implement the premarket notification program which will largely replace the FAP process for those food additives that are food contact substances. The collection of information associated with notifications for new uses of FCS's under section 409 of the act has been previously announced for public comment in a notice published in the **Federal Register** of November 12, 1999 (64 FR 61648).

FDA is also proposing to require that a notification for a food contact substance include FDA Form No. 3480 "Notification for New Use of a Food Contact Substance" and a notification for a formulation of a food contact material include FDA Form No. 3479 "Notification for a Food Contact Substance Formulation" that will serve to summarize pertinent information in the notification. FDA Form No. 3480 was made available for public comment in the November 12, 1999, notice. FDA believes that these forms will facilitate both preparation and review of notifications since the forms will serve to organize information necessary to support the safety of the use of the FCS. The burden of filling out the appropriate form has been included in the burden estimate for the notification.

Description of Respondents: Manufacturers of food contact substances.

FDA estimates the burden of this collection of information as follows:

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN ¹

21 CFR Section	Form	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
170.106 ²	FDA 3479	200	4	800	2	1,600
170.101 ^{3,7}	FDA 3480	200	1	200	25	5,000

TABLE 1.—ESTIMATED ANNUAL REPORTING BURDEN¹—Continued

21 CFR Section	Form	No. of Respondents	Annual Frequency per Response	Total Annual Responses	Hours per Response	Total Hours
170.101 ^{4,7}	FDA 3480	55	2	110	120	13,200
170.101 ^{5,7}	FDA 3480	45	2	90	150	13,500
170.101 ^{6,7}	FDA 3480	16	1	16	150	2,400
Total						35,700

¹ There are no capital costs or operating and maintenance costs associated with this collection of information.

² Notifications for a food contact substance formulation. These notifications require only FDA Form No. 3479 ("Notification for a Food Contact Substance Formulation") to be filled out and documentation attached.

³ Duplicate notifications for uses of food contact substances.

⁴ Notifications for uses that would currently be the subject of exemptions under 21 CFR 170.39 or very simple FAP's.

⁵ Notifications for uses that would currently be the subject of moderately complex FAP's.

⁶ Notifications for uses that would currently be the subject of more complex FAP's.

⁷ These notifications require the submission of FDA Form No. 3480 ("Notification for New Use of a Food Contact Substance").

The above estimate is based on the types of submissions that FDA currently receives for food contact substances in the TOR and the FAP processes and the following assumptions and information:

- FDA estimates that the likely increase in PMN's over the number of FAP's and TOR requests will be approximately four times the highest recent influx of these submissions (50 and 54, respectively). This factor is based on an analysis of the number of companies producing various types of food contact substances and the types of food contact substances for which FAP's and TOR's are most commonly submitted to FDA.

- Based on input from industry sources, FDA estimates that the agency will receive approximately 800 notifications annually for food contact substance formulations.

- FDA also has included 200 expected duplicate submissions in the second lowest tier. FDA expects that the burden for preparing these notifications will primarily consist of the notifier filling out FDA Form No. 3480, verifying that a previous notification is effective, and preparing necessary documentation.

- Based on the amount of data typically submitted in FAP's and TOR requests, FDA identified three other tiers of PMN's that represent escalating levels of burden required to collect information.

- FDA estimated the median number of hours necessary for collecting information for each type of notification within each of the three tiers based on input from industry sources.

In compliance with the PRA (44 U.S.C. 3507(d)), the agency has submitted the information collection provisions of this proposed rule to OMB for review. Interested persons are requested to send comments regarding the information collection by August 14, 2000 to the Office of Information and Regulatory Affairs, OMB (address above), Attn: Desk Officer for FDA.

VII. Analysis of Impacts

A. Preliminary Regulatory Impact Analysis

FDA has examined the economic implications of this proposed rule as required by Executive Order 12866. Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). Executive Order 12866 classifies a rule as significant if it meets any one of a number of specified conditions, including having an annual effect on the economy of \$100 million, adversely affecting a sector of the economy in a material way, adversely affecting competition, or adversely affecting jobs. A regulation is also considered a significant regulatory action if it raises novel legal or policy issues. The Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action as defined by Executive Order 12866.

1. The Need for Regulation

This notice proposes regulations that are needed to help implement the premarket notification process for food contact substances created by FDAMA. These premarket notifications will largely replace FAP's for food contact substances. In the petition process, FDA evaluates the safety of the proposed use of a food additive and, if FDA determines that the proposed use is safe, the agency issues a regulation authorizing the legal marketing of the product. Under the statute, FDA has an initial period of 90 days, which may be extended for an additional 90 days, in

which to make a determination regarding the safety of the proposed use and publish an order stating the agency's determination. However, regardless of the time that actually passes after submission of a FAP, the FAP may not be legally marketed until FDA publishes an authorizing regulation. By contrast, the premarket notification provision of FDAMA requires FDA to object within 120 days to a manufacturer's notification that it intends to use a particular food contact substance for a particular use, or the substance may be legally marketed on the 121st day without issuance of a regulation.

This notice also proposes regulations to implement the statutory requirement that information in a PMN not be publicly disclosed before completion of FDA's review. Under the petition process, the publication in the **Federal Register** of the notice of filing for the petition permits competitors of the petitioner to learn about the new food contact substance before authorization. Disclosure of a manufacturer's intent to market a substance before authorization lowers the competitive advantage of a new product, since a food additive regulation authorizes anyone to market the substance for its intended use. Under section 409(h) of the act and the proposed rule, a notification will be effective for the manufacturer named in the notification only, thereby protecting the commercial intent of the manufacturers of the new food contact substance during the period of review, and permitting the manufacturer of the new food contact substance to market the substance first.

The implementing regulations propose binding criteria for the successful submission of notifications and a concrete framework for the resolution of routine questions or problems arising in the notification process. The notification process is more predictable than the

corresponding FAP process, because the notifier will have either an effective notification or FDA's objection within 120 days. The structure added by limited implementing regulations would enhance the predictability of that process and reduce the burden on all potential notifiers. Therefore, the proposed regulations implementing the statutory requirement for PMN's would help the agency to reduce delays in the marketing of new food contact substances. In the absence of the proposed rule, the agency would be less effective in achieving this goal.

In the economic analysis of the proposed rule, the agency will not separate the benefits and costs of the statute from the benefits and costs of the regulations helping to implement the statute. The regulations and the statute are complementary and will be assessed together.

2. Regulatory Options

FDA examined a range of regulatory options to demonstrate why the proposed action is most beneficial to the public. Not all of the options discussed below are currently legally available. FDA assesses options that are not legally available in order to elucidate its reasoning for the option that was chosen.

a. *No new regulatory activity.* No additional social costs or benefits are associated with this option. Section 409 of the act does not require FDA to issue regulations to implement the notification process for food contact substances except for regulations prescribing the procedure by which a notification may be deemed no longer effective (section 409(i)(3)). The notification process for food contact substances begins to operate when the budgetary requirements of section 409(h)(5) of the act are met whether or not FDA issues regulations.

If no regulations exist to govern the notification program when it begins to operate, FDA will operate the program through guidance alone. This situation would provide the most discretion for FDA to deal with individual notifications but would provide less predictability for industry. Less predictability would create additional burden on the industry to prepare and manage notifications for review.

As stated above, the proposed implementing regulations provide binding criteria for the successful submission of notifications and a concrete framework for the resolution of routine questions or problems arising in the notification process. The notification process is more predictable than the corresponding FAP process,

because the notifier will have either an effective notification or FDA's objection within 120 days. The structure added by limited implementing regulations will enhance the predictability of that process and reduce the burden on all potential notifiers. Furthermore, if the agency continued to rely on the current FAP procedure to approve food contact substances, there could be delays in meeting consumer demand when the agency's evaluation has not been completed within a predictable time; these delays could represent potentially significant avoidable costs. This unpredictability discourages new products when the food contact substance manufacturers do not believe their products can be brought to market within a reasonable time. When products are not brought to market, the public bears a social cost in terms of lost consumer satisfaction from the lack of desirable products. Although the public cost from new products not being brought to market are mostly unseen and are not measurable, they may be large.

b. *Modification of the petition process to require automatic authorization at the end.* Although this option is not legally available, the public might have benefited if the current petition process were modified to require automatic authorization at the end of a specified review period. The period of evaluation for food contact substance petitions could be extended to 120 days, with automatic authorization granted for petitions that are not reviewed during this period. Extending the review period would provide the agency with additional time to review each petition and the requirement of automatic agency authorization at the end of the review period would create reliable expectations for petitioners. However, extending the period of evaluation would not address all of the problems that petitioners encounter in the current process. This option neglects the circumstance that certain information may be disclosed to competitors during the review process.

c. *Stricter requirements for data submission.* The agency might have proposed to require that food contact substances meet stricter requirements for data submission than those it is proposing. For example, FDA might require additional validation for all data that form the basis of the determination that the food contact substance is safe for the intended use. The agency did not choose this option because additional data requirements would impose a cost by potentially delaying the introduction of beneficial substances.

d. *Deregulation—no requirement for a petition or a notification.* Congress could legislate to dispense with the approval of new food contact substances through either petitions or notifications. The objection to this option is that the agency's review and authorization of food contact substances protects the public from harmful substances that might otherwise be introduced into the food supply and reduces the costs of private monitoring of the food supply. Protection in this context means that the agency requires that manufacturers of products under review by FDA demonstrate a reasonable certainty of no harm from the intended use of the product.

With deregulation, consumers bear the risks when producers sell products that do not meet the regulatory standard of reasonable certainty of no harm. If the approval of new food contact substances were withdrawn, consumers would have to monitor the safety of the substances in the food supply. If products cause harm, consumers would have to rely on the tort system for redress. Consumers would have to prove that a harm was linked to the food contact substance based on a standard that might vary by jurisdiction or at the whim of a jury. Furthermore, proving the link between the substance and the harm could be extremely difficult. Private markets operate within the framework of legal institutions. The tort system of the common law evolved, in part, to provide remedies to injuries suffered in transactions in private markets. For instance, under this system, if a defective product injures someone, then the injured person may recover damages from the producer of the defective product. The recovery of damages requires the injured person to prove that his injuries were caused by the producer's product. Regardless of the legal standard chosen (negligence, warranty, or strict liability) the injured person must be able to link his injury to the specific product of a specific producer. Because legal proceedings are always retrospective and must have occurred after the plaintiff consumer has suffered an injury, the social cost under the tort system is the cost of the harm caused to the plaintiff and the cost of the legal proceedings.

In most instances, consumers experiencing illness or other harm from food consumption do not recognize the illness as foodborne or are unable to link the illness to consumption of a particular food. This inability to connect illness and food or food contact substances exists because many symptoms do not occur immediately after consumption of the product. Many

consumers are never compensated, and in practice, the tort system is rarely used to remedy the harm that comes from unsafe foods or food additives. Therefore, the costs of private monitoring and enforcement of safety using the tort system in an unregulated market are probably substantially greater than the social costs of regulatory enforcement and the additional research costs needed to demonstrate with reasonable certainty that products are safe.

3. Benefits

The benefits from the change to premarket notifications come from the increased innovation in the food contact substance market. Consumers want new and better food contact substances (or their properties) and receive benefits from them in the form of increased satisfaction. Although new substances will (on average) generate monetary benefits that exceed monetary costs—if not, new substances would not be introduced—it is difficult to place a monetary value on the full increase in consumer satisfaction from better food contact substances in the future. FDA therefore did not attempt to directly measure the increased consumer satisfaction arising from greater innovation in food contact substances. Instead, the agency estimated the benefits indirectly by the increase in innovation. FDA measured the benefits from the change to premarket notifications as the expected increase in the annual number of new notifications after the change. More product notifications to the agency imply more innovation, which in turn implies better products and greater consumer satisfaction.

Determining the benefits without regard for the congressional requirement to change regimes, although it ignores the rationale and legal authority for the change, provides a simple measure of the consequences of the change to the system of premarket notifications for new food contact substances. The increase in notifications, however, may overstate innovation because: (1) Not all notifications will be for new products and (2) the new regime will require each manufacturer to submit a notification to obtain marketing approval so some duplication of firm and agency resources might occur when different manufacturers produce the same substances. Thus, the estimated benefit due to innovation represents a maximum.

The agency estimated that the likely increase in submissions will be approximately four times the highest recent number of annual submissions

for food contact substances (50 FAP's and 54 TOR submissions). Thus, for fiscal year (FY) 2000, FDA estimates that 416 premarket notifications will be submitted ($4 \times 50 + 4 \times 54$). As explained above, the agency has not attempted to place a monetary value on the benefits from these submissions.

4. Costs

The costs of the proposed rule are the costs incurred by firms that notify the agency of a new substance, but would not have had to under the previous regime. The firms that will bear this cost manufacture products identical to those that have already been through the notification process. These firms would formerly have been able to avoid the regulatory process altogether.

The agency used the following calculation:

Cost = (Number of Notifications) X (Hours/Notification) X (Hourly Rate to Prepare a Notification) + (Number of Notifications) X (Average Cost for Data Development)

The agency determined the expected number of notifications for seven categories of notifications for those firms that are expected to make substances identical to those for which notifications have been received, the number of hours required to prepare the notification for each category, and the estimated average hourly cost to prepare the notification. In addition the agency estimated the average cost of developing the data for each type of submission.

The total number of FAP's and TOR's received in FY 1998 and that would be affected by the change in regimes was 102. Based on petition data, these 102 were divided between petitions for components of food contact materials and petitions for substances used to manufacture food which do not have an intended effect in the food as consumed. The burden of the data collection for FAP's varies with the type of petition submitted. The following are the agency's estimates of the information collection burden for FAP's and TOR's.

A TOR requires the least amount of time for the collection of information: approximately 88 hours per submission. Forty-nine TOR's were received in FY 1998, resulting in a burden of 4,664 hours.

Category A. A simple indirect additive petition with minimal testing requirements (collection of identity information, genetic toxicity testing and administrative details) requires approximately 120 hours per petition. Sixteen such petitions of this type were received in FY 1998, resulting in a burden of 1,920 hours. In addition, the average data collection costs for such

petitions is about \$12,500, resulting in a total dollar burden for data collection of \$200,000 for FY 1998.

Category B. An average indirect additive petition consisting of analytical work, 90-day feeding studies, toxicological review of study data, and internal review and the drafting of the petition, requires approximately 150 hours per petition. Twenty-two such petitions were received in FY 1998, resulting in a burden of 3,300 hours. In addition, the average data collection costs for such petitions is about \$350,000, resulting in a total dollar burden for data collection of \$7,700,000 for FY 1998.

Category C. For an indirect additive petition with complex analytical work, the estimated time requirement per petition is approximately 150 hours. Eleven such petitions were received in FY 1998, resulting in a burden of 1,650 hours. In addition, the average data collection costs for such petitions is about \$375,000, resulting in a total dollar burden for data collection of \$4,125,000 for FY 1998.

Category D. A petition for a major new component of food packaging, involving long-term feeding studies, toxicology review, analytical work, and administrative details, requires more hours and a larger dollar investment for data development. FDA does not expect to accept such petitions as notifications.

Category E. A simple petition for a secondary direct food additive with minimal testing requirements (collection of identity information, minimal toxicity testing, analytical work and administrative details) requires approximately 120 hours per petition. One such petition was received in FY 1998, resulting in a burden of 120 hours. In addition, the average data collection costs for such petitions is about \$12,500, resulting in a total dollar burden for data collection of \$12,500 for FY 1998.

Category F. An average secondary direct additive petition consisting of analytical work, 90-day feeding studies, toxicological review of study data, and internal review and the drafting of the petition, requires approximately 150 hours per petition. Two such petitions were received in FY 1998, resulting in a burden of 300 hours. In addition, the average data collection costs for such petitions is about \$350,000, resulting in a total dollar burden for data collection of \$700,000 for FY 1998.

Furnishing the information required even in a simple indirect additive petition requires a team of professional employees, which may include toxicologists, chemists, environmental scientists, and lawyers. According to information provided by industry trade

associations, the collection of information, analytical work, toxicological review and administrative details involved in such a petition (Category A) average about 120 hours. In addition, such a petition requires an average of \$12,500 for data

development. Assuming that the aggregate professional hourly cost is \$90, then the cost for submitting a simple petition is \$10,800 (calculated by multiplying the hourly cost and the total hours) + \$12,500 (for data

development), for a total cost of \$23,300.

The following summaries list the TOR and petition categories and the cost for each, assuming an aggregate professional hourly cost of \$90.

TABLE 2.—CATEGORIES OF FOOD CONTACT SUBSTANCE SUBMISSIONS (CURRENT)

Submission Type	No. of Submissions	Total Hours	Cost of Hours	Other Costs
Threshold of regulation	49	4,664	419,760	0
Category A	6	1,920	172,800	200,000
Category B	22	3,300	297,000	7,700,000
Category C	11	1,650	148,500	4,125,000
Category D	0	0	0	0
Category E	1	120	10,800	12,500
Category F	2	300	27,000	700,000
Totals		11,954	1,075,860	12,737,500

If, in a given fiscal year the expected number of PMN's has the same proportion of categories as does the FY 1998 petitions and TOR's, then the agency expects:

TABLE 3.—CATEGORIES OF FOOD CONTACT SUBSTANCE SUBMISSIONS (PROJECTED)

Submission Type	No. of Notifications	Total Hours	Cost of Hours	Other Costs
Threshold of regulation	201	17,688	1,591,920	0
Category A	66	7,920	712,800	825,000
Category B	91	13,650	1,285,000	31,850,000
Category C	46	6,900	621,000	17,250,000
Category D	0	0	0	0
Category E	4	480	43,200	50,000
Category F	8	1,200	108,000	2,800,000
Totals		47,838	4,361,920	52,775,000

FDA expects approximately 50 percent of new notifications to be duplicates of PMN's submitted for products that would have required only one authorization under the old regime. Comparable products that could have used authorizations for another firm's product now require separate authorizations. Therefore, 50 percent of the expected total cost is the social cost imposed on the industry because of the change in regimes, for a total expected social cost of \$26,387,500. As with the estimate of benefits above, this estimate of social cost represents a maximum cost since duplicate notifications may not require development of new scientific data.

5. Summary of Benefits and Costs

The social benefits of the proposed change in regime are from new product innovation. The agency estimates that four times the current number of petitions and TOR's will be introduced into the market, for a total of 416. The social costs from the change in regimes are the costs to submit duplicate notifications. The agency estimates that 50 percent of the total will be duplicate notifications for a maximum total social cost of \$26,387,500.

B. Initial Regulatory Flexibility Analysis

1. Introduction

FDA has examined the economic implications of these proposed rules as required by the Regulatory Flexibility Act (5 U.S.C. 601–612). If a rule has a significant economic impact on a substantial number of small entities, the Regulatory Flexibility Act requires agencies to analyze regulatory options that would lessen the economic effect of the rule on small entities.

2. Economic Effects on Small Entities

We were unable to estimate how many small entities will be affected by this proposed regulation, because the universe of affected small entities might include any entities with a new idea. Past practice may not be a useful guide for estimating how many future entities will be affected. Some of these firms will now have to submit a PMN, when in the past they would not have had to. Because they will have to make a submission, the cost may act as a barrier and discourage them. On the other hand, firms that might not have submitted an application because the regime did not protect their ideas from copying, will now have some protection

for their ideas by virtue of the new regime and thus be more likely to submit a PMN. We believe the net affect will be to encourage more innovation as reflected by more notifications.

3. Regulatory Relief

Because some small firms are expected to be adversely affected by the proposed rule, options for regulatory relief, such as small business exemption, need to be addressed. The benefit of this option is that small businesses would not incur an additional cost. The drawback is that small firms could then copy and distribute themselves the substances being reviewed in response to the marketing submission of a competitor, creating disincentives for new substance development by rival firms.

4. Description of Record Keeping and Reporting

There are no additional recordkeeping requirements for the proposed rule.

5. Summary

FDA estimates that there will be no additional direct costs to small businesses because of this rule. If small business entities determine that the costs of notification outweighed the

benefits, the small business entities could rely on existing authorized food contact substances.

C. Unfunded Mandates and Congressional Review

Section 1531(a) of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), defines a significant rule as a Federal mandate that may result in the expenditure by State, local, and tribal governments in the aggregate, or by the private sector, of \$100 million (adjusted annually for inflation) in any one year. FDA has determined that this rule does not constitute a significant rule under the Unfunded Mandates Reform Act of 1995.

The Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121) defines a major rule for the purpose of congressional review as having caused or being likely to cause one or more of the following: An annual effect on the economy of \$100 million; a major increase in costs or prices; significant effects on competition, employment, productivity, or innovation; or significant effects on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets. In accordance with the Small Business Regulatory Enforcement Fairness Act, OMB has determined that this proposed rule is not a major rule for the purpose of congressional review.

VIII. Environmental Impact

The agency has determined under 21 CFR 25.30(h) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

IX. Comments

Interested persons may, on or before September 26, 2000, submit to the Dockets Management Branch (address above) written comments regarding this proposed rule, except that comments regarding the information collection provisions should be submitted on or before August 14, 2000. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch. (address above) between 9 a.m. and 4 p.m., Monday through Friday.

X. References

The following references have been placed on display in the Dockets Management Branch (address above) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

1. FDA Form No. 3479 "Notification for a Food Contact Substance Formulation," Rev. 9/99.

2. FDA Form No. 3480 "Notification for a New Use of A Food Contact Substance," Rev. 5/00.

List of Subjects

21 CFR Part 20

Confidential business information, Courts, Freedom of information, Government employees.

21 CFR Part 58

Laboratories, Reporting and recordkeeping requirements.

21 CFR Part 170

Administrative practice and procedure, Food additives, Reporting and recordkeeping requirements.

21 CFR 171

Administrative practice and procedure, Food additives.

21 CFR Part 174

Food additives, Food packaging.

21 CFR Part 179

Food additives, Food labeling, Food packaging, Radiation protection, Reporting and recordkeeping requirements, Signs and symbols.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs it is proposed that 21 CFR parts 20, 58, 170, 171, 174, and 179 be amended as follows:

PART 20—PUBLIC INFORMATION

1. The authority citation for 21 CFR part 20 continues to read as follows:

Authority: 5 U.S.C. 552; 18 U.S.C. 1905; 19 U.S.C. 2531-2582; 21 U.S.C. 321-393, 1401-1403; 42 U.S.C. 241, 242, 242a, 242l, 242n, 243, 262, 263, 263b-263n, 264n, 265, 300u-300u-5, 300aa-1.

2. Section 20.100 is amended by adding paragraph (c)(42) to read as follows:

§ 20.100 Applicability; cross-reference to other regulations.

* * * * *

(c) * * *

(42) Premarket notifications for food contact substances, in § 170.102 of this chapter.

PART 58—GOOD LABORATORY PRACTICE FOR NONCLINICAL LABORATORY STUDIES

3. The authority citation for 21 CFR part 58 continues to read as follows:

Authority: 21 U.S.C. 342, 346, 346a, 348, 351, 352, 353, 355, 360, 360b-360f, 360h-360j, 371, 379e, 381; 42 U.S.C. 216, 262, 263b-263n.

4. Section 58.3 is amended by adding paragraph (e)(23) to read as follows:

§ 58.3 Definitions.

* * * * *

(e) * * *

(23) A premarket notification for a food contact substance, described in part 170, subpart D, of this chapter.

* * * * *

PART 170—FOOD ADDITIVES

5. The authority citation for 21 CFR part 170 continues to read as follows:

Authority: 21 U.S.C. 321, 341, 342, 346a, 348, 371.

6. Section 170.3 is amended by revising paragraph (e)(2), and adding paragraph (e)(3) to read as follows:

§ 170.3 Definitions.

* * * * *

(e)(1) * * *

(2) *Uses of food additives not requiring a listing regulation.* Use of a substance in a food contact article (e.g., food-packaging or food-processing equipment) whereby the substance migrates, or may reasonably be expected to migrate, into food at such levels that the use has been exempted from regulation as a food additive under § 170.39, and food contact substances used in accordance with a notification submitted under section 409(h) of the act that is effective.

(3) *A food contact substance* is any substance that is intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food.

* * * * *

7. Subpart D, consisting of §§ 170.100 through 170.106 is added to part 170 to read as follows:

Subpart D—Premarket Notifications

Sec.

170.100 Submission of a premarket notification for a food contact substance (PMN) to the Food and Drug Administration (FDA).

170.101 Information in a premarket notification for a food contact substance (PMN).

170.102 Confidentiality of information in a premarket notification for a food contact substance (PMN).

170.103 Withdrawal without prejudice of a premarket notification for a food contact substance (PMN).

170.104 Action on a premarket notification for a food contact substance (PMN).

170.105 The Food and Drug Administration (FDA's) determination that a premarket notification for a food contact substance (PMN) is no longer effective.

170.106 Notification for a food contact substance formulation (NFCSF).

Subpart D—Premarket Notifications

§ 170.100 Submission of a premarket notification for a food contact substance (PMN) to the Food and Drug Administration (FDA).

(a) A PMN is effective for the food contact substance manufactured or prepared by the manufacturer or supplier identified in the PMN submission. If another manufacturer or supplier wishes to market the same food contact substance for the same use, that manufacturer or supplier must also submit a PMN to FDA.

(1) A PMN must contain all of the information described in § 170.101.

(2) A PMN may incorporate by reference any information in FDA's files provided that the notifier is authorized to reference the information. The PMN should include information establishing that the notifier is authorized to reference information in FDA's files.

(3) Any material submitted in or referenced by a PMN that is in a foreign language must be accompanied by an English translation verified to be complete and accurate.

(b) FDA may choose not to accept a PMN for either of the following:

(1) A use of a food contact substance that is the subject of a regulation in parts 173 through 189 of this chapter; or

(2) A use of a food contact substance that is the subject of an exemption under the threshold of regulation process described in § 170.39.

(c) A petition must be submitted under § 171.1 of this chapter to authorize the safe use of a food contact substance in either of the following circumstances, unless FDA agrees to accept a PMN for the proposed use.

(1) The use of the food contact substance increases the cumulative dietary concentration to a certain level. For a substance that is a biocide (e.g., it is intended to exert microbial toxicity), this level is equal to or greater than 200 parts per billion in the daily diet (0.6 milligram (mg)/person/day). For a substance that is not a biocide, this level is equal to or greater than 1 part per million in the daily diet (3 mg/person/day); or

(2) There exists a bioassay on the food contact substances, FDA has not reviewed the bioassay, and the bioassay is not clearly negative for carcinogenic effects.

(d) A notifier must keep a current address on file with FDA.

(1) The current address may be either the notifier's address or the address of the notifier's agent.

(2) FDA will deliver correspondence to the notifier's current address.

§ 170.101 Information in a premarket notification for a food contact substance (PMN).

A PMN must contain the following:

(a) A comprehensive discussion of the basis for the notifier's determination that the use of the food contact substance is safe. This discussion must:

(1) Discuss all information and data submitted in the notification; and

(2) Address any information and data that may appear to be inconsistent with the notifier's determination that the proposed use of the food contact substance is safe.

(b) All data and other information that form the basis of the notifier's determination that the food contact substance is safe under the intended conditions of use. Data must include primary biological data and chemical data.

(c) A good laboratory practice statement for each nonclinical laboratory study that is submitted as part of the PMN, in the form of either:

(1) A signed statement that the study was conducted in compliance with the good laboratory practice regulations under part 58 of this chapter; or

(2) A brief signed statement listing the reason(s) that the study was not conducted in compliance with part 58 of this chapter.

(3) Data from any study conducted after 1978 but not conducted in compliance with part 58 of this chapter must be validated by an independent third party prior to submission to the Food and Drug Administration (FDA), and the report and signed certification of the validating party must be submitted as part of the notification.

(d) Information to address FDA's responsibility under the National Environmental Policy Act, in the form of either:

(1) A claim of categorical exclusion under § 25.30 or § 25.32 of this chapter; or

(2) An environmental assessment complying with § 25.40 of this chapter.

(e) A completed and signed FDA Form No. 3480.

§ 170.102 Confidentiality of information in a premarket notification for a food contact substance (PMN).

(a) During the 120-day period of the Food and Drug Administration (FDA) review of a PMN, FDA will not publicly disclose any information in that PMN.

(b) FDA will not publicly disclose the information in a PMN that is withdrawn prior to the completion of FDA's review.

(c) Once FDA completes its review of a PMN, the agency will make its conclusion about the PMN publicly available. For example, if FDA objects to a notification 90 days after the date of receipt, the agency would make available its objection at that time.

(d) By submitting a PMN to FDA, the notifier waives any claim to confidentiality of the information required to adequately describe the food contact substance and the intended conditions of use that are the subject of that PMN.

(e) The following data and information in a PMN are available for public disclosure, unless extraordinary circumstances are shown, on the 121st day after receipt of the notification by FDA, unless the PMN is withdrawn under § 170.103.

(1) All safety and functionality data and information submitted with or incorporated by reference into the notification. Safety and functionality data include all studies and tests of a food contact substance on animals and humans and all studies and tests on a food substance for establishing identity, stability, purity, potency, performance, and usefulness.

(2) A protocol for a test or study, unless it is exempt from disclosure under § 20.61 of this chapter.

(3) A list of all ingredients contained in a food contact substance, excluding information that is exempt from disclosure under § 20.61 of this chapter. Where applicable, an ingredient list will be identified as incomplete.

(4) An assay method or other analytical method, unless it serves no regulatory or compliance purpose and is exempt from disclosure under § 20.61 of this chapter.

(5) All correspondence and written summaries of oral discussions relating to the notification, except information that is exempt for disclosure under § 20.61.

(6) All other information not subject to an exemption from disclosure under subpart D of part 20 of this chapter.

§ 170.103 Withdrawal without prejudice of a premarket notification for a food contact substance (PMN).

A notifier may withdraw a PMN without prejudice to a future

submission to the Food and Drug Administration (FDA) if FDA has not completed review of the PMN. For the purpose of this section, FDA's review is completed when, FDA has allowed 120 days to pass without objecting to the PMN or FDA has issued an objection letter.

§ 170.104 Action on a premarket notification for a food contact substance (PMN).

(a) If the Food and Drug Administration (FDA) does not object to a PMN within the 120-day period for FDA review, the PMN becomes effective.

(b) In order for the 120-day review period to begin FDA must accept that notification.

(1) If any element required under § 170.101 is missing from a PMN, then FDA will not accept that PMN and FDA will send a PMN nonacceptance letter to the notifier. If the notifier submits the missing information before FDA sends a PMN nonacceptance letter, the date of receipt of the PMN will become the date of receipt of the missing information.

(2) If FDA accepts a PMN, then FDA will acknowledge in writing its receipt of that PMN.

(c) Objection to a PMN:

(1) If FDA objects to a PMN, then FDA will send a PMN objection letter. The date of the letter will be the date of FDA's objection for purposes of section 409(h)(2)(A) of the act.

(2) If FDA objects to a PMN within the 120-day period for FDA review, the PMN will not become effective.

(3) FDA may object to a PMN if any part of FDA's 120-day review occurs during a period when this program is not funded as required in section 409(h)(5) of the act.

(d) If FDA and a notifier agree that the notifier may submit a FAP proposing the approval of the food contact substance for the use in the notifier's PMN, FDA will consider that PMN to be withdrawn by the notifier on the date the petition is received by FDA.

§ 170.105 The Food and Drug Administration's (FDA's) determination that a premarket notification for a food contact substance (PMN) is no longer effective.

(a) If data or other information available to FDA, including data not submitted by the notifier, demonstrate that the intended use of the food contact substance is no longer safe, FDA may determine that the authorizing PMN is no longer effective.

(b) If FDA determines that a PMN is no longer effective, FDA will inform the notifier in writing of the basis for that determination. FDA will give the notifier an opportunity to show why the

PMN should continue to be effective and will specify the time that the notifier will have to respond.

(c) If the notifier fails to respond adequately to the safety concerns regarding the notified use, FDA will publish a notice of its determination that the PMN is no longer effective. FDA will publish this notice in the **Federal Register**, stating that a detailed summary of the basis for FDA's determination that the PMN is no longer effective has been placed on public display and that copies are available upon request. The date that the notice publishes in the **Federal Register**, is the date on which the notification is no longer effective.

(d) FDA's determination that a PMN is no longer effective is final agency action subject to judicial review.

§ 170.106 Notification for a food contact substance formulation (NFCFSF).

(a) In order for the Food and Drug Administration (FDA) to accept an NFCFSF, any food additive that is a component of the formulation must be authorized for its intended use in that NFCFSF.

(b) FDA may publish a notice in the **Federal Register** stating that the agency has insufficient resources to review NFCFSF's. From the date that this notice publishes in the **Federal Register**, FDA will no longer accept NFCFSF's.

(c) An NFCFSF must contain the following:

(1) A completed and signed FDA Form No. 3479; and

(2) Any additional documentation required to establish that each component of the formulation already may be legally marketed for its intended use.

PART 171—FOOD ADDITIVE PETITIONS

8. The authority citation for 21 CFR part 171 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348, 371.

9. Section 171.1 is amended by revising paragraph (i)(1) to read as follows:

§ 171.1 Petitions.

* * * * *

(i)(1)(i) Within 15 days after receipt, the Food and Drug Administration will notify the petitioner of the acceptance or nonacceptance of a petition, and if not accepted, the reasons therefor. If accepted, the petitioner will be sent a letter stating this and the date of the letter shall become the date of filing for the purposes of section 409(b)(5) of the act. In cases in which the Food and Drug Administration agrees that a

premarket notification submitted under section 409(h) of the act may be converted to a petition, the withdrawal date for the premarket notification will be deemed the date of receipt for the FAP.

(ii) If the petitioner desires, he may supplement a deficient petition after being notified regarding deficiencies. If the supplementary material or explanation of the petition is deemed acceptable, the petitioner shall be notified. The date of such notification becomes the date of filing. If the petitioner does not wish to supplement or explain the petition and requests in writing that it be filed as submitted, the petition shall be filed and the petitioner so notified.

(iii) Notwithstanding paragraph (i)(1)(ii) of this section, the petition shall not be filed if the Food and Drug Administration determines that the use identified in the petition should be the subject of a premarket notification under section 409(h) of the act rather than a FAP.

* * * * *

10. Section 171.7 is amended by adding paragraph (c) to read as follows:

§ 171.7 Withdrawal of petition without prejudice.

* * * * *

(c) Any petitioner who has a FAP pending before the agency and who subsequently submits a premarket notification for a use or uses described in such petition, shall be deemed to have withdrawn the petition for such use or uses without prejudice to a future filing on the date the premarket notification is received by FDA.

PART 174—INDIRECT FOOD ADDITIVES: GENERAL

11. The authority citation for 21 CFR part 174 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 348, 371.

12. Section 174.5 is amended by adding paragraph (d)(5) to read as follows:

§ 174.5 General provisions applicable to indirect food additives.

* * * * *

(d) * * *

(5) Food contact substances used in accordance with an effective premarket notification submitted under section 409(h) of the act.

PART 179—IRRADIATION IN THE PRODUCTION, PROCESSING, AND HANDLING OF FOOD

13. The authority citation for 21 CFR part 179 continues to read as follows:

Authority: 21 U.S.C. 321, 342, 343, 348, 373, 374.

14. Section 179.25 is amended by revising paragraph (c) to read as follows:

§ 179.25 General provisions for food irradiation.

* * * * *

(c) Packaging materials subjected to irradiation incidental to the radiation treatment and processing of prepackaged food shall be in compliance with § 179.45, shall be the subject of an exemption for such use under § 170.39 of this chapter, or shall be the subject of an effective premarket notification for such use submitted under § 170.100 of this chapter.

* * * * *

Dated: January 24, 2000.

Margaret M. Dotzel,

Acting Associate Commissioner for Policy.

[FR Doc. 00-17653 Filed 7-12-00; 8:45 am]

BILLING CODE 4160-01-F

**ENVIRONMENTAL PROTECTION
AGENCY**

40 CFR Part 271

[FRL-6730-9]

**Hazardous Waste Management
Program: Final Authorization of State
Hazardous Waste Management
Program Revisions for State of Texas**

AGENCY: Environmental Protection
Agency (EPA).

ACTION: Proposed rule and request for
comment.

SUMMARY: The EPA (also, “the Agency” in this preamble) proposes to grant final authorization to the hazardous waste program revisions submitted by the State of Texas for its hazardous waste program revisions, specifically, revisions needed to meet the Resource Conservation and Recovery Act (RCRA) Cluster VI, which contains Federal rules promulgated between July 1, 1995 to June 30, 1996. In the “Rules and Regulations” section of this **Federal Register** (FR), EPA is authorizing the State’s program revisions as an immediate final rule without prior proposal because the EPA views this action as noncontroversial and anticipates no adverse comments. The Agency has explained the reasons for this authorization in the preamble to the immediate final rule. If the EPA does not receive adverse written comments, the immediate final rule will become effective and the Agency will not take further action on this proposal. If the EPA receives adverse written comments, a second **Federal Register** document will be published before the time the immediate final rule takes effect. The second document may withdraw the immediate final rule or identify the issues raised, respond to the comments and affirm that the immediate final rule will take effect as scheduled. Any parties interested in commenting on this action should do so at this time.

DATES: Written comments must be received on or before August 14, 2000.

ADDRESSES: Mail written comments to Alima Patterson, Region 6, Regional Authorization Coordinator, Grants and Authorization Section (6PD-G), Multimedia Planning and Permitting Division, at the address shown below. You can examine copies of the materials submitted by the State of Texas during normal business hours at the following locations: EPA Region Library, 12th Floor, 1445 Ross Avenue, Dallas, Texas 75202-2733, (214) 665-6444; or Texas Natural Resource Conservation Commission, 1700 N. Congress Avenue, Austin TX 78711-3087, (512) 239-6757.

FOR FURTHER INFORMATION CONTACT:
Alima Patterson (214) 665-8533.

SUPPLEMENTARY INFORMATION: For additional information, please see the immediate final rule published in the “Rules and Regulations” section of this **Federal Register**.

Dated: June 14, 2000.

Jerry Clifford,

Acting Regional Administrator, Region 6.

[FR Doc. 00-17489 Filed 7-12-00; 8:45 am]

BILLING CODE 6560-50-P

Notices

Federal Register

Vol. 65, No. 135

Thursday, July 13, 2000

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

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Request for Reinstatement and Revision of a Previously Approved Information Collection

AGENCY: Farm Service Agency, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995, this notice announces the intent of the Farm Service Agency (FSA) to request a reinstatement and revision of a previously approved information collection used in support of the FSA, Farm Loan Programs (FLP). This renewal does not involve any revisions to the program regulations.

DATES: Comments on this notice must be received on or before September 11, 2000 to be assured consideration.

FOR FURTHER INFORMATION CONTACT: Patrick Spalding, Loan Officer, USDA, FSA, Farm Loan Programs, Loan Making Division, 1400 Independence Avenue, SW, STOP 0522, Washington, D.C. 20250-0522; Telephone (202) 690-0595; Electronic mail: patrick.spalding@usda.gov.

SUPPLEMENTARY INFORMATION:

Title: Direct Farm Ownership Loan Policies, Procedures, and Authorizations.

OMB Control Number: 0560-0157.

Type of Request: Reinstatement and Revision of a Previously Approved Information Collection.

Abstract: The information collected under OMB Control Number is 0560-0157 is necessary to administer the farm ownership loan program in accordance with the requirements in 7 CFR part 1943 subpart A as authorized by the Consolidated Farm and Rural Development Act. Specifically, the Agency uses the information to evaluate loan making or loan servicing proposals. The information is needed by the

Agency to evaluate an applicant's eligibility, and to determine if the operation is economically feasible and the security offered in support of the loan is adequate.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .25 hours per response.

Respondents: Individuals or households, businesses or other for profit and farms.

Estimated Number of Respondents: 200.

Estimated Number of Responses: 210.

Estimated Total Annual Burden: 50.85.

Comments are sought on these requirements including: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collections techniques or other forms of information technology.

These comments should be sent to the Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503 and to Mike Hinton, USDA, FSA, Farm Loan Programs, Loan Making Division, 1400 Independence Avenue, SW, STOP 0522, Washington, D.C. 20250-0522. Copies of the information collection may be obtained from Mike Hinton at the above address. Comments regarding paperwork burden will be summarized and included in the request for OMB approval of the information collection. All comments will also become a matter of public record.

Signed in Washington, D.C., on July 6, 2000.

Keith Kelly,

Administrator, Farm Service Agency.

[FR Doc. 00-17680 Filed 7-12-00; 8:45 am]

BILLING CODE 3410-05-P

DEPARTMENT OF COMMERCE

Census Bureau

Survey of Income and Program Participation (SIPP) Wave 1 of the 2001 Panel

ACTION: Proposed Collection; Comment Request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before September 11, 2000.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at LEngelme@doc.gov).

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Judith H. Eargle, Census Bureau, FOB 3, Room 3379, Washington, DC 20233-0001, (301) 457-3819.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts the SIPP which is a household-based survey designed as a continuous series of national panels. New panels are introduced every few years with each panel usually having durations of 1 to 4 years. Respondents are interviewed at 4-month intervals or "waves" over the life of the panel. The survey is molded around a central "core" of labor force and income questions that remain fixed throughout the life of the panel. The core is supplemented with questions designed to address specific needs, such as obtaining information on taxes, the ownership and contributions made to an Individual Retirement Account, Keogh, and 401K plans, examining patterns in respondent work schedules, and child

care arrangements. These supplemental questions are included with the core and are referred to as "topical modules."

The SIPP represents a source of information for a wide variety of topics and allows information for separate topics to be integrated to form a single, unified database so that the interaction between tax, transfer, and other government and private policies can be examined. Government domestic-policy formulators depend heavily upon the SIPP information concerning the distribution of income received directly as money or indirectly as in-kind benefits and the effect of tax and transfer programs on this distribution. They also need improved and expanded data on the income and general economic and financial situation of the U.S. population. The SIPP has provided these kinds of data on a continuing basis since 1983 permitting levels of economic well-being and changes in these levels to be measured over time.

The 2001 panel is currently scheduled for three years and will include nine waves of interviewing beginning February 2001. Approximately 50,000 households will be selected for the 2001 panel, of which, 37,500 are expected to be interviewed. We estimate that each household will contain 2.1 persons, yielding 78,750 interviews in Wave 1 and subsequent waves. Interviews take 30 minutes on average. Two waves of interviewing will occur in the 2001 SIPP Panel during FY 2001. The total annual burden for 2001 Panel SIPP interviews would be 78,750 hours in FY 2001.

The topical modules for the 2001 Panel Wave 1 collect information about: Reciprocity History Employment History Wave 1 interviews will be conducted from February 2001 through May 2001.

A 10-minute reinterview of 2,500 persons is conducted at each wave to ensure accuracy of responses. Reinterviews would require an additional 835 burden hours in FY 2001.

An additional 1,050 burden hours is requested in order to continue the SIPP Methods Panel testing which will be conducted during the period of Wave 1 interviewing. The test targets SIPP Wave 1 items and sections that require thorough and rigorous testing in order to improve the quality of core data.

II. Method of Collection

The SIPP is designed as a continuing series of national panels of interviewed households that are introduced every few years with each panel having durations of 1 to 4 years. All household members 15 years old or over are interviewed using regular proxy-

respondent rules. During the 2001 panel, respondents are interviewed a total of nine times (nine waves) at 4-month intervals making the SIPP a longitudinal survey. Sample people (all household members present at the time of the first interview) who move within the country and reasonably close to a SIPP primary sampling unit will be followed and interviewed at their new address. Individuals 15 years old or over who enter the household after Wave 1 will be interviewed; however, if these individuals move, they are not followed unless they happen to move along with a Wave 1 sample individual.

III. Data

OMB Number: Not Available.

Form Number: SIPP/CAPI Automated Instrument.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 78,750 persons per wave.

Estimated Time Per Response: 30 minutes per person on average.

Estimated Total Annual Burden Hours: 80,635.

Estimated Total Annual Cost: The only cost to respondents is their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for the Office of Management and Budget approval of this information collection; they also will become a matter of public record.

Dated: July 10, 2000.

Madeleine Clayton,
Management Analyst, Office of the Chief
Information Officer.

[FR Doc. 00-17721 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Census Bureau

Survey of Income and Program Participation (SIPP) Wave 4 of the 2000 Panel

ACTION: Proposed collection; comment request.

SUMMARY: The Department of Commerce, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other federal agencies to take this opportunity to comment on proposed or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3506(c)(2)(A)).

DATES: Written comments must be submitted on or before September 11, 2000.

ADDRESSES: Direct all written comments to Linda Engelmeier, Departmental Forms Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at LEngelme@doc.gov).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Judith H. Eargle, Census Bureau, FOB 3, Room 3379, Washington, DC 20233-0001, (301) 457-3819.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau conducts the SIPP which is a household-based survey designed as a continuous series of national panels. New panels are introduced every few years with each panel usually having durations of 1 to 4 years. Respondents are interviewed at 4-month intervals or "waves" over the life of the panel. The survey is molded around a central "core" of labor force and income questions that remain fixed throughout the life of the panel. The core is supplemented with questions designed to address specific needs, such as obtaining information on taxes, the ownership and contributions made to an Individual Retirement Account, Keogh and 401K plans, examining patterns in respondent work schedules, and child care arrangements. These supplemental questions are included with the core and are referred to as "topical modules."

The SIPP represents a source of information for a wide variety of topics

and allows information for separate topics to be integrated to form a single, unified database so that the interaction between tax, transfer, and other government and private policies can be examined. Government domestic-policy formulators depend heavily upon the SIPP information concerning the distribution of income received directly as money or indirectly as in-kind benefits and the effect of tax and transfer programs on this distribution. They also need improved and expanded data on the income and general economic and financial situation of the U.S. population. The SIPP has provided these kinds of data on a continuing basis since 1983 permitting levels of economic well-being and changes in these levels to be measured over time.

The 2000 Panel is currently scheduled for just over one year and will include 3 waves of interviewing. We are considering extending the panel to include 9 waves. A request for OMB clearance of the core questions and Wave 4 topical modules will be submitted if the panel is extended. Approximately 11,500 households are in the 2000 Panel. We estimate that each household will contain 2.1 persons, yielding 24,150 interviews in each wave. Interviews take 30 minutes on average. If the 2000 Panel is extended, three waves of interviewing would occur in the 2000 Panel during FY 2001. The total annual burden for 2000 Panel SIPP interviews would be 36,255 hours in FY 2001.

The topical modules for the 2000 Panel Wave 4 would collect information about:

- Annual Income and Retirement Accounts
- Child Care
- Work Schedule
- Taxes
- Children's Well-Being

Wave 4 interviews would be conducted from February 2001 through May 2001.

A 10-minute reinterview of 750 persons is conducted at each wave to ensure accuracy of responses. Reinterviews would require an additional 375 burden hours in FY 2001.

An additional 1,050 burden hours is requested in order to continue the SIPP Methods Panel testing which will be conducted during the period of Wave 4 interviewing. The test targets SIPP Wave 1 items and sections that require thorough and rigorous testing in order to improve the quality of core data.

II. Method of Collection

The SIPP is designed as a continuing series of national panels of interviewed

households that are introduced every few years with each panel having durations of 1 to 4 years. All household members 15 years old or over are interviewed using regular proxy-respondent rules. During the 2000 panel, respondents are interviewed at 4-month intervals making the SIPP a longitudinal survey. Sample people (all household members present at the time of the first interview) who move within the country and reasonably close to a SIPP primary sampling unit will be followed and interviewed at their new address. Individuals 15 years old or over who enter the household after Wave 1 will be interviewed; however, if these individuals move, they are not followed unless they happen to move along with a Wave 1 sample individual.

III. Data

OMB Number: 0607-0865.

Form Number: SIPP/CAP Automated Instrument.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 24,150 persons per wave.

Estimated Time Per Response: 30 minutes per person on average.

Estimated Total Annual Burden Hours: 37,650.

Estimated Total Annual Cost: The only cost to respondents is their time.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13, United States Code, Section 182.

IV. Request for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized or included in the request for the Office of Management and Budget approval of this information collection; they also will become a matter of public record.

Dated: July 10, 2000.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 00-17722 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Census Bureau

Submission for OMB Review; Comment Request

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

Agency: U.S. Census Bureau
Department of Commerce.

Title: Annual Survey of Local Government Finances (School Systems).

Form Number(s): F-33, F-33-1, F-33-L1, F-33-L2, F-33-L3.

Agency Approval Number: 0607-0700.

Type of Request: Revision of a currently approved collection.

Burden: 3,737 hours.

Number of Respondents: 3,500.

Avg Hours Per Response: 1.1 hours average over all forms.

Needs and Uses: The Census Bureau collects education finance data as part of its Annual Survey of State and Local Governments. This survey is the only comprehensive source of public fiscal data collected on a nationwide scale using uniform definitions, concepts and procedures. The collection covers the revenues, expenditures, debt, and assets of all public school systems. This data collection has been coordinated with the National Center for Education Statistics (NCES). The NCES uses this collection to satisfy its need for school system level finance data.

Information on the finances of our public schools is vital to assessing their effectiveness. This data collection makes it possible to access a single database to obtain information on such things as per pupil expenditures and the percent of state, local, and federal funding for each school system. Recently, as exemplified by the establishment of the America 2000 education goals, there has been increased interest in improving the Nation's public schools. One result of this intensified interest has been a significant increase in the demand for school finance data.

In this request, six new "special processing" items have been added to the F-33 data collection form for state

payments made on behalf of the school systems. These items will make it possible for expenditure data to be more accurately reported at the functional level. Additionally, we are adding two new data collection forms. Form F-33-L2 is a supplemental letter that we will send to the school systems whose state education agencies cannot provide indebtedness information. Form F-33-L3 is a supplemental letter that we will send to the school systems whose state education agencies cannot provide assets and indebtedness information. This letter combines the items requested on the forms F-33-L1 and F-33-L2.

Affected Public: State, local, or Tribal government.

Frequency: Annually.

Respondent's Obligation: Voluntary.

Legal Authority: Title 13 U.S.C., Sections 161 and 182.

OMB Desk Officer: Susan Schechter, (202) 395-5103.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482-3272, Department of Commerce, room 6086, 14th and Constitution Avenue, NW, Washington, DC 20230 (or via the Internet at LEngelme@doc.gov).

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Susan Schechter, OMB Desk Officer, room 10201, New Executive Office Building, Washington, DC 20503.

Dated: July 7, 2000.

Madeleine Clayton,

Management Analyst, Office of the Chief Information Officer.

[FR Doc. 00-17718 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-07-P

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Technical Advisory Committees; Notice of Recruitment of Private-Sector Members

Summary: Six Technical Advisory Committees (TACs) advise the Department of Commerce on the technical parameters for export controls applicable to dual-use commodities and technology and on the administration of those controls. The TACs are composed of representatives from industry and Government representing diverse points of view on the concerns of the exporting community. Industry representatives are selected from firms producing a broad range of goods, technologies, and software presently controlled for

national security, foreign policy, non-proliferation, and short supply reasons or that are proposed for such controls, balanced to the extent possible among large and small firms.

TAC members are appointed by the Secretary of Commerce and serve terms of not more than four consecutive years. The membership reflects the Department's commitment to attaining balance and diversity. TAC members must obtain secret-level clearances prior to appointment. These clearances are necessary so that members can be permitted access to the classified information needed to formulate recommendations to the Department of Commerce. Each TAC meets approximately 4 times per year. Members of the Committees will not be compensated for their services.

The six TACs are responsible for advising the Department of Commerce on the technical parameters for export controls and the administration of those controls within the following areas: Information Systems TAC: Control List Categories 3 (electronics—semiconductor section), 4 (computers), and 5 (telecommunications and information security); Materials TAC: Control List Category 1 (materials, chemicals, microorganisms, and toxins); Materials Processing Equipment TAC: Control List Category 2 (materials processing); Regulations and Procedures TAC: the Export Administration Regulations (EAR) and procedures for implementing the EAR; Sensors and Instrumentation TAC: Control List Categories 3 (electronics—instrumentation section) and 6 (sensors and lasers); Transportation and Related Equipment TAC: Control List Categories 7 (navigation and avionics), 8 (marine technology), and 9 (propulsion systems, space vehicles, and related equipment).

To respond to this recruitment notice, please send a copy of your resume. Please use the fax number or e-mail address below.

Deadline: This Notice of Recruitment will be open for one year from its date of publication in the **Federal Register**.

For More Information Contact: Ms. Lee Ann Carpenter on (202) 482-2583. Resumes may be faxed to her at (202) 501-8024 or e-mailed to her at lcarpent@bxa.doc.gov

Dated: July 6, 2000.

R. Roger Majak,

Assistant Secretary for Export Administration.

[FR Doc. 00-17748 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-JT-M

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 34-2000]

Proposed Foreign-Trade Zone— Pensacola/Escambia County, Florida Area Application and Public Hearing

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Pensacola-Escambia County Promotion and Development Commission, a Florida public corporation, to establish a general-purpose foreign-trade zone at sites in the Pensacola and Escambia County, Florida area, within/adjacent to the Pensacola Customs port of entry. The application was submitted pursuant to the provisions of the FTZ Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on July 6, 2000. The applicant is authorized to make the proposal under Section 288.36, Florida Statutes 1999.

The proposed new zone would consist of five sites covering 1,660 acres in the Escambia County and Pensacola metropolitan area: *Site 1* (40 acres)—Port of Pensacola (owned by the City of Pensacola), 700 S. Barracks Street, Pensacola; *Site 2* (1,400 acres)—Pensacola Regional Airport complex (owned by the City of Pensacola), 2430 Airport Boulevard, Pensacola; *Site 3* (70 acres)—Pensacola Shipyard Marine Complex (owned by FDC Holdings, Inc.), 700 South Myrick Street, Pensacola; *Site 4* (10 acres)—FDC Industrial Warehouse site (owned by FDC Holdings, Inc.), 10 Spruce Street, Pensacola; and, *Site 5* (140 acres)—Century Industrial Park (owned by the Town of Century), Escambia County Road x4 and Industrial Boulevard, Century. Site 4 is in a brownfield redevelopment area that is being funded by EPA and the State of Florida. Site 5 is located in an enterprise zone.

The application indicates a need for additional foreign-trade zone services in the Pensacola and Escambia County, Florida area. Several firms have indicated an interest in using zone procedures for warehousing/distribution of such items as forest products, paper products, cabinets, marine electrical systems and components, and custom modified gas chromatography equipment for the petroleum, chemical and petrochemical industries. Specific manufacturing approvals are not being sought at this time. Requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff

has been designated examiner to investigate the application and report to the Board.

As part of the investigation, the Commerce examiner will hold a public hearing on August 9, 2000, 1:00 p.m., at the Pensacola City Hall, Whibbs Room, First Floor, Pensacola, Florida 32501.

Public comment on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is September 11, 2000. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to September 26, 2000).

A copy of the application and accompanying exhibits will be available during this time for public inspection at the following locations:

Office of the Pensacola Area Chamber of Commerce, 117 West Garden Street, Pensacola, FL 32501

Office of the Executive Secretary, Foreign-Trade Zones Board, Room 4008, U.S. Department of Commerce, 14th and Pennsylvania Avenue, NW., Washington, DC 20230

Dated: July 7, 2000.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 00-17764 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 35-2000]

Foreign-Trade Zone 74—Baltimore, Maryland Application for Expansion

An application has been submitted to the Foreign-Trade Zones (FTZ) Board (the Board) by the Baltimore Development Corporation, on behalf of the City of Baltimore, Maryland, grantee of FTZ 74, requesting authority to expand and reorganize its zone in the Baltimore, Maryland area, within the Baltimore Customs port of entry. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on July 7, 2000.

FTZ 74 was approved on January 21, 1982 (Board Order 183, 47 FR 5737, 2/8/82) and expanded on January 31, 1989 (Board Order 427, 54 FR 5992, 2/7/89). The zone project currently consists of approximately 150 acres at the following sites: *Site 1A*—6201-6301

Pulaski Highway, Baltimore; *Site 2*—open space 1 mile from the Holabird Park; *Site 3*—within the Point Breeze Business Center, 2500 Broening Highway, adjacent to the Dundalk Marine Terminal; *Site 3A* (Canton Warehouse x1)—at the northwest corner of the Seagirt Marine Terminal at the intersection of Keith Avenue and Vail Street; *Site 3B*—warehouse at 1657-B South Highland Avenue, Baltimore, within the Highland Marine Terminal; *Site 3C*—2101 E. Fort Avenue, Locust Point; and, *Site 4*—Shed x4 within the Port of Baltimore's Dundalk Marine Terminal and Piers 4/5 at the North Locust Point Marine Terminal.

The applicant, in a major revision to its zone plan, now requests authority to expand and reorganize its general-purpose zone to add 9 new sites; restore FTZ status to areas at existing Sites 1 and 3 that had been previously deleted, returning existing Sites 1 and 3 to their original boundaries as approved by the Board in 1982 and 1989 respectively; eliminate existing Site 2; and, redesignate existing Site 3 as Site 2. Sites authorized by certain previous temporary boundary modifications are included in the new sites, and the proposed expansion would supercede such modifications. The expansion and reconfiguration of the zone will result in a zone project consisting of eleven sites (1,300 acres) located in Baltimore City, at or adjacent to the Port of Baltimore. Sites 1 and 2 and Proposed Sites 3 to 8 are part of the Port of Baltimore complex and Sites 9-11 are business parks.

The revised zone plan for FTZ 74, as proposed, would be expanded and reorganized as follows: *Site 1*: (20 acres)—Holabird Industrial Park, Baltimore; *Site 2*: (127 acres)—within the Point Breeze Business Center, 2500 Broening Highway, adjacent to the Dundalk Marine Terminal, Baltimore; *Proposed Site 3*: (213 acres) Seagirt Marine Terminal, Baltimore; *Proposed Site 4*: (272 acres)—Dundalk Marine Terminal, Baltimore; *Proposed Site 5*: (97 acres)—Chesapeake Terminal and American Port Services Center, Baltimore; *Proposed Site 6*: (274 acres)—Atlantic and Fairfield Terminals, Baltimore; *Proposed Site 7*: (196 acres)—North & South Locust Point Terminals, Baltimore; *Proposed Site 8*: (157 acres)—Rukert and Clinton Street Marine Terminals, Baltimore; *Proposed Site 9*: (15 acres)—Belt's Business Center, 600 Folcroft Street, Baltimore; *Proposed Site 10*: (81 acres)—Pulaski Business Park, 6200 Pulaski Highway, Baltimore; and, *Proposed Site 11*: (12 acres)—Obrecht Business Center, 6200 Frankford Ave., Baltimore. No specific

manufacturing requests are being made at this time. Such requests would be made to the Board on a case-by-case basis.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment on the application is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is September 11, 2000. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to September 26, 2000).

A copy of the application and accompanying exhibits will be available for public inspection at each of the following locations:

U.S. Department of Commerce, Export Assistance Center, 401 E. Pratt Street, Suite 2432, Baltimore, MD 21202

Office of the Executive Secretary, Foreign-Trade Zones Board, Room 4008, U.S. Department of Commerce, 14th & Pennsylvania Avenue NW., Washington, DC 20230.

Dated: July 7, 2000.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 00-17765 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 33-2000]

Foreign-Trade Zone 7—Mayaguez, Puerto Rico: Application for Subzone, Caribbean Petroleum Corporation/Caribbean Petroleum Refining, Inc. (Oil Refinery Complex), Bayamon, Puerto Rico

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Puerto Rico Industrial Development Company, grantee of FTZ 7, requesting special-purpose subzone status for the oil refinery complex of Caribbean Petroleum Corporation/Caribbean Petroleum Refining, Inc. (CPC/CPR), located in Bayamon, Puerto Rico. The application was submitted pursuant to the provisions of the Foreign-Trade Zones Act, as amended (19 U.S.C. 81a-81u), and the regulations of the Board (15 CFR part 400). It was formally filed on July 6, 2000.

The refinery complex (48,000 BPD capacity, 77 storage tanks with over 2

million barrels of capacity) is located on State Road 28, Km. 2, Bayamon, Puerto Rico. The refinery (173.81 acres, 155 employees) is used to produce fuels and petrochemical products, including gasoline, jet fuel, distillates, residual fuels, naphthas, motor fuel blendstocks, liquid petroleum gases, butane, kerosene, and propane. Refinery by-products include petroleum coke, asphalt and sulfur. All of the crude oil (85 percent of inputs), and some naphthas, and gas oils are sourced from abroad.

Zone procedures would exempt the refinery from Customs duty payments of the foreign products used in its exports. On domestic sales, the company would be able to choose the Customs duty rates that apply to certain petrochemical feedstocks and refinery by-products (duty-free) by admitting incoming foreign crude oil in non-privileged foreign status. The duty rates on inputs range from 5.25 cents/barrel to 10.5 cents/barrel. The application indicates that the savings from zone procedures would help improve the refinery's international competitiveness.

In accordance with the Board's regulations, a member of the FTZ Staff has been designated examiner to investigate the application and report to the Board.

Public comment is invited from interested parties. Submissions (original and 3 copies) shall be addressed to the Board's Executive Secretary at the address below. The closing period for their receipt is September 11, 2000. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period to September 26, 2000.

A copy of the application and the accompanying exhibits will be available for public inspection at each of the following locations:

U.S. Department of Commerce, Export Assistance Center, 525 F.D. Roosevelt Ave., Suite 905, La Torre de Plaxa, San Juan, PR 00918

Office of the Executive Secretary, Foreign-Trade Zones Board, Room 4008, U.S. Department of Commerce, 14th and Pennsylvania Avenue, NW., Washington, DC 20230

Dated: July 6, 2000.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 00-17763 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-DS-M

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-803]

Notice of Final Results and Partial Rescission of Antidumping Duty Administrative Reviews: Heavy Forged Hand Tools From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Results of Antidumping Duty Administrative Reviews.

SUMMARY: On March 8, 2000, the Department of Commerce ("the Department") published the preliminary results of the administrative reviews of the antidumping duty orders on heavy forged hand tools ("HFHTs") from the People's Republic of China (65 FR 12202). The reviews cover five manufacturer/exporters, Fujian Machinery & Equipment Import & Export Corporation ("FMEC"), Liaoning Machinery Import & Export Corporation ("LMC"), Shandong Machinery Import & Export Corporation ("SMC"), Shandong Huarong General Group Corporation ("Shandong Huarong"), and Tianjin Machinery Import & Export Corporation ("TMC"). The period of review ("POR") is February 1, 1998 through January 31, 1999.

The final weighted-average dumping margins for the reviewed firms are listed below in the section entitled "*Final Results of the Reviews*." The final margins differ from those published in the preliminary results due to changes that we made since the preliminary results. For details regarding these changes, see the section of the notice entitled "*Changes Since the Preliminary Results of the Reviews*."

EFFECTIVE DATE: July 13, 2000.

FOR FURTHER INFORMATION CONTACT: Lyman Armstrong or James Terpstra, AD/CVD Enforcement Group II, Office IV, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482-3601 or (202) 482-3965 respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 ("the Act") by the Uruguay Round

Agreements Act ("URAA"). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations at 19 CFR part 351 (1998).

Background

Since the publication of the preliminary results, the following events have occurred. The Department issued supplemental questionnaires to TMC, LMC, and Shandong Huarong on March 9, 2000, and received responses to those questionnaires on March 17, 2000, and March 20, 2000. On March 28, 2000, and April 3, 2000, the respondents submitted publicly available information and comments regarding factor valuation. In response to the Department's invitation to comment on the preliminary results of these reviews, the respondents filed case briefs on April 10, 2000, and the petitioner filed a rebuttal brief on April 14, 2000. The respondents requested a public hearing on March 28, 2000 and a public hearing was held on April 19, 2000.

The Department has conducted these administrative reviews in accordance with section 751 of the Act.

Partial Rescission

At the preliminary results of these reviews, we preliminarily rescinded the reviews of Shandong Huarong with respect to hammers/sledges and picks/mattocks, and for LMC with respect to hammers/sledges, picks/mattocks, and axes/adzes classes because they had no shipments of products in these classes or kinds of merchandise. We have received no comment on this from interested parties, nor has any additional information been put on the record in these reviews. Therefore, we are making these rescissions final.

Scope of Reviews

Imports covered by these reviews are shipments of HFHTs from the PRC comprising the following classes or kinds of merchandise: (1) Hammers and sledges with heads over 1.5 kg (3.33 pounds) (hammers/sledges); (2) bars over 18 inches in length, track tools and wedges (bars/wedges); (3) picks/mattocks; and (4) axes/adzes.

HFHTs include heads for drilling, hammers, sledges, axes, mauls, picks, and mattocks, which may or may not be painted, which may or may not be finished, or which may or may not be imported with handles; assorted bar products and track tools including wrecking bars, digging bars and tampers; and steel wood splitting wedges. HFHTs are manufactured through a hot forge operation in which steel is sheared to required length,

heated to forging temperature, and formed to final shape on forging equipment using dies specific to the desired product shape and size. Depending on the product, finishing operations may include shot-blasting, grinding, polishing and painting, and the insertion of handles for handled products. HFHTs are currently classifiable under the following Harmonized Tariff Schedule (HTS) subheadings: 8205.20.60, 8205.59.30, 8201.30.00, and 8201.40.60. Specifically excluded are hammers and sledges with heads 1.5 kg (3.33 pounds) in weight and under, hoes and rakes, and bars 18 inches in length and under. Although the HTS subheadings are provided for convenience and Customs purposes, our written description of the scope of these orders is dispositive.

Verification

As provided in section 782(i) of the Act, we conducted verifications of the information provided by the trading companies SMC and TMC, as well as the information provided by their suppliers (the manufacturers of the subject merchandise). We used standard verification procedures including on-site inspection of the manufacturers' facilities, examination of relevant sales and financial records, and selection of relevant source documentation as exhibits. Our verification findings are detailed in the memoranda dated February 28, 2000, the public versions of which are on file in the Central Records Unit, Room B099 of the Main Commerce building (CRU-Public File). See *SMC's Sales Verification Report* (February 28, 2000), *TMC's Sales Verification Report* (February 28, 2000), *SMC's Cost Verification Report* (February 28, 2000), and *TMC's Cost Verification Report* (February 28, 2000).

Use of Facts Available

At the preliminary results of these reviews, we applied adverse facts available to Shandong Huarong with respect to axes/adzes; and to the PRC-wide entity (including FMEC) with respect to hammers/sledges, picks/mattocks, bars/wedges, and axes/adzes because they failed to provide certain information that was requested by the Department. We have received no comment on this issue from interested parties, nor has any additional information been put on the record in these reviews. Therefore, for the reasons stated in the preliminary results, we are using adverse facts available for Shandong Huarong with respect to the axes/adzes class or kind of merchandise and for the PRC-wide entity for all classes or kinds of subject merchandise

for these final results. See the "Facts Available" section of the Department's "Issues and Decision Memorandum" ("Decision Memorandum") from Holly A. Kuga, Acting Deputy Assistant Secretary, Important Administration, to Troy H. Cribb, Acting Assistant Secretary for Import Administration, dated July 6, 2000.

For a discussion of our use of facts available in regards to SMC, see Comments 1, 2 and 3 of the Decision Memorandum.

Corroboration

Section 776(c) of the Act provides that when the Department selects from among the facts otherwise available and relies on "secondary information," the Department shall, to the extent practicable, corroborate that information from independent sources reasonably at the Department's disposal. The Statement of Administrative Action (SAA) (H.R. Doc. 103-316 (2nd Sess. 1994)) states that "corroborate" means to determine that the information used has probative value. See SAA at 870. To corroborate secondary information, the Department will, to the extent practicable, examine the reliability and relevance of the information to be used. However, unlike other types of information, such as input costs or selling expenses, there are no independent sources for calculated dumping margins. The only source for margins is administrative determinations. Thus, in an administrative review, if the Department chooses as total adverse facts available a calculated dumping margin from a prior segment of the proceeding, it is not necessary to question the reliability of the margin for that time period. See *Grain-Oriented Electrical Steel From Italy; Preliminary Results of Antidumping Duty Administrative Review*, 61 FR 36551, 36552 (July 11, 1996). With respect to the relevance aspect of corroboration, however, the Department will consider information reasonably at its disposal to determine whether a margin continues to have relevance. Accordingly, for each class or kind of HFHTs for which we have resorted to adverse facts available, we have used the highest margin from this or any prior segment of the proceeding as the margin for these final results because there is no evidence on the record indicating that such margins are not appropriate as adverse facts available.

Analysis of Comments Received

All issues raised in the case and rebuttal briefs by parties to these administrative reviews are addressed in

the Decision Memorandum, which is hereby adopted by this notice. A list of the issues which parties have raised and to which we have responded, all of which are in the Decision Memorandum, is attached to this notice as an Appendix. Parties will find a complete discussion of all issues raised in these reviews and the corresponding recommendations in this public memorandum which is on file in the CRU-Public File. In addition a complete version of the Decision Memorandum can be accessed directly on the Web at www.ia.ita.doc.gov/frn/. The paper copy and electronic version of the Decision Memorandum are identical in content.

Changes Since the Preliminary Results of the Reviews

The Department, at verification, found certain errors in TMC's reported consumption of paint, electricity, packing materials, and coal. See *TMC's Cost Verification Report* (February 28, 2000) at 2. In addition, the Department made clerical errors in calculating the surrogate values for steel scrap, pallets, inland and ocean freight. The Department corrected for the errors in these final results of these administrative reviews. See *TMC's Final Calculation Memorandum* (July 06, 2000); see also *LMC's Final Calculation Memorandum* (July 06, 2000); see also *Shandong Huarong's Final Calculation Memorandum* (July 06, 2000). No other changes were made to our margin calculation programs.

Final Results of the Reviews

We determine that the following percentage weighted-average margins exist for the period February 1, 1999, through January 31, 1999:

Manufacturer/exporter	Margin (percent)
Shandong Huarong General Group Corporation:	
Axes/Adzes	41.12
Bars/Wedges	23.99
Liaoning Machinery Import & Export Corporation:	
Bars/Wedges	17.91
Tianjin Machinery Import & Export Corporation:	
Axes/Adzes	41.12
Bars/Wedges	91.45
Hammers/Sledges	32.51
Picks/Mattocks	2.34
Shandong Machinery Import & Export Corporation:	
Axes/Adzes	41.12
Bars/Wedges	91.45
Hammers/Sledges	32.51
Picks/Mattocks	98.77
PRC-wide rates:	
Axes/Adzes	41.12

Manufacturer/exporter	Margin (percent)
Bars/Wedges	91.45
Hammers/Sledges	32.51
Picks/Mattocks	98.77

The Department shall determine, and Customs shall assess, antidumping duties on all appropriate entries. In accordance with 19 CFR 351.212(b), we have calculated an importer-specific duty assessment rate. With respect to both export price and constructed export price sales, we divided total dumping margins for the reviewed sales by the total entered value of those reviewed sales for each importer. We will direct Customs to assess the resulting percentage margins against the entered Customs values for the subject merchandise on each of that importer's entries under the order during the review period.

Cash Deposit Requirements

The following deposit requirements will be effective upon publication of this notice of final results of administrative reviews for all shipments of HFHTs from the PRC entered, or withdrawn from warehouse, for consumption on or after the date of publication, as provided by section 751(a)(1) of the Act: (1) The cash deposit rates for the reviewed companies will be the rates shown above; (2) for companies previously found to be entitled to a company-specific rate and for which no review was requested, the cash deposit rates will continue to be the company-specific rates published for the most recent period reviewed; (3) for all other PRC exporters of subject merchandise, the cash deposit rates will be the PRC country-wide rate indicated above; and (4) the cash deposit rate for non-PRC exporters of subject merchandise from the PRC will be the rates applicable to the PRC supplier of that exporter. These deposit requirements shall remain in effect until publication of the final results of the next administrative reviews.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as the only reminder to parties subject to

administrative protective orders ("APOs") of their responsibility concerning the return or destruction of proprietary information disclosed under an APO in accordance with 19 CFR 351.305 or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and terms of an APO is a violation which is subject to sanction.

We are issuing and publishing these determinations and this notice in accordance with sections section 751(a)(1) and 771(i) of the Act.

Dated: July 6, 2000.

Troy H. Cribb,

Acting Assistant Secretary for Import Administration.

Appendix—Issues in Decision Memorandum Comments and Responses

- Whether Shandong Machinery Import & Export Company ("SMC") Failed Verification for Hammers/Sledges
- Whether the Application of Adverse Facts Available is Warranted for SMC's Sales of Hammers/Sledges
- Whether the Application of Adverse Facts Available is Warranted for SMC's Axes/Adzes, Picks/Mattocks, and Bars/Wedges
- Factory A's Unreported Factors of Production: Resin and Tape
- Calculation of Hammer Weight Loss for SMC
- Surrogate Value for Steel Bar
- Surrogate Value for Steel Billet
- Surrogate Value for Steel Scrap
- Surrogate Value for Pallets
- Truck Freight
- The "Sigma" Rule/Inland Freight
- Ocean Freight Rate
- Tianjin Machinery Import & Export Corporation ("TMC") Verification and Adjustment Issues
- Preliminary Adjustments Noted in the Calculation Memorandums

[FR Doc. 00-17760 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-337-804]

Certain Preserved Mushrooms from Chile: Final Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Rescission of Antidumping Duty Administrative Review.

SUMMARY: In response to a timely request from the petitioners¹, on January 26, 2000, the Department of Commerce published a notice of initiation of an administrative review of the antidumping duty order on certain preserved mushrooms from Chile with respect to Nature's Farm Products (Chile) S.A. and Ravine Foods Inc., covering the period August 5, 1998, through November 30, 1999. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 65 FR 42280 (January 26, 2000). The Department of Commerce is now rescinding this review as a result of the absence of imports and entries into the United States of the subject merchandise during the period of review.

EFFECTIVE DATE: July 13, 2000.

FOR FURTHER INFORMATION CONTACT:

David J. Goldberger or Katherine Johnson, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482-4136 or (202) 482-4929, respectively.

SUPPLEMENTARY INFORMATION:

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended ("the Act"), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department of Commerce's regulations are to 19 CFR part 351 (1999).

Background

On January 21, 2000, the Department ("the Department") issued the antidumping questionnaire to Nature's Farm Products (Chile) S.A. ("NFP") via its U.S. parent, Nature Farm Products, Inc., and Ravine Foods Inc. ("Ravine"), a Canadian company. On January 26, 2000, the Department published a notice of initiation of an administrative review of the antidumping duty order on certain preserved mushrooms from Chile with respect to NFP and Ravine (65 FR 4228). On February 28, 2000,

¹ The petitioners are the Coalition for Fair Preserved Mushroom Trade which includes the American Mushroom Institute and the following domestic companies: L.K. Bowman, Inc., Nottingham, PA; Modern Mushrooms Farms, Inc., Toughkernamon, PA; Monterrey Mushrooms, Inc., Watsonville, CA; Mount Laurel Canning Corp., Temple, PA; Mushrooms Canning Company, Kennett Square, PA; Southwood Farms, Hockessin, DE; Sunny Dell Foods, Inc., Oxford, PA; United Canning Corp., North Lima, OH.

Ravine advised the Department that the company did not export the subject merchandise to the United States during the period of review ("POR").

To confirm the accuracy of Ravine's claim, the Department performed a customs query on entries of the subject merchandise exported from Chile and Canada. In so doing, the Department examined U.S. Customs import statistics, and found no imports of the subject merchandise by Ravine, NFP, or any other company from Chile to the United States during the POR. We also found no imports of the subject merchandise from Canada. See March 14, 2000, Memorandum, "U.S. Customs Data on Imports of the Subject Merchandise," from David J. Goldberger to Irene Darzenta Tzafolias.

On May 26, 2000, the Department published a notice of preliminary rescission of antidumping duty administrative review on certain preserved mushrooms from Chile with respect to NFP and Ravine (65 FR 34147). In light of its no shipments finding, the Department preliminarily determined that there was no basis for applying facts available in this instance with regard to NFP, which did not respond to our questionnaire. No party commented on the Department's preliminary findings.

Scope of the Review

The products covered by this review are certain preserved mushrooms whether imported whole, sliced, diced, or as stems and pieces. The preserved mushrooms covered under this review are the species *Agaricus bisporus* and *Agaricus bitorquis*. "Preserved mushrooms" refer to mushrooms that have been prepared or preserved by cleaning, blanching, and sometimes slicing or cutting. These mushrooms are then packed and heated in containers including but not limited to cans or glass jars in a suitable liquid medium, including but not limited to water, brine, butter or butter sauce. Preserved mushrooms may be imported whole, sliced, diced, or as stems and pieces. Included within the scope of this review are "brined" mushrooms, which are presalted and packed in a heavy salt solution to provisionally preserve them for further processing.

Excluded from the scope of this review are the following: (1) All other species of mushroom, including straw mushrooms; (2) all fresh and chilled mushrooms, including "refrigerated" or "quick blanched mushrooms"; (3) dried mushrooms; (4) frozen mushrooms; and (5) "marinated," "acidified" or "pickled" mushrooms, which are prepared or preserved by means of

vinegar or acetic acid, but may contain oil or other additives.

The merchandise subject to this review is classifiable under subheadings 2003.1000.27, 2003.1000.31, 2003.1000.37, 2003.1000.43, 2003.1000.47.2003.1000.53, and 0711.90.4000 of the Harmonized Tariff Schedule of the United States ("HTS"). Although the HTS subheadings are provided for convenience and Customs purposes, our written description of the scope of this review is dispositive.

Final Rescission of Review

Pursuant to 19 CFR 351.213(d)(3), the Department may rescind an administrative review, in whole or only with respect to a particular exporter or producer, if the Secretary concludes that, during the period covered by the review, there were no entries, exports, or sales of the subject merchandise. In this case, the available evidence indicates that there were no entries of certain preserved mushrooms produced or exported from Chile during the POR. We also note, however, that our normal practice under section 776(b) of the Act is to use adverse facts available when a respondent (here, NFP) has not responded to our questionnaire and thus has failed to cooperate to the best of its ability. Given that the same dumping rate would apply to NFP regardless of whether we applied adverse facts available or simply rescinded this review, in the unusual circumstances of this case we have decided simply to rescind this review as to both Ravine and NFP in accordance with 19 CFR 351.213(d)(3).

The cash-deposit rate for NFP and "All Other" producers/exporters of the subject merchandise will remain at 148.51 percent, the rate established in the most recent segment of this proceeding for these producers/exporters (63 FR 56613, October 22, 1998), which is also the highest rate on the record of any segment of the proceeding.

This notice is published in accordance with 19 CFR 351.213(d)(4).

Richard W. Moreland,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 00-17761 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-DS-P

DEPARTMENT OF COMMERCE

International Trade Administration

[A-570-804]

Sparklers from the People's Republic of China: Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Final Results of Antidumping Duty Administrative Review.

SUMMARY: On April 6, 2000, the Department of Commerce (the "Department") published the preliminary results of its administrative review of the antidumping duty order on Sparklers from the People's Republic of China. See *Sparklers from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 65 FR 18059 (April 6, 2000) ("Preliminary Results"). The review covers three manufacturers/exporters of this merchandise to the United States, Guangxi Native Produce Import & Export Corporation, Beihai Fireworks and Firecrackers Branch ("Guangxi"); Hunan Provincial Firecrackers & Fireworks Import & Export (Holding) Corporation, Liling City Fireworks Bomb Fty. ("Hunan"); and Jiangxi Native Produce Import & Export Corporation, Guangzhou Fireworks Company ("Jiangxi") (collectively "the respondents"). The period of review is June 1, 1998, through May 31, 1999. We gave interested parties an opportunity to comment on the *Preliminary Results* of review but received no comments. Therefore, these final results do not differ from the *Preliminary Results* of review, in which we found that the use of facts available is appropriate.

EFFECTIVE DATE: July 13, 2000.

FOR FURTHER INFORMATION CONTACT:

Paige Rivas or Nithya Nagarajan, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482-0651 or (202) 482-5253, respectively.

SUPPLEMENTARY INFORMATION:

The Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended ("the Act"), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Rounds Agreements Act ("URAA"). In addition, unless otherwise indicated, all citations

to the Department's regulations are to 19 CFR part 351 (1999).

Background

On April 6, 2000, the Department published in the **Federal Register** (65 FR 18059) the *Preliminary Results* of the administrative review of the antidumping duty order on Sparklers from the People's Republic of China for the 98–99 review period. We invited parties to comment on our *Preliminary Results* of review. On April 21, 2000, petitioner submitted comments that were returned by the Department because they contained untimely new factual information. In a letter dated May 2, 2000, the Department requested that petitioner resubmit a revised version of the comments that reflected only information already on the record by May 8, 2000. Petitioner did not resubmit its comments.

In the *Preliminary Results*, we determined that it was appropriate to use, as adverse facts available for the PRC-wide rate, the highest rate from this or any previous segment of the proceeding. We selected the PRC-wide rate of 93.54 percent from *Sparklers from the People's Republic of China: Adverse Decision and Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order in Accordance with Decision on Remand*, 58 FR 40624 (July 29, 1993). We have now completed the administrative review in accordance with section 751 of the Act and have continued to use the rate of 93.54 percent as adverse facts available.

Scope of the Review

The products covered by this administrative review are sparklers from the People's Republic of China. Sparklers are fireworks, each comprising a cut-to-length wire, one end of which is coated with a chemical mix that emits bright sparks while burning. Sparklers are currently classifiable under subheading 3604.10.00 of Harmonized Tariff Schedules ("HTS"). The HTS subheading is provided for convenience and Customs purposes. The written description remains dispositive as to the scope of this proceeding.

Analysis of Comments Received

Other than the petitioner's comments that were rejected for containing untimely new factual information, we did not receive any interested party comments on our *Preliminary Results*. Therefore, there is no Issues and Decision Memorandum for the final results of review.

Use of Facts Otherwise Available

As determined in the *Preliminary Results*, the Department continues to use adverse facts available for the final results of review. Because we have received no responses and have not been contacted by the respondents, we determine that the use of facts available is appropriate. See *Preliminary Results*.

Final Results of Review

Because we received no comments from interested parties on our *Preliminary Results*, we have determined that no changes to our analysis are warranted for purposes of these final results. As a result of our review, we determine that the following margin exists for the period June 1, 1998, through May 31, 1999:

Exporter/manufacture	Weighted-average margin percentage
PRC-wide	93.54

Cash Deposit Requirements

The following cash deposit requirements will be effective upon publication of the final results of this administrative review for all shipments of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided for by section 751(a)(1) of the Act: (1) For previously reviewed or investigated companies that have a separate rate and for which no review was requested, the cash deposit rate will continue to be the company-specific rate published for the most recent period; (2) for all other PRC exporters, the cash deposit rate will be the rate indicated above; and (3) the cash deposit rate for non-PRC exporters will be the rate applicable to the PRC supplier of the exporter. These deposit requirements, when imposed, shall remain in effect until publication of the final results of the next administrative review.

This notice also serves as a final reminder to importers of their responsibility under 19 CFR 351.402(f) to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this review period. Failure to comply with this requirement could result in the Secretary's presumption that reimbursement of antidumping duties occurred and the subsequent assessment of doubled antidumping duties.

This notice also serves as a reminder to parties subject to administrative protective order (APO) of their

responsibility concerning the disposition of proprietary information disclosed under APO in accordance with 19 CFR 351.305. Timely notification of return/destruction of APO materials or conversion to judicial protective order is hereby requested. Failure to comply with the regulations and the terms of an APO is a sanctionable violation.

We are issuing and publishing this determination and notice in accordance with sections 751(a)(1) and 777(i) of the Act.

Dated: June 28, 2000.

Troy H. Cribb,

Acting Assistant Secretary for Import Administration.

[FR Doc. 00–17762 Filed 7–12–00; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Notice 2]

National Fire Codes: Request for Proposals for Revision of Codes and Standards

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Fire Protection Association (NFPA) proposes to revise some of its fire safety codes and standards and requests proposals from the public to amend existing or begin the process of developing new NFPA fire safety codes and standards. The purpose of this request is to increase public participation in the system used by NFPA to develop its codes and standards. The publication of this notice of request for proposals by the National Institute of Standards and Technology (NIST) on behalf of NFPA is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the standards referenced in the notice.

DATES: Interested persons may submit proposals on or before the dates listed with the standards.

ADDRESSES: Casey C. Grant, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269–9101.

FOR FURTHER INFORMATION CONTACT: Casey C. Grant, Secretary, Standards Council, at the above address, (617) 770–3000.

SUPPLEMENTARY INFORMATION:

Background

The National Fire Protection Association (NFPA) develops building, fire, and electrical safety codes and standards. Federal agencies frequently use these codes and standards as the basis for developing Federal regulations concerning fire safety. Often the Office of the Federal Register approves the incorporation by reference of these standards under 5 U.S.C. 552(a) and 1 CFR Part 51.

Request for Proposals

Interested persons may submit proposals, supported by written data,

views, or arguments to Casey C. Grant, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101. Proposals should be submitted on forms available from the NFPA Codes and Standards Administration Office.

Each person must include his or her name and address, identify the document and give reasons for the proposal. Proposals received before or by 5:00 PM local time on the closing date indicated would be acted on by the Committee. The NFPA will consider any proposal that it receives on or before the date listed with the codes or standard.

At a later date, each NFPA Technical Committee will issue a report, which will include a copy of written proposals that have been received, and an account of their disposition of each proposal by the NFPA Committee as the Report on Proposals. Each person who has submitted a written proposal will receive a copy of the report.

Dated: July 6, 2000.

Karen H. Brown,
Deputy Director.

NFPA No	Title	Proposal closing date
NFPA 11-1998	Standard for Low-Expansion Foam	11/3/2000
NFPA 13-1999	Standard for the Installation of Sprinkler Systems	1/5/2001
NFPA 13D-1999	Standard for the Installation of Sprinkler Systems in One-and Two-Family Dwellings and Manufactured Home.	11/3/2000
NFPA 13R-1999	Standard for the Installation of Sprinkler Systems in Residential Occupancies up to and Including Four Stories in Height.	11/3/2000
NFPA 17-1998	Standard for Dry Chemical Extinguishing Systems	1/5/2001
NFPA 17A-1998	Standard for Wet Chemical Extinguishing Systems	1/5/2001
NFPA 20-1999	Standard for the Installation of Stationary Pumps for Fire Protection	12/28/2001
NFPA 51B-1999	Standard for Fire Prevention During Welding, Cutting, and Other Hot Work	12/28/2001
NFPA 52-1998	Compressed Natural Gas (CNG) Vehicular Fuel Systems Code	1/5/2001
NFPA 55-1998	Standard for the Storage, Use, and Handling of Compressed and Liquefied Gases in Portable Cylinders.	7/6/2001
NFPA 57-1999	Liquefied Natural Gas (LNG) Vehicular Fuel Systems Code	1/5/2001
NFPA 61-1999	Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Products Facilities.	1/5/2001
NFPA 69-1997	Standard on Explosion Prevention Systems	1/5/2001
NFPA 72-1999	National Fire Alarm Code	1/5/2001
NFPA 79-1997	Electrical Standard for Industrial Machinery	11/10/2000
NFPA 86-1999	Standard for Ovens and Furnaces	12/28/2001
NFPA 86C-1999	Standard for Industrial Furnaces Using a Special Processing Atmosphere	12/28/2001
NFPA 86D-1999	Standard for Industrial Furnaces Using Vacuum as an Atmosphere	12/28/2001
NFPA 97-2000	Standard Glossary of Terms Relating to Chimneys, Vents, and Heat-Producing Appliances.	7/6/2001
NFPA 101-2000	Code for Safety to Life from Fire in Building and Structures	3/30/2001
NFPA 101B-1999	Code for Means of Egress for Buildings and Structures	9/15/2000
NFPA 130-2000	Standard for Fixed Guideway Transit and Passenger Rail Systems	7/6/2001
NFPA 140-1999	Standard on Motion Picture and Television Production Studio Soundstages and Approved Production Facilities.	7/6/2001
NFPA 211-2000	Standard for Chimneys, Fireplaces, Vents, and Solid Fuel-Burning Appliances	7/6/2001
NFPA 225-P*	Standard for Manufactured Home Sites, Communities, and Setups	1/5/2001
NFPA 252-1999	Standard Methods of Fire Tests of Door Assemblies	12/28/2001
NFPA 260-1998	Standard Methods of Tests and Classification System for Cigarette Ignition Resistance of Components of Upholstered Furniture.	12/28/2001
NFPA 261-1998	Standard Method of Test for Determining Resistance of Mock-Up Upholstered Furniture Material Assemblies to Ignition by Smoldering Cigarettes.	12/28/2001
NFPA 262-1999	Standard Method of Test for Flame Travel and Smoke of Wires and Cables for Use in Air-Handling Spaces.	7/6/2001
NFPA 265-1998	Standard Methods of Fire Tests for Evaluating Room Fire Growth Contribution of Textile Wall Coverings.	1/5/2001
NFPA 272-1999	Standard Method of Test for Heat and Visible Smoke Release Rates for Upholstered Furniture Components or Composites and Mattresses Using an Oxygen Consumption Calorimeter.	7/6/2001
NFPA 285-1998	Standard Method of Test for the Evaluation of Flammability Characteristics of Exterior Non-Load-Bearing Wall Assemblies Containing Combustible Components Using the Intermediate-Scale, Multistory Test Apparatus.	12/28/2001
NFPA 415-1997	Standard on Airport Terminal Buildings, Fueling Ramp Drainage, and Loading Walkways.	1/5/2001
NFPA 480-1998	Standard for the Storage, Handling and Processing of Magnesium Solids and Powders.	1/5/2001
NFPA 485-1999	Standard for the Storage, Handling, Processing, and Use of Lithium Metal	1/5/2001
NFPA 505-1999	Fire Safety Standard for Powered Industrial Trucks Including Type Designations, Areas of Use, Conversions, Maintenance, and Operation.	1/5/2001

NFPA No	Title	Proposal closing date
NFPA 651-1998	Standard for the Machining and Finishing of Aluminum and the Production and Handling of Aluminum Powders.	1/5/2001
NFPA 705-1997	Recommended Practice for a Field Flame Test for Textiles and Films	1/5/2001
NFPA 750-2000	Standard on Water Mist Fire Protection Systems	7/6/2001
NFPA 1122-1997	Code for Model Rocketry	1/5/2001
NFPA 1221-1999	Standard for the Installation, Maintenance, and Use of Emergency Services Communications Systems.	1/5/2001
NFPA 1402-1997	Guide to Building Fire Service Training Centers	7/30/2000
NFPA 1403-1997	Standard on Live Fire Training Evolutions	7/30/2000
NFPA 1451-1997	Standard for a Fire Service Vehicle Operations Training Program	7/30/2000
NFPA 1561-2000	Standard on Emergency Services Incident Management System	7/30/2000
NFPA 1582-2000	Standard on Medical Requirements for Fire Fighters and Information of Fire Department Physicians.	7/30/2000
NFPA 1911-1997	Standard for Service Tests of Fire Pump Systems on Fire Apparatus	1/5/2001
NFPA 1914-1997	Standard for Testing Fire Department Aerial Devices	1/5/2001
NFPA 1961-1997	Standard for Fire Hose	7/31/2000
NFPA 1999-1997	Standard on Protective Clothing for Emergency Medical Operations	12/29/2000
NFPA 5000-P*	NFPA Building Code	11/9/2000

[FR Doc. 00-17792 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-13-M

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology

[Notice 1]

National Fire Codes: Request for Comments on NFPA Technical Committee Reports

AGENCY: National Institute of Standards and Technology, Commerce.

ACTION: Notice.

SUMMARY: The National Fire Protection Association (NFPA) revises existing standards and adopts new standards twice a year. At its November Meeting or its May Meeting, the NFPA acts on recommendations made by its technical committees.

The purpose of this notice is to request comments on the technical reports that will be presented at NFPA's 2001 May Meeting. The publication of this notice by the National Institute of Standards and Technology (NIST) on behalf of NFPA is being undertaken as a public service; NIST does not necessarily endorse, approve, or recommend any of the standards referenced in the notice.

DATES: The National Electrical Code® is published in a separate Report on Proposals and is available about July 14, 2000. Comments received on or before October 27, 2000 will be considered by the National Electrical Code Panels before NFPA takes final action on the proposals.

Twenty-seven reports are published in the 2001 May Meeting Report on Proposals and will be available on July 28, 2000. Comments received on or before October 6, 2000 will be considered by the respective NFPA Committees before final action is taken on the proposals.

ADDRESSES: The 2001 May Meeting Report on Proposals and the NEC® Report on Proposals are available and downloadable from NFPA's Website—www/nfpa.org or by requesting a copy from the NFPA, Fulfillment Center, 11 Tracy Drive, Avon, MA 02322. Comments on the reports should be submitted to Casey C. Grant, Secretary, Standards Council, NFPA, 1 Batterymarch Park, P.O. Box 9101, Quincy, Massachusetts 02269-9101. **FOR FURTHER INFORMATION CONTACT:** Casey C. Grant, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, MA 02269-9101, (617) 770-3000.

Background

The National Fire Protection Association (NFPA) develops building, fire, and electrical safety codes and standards. Federal agencies frequently use these codes and standards as the basis for developing Federal regulations concerning fire safety. Often, the Office of the Federal Register approves the incorporation by reference of these standards under 5 U.S.C. 552(a) and 1 CFR Part 51.

Revisions of existing standards and adoption of new standards are reported by the technical committees at the NFPA's November Meeting or at the May Meeting each year. The NFPA

invites public comment on its Report on Proposals.

Request for Comments

Interested persons may participate in these revisions by submitting written data, views, or arguments to Casey C. Grant, Secretary, Standards Council, NFPA, 1 Batterymarch Park, Quincy, Massachusetts 02269-9101. Commenters may use the forms provided for comments in the Reports on Proposals. Each person submitting a comment should include his or her name and address, identify the notice, and give reasons for any recommendations. Comments received on or before October 6, 2000 for the 2001 May Meeting Report on Proposals or October 27, 2000 for the NEC® Report on Proposals will be considered by the NFPA before final action is taken on the proposals.

Copies of all written comments received and the disposition of those comments by the NFPA committees will be published as the 2001 May Meeting Report on Comments by March 30, 2001, or April 16, 2001 for the NEC® Report on Comments, prior to the May Meeting.

A copy of the Report on Comments will be sent automatically to each commenter. Action on the reports of the Technical Committees (adoption or rejection) will be taken at the May Meeting, May 13-17, 2001 in Anaheim, California, by NFPA members.

Dated: July 6, 2000.

Karen H. Brown,
Deputy Director.

2001 MAY MEETING REPORT ON PROPOSALS

Doc No.	Title	Action
NFPA 15	Standard for Water Spray Fixed Systems for Fire Protection	P
NFPA 40	Standard for the Storage and Handling of Cellulose Nitrate Motion Picture Film	P
NFPA 70	National Electrical Code	P
NFPA 80A	Recommended Practice for Protection of Buildings from Exterior Fire Exposures	P
NFPA 96	Standard for Ventilation Control and Fire Protection of Commercial Cooking Operations	P
NFPA 231D	Standard for Storage of Rubber Tires	W
NFPA 268	Standard Test Method for Determining Ignitibility of Exterior Wall Assemblies Using a Radiant Heat Energy Source.	R
NFPA 271	Standard Method of Test for Heat and Visible Smoke Release Rates for Materials and Products Using an Oxygen Consumption Calorimeter.	P
NFPA 288	Standard Method of Fire Tests of Floor Door Assemblies	N
NFPA 301	Code for Safety to Life from Fire on Merchant Vessels	P
NFPA 306	Standard for the Control of Gas Hazards on Vessels	P
NFPA 407	Standard for Aircraft Fuel Servicing	P
NFPA 409	Standard on Aircraft Hangars	P
NFPA 414	Standard for Aircraft Rescue and Fire Fighting Vehicles	P
NFPA 495	Explosive Materials Code	P
NFPA 498	Standard for Safe Havens and Interchange Lots for Vehicles Transporting Explosives	R
NFPA 502	Standard for Road Tunnels, Bridges, and Other Limited Access Highways	P
NFPA 513	Standard for Motor Freight Terminals	W
NFPA 655	Standard for Prevention of Sulfur Fires and Explosions	P
NFPA 704	Standard System for the Identification of the Hazards of Materials for Emergency Response.	C
NFPA 1081	Standard for Industrial Fire Brigade Member Professional Qualifications	N
NFPA 1124	Code for the Manufacture, Transportation, and Storage of Fireworks and Pyrotechnic Articles.	C
NFPA 1125	Code for the Manufacture of Model Rocket and High Power Rocket Motors	C
NFPA 1142	Standard on Water Supplies for Suburban and Rural Fire Fighting	C
NFPA 1710	Standard for the Organization and Deployment of Fire Suppression, Emergency Medical Operations, and Special Operations to the Public by Career Fire Departments.	N
NFPA 1720	Standard on Volunteer Fire Service Deployment	N
NFPA 2112	Standard on Flash Fire Protective Garments for Industrial Personnel	N
NFPA 2113	Standard on Selection, Care, Use, and Maintenance of Flash Fire Protective Garments	N

P = Partial revision; W = Withdrawal; R = Reconfirmation; N = New; C = Complete Revision

[FR Doc. 00-17791 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-13-M

DEPARTMENT OF COMMERCE

Technology Administration

Submission for OMB Review; Comment Request

The Department of Commerce (DOC) has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). This request is being submitted under the regular 30-day processing procedures of the Paperwork Reduction Act.

Agency: Technology Administration.

Title: National Medal of Technology

Nomination Applications.

Agency Form Number(s): None.

OMB Approval Number: 0692-0001.

Type of Request: Reinstatement.

Burden: 2550 hours.

Number of Respondents: 102.

Average Hours Per Respondents: 25 hours.

Needs and Uses: This information collection is critical for the Nomination

Evaluation Committee to determine nomination eligibility and merit according to specified criteria for the annual selection of the Nation's leading technological innovators honored by the President of the United States. This information is needed in order to comply with P.L. 105-309. Comparable information is not available on a standardized basis.

Affected Public: Individuals, households, business and other for-profit.

Frequency: Annually.

Respondent's Obligation: Voluntary.

OMB Desk Officer: David Rostker, (202) 395-3897.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482-3272, Department of Commerce, Room 6086, 1401 Constitution Avenue, NW, Washington, DC 20230 (or via Internet at lengelme@doc.gov).

Written comments and recommendations for the proposed information collection should be sent no later than 30 days after publication of this notice, to Director, National Medal of Technology, Room 4226, Washington, DC 20230.

Dated: July 7, 2000.

Madeleine Clayton,
Management Analyst, Office of the Chief
Information Officer.

[FR Doc. 00-17717 Filed 7-12-00; 8:45 am]

BILLING CODE 3510-18-M

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

AGENCY: Consumer Product Safety Commission, Washington, DC 20207

TIME AND DATE: Wednesday, July 19, 2000 2:00 p.m.

LOCATION: Room 420, East West Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Open to the Public.

Matter to be Considered:

FY 2002 Budget Request

The staff will brief the Commission and the Commission will consider issues related to the Commission's budget for fiscal year 2002.

For a recorded message containing the latest agenda information, call (301) 504-0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sadye E. Dunn, Office of the Secretary, 4330 East West Highway., Bethesda, MD 20207 (301) 504-0800.

Dated: July 11, 2000.

Sadye E. Dunn,
Secretary.

[FR Doc. 00-17928 Filed 7-11-00; 3:59 pm]

BILLING CODE 6355-01-M

CONSUMER PRODUCT SAFETY COMMISSION

Sunshine Act Meeting

AGENCY: Consumer Product Safety Commission, Washington, DC 20207.

TIME AND DATE: Thursday, July 20, 2000, 2:00 p.m.

LOCATION: Room 410, East West Towers, 4330 East West Highway, Bethesda, Maryland.

STATUS: Closed to the Public.

Matter to be Considered

Compliance Status Report

The staff will brief the Commission on the status of various compliance matters.

For a recorded message containing the latest agenda information, call (301) 504-0709.

CONTACT PERSON FOR ADDITIONAL INFORMATION: Sadye E. Dunn, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20207 (301) 504-0800.

Dated: July 11, 2000.

Sadye E. Dunn,
Secretary.

[FR Doc. 00-17929 Filed 7-11-00; 3:59 pm]

BILLING CODE 6355-01-M

DEPARTMENT OF DEFENSE

Office of the Secretary

Defense Science Board Task Force on Future of DoD Airborne High-Frequency Radar Needs/Resources

ACTION: Notice of Advisory Committee Meetings.

SUMMARY: The Defense Science Board Task Force on Future of DoD Airborne High-Frequency Radar Needs/Resources will meet in closed session on July 12-13, 2000; July 19-20, 2000; July 26-27, 2000; and August 2-3, 2000. All meetings are scheduled to be held at SAIC, 4001 N. Fairfax Drive, Arlington, Virginia.

The mission of the Defense Science Board is to advise the Secretary of Defense through the Under Secretary of Defense for Acquisition, Technology &

Logistics on scientific and technical matters as they affect the perceived needs of the Department of Defense. At these meetings, the Task Force will focus on the use of airborne X-band radars to serve the broad mission areas of air defense and ground surveillance. It will review the overall architectural approaches for DoD programs in advanced air defense with an emphasis on theater cruise missile defense, as well as all elements of the kill chain with a focus on the needs for airborne X-band ESA systems. The Task Force will also review the architectural approaches for DoD programs in advanced ground surveillance with an emphasis on airborne X-band ESA sensors.

In accordance with Section 10(d) of the Federal Advisory Committee Act, P.L. No. 92-463, as amended (5 U.S.C. App. II, (1994)), it has been determined that these DSB Task Force meetings concern matters listed in 5 U.S.C. 552b(c)(1) (1994), and that accordingly these meetings will be closed to the public. However, due to critical mission requirements for a report by August, the Task Force is unable to provide timely notice of the above mentioned meetings.

Dated: July 6, 2000.

C.M. Robinson

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 00-17662 Filed 7-12-00; 8:45 am]

BILLING CODE 5001-10-M

DEPARTMENT OF DEFENSE

Defense Finance and Accounting Service

Privacy Act of 1974; System of Records

AGENCY: Defense Finance and Accounting Service, DOD.

ACTION: Notice of a New System of Records.

SUMMARY: The Defense Finance and Accounting Service proposes to add a system of records notice to its inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This action will be effective without further notice on August 14, 2000 unless comments are received that would result in a contrary determination.

ADDRESSES: Privacy Act Officer, Defense Finance and Accounting Service, 1931 Jefferson Davis Highway, ATTN: DFAS/PE, Arlington, VA 22240-5291.

FOR FURTHER INFORMATION CONTACT: Mrs. Pauline E. Korpany at (703) 607-3743.

SUPPLEMENTARY INFORMATION: The complete inventory of Defense Finance and Accounting Service records system notices subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act, was submitted on June 20, 2000, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996, (61 FR 6427, February 20, 1996).

Dated: July 6, 2000.

C.M. Robinson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

T5500b

SYSTEM NAME:

Garnishment Processing Files.

SYSTEM LOCATION:

Office of the Assistant General Counsel, Garnishment Operations, Defense Finance and Accounting Service-Cleveland Center, 1240 E. 9th Street, Cleveland, OH 44199-2055.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Present active duty and retired military personnel; present DoD Civilian employees; present Reserve and National Guard personnel and employees of the Executive Office of the President whose pay is garnished or attached under 5 U.S.C. 5220a; 10 U.S.C. 1408; 42 U.S.C. 659; and 42 U.S.C. 665.

CATEGORIES OF RECORDS IN THE SYSTEM:

Individual state court wage withholding notices or court order garnishment orders, interrogatories, correspondence between DFAS Office of General Counsel and parties to the case, DFAS pay units, United States Attorneys, United States District Courts and other State and Government agencies relevant to the processing of child support and commercial debt garnishment, applications under the Uniformed Services Former Spouses' Protection Act and applications for military involuntary allotments for commercial debt. Also bankruptcy trustees who received payments

pursuant to Chapter 13 of the Bankruptcy Code.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 5520a, Garnishment of pay; 10 U.S.C. 1408, Payment of retired or retainer pay in compliance with court orders; 42 U.S.C. 659, Consent by United States to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations; 42 U.S.C. 665, Allotments from pay for child and spousal support owed by members of uniformed services on active duty; and E.O. 9397 (SSN).

PURPOSE(S):

Records are being maintained for the purpose of processing court orders for the garnishment of wages.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To former spouses, who receive payments under 10 U.S.C. 1408, for purposes of providing information on how their payment was calculated to include what items were deducted from the member's gross pay and the dollar amount for each deduction.

To state child support agencies, in response to their written requests for information regarding the gross and disposable pay of military and civilian employees, for purposes of assisting the agencies in the discharge of their responsibilities under Federal and state law.

The 'Blanket Routine Uses' published at the beginning of the DFAS compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Records are maintained on electronic media.

RETRIEVABILITY:

Retrieved by individual's name and Social Security Number.

SAFEGUARDS:

Records are accessed by person(s) responsible for servicing, and authorized to use, the record system in performance of their official duties who are properly screened and cleared for need-to-know. Additionally, records are

in an office building protected by guards and controlled by screening of personnel and registration of visitors.

RETENTION AND DISPOSAL:

Disposition pending (until NARA has approved the retention and disposal schedule, treat records as permanent).

SYSTEM MANAGER AND ADDRESS:

General Counsel, Defense Finance and Accounting Service Headquarters, 1931 Jefferson Davis Highway, Arlington, VA 22240-5291.

Assistant General Counsel, Garnishment Operations, Defense Finance and Accounting Service-Cleveland Center, 1240 E. 9th Street, Cleveland, OH 44199-2005.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether information about themselves is contained in this system of records should address written inquiries to the Privacy Act Officer, Defense Finance and Accounting Service-Cleveland Center, 1240 E. Ninth Street, Cleveland, OH 44199-2055.

Individuals should provide sufficient proof of identity, such as full name, Social Security Number, and other information verifiable from the record itself.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about themselves contained in this system of records should address written inquiries to Privacy Act Officer, Defense Finance and Accounting Service-Cleveland Center, 1240 E. Ninth Street, Cleveland, OH 44199-2055.

Individuals should provide sufficient proof of identity, such as full name, Social Security Number, and other information verifiable from the record itself.

CONTESTING RECORD PROCEDURES:

The DFAS rules for accessing records, for contesting contents and appealing initial agency determinations are published in DFAS Regulation 5400.11-R; 32 CFR part 324; or may be obtained from the Privacy Act Officer at any DFAS Center.

RECORD SOURCE CATEGORIES:

Information is obtained from courts, Government records, individuals and similar documents and sources relevant to the proceedings.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 00-17657 Filed 7-12-00; 8:45 am]

BILLING CODE 5001-10-F

DEPARTMENT OF DEFENSE

Office of the Secretary

Membership of the Office of the Secretary of Defense Performance Review Board

AGENCY: Department of Defense.

ACTION: Notice.

This notice announces the appointment of the members of the Performance Review Board (PRB) of the Office of the Secretary of Defense, the Joint staff, the U.S. Mission to the North Atlantic Treaty Organization, the Defense Advance Research Projects Agency, the Defense Commissary Agency, the Defense Security Service, the Defense Security Assistance Agency, the Ballistic Missile Defense Organization, the Defense Field Activities and the U.S. Court of Appeals of the Armed Forces. The publication of PRB membership is required by 5 U.S.C. 4314(c)(4).

The Performance Review Board (PRB) provides fair and impartial review of Senior Executive Service performance appraisals and makes recommendations regarding performance ratings and performance awards to the Secretary of Defense.

EFFECTIVE DATE: July 1, 2000.

FOR FURTHER INFORMATION CONTACT:

Jeanne Raymos, Executive and Political Personnel Division, Directorate for Personnel and Security, Washington Headquarters Services, Office of the Secretary of Defense, Department of Defense, The Pentagon, (703) 693-8347.

SUPPLEMENTARY INFORMATION: In accordance with 5 U.S.C. 4314(c)(4), the following executive are appointed to the office of the Secretary of Defense PRB: specific PRB panel assignments will be made from this group. Executives listed will serve a one-year renewable term, effective July 1, 2000.

Office of the Secretary of Defense

Chairman

Robert R. Soule

John Ablard
Joseph Angello
Bill Bader
Bruce Baird
Howard Becker
Alan Beckett
Marc J. Berkowitz
Robert Brittigan
Lisa Bronson
Thomas Brunk
Jennifer Buck
Richard Burke
Mark Cancian
Carolyn A. Carmack

Victor F. Ciardello
 Michael Ciffrino
 Sharon Cooper
 Judith Ayres Daly
 Bruce Dauer
 James Dominy
 Jeanne B. Fites
 Albert Gallant
 John F. Gehrig
 Claiborne D. Haughton
 Charles J. Holland
 Sally Horn
 Frank Jones
 Paul Koffsky
 Frank Lalumiere
 Glenn F. Lamartin
 John R. Landon
 J. William Leonard
 Maureen Lieschke
 George Lotz
 Susan Ludlow-MacMurray
 J. David Martin
 Mary Lou McHugh
 Henry McIntrye
 Kirk Moberly
 Robert Newberry
 John Osterholz
 James C. Reardon
 William Reed
 Manfred J. Reinhard
 Donna S. Richbourg
 Richard Ritter
 Cheryl Roby
 Deborah Rosenblum
 Vincent Roske
 John Roth
 Gregory L. Schulte
 Harry E. Schulte
 Robert J. Shue
 Nancy L. Spruill
 Kent G. Stansberry
 Diana Tabler
 Robert D. Tate
 Robert W. Taylor
 Al Volkman
 Anne Johnson Winegar
 Christopher C. Wright
 Karen Yannello

Dated: July 6, 2000.

C. M. Robinson,

*Alternate OSD Federal Register Liaison
 Officer, Department of Defense.*

[FR Doc. 00-17658 Filed 7-13-00; 8:45 am]

BILLING CODE 5001-10-P

DEPARTMENT OF DEFENSE

Department of the Army

Privacy Act of 1974; System of Records

AGENCY: Department of the Army, DOD.

ACTION: Notice to Add a System of Records.

SUMMARY: The Department of the Army is proposing to add a system of records

notice to its existing inventory of record systems subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended.

DATES: This proposed action will be effective without further notice on August 14, 2000 unless comments are received which result in a contrary determination.

ADDRESSES: Privacy Act System Notice Manager, Records Management Division, U.S. Army Records Management and Declassification Agency, ATTN: TAPC-PDD-RP, Stop 5603, Ft. Belvoir, VA 22060-5603.

FOR FURTHER INFORMATION CONTACT: Ms. Janice Thornton at (703) 806-4390 or DSN 656-4390.

SUPPLEMENTARY INFORMATION: The Department of the Army systems of records notices subject to the Privacy Act of 1974, (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on June 20, 2000, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 6, 2000.

C.M. Robinson,

*Alternate OSD Federal Register Liaison
 Officer, Department of Defense.*

A0690-990-2 ASA(M&RA)

SYSTEM NAME:

Voluntary Leave Transfer Program Records.

SYSTEM LOCATION:

Records on current Federal employees are maintained by the local Civilian Personnel Advisory Centers at each installation. Official mailing addresses are published as an appendix to the Army's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have volunteered to participate in the voluntary leave transfer program as either a donor or a recipient.

CATEGORIES OF RECORDS IN THE SYSTEM:

Leave recipient records contain the individual's name, organization, office telephone number, Social Security

Number, position title, grade, pay level, leave balances, number of hours requested, brief description of the medical or personal hardship which qualifies the individual for inclusion in the program, and the status of that hardship.

The file may also contain medical or physician certifications and agency approvals or denials.

Donor records include the individual's name, organization, office telephone number, Social Security Number, position title, grade, and pay level, leave balances, number of hours donated and the name of the designated recipient.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 6331 et seq., Leave; 10 U.S.C. 3013, Secretary of the Army; Army Regulation 690-990-2, Hours of Duty, Pay and Leave Annotated; 5 CFR part 630; and E.O. 9397 (SSN).

PURPOSE(S)

The file is used in managing the Army's Voluntary Leave Transfer Program. The recipient's name, position data, organization, and a brief hardship description are published internally for passive solicitation purposes. The Social Security Number is sought to effectuate the transfer of leave from the donor's account to the recipient's account.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Department of Labor in connection with a claim filed by an employee for compensation due to a job-connected injury or illness

Where leave donor and leave recipient are employed by different Federal agencies, to the personnel and pay offices of the Federal agency involved to effectuate the leave transfer.

The 'Blanket Routine Uses' set forth at the beginning of Army's compilation of systems of records notices also apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper in file folders and electronic media storage.

RETRIEVABILITY:

By surname or Social Security Number.

SAFEGUARDS:

Records are accessed by custodian of the records or by persons responsible for servicing the record system in performance of their official duties. Records are stored in locked cabinets or rooms and are controlled by personnel screening and computer software.

RETENTION AND DISPOSAL:

Disposition pending (until NARA disposition is approved, treat as permanent).

SYSTEM MANAGER(S) AND ADDRESS:

Director of Civilian Personnel, Assistant Secretary of the Army, Manpower and Reserve Affairs Policy and Program Development, 200 Stovall Street, Alexandria, VA 22332-0300.

NOTIFICATION PROCEDURES:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Assistant Secretary of the Army, Manpower and Reserve Affairs Policy and Program Development, 200 Stovall Street, Alexandria, VA 22332-0300.

For verification purposes, the individual should provide full name, current address, and Social Security Number and the request must be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Assistant Secretary of the Army, Manpower and Reserve Affairs Policy and Program Development, 200 Stovall Street, Alexandria, VA 22332-0300.

For verification purposes, the individual should provide full name, current address, and Social Security Number and the request must be signed.

CONTESTING RECORD PROCEDURES:

The Army's rules for accessing records, and for contesting contents and appealing initial agency determinations are contained in Army Regulation 340-21; 32 CFR part 505; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Information is provided primarily by the record subject; however, some data may be obtained from personnel and leave records.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 00-17655 Filed 7-12-00; 8:45 am]

BILLING CODE 5001-10-F

DEPARTMENT OF DEFENSE**Defense Logistics Agency****Privacy Act of 1974; Systems of Records**

AGENCY: Defense Logistics Agency, DOD.

ACTION: Notice to Alter Systems of Records.

SUMMARY: The Defense Logistics Agency proposes to alter a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The notice is being altered to expand the categories of records being maintained, and a routine use is being added to allow disclosure of information to the Department of Justice for the purpose of asset identification, location, and recovery; and for immigration and naturalization record verification purposes.

DATES: This action will be effective without further notice on August 14, 2000 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: CSS-C, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Salus at (703) 767-6183.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on June 20, 2000, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 6, 2000.

C.M. Robinson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S500.50 CA**SYSTEM NAME:**

Access and Badging Records (*October 15, 1997, 62 FR 53602*).

CHANGES:

* * * * *

SYSTEM LOCATION:

Add new location to read 'Visitor security clearance data is also maintained by the Chief, Internal Review Group, DLA-DDAI, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.'

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

Add to the entry 'handicap data'.

* * * * *

PURPOSE(s):

Add to entry 'Data is also used to manage reserved, handicap, and general parking. Clearance data is also used by the DLA Internal Review Group to control access to sensitive records.'

* * * * *

S500.50 CA**SYSTEM NAME:**

Access and Badging Records.

SYSTEM LOCATION:

Staff Director, Office of Command Security, HQ Defense Logistics Agency, ATTN: CAAS, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221, and the Defense Logistics Agency Primary Level Field Activities. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

Visitor security clearance data is also maintained by the Chief, Internal Review Group, DLA-DDAI, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Defense Logistics Agency (DLA) civilian and military personnel, contractor employees, and individuals requiring access to DLA-controlled installations, facilities, or computer systems.

CATEGORIES OF RECORDS IN THE SYSTEM:

System contains documents relating to requests for and issuance of facility entry badges and passes, motor vehicle registration, and access to DLA computer systems or databases. The records contain the individual's name; address; Social Security Number; date of birth; a DLA-assigned bar code number; dates and times of building entry; current photograph; physical descriptors such as height, hair color, and eye color; handicap data; computer logon addresses, passwords, and user identification codes; security clearance data; personal vehicle description to

include year, make, model, and vehicle identification number; state tag data; operator's permit data; inspection and insurance data; vehicle decal number; parking lot assignment; and parking infractions.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C., Chapter 3, Powers; 5 U.S.C. 6122, Flexible schedules, agencies authorized to use; 5 U.S.C. 6125, Flexible schedules, time recording devices; 10 U.S.C. 133, Under Secretary of Defense for Acquisition and Technology; 18 U.S.C. 1029, Access device fraud; 18 U.S.C. 1030, Computer fraud; 23 U.S.C. 401 et seq., National Highway Safety Act of 1966; E.O. 9397 (SSN); and E.O. 10450 (Security Requirements for Government Employees).

PURPOSE(S):

Information is maintained to by DLA security personnel to control access onto DLA-managed installations and activities; access into DLA-controlled buildings and facilities, and access to DLA computer systems or databases.

Data is also used to manage reserved, handicap, and general parking. Clearance data is also used by the DLA Internal Review Group to control access to sensitive records.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

The 'Blanket Routine Uses' set forth at the beginning of DLA's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS:

STORAGE:

Records are stored in paper and electronic form.

RETRIEVABILITY:

Retrieved by name, Social Security Number, bar code number, or decal number.

SAFEGUARDS:

Records are maintained in secure, limited access, or monitored work areas accessible only to authorized DLA personnel.

RETENTION AND DISPOSAL:

Vehicle registration records are destroyed when superseded or upon

normal expiration or 3 years after revocation;

Individual badging and pass records are destroyed upon cancellation or expiration or 5 years after final action to bar from facility.

Database access records are maintained for the life of the employee and destroyed 1 year after employee departs.

Visitor and temporary passes, permits, and registrations are destroyed 2 years after final entry or 2 years after date of document, as appropriate.

SYSTEM MANAGER(S) AND ADDRESS:

Staff Director, Command Security, Defense Logistics Agency, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221, and the Commanders of the Defense Logistics Agency Primary Level Field Activities (PLFAs). Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Privacy Act Officer, HQ DLA, CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221, or the Privacy Act Officer of the PLFA involved. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

RECORD ACCESS PROCEDURES:

Individuals seeking to access records about themselves contained in this system of records should address written inquiries to the Privacy Act Officer, HQ DLA, CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221, or the Privacy Act Officer of the PLFA involved. Official mailing addresses are published as an appendix to DLA's compilation of systems of records notices.

CONTESTING RECORD PROCEDURES:

The DLA rules for accessing records, for contesting contents and appealing initial agency determinations are contained in DLA Regulation 5400.21; 32 CFR part 323; or may be obtained from the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

RECORD SOURCE CATEGORIES:

Information is supplied by security personnel and by individuals applying for access to DLA controlled installations, facilities, or databases.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 00-17656 Filed 7-12-00; 8:45 am]

BILLING CODE 5001-10-F

DEPARTMENT OF DEFENSE

Defense Logistics Agency

Privacy Act of 1974; Systems of Records

AGENCY: Defense Logistics Agency, DOD.

ACTION: Notice to Alter a System of Records.

SUMMARY: The Defense Logistics Agency proposes to alter a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The alteration to S322.10 DMDC, Defense Manpower Data Center Data Base consists of expanding the routine use to the Social Security Administration to permit disclosure of current earnings data on individuals who have left military service or DoD civil employment for purposes of allowing for comparisons to be made of individuals in like occupational series grades, or geographic regions. This information will also be used to support analytical studies of personnel stability, promotability, and long-term earnings.

DATES: This action will be effective without further notice on August 14, 2000 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

FOR FURTHER INFORMATION CONTACT: Ms. Susan Salus at (703) 767-6183.

SUPPLEMENTARY INFORMATION: The Defense Logistics Agency notices for systems of records subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act of 1974, as amended, was submitted on June 26, 2000, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, 'Federal Agency Responsibilities for Maintaining

Records About Individuals,' dated February 8, 1996 (February 20, 1996, 61 FR 6427).

Dated: July 6, 2000.

C.M. Robinson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

S322.10 DMDC

SYSTEM NAME:

Defense Manpower Data Center Data Base (March 29, 2000, 65 FR 16571).

CHANGES:

* * * * *

CATEGORIES OF RECORDS IN THE SYSTEM:

After 'civilian occupational information' add 'performance ratings of DoD civilian employees and military members; reasons given for leaving military service or DoD civilian service'

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

Amend paragraph 5.a. to read 'To the Office of Research and Statistics for the purpose of (1) conducting statistical analyses of impact of military service and use of GI Bill benefits on long term earnings, and (2) obtaining current earnings data on individuals who have voluntarily left military service or DoD civil employment so that analytical personnel studies regarding pay, retention and benefits may be conducted.

NOTE 3: Earnings data obtained from the SSA and used by DoD does not contain any information which identifies the individual about whom the earnings data pertains.'

* * * * *

S322.10 DMDC

SYSTEM NAME:

Defense Manpower Data Center Data Base.

SYSTEM LOCATION:

Primary location: Naval Postgraduate School Computer Center, Naval Postgraduate School, Monterey, CA 93943-5000.

Back-up location: Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955-6771.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

All Army, Navy, Air Force and Marine Corps officer and enlisted personnel who served on active duty from July 1, 1968, and after or who have been a member of a reserve component

since July 1975; retired Army, Navy, Air Force, and Marine Corps officer and enlisted personnel; active and retired Coast Guard personnel; active and retired members of the commissioned corps of the National Oceanic and Atmospheric Administration; participants in Project 100,000 and Project Transition, and the evaluation control groups for these programs. All individuals examined to determine eligibility for military service at an Armed Forces Entrance and Examining Station from July 1, 1970, and later.

Current and former DoD civilian employees since January 1, 1972.

All veterans who have used the GI Bill education and training employment services office since January 1, 1971. All veterans who have used GI Bill education and training entitlements, who visited a state employment service office since January 1, 1971, or who participated in a Department of Labor special program since July 1, 1971. All individuals who ever participated in an educational program sponsored by the U.S. Armed Forces Institute and all individuals who ever participated in the Armed Forces Vocational Aptitude Testing Programs at the high school level since September 1969.

Individuals who responded to various paid advertising campaigns seeking enlistment information since July 1, 1973; participants in the Department of Health and Human Services National Longitudinal Survey.

Individuals responding to recruiting advertisements since January 1987; survivors of retired military personnel who are eligible for or currently receiving disability payments or disability income compensation from the Department of Veteran Affairs; surviving spouses of active or retired deceased military personnel; 100% disabled veterans and their survivors; survivors of retired Coast Guard personnel; and survivors of retired officers of the National Oceanic and Atmospheric Administration who are eligible for or are currently receiving Federal payments due to the death of the retiree.

Individuals receiving disability compensation from the Department of Veteran Affairs or who are covered by a Department of Veteran Affairs' insurance or benefit program; dependents of active duty military retirees, selective service registrants.

Individuals receiving a security background investigation as identified in the Defense Central Index of Investigation. Former military and civilian personnel who are employed by DoD contractors and are subject to the provisions of 10 U.S.C. 2397.

All Federal Civil Service employees.

All non-appropriated funded individuals who are employed by the Department of Defense.

Individuals who were or may have been the subject of tests involving chemical or biological human-subject testing; and individuals who have inquired or provided information to the Department of Defense concerning such testing.

CATEGORIES OF RECORDS IN THE SYSTEM:

Computerized personnel/employment/pay records consisting of name, Service Number, Selective Service Number, Social Security Number, compensation data, demographic information such as home town, age, sex, race, and educational level; civilian occupational information; performance ratings of DoD civilian employees and military members; reasons given for leaving military service or DoD civilian service; civilian and military acquisition work force warrant location, training and job specialty information; military personnel information such as rank, assignment/deployment, length of service, military occupation, aptitude scores, post-service education, training, and employment information for veterans; participation in various inservice education and training programs; military hospitalization and medical treatment, immunization, and pharmaceutical dosage records; home and work addresses; and identities of individuals involved in incidents of child and spouse abuse, and information about the nature of the abuse and services provided.

CHAMPUS claim records containing enrollee, patient and health care facility, provided data such as cause of treatment, amount of payment, name and Social Security or tax identification number of providers or potential providers of care.

Selective Service System registration data.

Department of Veteran Affairs disability payment records.

Credit or financial data as required for security background investigations.

Criminal history information on individuals who subsequently enter the military.

Office of Personnel Management (OPM) Central Personnel Data File (CPDF), an extract from OPM/GOVT-1, General Personnel Records, containing employment/personnel data on all Federal employees consisting of name, Social Security Number, date of birth, sex, work schedule (full-time, part-time, intermittent), annual salary rate (but not actual earnings), occupational series,

position occupied, agency identifier, geographic location of duty station, metropolitan statistical area, and personnel office identifier. Extract from OPM/CENTRAL-1, Civil Service Retirement and Insurance Records, including postal workers covered by Civil Service Retirement, containing Civil Service Claim number, date of birth, name, provision of law retired under, gross annuity, length of service, annuity commencing date, former employing agency and home address. These records provided by OPM for approved computer matching.

Non-appropriated fund employment/personnel records consist of Social Security Number, name, and work address.

Military drug test records containing the Social Security Number, date of specimen collection, date test results reported, reason for test, test results, base/area code, unit, service, status (active/reserve), and location code of testing laboratory.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 5 U.S.C. App. 3 (Pub.L. 95-452, as amended (Inspector General Act of 1978)); 10 U.S.C. 136, Under Secretary of Defense for Personnel and Readiness; 10 U.S.C. 1562, Database on Domestic Violence Incidents; 10 U.S.C. 2358, Research and Development Projects; and E.O. 9397 (SSN).

PURPOSE(S):

The purpose of the system of records is to provide a single central facility within the Department of Defense to assess manpower trends, support personnel and readiness functions, to perform longitudinal statistical analyses, identify current and former DoD civilian and military personnel for purposes of detecting fraud and abuse of pay and benefit programs, to register current and former DoD civilian and military personnel and their authorized dependents for purposes of obtaining medical examination, treatment or other benefits to which they are qualified, and to collect debts owed to the United States Government and state and local governments.

Information will be used by agency officials and employees, or authorized contractors, and other DoD Components in the preparation of the histories of human chemical or biological testing or exposure; to conduct scientific studies or medical follow-up programs; to respond to Congressional and Executive branch inquiries; and to provide data or documentation relevant to the testing or exposure of individuals

All records in this record system are subject to use in authorized computer matching programs within the Department of Defense and with other Federal agencies or non-Federal agencies as regulated by the Privacy Act of 1974, as amended, (5 U.S.C. 552a).

Military drug test records will be maintained and used to conduct longitudinal, statistical, and analytical studies and computing demographic reports on military personnel. No personal identifiers will be included in the demographic data reports. All requests for Service-specific drug testing demographic data will be approved by the Service designated drug testing program office. All requests for DoD-wide drug testing demographic data will be approved by the DoD Coordinator for Drug Enforcement Policy and Support, 1510 Defense Pentagon, Washington, DC 20301-1510.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

1. To the Department of Veteran Affairs (DVA):

a. To provide military personnel and pay data for present and former military personnel for the purpose of evaluating use of veterans benefits, validating benefit eligibility and maintaining the health and well being of veterans and their family members.

b. To provide identifying military personnel data to the DVA and its insurance program contractor for the purpose of notifying separating eligible Reservists of their right to apply for Veteran's Group Life Insurance coverage under the Veterans Benefits Improvement Act of 1996 (38 U.S.C. 1968).

c. To register eligible veterans and their dependents for DVA programs.

d. To conduct computer matching programs regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a), for the purpose of:

(1) Providing full identification of active duty military personnel, including full-time National Guard/Reserve support personnel, for use in the administration of DVA's Compensation and Pension benefit program. The information is used to determine continued eligibility for DVA disability compensation to recipients who have returned to active duty so that benefits can be adjusted or terminated

as required and steps taken by DVA to collect any resulting over payment (38 U.S.C. 5304(c)).

(2) Providing military personnel and financial data to the Veterans Benefits Administration, DVA for the purpose of determining initial eligibility and any changes in eligibility status to insure proper payment of benefits for GI Bill education and training benefits by the DVA under the Montgomery GI Bill (Title 10 U.S.C., Chapter 1606—Selected Reserve and Title 38 U.S.C., Chapter 30—Active Duty). The administrative responsibilities designated to both agencies by the law require that data be exchanged in administering the programs.

(3) Providing identification of reserve duty, including full-time support National Guard/Reserve military personnel, to the DVA, for the purpose of deducting reserve time served from any DVA disability compensation paid or waiver of VA benefit. The law (10 U.S.C. 12316) prohibits receipt of reserve pay and DVA compensation for the same time period, however, it does permit waiver of DVA compensation to draw reserve pay.

(4) Providing identification of former active duty military personnel who received separation payments to the DVA for the purpose of deducting such repayment from any DVA disability compensation paid. The law requires recoupment of severance payments before DVA disability compensation can be paid (10 U.S.C. 1174).

(5) Providing identification of former military personnel and survivor's financial benefit data to DVA for the purpose of identifying military retired pay and survivor benefit payments for use in the administration of the DVA's Compensation and Pension program (38 U.S.C. 5106). The information is to be used to process all DVA award actions more efficiently, reduce subsequent overpayment collection actions, and minimize erroneous payments.

e. To provide identifying military personnel data to the DVA for the purpose of notifying such personnel of information relating to educational assistance as required by the Veterans Programs Enhancement Act of 1998 (38 U.S.C. 3011 and 3034).

2. To the Office of Personnel Management (OPM):

a. Consisting of personnel/employment/financial data for the purpose of carrying out OPM's management functions. Records disclosed concern pay, benefits, retirement deductions and any other information necessary for those management functions required by law (Pub.L. 83-598, 84-356, 86-724, 94-455

and 5 U.S.C. 1302, 2951, 3301, 3372, 4118, 8347).

b. To conduct computer matching programs regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a) for the purpose of:

(1) Exchanging personnel and financial information on certain military retirees, who are also civilian employees of the Federal government, for the purpose of identifying those individuals subject to a limitation on the amount of military retired pay they can receive under the Dual Compensation Act (5 U.S.C. 5532), and to permit adjustments of military retired pay by the Defense Finance and Accounting Service and to take steps to recoup excess of that permitted under the dual compensation and pay cap restrictions.

(2) Exchanging personnel and financial data on civil service annuitants (including disability annuitants under age 60) who are reemployed by DoD to insure that annuities of DoD reemployed annuitants are terminated where applicable, and salaries are correctly offset where applicable as required by law (5 U.S.C. 8331, 8344, 8401 and 8468).

(3) Exchanging personnel and financial data to identify individuals who are improperly receiving military retired pay and credit for military service in their civil service annuities, or annuities based on the 'guaranteed minimum' disability formula. The match will identify and/or prevent erroneous payments under the Civil Service Retirement Act (CSRA) 5 U.S.C. 8331 and the Federal Employees' Retirement System Act (FERSA) 5 U.S.C. 8411. DoD's legal authority for monitoring retired pay is 10 U.S.C. 1401.

(4) Exchanging civil service and Reserve military personnel data to identify those individuals of the Reserve forces who are employed by the Federal government in a civilian position. The purpose of the match is to identify those particular individuals occupying critical positions as civilians and cannot be released for extended active duty in the event of mobilization. Employing Federal agencies are informed of the reserve status of those affected personnel so that a choice of terminating the position or the reserve assignment can be made by the individual concerned. The authority for conducting the computer match is contained in E.O. 11190, Providing for the Screening of the Ready Reserve of the Armed Services.

3. To the Internal Revenue Service (IRS) for the purpose of obtaining home addresses to contact Reserve component members for mobilization purposes and

for tax administration. For the purpose of conducting aggregate statistical analyses on the impact of DoD personnel of actual changes in the tax laws and to conduct aggregate statistical analyses to lifestream earnings of current and former military personnel to be used in studying the comparability of civilian and military pay benefits. To aid in administration of Federal Income Tax laws and regulations, to identify non-compliance and delinquent filers.

4. To the Department of Health and Human Services (DHHS):

a. To the Office of the Inspector General, DHHS, for the purpose of identification and investigation of DoD employees and military members who may be improperly receiving funds under the Aid to Families of Dependent Children Program.

b. To the Office of Child Support Enforcement, Federal Parent Locator Service, DHHS, pursuant to 42 U.S.C. 653 and 653a; to assist in locating individuals for the purpose of establishing parentage; establishing, setting the amount of, modifying, or enforcing child support obligations; or enforcing child custody or visitation orders; and for conducting computer matching as authorized by E.O. 12953 to facilitate the enforcement of child support owed by delinquent obligors within the entire civilian Federal government and the Uniformed Services work force (active and retired). Identifying delinquent obligors will allow State Child Support Enforcement agencies to commence wage withholding or other enforcement actions against the obligors.

NOTE 1: Information requested by DHHS is not disclosed when it would contravene U.S. national policy or security interests (42 U.S.C. 653(e)).

NOTE 2: Quarterly wage information is not disclosed for those individuals performing intelligence or counter-intelligence functions and a determination is made that disclosure could endanger the safety of the individual or compromise an ongoing investigation or intelligence mission (42 U.S.C. 653(n)).

c. To the Health Care Financing Administration (HCFA), DHHS for the purpose of monitoring HCFA reimbursement to civilian hospitals for Medicare patient treatment. The data will ensure no Department of Defense physicians, interns or residents are counted for HCFA reimbursement to hospitals.

d. To the Center for Disease Control and the National Institutes of Mental Health, DHHS, for the purpose of conducting studies concerned with the health and well being of active duty,

reserve, and retired personnel or veterans, to include family members.

5. To the Social Security Administration (SSA):

a. To the Office of Research and Statistics for the purpose of (1) conducting statistical analyses of impact of military service and use of GI Bill benefits on long term earnings, and (2) obtaining current earnings data on individuals who have voluntarily left military service or DoD civil employment so that analytical personnel studies regarding pay, retention and benefits may be conducted.

NOTE 3: Earnings data obtained from the SSA and used by DoD does not contain any information which identifies the individual about whom the earnings data pertains.

b. To the Bureau of Supplemental Security Income for the purpose of verifying information provided to the SSA by applicants and recipients/beneficiaries, who are retired members of the Uniformed Services or their survivors, for Supplemental Security Income (SSI) or Special Veterans' Benefits (SBV). By law (42 U.S.C. 1006 and 1383), the SSA is required to verify eligibility factors and other relevant information provided by the SSI or SVB applicant from independent or collateral sources and obtain additional information as necessary before making SSI or SVB determinations of eligibility, payment amounts, or adjustments thereto.

6. To the Selective Service System (SSS) for the purpose of facilitating compliance of members and former members of the Armed Forces, both active and reserve, with the provisions of the Selective Service registration regulations (50 U.S.C. App. 451 and E.O. 11623).

7. To DoD Civilian Contractors and grantees for the purpose of performing research on manpower problems for statistical analyses.

8. To the Department of Labor (DOL) to reconcile the accuracy of unemployment compensation payments made to former DoD civilian employees and military members by the states. To the Department of Labor to survey military separations to determine the effectiveness of programs assisting veterans to obtain employment.

9. To the U.S. Coast Guard (USCG) of the Department of Transportation (DOT) to conduct computer matching programs regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a), for the purpose of exchanging personnel and financial information on certain retired USCG military members, who are also civilian employees of the Federal

government, for the purpose of identifying those individuals subject to a limitation on the amount of military pay they can receive under the Dual Compensation Act (5 U.S.C. 5532), and to permit adjustments of military retired pay by the U.S. Coast Guard and to take steps to recoup excess of that permitted under the dual compensation and pay cap restrictions.

10. To the Department of Housing and Urban Development (HUD) to provide data contained in this record system that includes the name, Social Security Number, salary and retirement pay for the purpose of verifying continuing eligibility in HUD's assisted housing programs maintained by the Public Housing Authorities (PHAs) and subsidized multi-family project owners or management agents. Data furnished will be reviewed by HUD or the PHAs with the technical assistance from the HUD Office of the Inspector General (OIG) to determine whether the income reported by tenants to the PHA or subsidized multi-family project owner or management agent is correct and complies with HUD and PHA requirements.

11. To Federal and Quasi-Federal agencies, territorial, state, and local governments to support personnel functions requiring data on prior military service credit for their employees or for job applications. To determine continued eligibility and help eliminate fraud and abuse in benefit programs and to collect debts and over payments owed to these programs. To assist in the return of unclaimed property or assets escheated to states of civilian employees and military member and to provide members and former members with information and assistance regarding various benefit entitlements, such as state bonuses for veterans, etc. Information released includes name, Social Security Number, and military or civilian address of individuals. To detect fraud, waste and abuse pursuant to the authority contained in the Inspector General Act of 1978, as amended (Pub.L. 95-452) for the purpose of determining eligibility for, and/or continued compliance with, any Federal benefit program requirements.

12. To private consumer reporting agencies to comply with the requirements to update security clearance investigations of DoD personnel.

13. To consumer reporting agencies to obtain current addresses of separated military personnel to notify them of potential benefits eligibility.

14. To Defense contractors to monitor the employment of former DoD

employees and members subject to the provisions of 41 U.S.C. 423.

15. To financial depository institutions to assist in locating individuals with dormant accounts in danger of reverting to state ownership by escheatment for accounts of DoD civilian employees and military members.

16. To any Federal, state or local agency to conduct authorized computer matching programs regulated by the Privacy Act of 1974, as amended, (5 U.S.C. 552a) for the purposes of identifying and locating delinquent debtors for collection of a claim owed the Department of Defense or the United States Government under the Debt Collection Act of 1982 (Pub.L. 97-365) and the Debt Collection Improvement Act of 1996 (Pub.L. 104-134).

17. To state and local law enforcement investigative agencies to obtain criminal history information for the purpose of evaluating military service performance and security clearance procedures (10 U.S.C. 2358).

18. To the United States Postal Service to conduct computer matching programs regulated by the Privacy Act of 1974, as amended (5 U.S.C. 552a), for the purposes of:

a. Exchanging civil service and Reserve military personnel data to identify those individuals of the Reserve forces who are employed by the Federal government in a civilian position. The purpose of the match is to identify those particular individuals occupying critical positions as civilians and who cannot be released for extended active duty in the event of mobilization. The Postal Service is informed of the reserve status of those affected personnel so that a choice of terminating the position on the reserve assignment can be made by the individual concerned. The authority for conducting the computer match is contained in E.O. 11190, Providing for the Screening of the Ready Reserve of the Armed Forces.

b. Exchanging personnel and financial information on certain military retirees who are also civilian employees of the Federal government, for the purpose of identifying those individuals subject to a limitation on the amount of retired military pay they can receive under the Dual Compensation Act (5 U.S.C. 5532), and permit adjustments to military retired pay to be made by the Defense Finance and Accounting Service and to take steps to recoup excess of that permitted under the dual compensation and pay cap restrictions.

19. To the Armed Forces Retirement Home (AFRH), which includes the United States Soldier's and Airmen's Home (USSAH) and the United States

Naval Home (USNH) for the purpose of verifying Federal payment information (military retired or retainer pay, civil service annuity, and compensation from the Department of Veterans Affairs) currently provided by the residents for computation of their monthly fee and to identify any unreported benefit payments as required by the Armed Forces Retirement Home Act of 1991, Pub.L. 101-510 (24 U.S.C. 414).

20. To Federal and Quasi-Federal agencies, territorial, state and local governments, and contractors and grantees for the purpose of supporting research studies concerned with the health and well being of active duty, reserve, and retired personnel or veterans, to include family members. DMDC will disclose information from this system of records for research purposes when DMDC:

a. has determined that the use or disclosure does not violate legal or policy limitations under which the record was provided, collected, or obtained;

b. has determined that the research purpose (1) cannot be reasonably accomplished unless the record is provided in individually identifiable form, and (2) warrants the risk to the privacy of the individual that additional exposure of the record might bring;

c. has required the recipient to (1) establish reasonable administrative, technical, and physical safeguards to prevent unauthorized use or disclosure of the record, and (2) remove or destroy the information that identifies the individual at the earliest time at which removal or destruction can be accomplished consistent with the purpose of the research project, unless the recipient has presented adequate justification of a research or health nature for retaining such information, and (3) make no further use or disclosure of the record except (A) in emergency circumstances affecting the health or safety of any individual, (B) for use in another research project, under these same conditions, and with written authorization of the Department, (C) for disclosure to a properly identified person for the purpose of an audit related to the research project, if information that would enable research subjects to be identified is removed or destroyed at the earliest opportunity consistent with the purpose of the audit, or (D) when required by law;

d. has secured a written statement attesting to the recipient's understanding of, and willingness to abide by these provisions.

21. To the Educational Testing Service, American College Testing, and like organizations for purposes of

obtaining testing, academic, socioeconomic, and related demographic data so that analytical personnel studies of the Department of Defense civilian and military workforce can be conducted.

NOTE 4: Data obtained from such organizations and used by DoD does not contain any information which identifies the individual about whom the data pertains.

The 'Blanket Routine Uses' set forth at the beginning of the DLA compilation of record system notices apply to this record system.

NOTE 5: Military drug test information involving individuals participating in a drug abuse rehabilitation program shall be confidential and be disclosed only for the purposes and under the circumstances expressly authorized in 42 U.S.C. 290dd-2. This statute takes precedence over the Privacy Act of 1974, in regard to accessibility of such records except to the individual to whom the record pertains. The DLA's 'Blanket Routine Uses' do not apply to these types records.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Electronic storage media.

RETRIEVABILITY:

Retrieved by name, Social Security Number, occupation, or any other data element contained in system.

SAFEGUARDS:

Access to personal information at both locations is restricted to those who require the records in the performance of their official duties. Access to personal information is further restricted by the use of passwords which are changed periodically. Physical entry is restricted by the use of locks, guards, and administrative procedures.

RETENTION AND DISPOSAL:

Disposition pending.

SYSTEM MANAGER(S) AND ADDRESS:

Deputy Director, Defense Manpower Data Center, DoD Center Monterey Bay, 400 Gigling Road, Seaside, CA 93955-6771.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system of records contains information about themselves should address written inquiries to the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: CAAR, 8725

John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

Written requests should contain the full name, Social Security Number, date of birth, and current address and telephone number of the individual.

RECORD ACCESS PROCEDURES:

Individuals seeking access to records about themselves contained in this system of records should address inquiries to the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

Written requests should contain the full name, Social Security Number, date of birth, and current address and telephone number of the individual.

CONTESTING RECORD PROCEDURES:

The DLA rules for accessing records, for contesting contents and appealing initial agency determinations are contained in DLA Regulation 5400.21, 32 CFR part 323, or may be obtained from the Privacy Act Officer, Headquarters, Defense Logistics Agency, ATTN: CAAR, 8725 John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060-6221.

RECORD SOURCE CATEGORIES:

The military services, the Department of Veteran Affairs, the Department of Education, Department of Health and Human Services, from individuals via survey questionnaires, the Department of Labor, the Office of Personnel Management, Federal and Quasi-Federal agencies, and the Selective Service System.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 00-17660 Filed 7-12-00; 8:45 am]

BILLING CODE 5001-10-F

DEPARTMENT OF DEFENSE

Department of the Navy

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DOD.

ACTION: Delete a Records System.

SUMMARY: The Department of the Navy proposes to delete a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: The action will be effective on August 14, 2000 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval Operations (N09B30), 2000 Navy Pentagon, Washington, DC 20350-2000.

FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685-6545 or DSN 325-6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy's record system notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The Department of the Navy proposes to delete a system of records notice in its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended. The deletion is not within the purview of subsection (r) of the Privacy Act of 1974 (5 U.S.C. 552a), as amended, which requires the submission of a new or altered system report.

Dated: July 6, 2000.

C.M. Robinson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

N07230-1

SYSTEM NAME:

Navy Standard Civilian Payroll System (NAVSCIPS) (*February 22, 1993, 58 FR 10805*).

Reason: These records are now under the cognizance of the Defense Finance and Accounting Service. See system of records notice T7335, Defense Civilian Pay System (DCPS).

[FR Doc. 00-17659 Filed 7-12-00; 8:45 am]

BILLING CODE 5001-10-F

DEPARTMENT OF DEFENSE

Department of the Navy

Privacy Act of 1974; System of Records

AGENCY: Department of the Navy, DOD.

ACTION: Notice to Add a System of Records.

SUMMARY: The Department of the Navy proposes to add a system of records notice to its inventory of record systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended.

DATES: This action will be effective on August 14, 2000 unless comments are received that would result in a contrary determination.

ADDRESSES: Send comments to the Department of the Navy, PA/FOIA Policy Branch, Chief of Naval

Operations (N09B30), 2000 Navy Pentagon, Washington, DC 20350-2000.
FOR FURTHER INFORMATION CONTACT: Mrs. Doris Lama at (202) 685-6545 or DSN 325-6545.

SUPPLEMENTARY INFORMATION: The Department of the Navy's record system notices for records systems subject to the Privacy Act of 1974 (5 U.S.C. 552a), as amended, have been published in the **Federal Register** and are available from the address above.

The proposed system report, as required by 5 U.S.C. 552a(r) of the Privacy Act was submitted on June 26, 2000, to the House Committee on Government Reform, the Senate Committee on Governmental Affairs, and the Office of Management and Budget (OMB) pursuant to paragraph 4c of Appendix I to OMB Circular No. A-130, 'Federal Agency Responsibilities for Maintaining Records About Individuals,' dated February 8, 1996, (61 FR 6427, February 20, 1996).

Dated: July 6, 2000.

C.M. Robinson,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

N12630-1

SYSTEM NAME:

Voluntary Leave Transfer Program Records.

SYSTEM LOCATION:

Navy Human Resources Offices. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records notices.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM:

Individuals who have volunteered to participate in the leave transfer program as either a donor or recipient.

CATEGORIES OF RECORDS IN THE SYSTEM:

Separate files exist for leave recipients and leave donors records.

Leave recipients records contain the individual's name, organization, office telephone number, Social Security Number, position title, grade, pay level, leave balance, number of hours requested, brief description of the medical or personal hardship which qualifies the individual for inclusion in the program, the status of that hardship, and a statement that selected data elements may be used in soliciting donations. The file may also contain medical or physician certifications and agency approvals or denials.

Leave donors records contain the individual's name, organization, office telephone number, Social Security

Number, position title, grade, and pay level, leave balance, number of hours donated and the name of the designated recipient.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM:

5 U.S.C. 301, Departmental Regulations; 5 U.S.C. 6331 et seq. (Leave); E.O. 9397 (SSN); and 5 CFR part 630.

PURPOSE(S):

To manage the Department of the Navy's Voluntary Leave Transfer Program. The recipient's name, position data, organization, and brief hardship description are published internally for passive solicitation purposes. The Social Security Number is sought to effectuate the transfer of leave by human resources and pay offices from the donor's account to the recipient's account.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

In addition to those disclosures generally permitted under 5 U.S.C. 552a(b) of the Privacy Act, these records or information contained therein may specifically be disclosed outside the DoD as a routine use pursuant to 5 U.S.C. 552a(b)(3) as follows:

To the Department of Labor in connection with a claim filed by an employee for compensation due to a job-connected injury or illness, when leave donor and leave recipient are employed by different Federal agencies.

The 'Blanket Routine Uses' that appear at the beginning of the Navy's compilation of systems of records notices apply to this system.

POLICIES AND PRACTICES FOR STORING, RETRIEVING, ACCESSING, RETAINING, AND DISPOSING OF RECORDS IN THE SYSTEM:

STORAGE:

Paper and automated records.

RETRIEVABILITY:

Name/Social Security Number of leave recipient for access to their files. Name/Social Security Number of leave donor for access to their files.

SAFEGUARDS:

Access to records is limited to the custodian of the records or by persons responsible for servicing the records in the performance of their official duties. Records are stored in locked cabinets or rooms and are controlled by personnel screening. Computer terminals are located in supervised areas. Access to computerized data is controlled by password or other user code systems.

RETENTION AND DISPOSAL:

Records are destroyed one year after the end of the year in which the file is closed.

SYSTEM MANAGER(S) AND ADDRESS:

Policy official: Office of the Deputy Assistant Secretary of the Navy (CP/EEO), 3801 Nebraska Avenue, NW, Washington, DC 20393-5441.

Record holder: Director of local Human Resources Offices. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records.

NOTIFICATION PROCEDURE:

Individuals seeking to determine whether this system contains information about themselves should address written inquiries to their servicing Human Resources Office. Official mailing addresses are published as an appendix to the Navy's compilation of systems of record.

The request should contain the name, approximate date during which the case record was developed, the address of the individual concerned and should be signed.

RECORD ACCESS PROCEDURES:

Individuals seeking access to information about them contained in this system of records should address written inquiries to their servicing Human Resources Office. Official mailing addresses are published as an appendix to the Navy's compilation of systems of records.

The request should contain the name, approximate date during which the case record was developed, the address of the individual concerned and should be signed.

CONTESTING RECORD PROCEDURES:

The Navy's rules for accessing records, and for contesting contents and appealing initial agency determinations are published in Secretary of the Navy Instruction 5211.5; 32 CFR part 701; or may be obtained from the system manager.

RECORD SOURCE CATEGORIES:

Employee, supervisors, and individuals who contribute leave.

EXEMPTIONS CLAIMED FOR THE SYSTEM:

None.

[FR Doc. 00-17661 Filed 7-12-00; 8:45 am]

BILLING CODE 5001-10-F

DEPARTMENT OF EDUCATION

[CFDA No.: 84.215E]

Elementary School Counseling Demonstration Program**AGENCY:** Department of Education.**ACTION:** Notice reopening the application deadline date for the Elementary School Counseling Demonstration Program.

SUMMARY: On April 18, 2000, the Department published a notice inviting applications for new awards for the Elementary and Secondary Education Act, Title X—Programs of National Significance, Part A—Fund for the Improvement of Education—Section 10102, Elementary Counseling Demonstration Program. The Secretary reopens the deadline date for the submission of applications for this competition from June 9, 2000 for applicants that can show a shipping label, invoice, or receipt for overnight delivery contracted to arrive by June 9, 2000. This action is taken due to unexpected or unavoidable delays in receipt of applications sent via certain overnight delivery services.

DATES: The applicant deadline date is reopened to July 13, 2000 for applicants able to show a shipping label, invoice, or receipt for overnight delivery contracted to arrive by June 9, 2000.

FOR FURTHER INFORMATION CONTACT: Loretta Riggans, Safe and Drug-Free Schools Program, U.S. Department of Education, 400 Maryland Avenue, SW., Washington, DC 20202-6123. Telephone: (202) 260-3954.

Individuals who use a telecommunication device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at (800) 877-8339.

Electronic Access to This Document: You may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or Adobe Portable Document Format (PDF) on the Internet at either of the following sites: <http://ocfo.ed.gov/fedreg.htm> <http://www.ed.gov/news.html>

To use the PDF you must have the Adobe Acrobat Reader Program with Search, which is available free at either of the previous sites. If you have questions about using the PDF, call the U.S. Government Printing Office (GPO), toll free, at 1-888-293-6498; or in the Washington, DC area at (202) 512-1530.

Note: The official version of this document is the document published in the **Federal Register**. Free Internet access to the official edition of the **Federal Register** and the Code of Federal Regulations is available on GPO Access at:

<http://www.access.gpo.gov/nara/index.html>

Program Authority: 20 U.S.C. 8002.

Dated: July 7, 2000.

Michael Cohen,*Assistant Secretary for Elementary and Secondary Education.*

[FR Doc. 00-17687 Filed 7-12-00; 8:45 am]

BILLING CODE 4000-01-M**DEPARTMENT OF ENERGY**

[FE Docket No. PP-226]

Notice of Floodplain and Wetlands Involvement Brownsville Public Utilities Board**AGENCY:** Office of Fossil Energy, DOE.**ACTION:** Notice of Floodplain/Wetland Involvement.

SUMMARY: Brownsville Public Utilities Board (BPUB) has applied for a Presidential permit to construct, connect, operate and maintain a double-circuit electric transmission line across the U.S. border with Mexico. In accordance with Department of Energy (DOE) regulations for compliance with floodplain/wetlands environmental review requirements (10 CFR Part 1022), a floodplain or wetlands assessment will be performed for this proposed action in a manner so as to avoid or minimize potential harm to or within potentially affected floodplain and wetlands.

DATES: Comments are due to the address below no later than July 28, 2000.

ADDRESSES: Written comments, questions about the proposed action, and requests to review the draft environmental assessment should be directed to: Ellen Russell, Office of Coal & Power Import and Export (FE-27), Office of Fossil Energy, U.S. Department of Energy, 1000 Independence Avenue, S.W., Washington, D.C. 20585-0350. Fax: (202) 287-5736. E-mail: Ellen.Russell@hq.doe.gov.

FOR FURTHER INFORMATION CONTACT: Ellen Russell (Program Office) 202-586-9624.

SUPPLEMENTARY INFORMATION: Under Executive Order 11988, Floodplain Management, and 10 CFR Part 1022, Compliance with Floodplain-Wetlands Environmental Review Requirements (http://tis-nt.eh.doe.gov/nepa/tools/regulate/nepa_reg/1022/1022.htm), notice is given that DOE is considering an application from BPUB for a Presidential permit to construct, connect, operate, and maintain electric transmission facilities across the U.S.

border with Mexico. BPUB proposes to construct a double-circuit 138,000 volt (138-kV) transmission line, on wood poles, from its existing Silas Ray Power Plant in Brownsville, Texas, and extending 3,000 feet to the U.S.-Mexico border. Notice of BPUB's application for a Presidential permit appeared in the **Federal Register** on June 30, 2000 (65 FR 40618).

Before making a final decision on granting or denying a Presidential permit to BPUB, DOE will prepare an environmental assessment (EA) to address the environmental impacts that would accrue from the proposed project and reasonable alternatives. The EA will be prepared in compliance with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*). The EA will include a floodplain and wetlands assessment. DOE expects to have a draft of the EA available for public review in August, 2000. Copies may be requested by telephone, facsimile, or e-mail from the address given above. A floodplain statement of findings will be included in any Finding of No Significant Impact that may be issued following completion of the EA.

If you wish further information on DOE's floodplain and wetlands environmental review requirements, please contact Carol M. Borgstrom, Director, Office of NEPA Policy and Assistance (EH-42), U.S. Department of Energy, 1000 Independence Avenue, SW, Washington, DC 20585-0119; Phone: 202-586-4600 or leave a message at 800-472-2756.

Issued in Washington, DC, on July 7, 2000.

Anthony J. Como,*Deputy Director, Electric Power Regulation, Office of Coal & Power Im/Ex, Office of Fossil Energy.*

[FR Doc. 00-17772 Filed 7-12-00; 8:45 am]

BILLING CODE 6450-01-P**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. RP00-372-000]

ANR Pipeline Company; Notice of Proposed Direct Bill

July 7, 2000.

Take notice that on June 30, 2000, ANR Pipeline Company (ANR) tendered for filing, pursuant to Section 4(e) of the Natural Gas Act (NGA), 15 U.S.C. § 717c(e), a plan for recovery of interest charges paid by ANR to Great Lakes Gas Transmission L.P. (Great Lakes)

pursuant to the Federal Energy Regulatory Commission's letter order dated July 30, 1998. *See Great Lakes Gas Transmission Limited Partnership*, 84 FERC (CCH) ¶ 61,124 (1998). ANR proposes to direct bill its customers approximately \$1.8 million.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before July 14, 2000. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17708 Filed 7-12-00; 8:45 am]
BILLING CODE 3717-01-M.

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-379-000]

ANR Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, ANR Pipeline Company (ANR) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheet, proposed to become effective July 1, 2000:

Original Sheet No. 14N

ANR is filing the tariff sheet to reflect the implementation of a negotiated rate agreement with PG&E Energy Trading-Gas Corporation (PG&E) for service under Rate Schedule IPLS. The service will be effective July 1, 2000 and terminate on June 30, 2001.

ANR states that a copy of this filing is being mailed to the affected shipper and to each of ANR's FERC Gas Tariff, Second Revised Volume No. 1 and Original Volume No. 2 customers, and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion

to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17715 Filed 7-12-00; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-374-000]

Columbia Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Columbia Gas Transmission Corporation (Columbia), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets with a proposed effective date of December 1, 2000:

Third Revised Sheet No. 275
Second Revised Sheet No. 277
Eighth Revised Sheet No. 281
Eighth Revised Sheet No. 282
Fifth Revised Sheet No. 283

Columbia states it is filing tariff sheets to revise its existing capacity auction provisions and that such revised provisions meet the principles set forth in the Commission's Order Nos. 637 and 637-A. Columbia is revising General Terms and Conditions (GTC), Section 4, which contain the procedures of Columbia's current "Auctions of Available Firm Service" involving the awarding of existing firm capacity and the exercise of the ROFR on Columbia, to reflect these changes. Columbia is also revising Section 3, to be consistent with the field provision of GTC Section 4(e) and the current provision of GTC Section 14.5(b).

Columbia states that copies of its filing have been mailed to all firm customers, interruptible customers, and affected state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17710 Filed 7-12-00; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97-406-023]

Dominion Transmission, Inc; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Dominion Transmission, Inc. (Dominion), formerly CNG Transmission Corporation, filed revised pro forma tariff sheets listed below to be part of its FERC Gas Tariff, Second Revised Volume No. 1, in order to implement fully unbundled gathering and extraction rates, and to reflect the effects of that unbundling on transportation service rates.

The work papers supporting the methodology by which the Company arrived at the proposed fully unbundled gathering and products extraction rates were included in the filing. The fully unbundled rates and the tariff sheets implementing those rates are to become effective January 1, 2001.

Pro Forma Sheet No. 31
Pro Forma Sheet No. 32
Pro Forma Sheet No. 34
Pro Forma Sheet No. 37
Pro Forma Sheet No. 107

Pro Forma Sheet No. 107A
 Pro Forma Sheet No. 120
 Pro Forma Sheet No. 120A
 Pro Forma Sheet No. 135
 Pro Forma Sheet No. 136
 Pro Forma Sheet No. 136A
 Pro Forma Sheet No. 319
 Pro Forma Sheet No. 351
 Pro Forma Sheet No. 353A
 Pro Forma Sheet No. 354
 Pro Forma Sheet No. 364A

Dominion states that the purpose of this filing is to place on file fully unbundled gathering and extraction rates in accordance with Article IV of Dominion's August 31, 1998 rate case Stipulation and Agreement in Docket No. RP97-406-000 as approved by the Commission. 85 FERC ¶ 61,261 (1998).

Dominion states that copies of its filing have been served on Dominion's customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17737 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-21-006]

Dominion Transmission, Inc.; Notice of Compliance Filing

July 7, 2000.

Take notice that on June 30, 2000, Dominion Transmission, Inc. (DTI), formerly CNG Transmission Corporation

tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, tariff sheets in compliance with the Commission's order issued June 29, 2000, in this proceeding and moved such tariff sheets into effect.

DTI states that the filing would implement two new rate schedules. Rate Schedules Delivery Point Operator (DPO) and City Gate Swing Customer (CSC). Rate Schedule DPO is designed primarily to allow operators of citygate interconnections with DTI to offer no-notice service to retail markets behind the citygate and their service providers. Rate Schedule CSC, a companion service to Rate Schedules DPO, is designed to all customers behind the citygate to receive no-notice service from DTI under certain terms and conditions.

DTI states that the revised tariff tariff sheets and compliance filing satisfy the conditions of the Commission's June 29, 2000, order in this proceeding.

DTI's filing also includes a motion to make the DPO and CSC tariff sheets effective on July 1, 2000.

DTI states that copies of its filing have been served upon all parties on the official service lists DTI's customers customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17741 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97-287-052]

El Paso Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, El Paso Natural Gas Company (El Paso) tendered for filing to its FERC Gas Tariff, Second Revised Volume No. 1-A, the following tariff sheets, to become effective July 1, 2000:

Thirty-First Revised Sheet No. 30
 Eighth Revised Sheet No. 31A

El Paso states that the above tariff sheets are being filed to implement two negotiated rate contracts pursuant to the Commission's Statement of Policy on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines and Regulation of Negotiated Transportation Services of Natural Gas Pipelines issued January 31, 1996 at Docket Nos. RM95-6-000 and RM96-7-000.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17736 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. RP96-320-031]****Koch Gateway Pipeline Company; Notice of Negotiated Rate Filing**

July 7, 2000.

Take notice that on June 30, 2000, Koch Gateway Pipeline Company (Koch) filed with the Federal Energy Regulatory Commission (Commission) a contract for disclosure of a recently negotiated rate transaction. As shown on the contract, Koch requests an effective date of July 1, 2000.

Special Negotiated Rate Between Koch and Entergy Mississippi, Inc.

Koch states that copies of the filing have been served upon all parties on the official service list created by the Secretary in this proceeding.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17733 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. RP00-373-000]****MIGC, Inc.; Notice of Tariff Filing**

July 7, 2000.

Take notice that on June 30, 2000 MIGC, Inc. (MIGC), tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, Fourth Revised Sheet NO. 6, with a proposed effective date of August 1, 2000.

MIGC states that the purpose of the filing is to revise and update the fuel retention and loss percentage factors (FL&U factors) set forth in its FERC Gas Tariff, First Revised Volume No. 1 in accordance with the requirements of Section 25 of said tariff.

MIGC states that copies of its filing are being mailed to its jurisdictional customers and interested State commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17709 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. RP00-371-000]****Northern Border Pipeline Company; Notice of Proposed Changes in FERC Gas Tariff**

July 7, 2000.

Take notice that on June 30, 2000, Northern Border Pipeline Company (Northern Border) tendered for filing to become part of Northern Border Pipeline Company's FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets to become effective July 1, 2000:

Second Revised Sheet Number 119
First Revised Sheet Number 120
Second Revised Sheet Number 121
Second Revised Sheet Number 134
Second Revised Sheet Number 275
Second Revised Sheet Number 276
Original Sheet Number 276A
Third Revised Sheet Number 278
Original Sheet Number 278A

Second Revised Sheet Number 281
Third Revised Sheet Number 283
Second Revised Sheet Number 284
Third Revised Sheet Number 285

Northern Border proposes to revise Section 5, Right of First Refusal, under Rate Schedule T-1 and Section 27 of its General Terms and Conditions, regarding the temporary removal of the rate cap in short-term capacity releases and corresponding bidding requirements in accordance with the Commission's Order Nos. 637 and 637-A.

Northern Border states the herein proposed changes do not result in a change in Northern Border's total revenue requirement.

Northern Border states that copies of this filing have been sent to all of Northern Border's contracted shippers and interested state regulatory commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17707 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory Commission****[Docket No. RP00-370-000]****Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff**

July 7, 2000.

Take notice that on June 30, 2000, Northern Natural Gas Company (Northern), tendered for filing in its FERC Gas tariff, Fifth Revised Volume

No. 1, the following tariff sheets proposed to be effective June 30, 2000:

Second Revised Sheet No. 104
Third Revised Sheet No. 119
First Revised Sheet No. 120
Fourth Revised Sheet No. 142
Second Revised Sheet No. 297
Fourth Revised Sheet No. 299
Third Revised Sheet No. 229A

Northern states that the purpose of this filing is to comply with Order No. 637 issued on February 9, 2000 and Order No. 637A issued on May 19, 2000. Northern is filing revised tariff sheets to modify its rights of first Refusal (ROFR) provisions.

Northern further states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims/htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17706 Filed 7-12-00; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96-272-015]

Northern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Northern Natural Gas Company (Northern) tendered for filing to become part of Northern's FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets, proposed to become effective on July 1, 2000.

Seventh Revised Sheet No. 66
Second Revised Sheet No. 66C

Northern states that the above sheets are being filed to implement specific negotiated rate transactions in accordance with the Commission's Policy Statement on Alternatives to Traditional Cost-of-Service Ratemaking for Natural Gas Pipelines.

Northern further states that copies of the filing have been mailed to each of its customers and interested State Commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17732 Filed 7-12-00; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Regulatory Commission

[Docket No. RP96-347-019]

Northern Natural Gas Company; Notice of Refund Report

July 7, 2000.

Take notice that on June 30, 2000, pursuant to the Carlton Settlement filed in Docket No. RP96-347 and its FERC Gas Tariff, Northern Natural Gas Company (Northern) has filed various schedules detailing the Carlton buyout and surcharge dollars reimbursed to the appropriate parties.

Northern states that copies of the filing were served upon Northern's customers and interested State Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C.

20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed on or before July 14, 2000. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17734 Filed 7-12-00; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-162-007]

Panhandle Eastern Pipe Line Company; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Panhandle Eastern Pipe Line Company (Panhandle) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, revised tariff sheet to be effective May 22, 2000 and June 1, 2000, as noted on Appendix A attached to the filing.

Panhandle states that the purpose of this filing is to reflect on the Rate Schedule HFT tariff rate sheet the rate adjustments and fuel reimbursement percentages that were filed during the Rate Schedule HFT was suspended.

Panhandle states that copies of this filing are being served on all affected customers, applicable state regulatory agencies and parties to this proceeding.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/>

rims.htm (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17742 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. MT00-9-000]

PG&E Gas Transmission, Northwest Corporation; Notice of Tariff Filing

July 7, 2000.

Take notice that on June 30, 2000, PG&E Gas Transmission, Northwest Corporation (PG&E GTN) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1-A, Ninth Revised Sheet No. 52 and Fourth Revised Sheet No. 85. PG&E GTN requests that these tariff sheets become effective August 1, 2000.

PG&E GTN asserts that the purpose of this filing is to update its Tariff to reflect additions and deletions to its list of Marketing Affiliates and to modify its Tariff to specify that PG&E GTN no longer shares any facilities or operating personnel with its Marketing Affiliates.

PG&E GTN further states that a copy of this filing has been served on PG&E GTN's jurisdictional customers and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17729 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99-518-015]

PG&E Gas Transmission, Northwest Corporation; Notice of Proposed Change in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, PG&E Gas Transmission, Northwest Corporation (PG&E GT-NW) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1-A, the following tariff sheets, with an effective date of July 1, 2000:

Eleventh Revised Sheet No. 7
Second Revised Sheet No. 7.01
Second Revised Sheet No. 7C
Original Sheet No. 7E

PG&E GT-NW states that these sheets are being filed to reflect the implementation of three negotiated rate agreements.

PG&E GT-NW further states that a copy of this filing has been served on PG&E GT-NW's jurisdictional customers, and interested state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17740 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99-496-006]

Southern Natural Gas Company; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000 Southern Natural Gas Company (Southern) tendered for filing to become part of its FERC Gas Tariff, Seventh Revised Volume No. 1, and First Revised Volume No. 2A, the revised tariff sheets listed on Appendix A to the filing.

Southern filed to place into effect as of August 1, 2000, tariff sheets in compliance with the Commission's Order on Uncontested Settlement and Granting Certificate Authorization issued in the above listed proceedings on May 31, 2000 (Order). Southern filed certain sheets as noted in the filing to be effective either March 1, 2000, June 1, 2000, or July 1, 2000, in accordance with the Stipulation and Agreement approved in the Order. These tariff sheets place into effect the provisions of the Stipulation and Agreement filed by Southern on March 10, 2000, in Docket Nos. RP99-496-000, et al., which provided for a full resolution of the issues that had been set for hearing in Southern's Section 4 general rate case and included Southern's acquisition of the facilities and assets of its subsidiary, South Georgia Natural Gas Company, and the conversion of Southern's ANR Storage Transportation Service from a Part 157 certificated service to a Part 284 seasonal service under Southern's FT Rate Schedule. As a matter of administrative convenience, Southern filed all of the affected tariff sheets in the instant filing.

Southern states that copies of the revised tariff sheets are being mailed to Southern's jurisdictional customers and interested state commissions and to parties on the official service list compiled by the Secretary in these proceedings.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings.

Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00-17739 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-366-000]

Southwest Gas Storage Company; Notice of Tariff Filing

July 7, 2000.

Take notice that on June 30, 2000, Southwest Gas Storage Company (Southwest) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, revised tariff sheets as listed on Appendix A attached to the filing, to be effective March 27, 2000 and August 1, 2000.

Southwest states that the purpose of this filing is to comply with the Commission's Regulation of Short-Term Natural Gas Transportation Service, and Regulation of Interstate Natural Gas Transportation Services in Docket Nos. RM98-10-000 and RM98-12-000 issued on February 9, 2000, 90 FERC ¶ 61,109 (Order No. 637) as clarified in Docket Nos. RM98-10-001, et al. issued on May 19, 2000, 91 FERC ¶ 61,169 (Order No. 637-A). Specifically, the proposed changes revise the applicable sections of the General Terms and Conditions of Southwest's tariff to remove the price cap for short-term capacity releases until September 30, 2002 and to modify the applicability of the right of first refusal as directed by Order Nos. 637 and 637-A.

Southwest states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be

taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00-17745 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-365-000]

Texas Eastern Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Texas Eastern Transmission Corporation (Texas Eastern) tendered for filing as part of its FERC Gas Tariff, Sixth Revised Volume No. 1 and Original Volume No. 2, revised tariff sheets listed on Appendix A to the filing, to become effective August 1, 2000.

Texas Eastern states that these revised tariff sheets are filed pursuant to Section 15.1, Electric Power Cost (EPC) Adjustment, of the General Terms and Conditions of Texas Eastern's FERC Gas Tariff, Sixth Revised Volume No. 1. Texas Eastern states that Section 15.1 provides that Texas Eastern shall file to be effective each August 1 revised rates for each applicable zone and rate schedule based upon the projected annual electric power costs required for the operation of transmission compressor stations with electric motor prime movers.

Texas Eastern states that these revised tariff sheets are being filed to reflect Texas Eastern's projected costs for the use of electric power for the twelve month period beginning August 1, 2000. Texas Eastern states that the rate changes proposed to the primary firm capacity reservation charges and, usage rates for full Access Area Boundary service from the Access Area Zone, East Louisiana, to the three market area zones are as follows:

Zone (market)	Reservation (in dth)	Usage (in dth)
1	\$0.008	-\$0.0002
2	\$0.023	-\$0.0007

Zone (market)	Reservation (in dth)	Usage (in dth)
3	\$0.034	-\$0.0010

Texas Eastern states that copies of its filing have been mailed to all affected customers and interested state commissions.

Any persons desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00-17744 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-378-000]

Texas Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Texas Gas Transmission Corporation (Texas Gas) tendered for filing to become part its FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheets, with an effective date of August 1, 2000:

2 Rev Thirty-third Revised Sheet No. 10
2 Rev Sixteenth Revised Sheet No. 10A
2 Rev Sub Original Sheet No. 10A.01
2 Rev Sub Original Sheet No. 10A.02
1 Rev Twenty-ninth Revised Sheet No. 11
2 Rev Seventeenth Revised Sheet No. 11B

Texas Gas states that this filing reflects the termination of the Docket No. RP97-344 Miscellaneous Revenue Credit originally filed in compliance with Article III of Texas Gas's

Stipulation and Agreement in Docket No. RP97-344. The termination of the Docket No. RP97-344 Revenue Credit increases the daily demand rates for Rate Schedules NNS, SNS, and FT by \$0.0010 and increases SGT rates by \$0.0020.

Texas Gas states that copies of the revised tariff sheets are being mailed to Texas Gas's jurisdictional customers and interested state commissions.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17714 Filed 7-12-00; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99-327-002]

Texas Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Texas Gas Transmission Corporation (Texas Gas) tendered for filing to become part of its FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheets, with an effective date of July 1, 2000:

1 Rev Thirty-third Revised Sheet No. 10
1 Rev Sixteenth Revised Sheet No. 10A
First Revised Sub Original Sheet No. 10A.01
First Revised Sub Original Sheet No. 10A.02
1 Rev Twenty-first Revised Sheet No. 11A
1 Rev Seventeenth Revised Sheet No. 11B
1 Rev Thirty-first Revised Sheet No. 12

Texas Gas states that the filing reflects the expiration of the Order No. 528 Commodity Surcharge (Docket No.

RP99-327) originally filed on June 1, 1999, and approved by the Commission in its Order dated June 30, 1999. Due to the scheduled expiration of the commodity surcharge and the resulting decrease in applicable rates, Texas Gas requested an effective date for the filed tariff sheets of July 1, 2000.

Texas Gas states that copies of the revised tariff sheets are being mailed to Texas Gas's jurisdictional customers, interested state commissions, and all parties appearing on the official service list.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17738 Filed 7-12-00; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-260-002]

Texas Gas Transmission Corporation; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Texas Gas Transmission Corporation (Texas Gas) tendered for filing, as part of its FERC Gas Tariff, First Revised Volume No. 1, the following revised tariff sheets, with an effective date of June 1, 2000:

Substitute Original Sheet No. 11D
Pro forma Sub Thirty-second Revised Sheet No. 12
Pro forma Original Sheet No. 12.01

Texas Gas states that this filing is being submitted in compliance with the Commission's May 31 Suspension Order in the referenced docket. In that Order, the Commission directed Texas Gas,

within 30 days, to take certain actions as described below:

1. File a revised tariff sheet with a stated rate for one-day contracts, winter and summer, under the proposed STF Rate Schedule;

2. Fully explain the basis and justification for the premiums Texas Gas assigned to the differentiated rates under the proposed STF Rate Schedule;

3. Provide a basis and justification for having seasonal rates for short-term, firm service, but not for interruptible service (i.e., explain why interruptible rates should not follow the same seasonal pattern as firm short-term rates);

4. Explain why Texas Gas has offered term differentiated rates for short-term service and not for long-term service, as well;

5. Revise the proposed STF service to reflect distance sensitive rates; and

6. Explain the need for continued sales of storage gas by Texas Gas.

Texas Gas states that copies of this filing have been served upon Texas Gas's jurisdictional customers and interested state commissions.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17743 Filed 7-12-00; 8:45 am]
BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97-255-008]

TransColorado Gas Transmission Company; Notice of Tariff Filing

July 7, 2000.

Take notice that on June 30, 2000, TransColorado Gas Transmission Company (TransColorado) tendered for

filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets, with an effective date of July 1, 2000.

Eighth Revised Sheet No. 21
Eighth Revised Sheet No. 22

TransColorado states that the filing is being made in compliance with the Commission's letter order issued March 20, 1997, in Docket No. RP97-255-000.

TransColorado states that the tendered tariff sheets revises TransColorado's Tariff to implement an amended negotiated-rate firm transportation service agreement between TransColorado and Barrett Resources Corporation and a new negotiated-rate firm transportation service agreement with Texaco Natural Gas Inc. TransColorado requested waiver of 18 CFR 154.207 so that the tendered tariff sheets may become effective July 1, 2000.

TransColorado states that a copy of this filing has been served upon all parties to this proceeding, TransColorado's customers, the Colorado Public Utilities Commission and New Mexico Public Utilities Commission.

Any person desiring to protest this filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Section 385.211 of the Commission's Rules and Regulations. All such protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17735 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-380-000]

Transcontinental Gas Pipe Line Corporation; Notice of Tariff Filing

July 7, 2000.

Take notice that on June 30, 2000, Transcontinental Gas Pipe Line

Corporation (Transco) tendered for filing to become part of its FERC Gas Tariff, Third Revised Volume No. 1, certain revised tariff sheets as listed on Appendix A to the filing, with a proposed effective date of August 1, 2000.

Transco states that the instant filing is submitted pursuant to Section 39 of the General Terms and Conditions of Transco's FERC Gas Tariff which provides that Transco will file to adjust its Great Plains Volumetric Surcharge (GPS) 30 days prior to each GPS Annual Period beginning August 1. The GPS Surcharge is designed to recover (i) the cost of gas purchased from Great Plains Gasification Associates (or its successor) which exceeds the Spot Index (as defined in Section 39 of the General Terms) and (ii) the related cost of transporting such gas.

The revised GPS Surcharge included therein consists of two components—the Current GPS Surcharge calculated for the period August 1, 2000 through July 31, 2001 plus the Great Plains Deferred Account Surcharge (Deferred Surcharge). The determination of the Deferred Surcharge is based on the balance in the current GPS subaccount plus accumulated interest at April 30, 2000.

Transco states that include in Appendix B attached to the filing are workpapers supporting the calculation of the revised GPS Surcharge of \$0.0097 per dt reflected on the tariff sheets included therein.

Transco states that copies of the instant filing are being mailed to customers, State Commission and other interested parties.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/>

[rims.htm](http://www.ferc.fed.us/online/rims.htm) (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17716 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-369-000]

Trunkline Gas Company; Notice of Tariff Filing

July 7, 2000.

Take notice that on June 30, 2000, Trunkline Gas Company (Trunkline) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, revised tariff sheets as listed on Appendix A attached to the filing, to be effective March 27, 2000 and August 1, 2000.

Trunkline states that the purpose of this filing is to comply with the Commission's Regulation of Short-Term Natural Gas Transportation Service, and Regulation of Interstate Natural Gas Transportation Services in Docket Nos. RM98-10-000 and RM98-12-000 issued on February 9, 2000, 90 FERC ¶ 61,109 (Order No. 637) as clarified in Docket Nos. RM98-10-001, *et al.* issued on May 19, 2000, 91 FERC ¶ 61,169 (Order No. 637-A). Specifically, the proposed changes revise the applicable sections of the General Terms and Conditions of Trunkline's tariff to remove the price cap for short-term capacity releases until September 30, 2002 and to modify the applicability of the right of first refusal as directed by Order Nos. 637 and 637-A.

Trunkline states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17705 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-376-000]

Trunkline LNG Company; Notice of Tariff Filing

July 7, 2000.

Take notice that on June 30, 2000, Trunkline LNG Company (TLNG) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1-A, revised tariff sheets as listed on Appendix A attached to the filing, to be effective March 27, 2000 and August 1, 2000.

TLNG states that the purpose of this filing is to comply with the Commission's Regulation of Short-Term Natural Gas Transportation Service, and Regulation of Interstate Natural Gas Transportation Services in Docket Nos. RM98-10-000 and RM98-12-000 issued on February 9, 2000, 90 FERC ¶ 61,109 (Order No. 637) as clarified in Docket Nos. RM98-10-001, *et al.* issued on May 19, 2000, 91 FERC ¶ 61,169 (Order No. 637-A). Specifically, the proposed changes revise the applicable sections of the General Terms and Conditions of TLNG's tariff to remove the price cap for short-term capacity releases until September 30, 2002 and to modify the applicability of the right of first refusal as directed by Order Nos. 637 and 637-A.

TLNG states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make

protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17712 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-377-000]

Trunkline LNG Company; Notice of Proposed Changes in FERC Gas Tariff

July 7, 2000.

Take notice that on June 30, 2000, Trunkline LNG Company (TLNG) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1-A, the following tariff sheet to be effective August 1, 2000:

Fourth Revised Sheet No. 5

TLNG states that this filing is made in accordance with Section 19 (Fuel Reimbursement Adjustment) and Section 20 (Electric Power Cost Adjustment) of the General Terms and Conditions (GT&C) of TLNG's FERC Gas Tariff, Original Volume No. 1-A. The revised tariff sheets reflect a 0.41% increase to the currently effective fuel reimbursement percentage and a (\$0.0007) per Dt. decrease for the electric power cost adjustment under Rate Schedules FTS and ITS.

TLNG states that copies of this filing are being served on all affected customers and applicable state regulatory agencies.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, DC 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17713 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-368-000]

Tuscarora Gas Transmission Company; Notice of Tariff Filing

July 7, 2000.

Take notice that on June 30, 2000, Tuscarora Gas Transmission Company (Tuscarora) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheets to become effective August 1, 2000:

Second Revised Sheet No. 70

First Revised Sheet No. 74

Second Revised Sheet No. 78

Second Revised Sheet No. 79

Tuscarora asserts that the purpose of this filing is to comply with Order No. 637, issued on February 9, 2000 in Docket Nos. RM98-10-000 and RM98-12-000 (Order No. 637). Order No. 637 provides for a waiver of the rate ceiling for short-term capacity release transactions (with a term of less than one year) until September 30, 2002. Tuscarora has revised Section 26 of the General Terms and Conditions of its tariff to remove the price cap for short-term capacity release transactions of less than one year.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/>

rims.htm (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17704 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP00-373-000]

Tuscarora Gas Transmission Company; Notice of Site Visit

July 7, 2000.

On July 17 through July 19, 2000, the staff of the Office of Energy Projects will conduct a precertification site visit with the staff of the U.S. Department of Interior, Bureau of Land Management, Carson City Field Office (BLM), and corporate officials of the Tuscarora Gas Transmission Company (Tuscarora). The purpose of the site visit is to tour the project area of Tuscarora's proposed Hungry Valley Lateral Project in Washoe County, Nevada.

The BLM is the lead agency in the preparation of the environmental assessment for this proposal. The Commission is a cooperating agency and will be assisting the BLM in the preparation of the document, pursuant to the National Environmental Policy Act.

All parties may attend the site visit. Those planning to attend must provide their own transportation. For further information on attending the site visit, please call Mr. Paul McKee of the Commission's External Affairs Office at (202) 208-1088.

David P. Boergers,
Secretary.

[FR Doc. 00-17726 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00-367-000]

Williston Basin Interstate Pipeline Company; Notice of Fuel Reimbursement Charge Filing

July 7, 2000.

Take notice that on June 30, 2000, Williston Basin Interstate Pipeline Company (Williston Basin), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1 and

Original Volume No. 2, the following revised tariff sheets to become effective August 1, 2000:

Second Revised Volume No. 1

Thirty-eighth Revised Sheet No. 15
Nineteenth Revised Sheet No. 15A
Fortieth Revised Sheet No. 16
Nineteenth Revised Sheet No. 16A
Thirty-seventh Revised Sheet No. 18
Nineteenth Revised Sheet No. 18A
Nineteenth Revised Sheet No. 19
Nineteenth Revised Sheet No. 20
Thirty-third Revised Sheet No. 21

Original Volume No. 2

Eighty-second Revised Sheet No. 11B

Williston Basin states the revised tariff sheets reflect revisions to the fuel reimbursement charge and percentage components of the Company's relevant transportation, gathering, and storage rates, pursuant to Williston Basin's Fuel Reimbursement Adjustment Provision, contained in Section 38 of the General Terms and Conditions of its FERC Gas Tariff, Second Revised Volume No. 1.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed on or before July 14, 2000. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17703 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. MT00-10-000]

Williston Basin Interstate Pipeline Company; Notice of Tariff Filing

July 7, 2000.

Take notice that on June 30, 2000, Williston Basin Interstate Pipeline

Company (Williston Basin), tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following revised tariff sheets, with a proposed effective date of June 30, 2000.

Twelfth Revised Sheet No. 187
Original No. 187A
Eighth Revised Sheet No. 188

Williston Basin states that the proposed revision to its Tariff is being made to reflect that to the extent that the term "Marketing Affiliate," within the context of FERC Order Nos. 566, *et seq.*, is deemed to include WBI Production, Inc. (WBI Production), as it pertains to and so long as WBI Production sells natural gas acquired from Frontier Gas Storage Company, then the executive officers of Transporter may be considered shared policy making personnel.

Williston Basin states that the proposed Tariff revisions also reflect the fact that Transporter and Montana-Dakota Utilities Co., a local distribution company division of MDU Resources Group, Inc. (MDU) and/or MDU share a record storage area at the Bismarck Service Center, 909 Airport Road, Bismarck, ND 58504.

Any person desiring to be heard or to protest said filing should file a motion to intervene or a protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 or 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed in accordance with Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the web at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,
Secretary.

[FR Doc. 00-17730 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY**Federal Energy Regulatory
Commission**

[Docket No. EC00-110-000, et al.]

**Entergy Gulf States, Inc., et al.; Electric
Rate and Corporate Regulation Filings**

July 6, 2000.

Take notice that the following filings have been made with the Commission:

1. Entergy Gulf States, Inc.

[Docket No. EC00-110-000]

Take notice that on June 27, 2000, Entergy Gulf States, Inc. (Entergy Gulf States) tendered for filing an application under Section 203 of the Federal Power Act to transfer certain jurisdictional facilities to the City of Gueydan, Louisiana, (Gueydan) which operates the electric distribution system within Gueydan's city limits.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice.

2. Carolina Power & Light Company

[Docket No. EC00-111-000]

Take notice that on June 30, 2000, Carolina Power & Light Company (CP&L), tendered for filing an application pursuant to Section 203 of the Federal Power Act for authorization to sell various jurisdictional facilities the City of Camden, South Carolina. The facilities include conductors, poles, substations, land, transformers, breakers, switches, steel structures, controls, and appurtenances normally included in transmission substations. CP&L states that these facilities are currently being used to serve the City of Camden and one industrial customer.

Comment date: July 28, 2000, in accordance with Standard Paragraph E at the end of this notice.

3. CE Puna Limited Partnership

[Docket No. EG00-187-000]

Take notice that on June 29, 2000, CE Puna Limited Partnership (Applicant), with its principal place of business at 111 Market Place, Suite 200, Baltimore, Maryland 21202, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

4. CII Woodpower I, Inc.

[Docket No. EG00-188-000]

Take notice that on June 29, 2000, CII Woodpower I, Inc. (Applicant), with its principal place of business at 111 Market Place, Suite 200, Baltimore, Maryland 21202, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

5. CII Woodpower II, Inc.

[Docket No. EG00-189-000]

Take notice that on June 29, 2000, CII Woodpower II, Inc. (Applicant) with its principal place of business at 111 Market Street, Suite 200, Baltimore, Maryland 21202, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

6. CD Soda I, Inc.

[Docket No. EG00-190-000]

Take notice that on June 29, 2000, CD Soda I, Inc. (the Applicant), with its principal place of business at 111 Market Place, Suite 200, Baltimore, Maryland 21202, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

7. CD Soda II, Inc.

[Docket No. EG00-191-000]

Take notice that on June 29, 2000, CD Soda II, Inc. (the Applicant), with its principal place of business at 111 Market Place, Suite 200, Baltimore, Maryland 21202, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to

Part 365 of the Commission's regulations.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

8. CD Rocklin I, Inc.

[Docket No. EG00-192-000]

Take notice that on June 29, 2000, CD Rocklin I, Inc. (the Applicant), with its principal place of business at 111 Market Place, Suite 200, Baltimore, Maryland 21202, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

9. CD Rocklin II, Inc.

[Docket No. EG00-193-000]

Take notice that on June 29, 2000, CD Rocklin II, Inc. (the Applicant), with its principal place of business at 111 Market Place, Suite 200, Baltimore, Maryland 21202, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

10. CD Rocklin III, Inc.

[Docket No. EG00-194-000]

Take notice that on June 29, 2000, CD Rocklin III, Inc. (the Applicant), with its principal place of business at 111 Market Place, Suite 200, Baltimore, Maryland 21202, filed with the Federal Energy Regulatory Commission an application for determination of exempt wholesale generator status pursuant to Part 365 of the Commission's regulations.

Comment date: July 27, 2000, in accordance with Standard Paragraph E at the end of this notice. The Commission will limit its consideration of comments to those that concern the adequacy or accuracy of the application.

11. Ameren Services Company

[Docket No. ER00-1008-001]

Take notice that on June 30, 2000, Ameren Services Company (ASC), the transmission provider, tendered for filing an Amended Service Agreement for Long-Term Firm Point-to-Point Transmission Services between ASC and Reliant Energy Services, Inc. ASC asserts that the purpose of the Amended Agreement is to reflect additional terms which have been agreed upon by the parties, including a Guaranty Agreement which is designed to cover construction cost that ASC will incur on behalf of the customer.

The parties request that the Service Agreements be allowed to become effective June 1, 2000.

Comment date: July 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

12. Virginia Electric and Power Company

[Docket No. ER00-2739-000]

Take notice that on July 5, 2000, Virginia Electric and Power Company (Virginia Power), tendered for filing a tariff sheet numbered "Original Sheet No. 1" that is blank and marked "Reserved" under Virginia Electric and Power Company, FERC Electric Tariff, Second Revised Volume No. 5 in compliance with Designation of Electric Rate Schedule Sheets, 90 FERC ¶ 61,352 (2000). Virginia Power respectfully requested that the tariff sheet be accepted for filing as of June 7, 2000.

Copies of the filing were served upon the public utility's jurisdictional customers, Virginia State Corporation Commission and North Carolina Utilities Commission.

Comment date: July 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

13. Carolina Power & Light Company

[Docket No. ER00-2741-000]

Take notice that Carolina Power & Light Company ("CP&L"), on July 5, 2000, tendered for filing a title page with no pagination and a tariff sheet numbered "Original Sheet No. 1" that is blank and marked "Reserved" under Carolina Power & Light Company, FERC Electric Tariff, Second Revised Volume No. 3 in compliance with Designation of Electric Rate Schedule Sheets, 90 FERC ¶ 61,352 (2000). CP&L respectfully requested that the sheets be accepted for filing as of June 7, 2000.

Copies of the filing were served upon the public utility's jurisdictional customers, North Carolina Utilities Commission and South Carolina Public Service Commission.

Comment date: July 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

14. Wisconsin Energy Corporation Operating Companies

[Docket No. ER00-2763-000]

Take notice that on July 5, 2000, Wisconsin Energy Corporation Operating Companies (Wisconsin Energy), tendered for filing a title page with the correct designation and a tariff sheet numbered "Original Sheet No. 1" that is blank and marked "Reserved" under Wisconsin Energy Corporation Operating Companies, FERC Electric Tariff, First Revised Volume No. 1 in compliance with Designation of Electric Rate Schedule Sheets, 90 FERC ¶ 61,352 (2000).

Wisconsin Energy requested that the sheets be accepted for filing as of June 7, 2000.

Copies of the filing were served upon the public utility's jurisdictional customers, Public Service Commission of Wisconsin and Michigan Public Service Commission.

Comment date: July 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

15. Ohio Edison Company

[Docket No. ER00-3051-000]

Take notice that on July 3, 2000, Ohio Edison Company tendered for filing agreements to construct second delivery points at Cuyahoga Falls and Monroeville, and revisions to Appendices A and B of Service Agreements with American Municipal Power-Ohio, Inc. Under FERC Electric Tariff, Second Revised Volume No.2. This filing is made pursuant to Section 205 of the Federal Power Act.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

16. The Dayton Power and Light Company

[Docket No. ER00-3052-000]

Take notice that on June 30, 2000, The Dayton Power and Light Company (Dayton) submitted service agreements establishing with British Columbia Power Exchange Corporation and Pepco Energy Services as customers under the terms of Dayton's Open Access Transmission Tariff.

Dayton requests an effective date of one day subsequent to this filing for the service agreements. Accordingly, Dayton requests waiver of the Commission's notice requirements.

Copies of this filing were served upon with British Columbia Power Exchange Corporation and Pepco Energy Services

and the Public Utilities Commission of Ohio.

Comment date: July 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

17. The Dayton Power and Light Company

[Docket No. ER00-3053-000]

Take notice that on June 30, 2000, The Dayton Power and Light Company (Dayton) submitted service agreements establishing Amerada Hess Corporation as a customer under the terms of Dayton's Market-Based Sales Tariff.

Dayton requests an effective date of one day subsequent to this filing for the service agreements. Accordingly, Dayton requests waiver of the Commission's notice requirements.

Copies of this filing were served upon Amerada Hess Corporation and the Public Utilities Commission of Ohio.

Comment date: July 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

18. DTE Georgetown, LLC

[Docket No. ER00-3054-000]

Take notice that on June 30, 2000, DTE Georgetown, LLC (DTE Georgetown) filed a tolling agreement under its FERC Electric Tariff Original Volume No. 1.

DTE Georgetown requests that the acceptance of this contract be effective as of June 1, 2000.

Comment date: July 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

19. PPL Montour, LLC

[Docket No. ER00-3055-000]

Take notice that on June 30, 2000, PPL Montour, LLC (PPL Montour) notified the Commission that PPL Electric Utilities Corporation (PPL Utilities) will assign its rights and obligations under the Energy Service Agreement among the Keystone Generating Station Owners and Sithe Power Marketing, L.P., dated November 24, 1999, and filed the Energy Service Agreement.

PPL requests that the effective date of the Energy Service Agreement be made July 1, 2000.

PPL Montour has served a copy of this filing on the Keystone Generating Owners, Sithe Power Marketing, L.P. and PPL Utilities.

Comment date: July 21, 2000, in accordance with Standard Paragraph E at the end of this notice.

20. South Carolina Electric & Gas Company

[Docket No. ER00-3056-000]

Take notice that on July 3, 2000, South Carolina Electric & Gas Company (SCE&G) submitted a service agreement establishing DTE Energy Trading, Inc. as a firm point-to-point customer under the terms of SCE&G's Open Access Transmission Tariff.

SCE&G requests an effective date of one day subsequent to the filing of the service agreement. Accordingly, SCE&G requests waiver of the Commission's notice requirements.

Copies of this filing were served upon DTE Energy Trading, Inc. and the South Carolina Public Service Commission.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

21. Indiana Michigan Power Company, d/b/a American Electric Power

[Docket No. ER00-3057-000]

Take notice that on July 3, 2000, Indiana Michigan Power Company, d/b/a American Electric Power (AEP), tendered for filing with the Commission Addenda to the Service Agreements under which AEP provides wholesale electric service to members of the Indiana and Michigan Municipal Distributors Association (IMMDA). Specifically, AEP provides wholesale electric service under AEP's FERC Tariff MRS, Original Volume No. 4, to the Town of Avilla, Indiana, the City of Bluffton, Indiana, the City of Garrett, Indiana, the City of Gas City, Indiana, the City of Mishawaka, Indiana,¹ the Town of New Carlisle, Indiana, the City of Niles, Michigan, the Village of Paw Paw, Michigan, the City of South Haven, Michigan, the City of Sturgis, Michigan,² and the Town of Warren, Indiana, by electric service agreements dated at various dates during the year 1997 (Service Agreements).

AEP requests that the Addenda be made effective beginning with the July 2000 billing month.

AEP states that a copy of its filing was served upon the IMMDA members, the Indiana Utility Regulatory Commission, and the Michigan Public Service Commission.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

¹ AEP provides wholesale electric service to the City of Mishawaka under FERC Tariff WS, Original Volume No. 5.

² AEP Tariff MRS Service to the City of Sturgis under the Electric Service Agreement dated May 8, 1968 ended August 31, 1999.

22. Cleco Evangeline LLC

[Docket No. ER00-3058-000]

Take notice that on July 3, 2000, Cleco Evangeline LLC (Cleco Evangeline), tendered for filing a sale and tolling agreement under which Cleco Evangeline will make market-based power sales to Williams Energy Marketing & Trading Company. Cleco Evangeline is an affiliate of Cleco Utility Group Inc., a public utility subject to the Commission's jurisdiction under the Federal Power Act, 16 U.S.C. § 791(a) *et seq.* Cleco Evangeline requests confidential treatment of the agreement pursuant to 18 CFR 388.112.

A copy of the filing has been served upon Williams Energy Marketing & Trading Company.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

23. Indianapolis Power & Light Company

[Docket No. ER00-3059-000]

Take notice that on July 3, 2000, Indianapolis Power & Light Company (IPL) tendered for filing a blanket service agreement under IPL's Wholesale Power Sales Tariff. The Tariff was accepted for filing effective April 29, 2000 and has been designated as IPL's FERC Electric Tariff Revised Volume 2.

IPL requests that the effective date of the service agreement be June 1, 2000.

A copy of the filing was served upon the party to the service agreement.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

24. Ohio Valley Electric Corporation

[Docket No. ER00-3060-000]

Take notice that on July 3, 2000, Ohio Valley Electric Corporation (OVEC), in accordance with the Commission's order in *North American Electric Reliability Council*, 91 FERC ¶ 61,122 (2000), tendered for filing a notice informing the Commission that OVEC has adopted revised Transmission Loading Relief procedures submitted to the Commission by the North American Electric Reliability Council.

Copies of this filing were served upon OVEC's jurisdictional customers and upon each state public service commission that, to the best of OVEC's knowledge, has retail rate jurisdiction over such customers.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

25. Alrus Consulting, L.L.C.

[Docket No. ER00-3061-000]

Take notice that on July 3, 2000, Alrus Consulting L.L.C. (Alrus) filed a Petition with the Federal Energy Regulatory Commission (Commission) for acceptance of FERC Rate Schedule IND/COMM Generators—Alrus, FERC Electric Rate Schedule No. 1, the granting of certain waivers of the Commission's Regulations, and the granting of certain blanket approvals. Alrus seeks authority to purchase energy and/or capacity from eligible independent power producers (IPPs) at market-based rates for resale.

Alrus also requests a waiver of the 60-day prior notice requirement to allow the rate schedule to become effective, without suspension or hearing, on or before July 26, 2000.

Alrus is an unaffiliated power marketer authorized to engage in wholesale power and energy transactions pursuant to the Commission's Order in Docket No. ER00-861-000.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

26. New Century Services, Inc.

[Docket No. ER00-3062-000]

Take notice that on July 3, 2000, New Century Services, Inc. on behalf of Cheyenne Light, Fuel and Power Company, Public Service Company of Colorado, and Southwestern Public Service Company (collectively Companies) tendered for filing a Service Agreement under their Joint Open Access Transmission Service Tariff for Firm Point-to-Point Transmission Service between the Companies and Golden Spread Electric Cooperative, Inc.

The Companies request that the Agreement be made effective on June 6, 2000.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

27. New Century Services, Inc.

[Docket No. ER00-3063-000]

Take notice that on July 3, 2000, New Century Services, Inc. on behalf of Cheyenne Light, Fuel and Power Company, Public Service Company of Colorado, and Southwestern Public Service Company (collectively Companies) tendered for filing a Service Agreement under their Joint Open Access Transmission Service Tariff for Non-Firm Point-to-Point Transmission Service between the Companies and Golden Spread Electric Cooperative, Inc.

The Companies request that the Agreement be made effective on June 6, 2000.

Comment date: July 24, 2000, in accordance with Standard Paragraph E at the end of this notice.

28. Genesee Power Station Limited Partnership

[Docket No. QF93-19-001]

Take notice that on June 29, 2000, Genesee Power Station Limited Partnership, a Michigan limited partnership, filed with the Federal Energy Regulatory Commission an application for certification of a facility as a qualifying small power production facility pursuant to § 292.207(b) of the Commission's regulations. No determination has been made that the submittal constitutes a complete filing.

The applicant's 38 MW facility located in Genesee Township, Michigan (Facility) was self-certified in Docket No. QF93-19-000. Certification by the Commission is sought to confirm the QF status of the Facility in light of changes in certain upstream ownership interests. The Facility is interconnected with Consumers Energy Company, and Consumers Energy Company supplies all maintenance power to the Facility.

Comment date: July 31, 2000, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest such filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection. This filing may also be viewed on the Internet at <http://www.ferc.fed.us/online/rims.htm> (call 202-208-2222 for assistance).

David P. Boergers,

Secretary.

[FR Doc. 00-17681 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 11480-001 Alaska]

Haida Corporation; Notice of Availability of Final Environmental Assessment

July 7, 2000.

In accordance with the National Environmental Policy Act of 1969 and the Federal Energy Regulatory Commission's (Commission) regulations, 18 CFR Part 380 (Order No. 486, 52 F.R. 47897), the Office of Energy Projects has reviewed the application for an original license for Haida Corporation's proposed Reynolds Creek Hydroelectric Project, and has prepared a Final Environmental Assessment (FEA). The project would be located about 10 miles east of Hydaburg, Alaska on Prince of Wales Island.

On September 9, 1999, the Commission staff issued a draft environmental assessment (DEA) for the project and requested that comments be filed with the Commission within 45 days. Comments on the DEA were filed by the Alaska Power & Telephone Company, National Marine Fisheries Service, Alaska Department of Fish and Game, Alaska Division of Governmental Coordination, Haida Corporation, and Natural Heritage Institute and are addressed in the FEA.

The FEA contains the staff's analysis of the potential environmental impacts of the project and concludes that licensing the project, with appropriate environmental protective measures, would not constitute a major federal action that would significantly affect the quality of the human environment.

Copies of the FEA are available for review in the Commission's Public Reference Room, Room 2A, at 888 First Street, N.E., Washington, D.C. 20426, and on the web at <http://www.ferc.fed.us/online/rims.htm> [please call (202) 208-2222 for assistance].

David P. Boergers,

Secretary.

[FR Doc. 00-17731 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Declaration of Intention and Soliciting Comments; Motions To Intervene, and Protests

July 7, 2000.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Declaration of Intention.

b. *Docket No.:* DI00-5-000.

c. *Date Filed:* June 15, 2000.

d. *Applicant:* John & Ronda Gacek.

e. *Name of Project:* Hidden Creek Hydro.

f. *Location:* On unnamed stream, known as Hidden Creek, San Miguel County, T. 42N., R. 11 W., sec. 2, SE¼NE¼, New Mexico Principal Meridian, Colorado. Project would not utilize federal lands or reservations.

g. *Filed Pursuant to:* Section 23(b)(1) of the Federal Power Act, 16 U.S.C. §§ 817(b).

h. *Applicant Contact:* Mr. John Joseph Gacek, Jr., and Ronda L. Gacek, P.O. Box 1930, 4400 Fallcreek Road, Telluride, CO 81435, telephone (970) 728-0214 (office/home), (970) 728-1469 (FAX), E-Mail jgconst@rmi.net.

i. *FERC Contact:* Any questions on this notice should be addressed to Diane M. Murray at (202) 219-2682, E-mail address: diane.murray@ferc.fed.us.

j. *Deadline for filing comments and/or motions:* August 14, 2000.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington DC 20426.

Please include the docket number (DI00-5-000) on any comments or motions filed.

k. *Description of Project:* The proposed project would consist of: (1) A 3-foot-high dam; (2) a 1,260-foot-long pipeline; (3) a powerhouse with a total generating capacity of 1,500 kW; and (4) appurtenant facilities. The estimated cost of running power to the site by the local power company, San Miguel Power Association, is over \$100,000.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the project. The Commission also determines whether or not the project: (1) Would be located on a navigable waterway; (2) would occupy

or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room located at 888 First Street, NE., Room 2A, Washington, DC 20426, or by calling (202) 208-1371. This filing may be viewed on <http://www.ferc.fed.us/online/rims.htm> (call (202) 208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the

Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

David P. Boergers,
Secretary.

[FR Doc. 00-17727 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Declaration of Intention and Soliciting Comments Motions To Intervene, and Protests

July 7, 2000.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Declaration of Intention.

b. *Docket No.:* DI00-6-000.

c. *Date Filed:* June 15, 2000.

d. *Applicant:* John & Ronda Gacek.

e. *Name of Project:* Sanctuary Ranch Hydro.

f. *Location:* On Fall Creek, San Miguel County, T. 42 N., R. 11 W., sec. 2, SE $\frac{1}{4}$ NE $\frac{1}{4}$, New Mexico Principal Meridian, Colorado. Project would not utilize federal lands or reservations.

g. *Filed Pursuant to:* Section 23(b)(1) of the Federal Power Act, 16 U.S.C. 817(b).

h. *Applicant Contact:* Mr. John Joseph Gacek, Jr., and Ronda L. Gacek, P.O. Box 1930, 4400 Fallcreek Road, Telluride, CO 81435, telephone (970) 728-0214 (office/home), (970) 728-1469 (FAX), E-Mail jgconst@rmi.net.

i. *FERC Contact:* Any questions on this notice should be addressed to Diane M. Murray at (202) 219-2682, or E-mail address: diane.murray@ferc.fed.us.

j. *Deadline for filing comments and/or motions:* August 14, 2000.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, D.C. 20426.

Please include the docket number (DI00-6-000) on any comments or motions filed.

k. *Description of Project:* The proposed project would consist of: (1) an intake; (2) a 1,100-foot-long pipeline; (3) a powerhouse with a total generating capacity of 1,500 kW; and (4) appurtenant facilities. The estimated cost of running power to the site by the

local power company, San Miguel Power Association, is over \$100,000.

When a Declaration of Intention is filed with the Federal Energy Regulatory Commission, the Federal Power Act requires the Commission to investigate and determine if the interests of interstate or foreign commerce would be affected by the project. The Commission also determines whether or not the project: (1) Would be located on a navigable waterway; (2) would occupy or affect public lands or reservations of the United States; (3) would utilize surplus water or water power from a government dam; or (4) if applicable, has involved or would involve any construction subsequent to 1935 that may have increased or would increase the project's head or generating capacity, or have otherwise significantly modified the project's pre-1935 design or operation.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room located at 888 First Street, NE., Room 2A, Washington, D.C. 20426, or by calling (202) 208-1371. This filing may be viewed on <http://www.ferc.fed.us/online/rims.htm> (call (202) 208-2222 for assistance). A copy is also available for inspection and reproduction at the address in item h. above.

m. Individuals desiring to be included on the Commission's mailing list should so indicate by writing to the Secretary of the Commission.

Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

Filing and Service of Responsive Documents—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's

regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

David P. Boergers,

Secretary.

[FR Doc. 00-17728 Filed 7-12-00; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[OPPTS-42212A; FRL-6595-2]

Priority-Setting Workshop for the Endocrine Disruptor Screening Program; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA is extending the comment period, announced in the May 19, 2000, **Federal Register**, for issues discussed at the June 5-7 Priority-Setting Workshop for the Endocrine Disruptor Screening Program (EDSP), from July 7, 2000 to August 25, 2000. The Agency has developed a draft version of a priority-setting system for the selection of chemicals for testing in the EDSP and seeks public input on the further design and implementation of the system.

DATES: Comments, identified by docket control number OPPTS-42212A, must be received on or before August 25, 2000.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I. of the **SUPPLEMENTARY INFORMATION.** To ensure proper receipt by EPA, it is imperative that you identify docket control number OPPTS-42212A in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: For general information contact: Barbara Cunningham, Director, Office of

Program Management and Evaluation, Office of Pollution Prevention and Toxics (7401), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 554-1404; e-mail address: TSCA-Hotline@epa.gov.

For technical information contact: Jim Darr, telephone number: (202) 260-3441; e-mail address: darr.james@epa.gov or Patrick Kennedy, telephone number: (202) 260-3916; e-mail address: kennedy.patrick@epa.gov. Mailing address: Economics, Exposure, and Technology Division (7406), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Electronic messages must contain the docket control number OPPTS-42212A and the heading "Endocrine Disruptor Priority-Setting Database" in the subject line on the first page of your message.

SUPPLEMENTARY INFORMATION:

I. Does This Action Apply to Me?

This action is directed to the public in general. This action may, however, be of interest to persons who manufacture, import, or use chemical substances that are addressed by the Endocrine Disruptor Priority-Setting Database (EDPSD). The general public may also have an interest in the design and implementation of the EDPSD and in other aspects of the EDSP covered at the workshop. Since other entities may also be interested, the Agency has not attempted to describe all the specific entities that may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed under **FOR FURTHER INFORMATION CONTACT.**

II. How Can I Get Additional Information, Including Copies of this Document or Other Related Documents?

A. Electronically. You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at <http://www.epa.gov/>. To access this document, on the Home Page select "Laws and Regulations" and then look up the entry for this document under the "**Federal Register**—Environmental Documents." You can also go directly to the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>.

To access information presented at the June 5-7, 2000, workshop, you may go to the website at <http://www.epa.gov/scipoly/oscpendo/>. A summary report of comments made at

the workshop will be posted at this site by July 28, 2000.

B. In person. The Agency has established an official record for this document under docket control number OPPTS-42212A. The official record consists of the documents specifically referenced in this notice, any public comments received during an applicable comment period, and other information related to the EDPSD, including any information claimed as Confidential Business Information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record, which includes printed, paper versions of any electronic comments that may be submitted during an applicable comment period, is available for inspection in the TSCA Nonconfidential Information Center, North East Mall Rm. B-607, Waterside Mall, 401 M St., SW., Washington, DC. The Center is open from noon to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number of the Center is (202) 260-7099.

III. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPPTS-42212A in the subject line on the first page of your response.

A. By mail. Submit your comments to: Document Control Office (7407), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

B. In person or by courier. Deliver your comments to: OPPT Document Control Office (DCO) in East Tower Rm. G-099, Waterside Mall, 401 M St., SW., Washington, DC. The DCO is open from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The telephone number for the DCO is (202) 260-7093.

C. Electronically. You may submit your comments electronically by e-mail to: "oppt.ncic@epa.gov," or mail your computer disk to the address identified above. Do not submit any information electronically that you consider to be CBI. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on standard disks in WordPerfect 6.1/8.0 or ASCII file format. All comments in electronic form must be identified by docket control number OPPTS-42212A. Electronic

comments may also be filed online at many Federal Depository Libraries.

IV. What Action is EPA Taking?

EPA is extending the comment period, for issues discussed at the June 5–7 Priority-Setting Workshop for the EDSP, until August 25, 2000. A description of EPA's draft EDPSD and a listing of the issues covered at the workshop were announced in the **Federal Register** of May 19, 2000 (65 FR 31900) (FRL–6559–9).

List of Subjects

Environmental protection, Chemicals, Endocrine disruptors, Pesticides.

Dated: July 5, 2000.

Susan H. Wayland,

Acting Assistant Administrator, Office of Prevention, Pesticides and Toxic Substances.
[FR Doc. 00–17753 Filed 7–12–00; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[PF–952; FRL–6592–9]

Notice of Filing a Pesticide Petition to Establish a Tolerance for a Certain Pesticide Chemical in or on Food

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the initial filing of a pesticide petition proposing the establishment of regulations for residues of a certain pesticide chemical in or on various food commodities.

DATES: Comments, identified by docket control number PF–952, must be received on or before August 14, 2000.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit I.C. of the

SUPPLEMENTARY INFORMATION. To ensure proper receipt by EPA, it is imperative that you identify docket control number PF–952 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Jim Tompkins, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305–5697; e-mail address: tompkins.jim@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

You may be affected by this action if you are an agricultural producer, food manufacturer or pesticide manufacturer. Potentially affected categories and entities may include, but are not limited to:

Cat-egories	NAICS codes	Examples of poten-tially affected entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufac-turing

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. Other types of entities not listed in the table could also be affected. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action might apply to certain entities. If you have questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information, Including Copies of this Document and Other Related Documents?

1. *Electronically.* You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at <http://www.epa.gov/>. To access this document, on the Home Page select “Laws and Regulations” and then look up the entry for this document under the “**Federal Register**—Environmental Documents.” You can also go directly to the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>.

2. *In person.* The Agency has established an official record for this action under docket control number PF–952. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as confidential business information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any

information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection in the Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

C. How and to Whom Do I Submit Comments?

You may submit comments through the mail, in person, or electronically. To ensure proper receipt by EPA, it is imperative that you identify docket control number PF–952 in the subject line on the first page of your response.

1. *By mail.* Submit your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

2. *In person or by courier.* Deliver your comments to: Public Information and Records Integrity Branch (PIRIB), Information Resources and Services Division (7502C), Office of Pesticide Programs (OPP), Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Highway, Arlington, VA. The PIRIB is open from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The PIRIB telephone number is (703) 305–5805.

3. *Electronically.* You may submit your comments electronically by e-mail to: “opp-docket@epa.gov,” or you can submit a computer disk as described above. Do not submit any information electronically that you consider to be CBI. Avoid the use of special characters and any form of encryption. Electronic submissions will be accepted in Wordperfect 6.1/8.0 or ASCII file format. All comments in electronic form must be identified by docket control number PF–952. Electronic comments may also be filed online at many Federal Depository Libraries.

D. How Should I Handle CBI That I Want to Submit to the Agency?

Do not submit any information electronically that you consider to be CBI. You may claim information that you submit to EPA in response to this document as CBI by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with

procedures set forth in 40 CFR part 2. In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public version of the official record. Information not marked confidential will be included in the public version of the official record without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified under **FOR FURTHER INFORMATION CONTACT**.

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

You may find the following suggestions helpful for preparing your comments:

1. Explain your views as clearly as possible.
2. Describe any assumptions that you used.
3. Provide copies of any technical information and/or data you used that support your views.
4. If you estimate potential burden or costs, explain how you arrived at the estimate that you provide.
5. Provide specific examples to illustrate your concerns.
6. Make sure to submit your comments by the deadline in this notice.
7. To ensure proper receipt by EPA, be sure to identify the docket control number assigned to this action in the subject line on the first page of your response. You may also provide the name, date, and **Federal Register** citation.

II. What Action is the Agency Taking?

EPA has received a pesticide petition as follows proposing the establishment and/or amendment of regulations for residues of a certain pesticide chemical in or on various food commodities under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a. EPA has determined that this petition contains data or information regarding the elements set forth in section 408(d)(2); however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

List of Subjects

Environmental protection, Agricultural commodities, Feed additives, Food additives, Pesticides and pests, Reporting and recordkeeping requirements.

Dated: July 5, 2000.

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner summary of the pesticide petition is printed below as required by section 408(d)(3) of the FFDCA. The summary of the petition was prepared by the petitioner and represents the view of the petitioner. EPA is publishing the petition summary verbatim without editing in any way. The petition summary announces the availability of a description of the analytical methods available to EPA for the detection and measurement of the pesticide chemical residues or an explanation of why no such method is needed.

Zeneca Ag. Products

9F6032

EPA has received a pesticide petition 9F6032 from Zeneca Ag. Products, 1800 Concord Pike, P.O. Box 15458, Wilmington, DE 19850-5458 proposing, pursuant to section 408(d) of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing tolerances for residues of sulfosate (the trimethylsulfonium salt of glyphosate, also known as glyphosate-trimesium) in or on the raw agricultural commodities (RAC) cotton gin byproducts at 120 parts per million (ppm) (of which no more than 35 ppm is trimethylsulfonium (TMS)); cotton undelinted seed at 40 ppm (of which no more than 10 ppm is TMS); leaves of root and tuber vegetables group (except radish) at 0.25 ppm (of which no more than 0.2 ppm is TMS); pistachio at 0.05 ppm; potato flakes at 2 ppm (of which no more than 1.5 ppm is TMS); radish roots at 16 ppm (of which no more than 15 ppm is TMS); radish tops at 10 ppm (of which no more than 8 ppm is TMS); root vegetables subgroup (except radish) at 0.15 ppm (of which no more than 0.1 ppm is TMS); sorghum grain at 35 ppm (of which no more than 15 ppm is TMS); sorghum forage at 0.2 ppm (of which no more than 0.1 ppm is TMS); sorghum stover at 140 ppm (of which no more than 60 ppm is TMS); sweet corn forage at 20 ppm (of which no more than 5 ppm is TMS); sweet corn, kernels + cob with husks removed at 0.15 ppm (of which no more than 0.1 ppm is TMS); sweet corn stover at 165 ppm (of which no more than 65 ppm is TMS); tuberous and corm vegetables subgroup at 1 ppm (of which no more than 0.5 ppm is TMS); and to increase the tolerance in poultry meat by-products to

0.5 ppm and in milk to 2 ppm. EPA has determined that the petition contains data or information regarding the elements set forth in section 408(d)(2) of the FFDCA; however, EPA has not fully evaluated the sufficiency of the submitted data at this time or whether the data support granting of the petition. Additional data may be needed before EPA rules on the petition.

A. Residue Chemistry

1. *Plant metabolism.* The metabolism of sulfosate has been studied in corn, grapes, and soybeans. EPA has concluded that the nature of the residue is adequately understood and that the only residues of concern are the parent ions *N*-(phosphonomethyl)-glycine anion (PMG) and TMS.

2. *Analytical method.* Gas chromatography/mass selective (GC/MS) detector methods have been developed for PMG analysis in crops, animal tissues, milk, and eggs. Gas chromatography detection methods have been developed for TMS in crops, animal tissues, milk, and eggs.

3. *Magnitude of residues—i. Magnitude of residues in crops—a. Cotton.* Residue data are available for sulfosate in a total of 13 trials conducted in 5 EPA regions and 11 different states. The proposed tolerance of 40 ppm (of which no more than 10 ppm is TMS) for undelinted cotton seed and the proposed tolerance of 120 ppm (of which no more than 35 ppm is TMS) for cotton gin by-products will accommodate any residue resulting from the proposed use pattern.

Cotton seed for processing were obtained and samples were processed into hulls, meal, and refined oil. There was no concentration in the processed fractions. No tolerances are required for cotton hulls, meal, or refined oil at the proposed use rates.

b. *Sorghum.* Residue data are available for sulfosate in a total of 12 trials conducted in 6 EPA regions and 8 different states. The proposed tolerance of 0.2 ppm (of which no more than 0.1 ppm is TMS) for sorghum forage; the proposed tolerance of 35 ppm (of which no more than 15 ppm is TMS) for sorghum grain; and the proposed tolerance of 140 ppm (of which no more than 60 ppm is TMS) for sorghum stover will accommodate any residue resulting from the proposed use pattern. Aspirated grain fractions (AGF) were also collected. Analysis of the treated samples showed that residue of both TMS and PMG concentrated in AGF, but the combined levels are less than the existing tolerance in 40 CFR 180.489 for aspirated grain fractions. No

change in the existing tolerance is required.

c. *Sweet corn*. Residue data are available for sulfosate in a total of 12 trials conducted in 7 EPA regions and 11 different states. The proposed tolerance of 20 ppm (of which no more than 5 ppm is TMS) for sweet corn forage; the proposed tolerance of 0.15 ppm (of which no more than 0.1 ppm is TMS) for sweet corn kernels plus cobs with husks removed; and the proposed tolerance of 165 ppm (of which no more than 65 ppm is TMS) for sweet corn stover will accommodate any residue resulting from the proposed use pattern.

d. *Leaves of root and tuber vegetables group (except radish)*. Residue data are available for sulfosate in a total of 15 trials in the representative commodities of turnips and sugar beets in 8 EPA regions and 12 different states. Residue data are also available for sulfosate in a total of five trials in radish conducted in four EPA regions and four different states. The proposed tolerance of 0.25 ppm (of which no more than 0.2 ppm is TMS) for the leaves of the root and tuber vegetable group (except radish) and the proposed tolerance of 10 ppm (of which no more than 8 ppm is TMS) for radish tops will accommodate any residue resulting from the proposed use pattern.

e. *Root vegetables subgroup 1-A (except radish)*. Residue data are available for sulfosate in a total of 20 trials in the representative commodities of sugar beets, radish, and carrots in 8 EPA regions and 10 different states. Residue data are also available for sulfosate in a total of six trials in turnips conducted in five EPA regions and six different states. The proposed tolerance of 0.15 ppm (of which no more than 0.1 ppm is TMS) for the root vegetables subgroup (except radish) and the proposed tolerance of 16 ppm (of which no more than 15 ppm is TMS) for radish roots will accommodate any residue resulting from the proposed use pattern.

Sugar beets treated at a 5x exaggerated rate for processing were obtained. No residues above the limit of quantitation (LOQ) were found in any of the sugar beet magnitude of the residue studies nor in the 5x exaggerated rate treated sugar beet samples so a processing study is not required. No tolerances are required for sugar beet refined sugar, dried pulp, or molasses at the proposed use rates.

f. *Tuberous and corm vegetables subgroup 1-D*. Residue data are available for sulfosate in a total of 12 trials in the representative commodity, potatoes, in 7 EPA regions and 10 different states. The proposed tolerance of 1 ppm (of which no more than 0.5

ppm is TMS) for the tuberous and corm vegetables subgroup will accommodate any residue resulting from the proposed use pattern.

Potatoes for processing were obtained and samples were processed into potato flakes, chips, and wet peel. Analysis of the treated samples showed that residue of TMS concentrated in potato flakes. The proposed tolerance for potato flakes of 2 ppm (of which no more than 1.5 ppm is TMS) is adequate to accommodate any residues arising from this use pattern in potatoes. No tolerances are required for potato chips and potato wet peel.

g. *Pistachio*. Residue data are available for sulfosate for representative commodities of the nut crop group (pecans, walnuts, and almonds). Residues were below the LOQ of 0.05 ppm in all samples. These data are sufficient to support a tolerance in pistachio. The proposed tolerance for pistachio of 0.05 ppm is the same as the established tolerance in 40 CFR 180.489 for the tree nut group and is adequate to accommodate any residues arising from this use pattern in pistachios.

ii. *Magnitude of residue in animals*—
a. *Ruminants*. The maximum dietary burden in dairy cows results from a diet comprised of 20% AGF, 60% wheat forage, 15% sweet corn stover, and 5% cotton gin by-products for a total dietary burden of 427 ppm. The maximum dietary burden in beef cows results from a diet comprised of 20% AGF, 25% sweet corn stover, 25% sorghum grain, 25% wheat forage, and 5% cotton gin by-products for a total dietary burden of 438 ppm. Comparison to a ruminant feeding study at a dosing level of 1,000 ppm indicates that the appropriate tolerance levels resulting from these proposed additional uses are covered by existing tolerances in 40 CFR 180.489, except milk. The appropriate tolerance for milk is 2 ppm.

b. *Poultry*. The maximum dietary burden in poultry results from a diet comprised of 80% sorghum grain and 20% soybean hulls for a total dietary burden of 43 ppm. Comparison to a poultry feeding study at a dosing level of 50 ppm indicates that the appropriate tolerance levels are covered by existing tolerances in 40 CFR 180.489, except poultry meat by-products. The appropriate tolerance for poultry meat by-products is 0.5 ppm.

B. Toxicological Profile

1. *Acute toxicity*. Several acute toxicology studies have been conducted placing technical grade sulfosate in toxicity category III and IV.

2. *Genotoxicity*. The toxicological endpoints for sulfosate are discussed in

Unit 3.B. of the **Federal Register** notice of April 8, 1999 (64 FR 17171) (FRL-6071-2).

3. *Reproductive and developmental toxicity*. The toxicological endpoints for sulfosate are discussed in Unit B.3. of the **Federal Register** notice of April 8, 1999 (64 FR 17171).

4. *Subchronic toxicity*. The toxicological endpoints for sulfosate are discussed in Unit 3.B. of the **Federal Register** notice of April 8, 1999 (64 FR 17171).

5. *Chronic toxicity*. The toxicological endpoints for sulfosate are discussed in Unit 3.B. of the **Federal Register** notice of April 8, 1999 (64 FR 17171).

6. *Animal metabolism*. The metabolism of sulfosate has been studied in animals. The residues of concern for sulfosate in meat, milk, and eggs are the parent ions PMG and TMS only.

7. *Metabolite toxicology*. There are no metabolites of toxicological concern. Only the parent ions, PMG and TMS, are of toxicological concern.

8. *Endocrine disruption*. Current data suggest that sulfosate is not an endocrine disruptor.

C. Aggregate Exposure

1. *Dietary exposure*—i. *Food*. For the purposes of assessing the potential dietary exposure, Zeneca has utilized the tolerance level for all existing and pending tolerances; and the proposed maximum permissible levels of 120 ppm for cotton gin by-products; 40 ppm for cotton undelinted seed; 0.25 ppm for leaves of root and tuber vegetables group (except radish); 0.05 ppm for pistachio; 2 ppm for potato flakes; 16 ppm for radish roots; 10 ppm for radish tops; 0.15 ppm for root vegetables subgroup (except radish); 35 ppm for sorghum grain; 0.2 ppm for sorghum forage; 140 ppm for sorghum stover; 20 ppm for sweet corn forage; 0.15 ppm for sweet corn, kernels + cob with husks removed; 165 ppm for sweet corn stover; 1 ppm for tuberous and corm vegetables subgroup; 0.5 ppm in poultry meat by-products; 2 ppm in milk; and 100% crop treated acreage for all commodities. Assuming that 100% of foods, meat, eggs, and milk products will contain sulfosate residues and those residues will be at the level of the tolerance results in an overestimate of human exposure. This is a very conservative approach to exposure assessment.

a. *Chronic exposure*. For all existing and pending tolerances and the proposed maximum permissible levels proposed in this notice of filing, the potential exposure for the U.S. population is 0.04 milligrams/kilograms

body weight per day (mg/kg/bwt/day) (17.6% of RfD). Potential exposure for children's population subgroups range from 0.02 mg/kg bwt/day (7.8% of RfD) for nursing infants (<1 year old) to 0.12 mg/kg bwt/day (47.8%) for children 1–6 years old. The chronic dietary risk due to food does not exceed the level of concern (100%).

b. *Acute exposure.* The exposure to the most sensitive population subgroup, non-nursing infants, is 23.5% of the acute RfD at the 95th percentile. The acute dietary risk due to food does not exceed the level of concern (100%).

ii. *Drinking water.* Results from computer modeling indicate that sulfosate in ground water will not contribute significant residues in drinking water as a result of sulfosate use at the recommended maximum annual application rate (8.00 lbs. active ingredient/acre). The computer model uses conservative numbers, therefore it is unlikely that ground water concentrations would exceed the estimated concentration of 0.014 parts per billion (ppb), and sulfosate should not pose a threat to ground water.

The surface water estimates are based on an exposure modeling procedure called Generic Expected Environmental Concentration (GENEEC). The assumptions of two applications of 4.00 lbs. active ingredient/acre resulted in calculated estimated maximum concentrations of 58 ppb (acute, based on the highest 56-day value) and 10 ppb (chronic, average). GENEEC modeling procedures assumed that sulfosate was applied to a 10-hectare field that drained into a 1-hectare pond, 2-meters deep with no outlet.

As a conservative assumption, because sulfosate residues in ground water are expected to be insignificant compared to surface water, it has been assumed that 100% of drinking water consumed was derived from surface water in all drinking water exposure and risk calculations. To calculate the maximum acceptable acute and chronic exposures to sulfosate in drinking water, the dietary food exposure (acute or chronic) was subtracted from the appropriate (acute or chronic) RfD. Drinking water levels of concern (DWLOCs) were then calculated using the maximum acceptable acute or chronic exposure, default body weights (70 kg-adult, 10 kg-child), and drinking water consumption figures (2 liters-adult, 1 liter-child).

The maximum concentration of sulfosate in surface water is 58 ppb. The acute DWLOCs for sulfosate in surface water were all greater than 5,400 ppb. The estimated average concentration of sulfosate in surface water is 10 ppb

which is much less than the calculated levels of concern (>1,300 ppb) in drinking water as a contribution to chronic aggregate exposure. Therefore, for current and proposed uses of sulfosate, Zeneca concludes with reasonable certainty that residues of sulfosate in drinking water would not result in unacceptable levels of aggregate human health risk.

2. *Non-dietary exposure.* Sulfosate is currently not registered for use on any residential non-food sites. Therefore, residential exposure to sulfosate residues will be through dietary exposure only.

D. Cumulative Effects

There is no information to indicate that toxic effects produced by sulfosate are cumulative with those of any other chemical compound.

E. Safety Determination

1. *U.S. population—i. Acute risk.* Since there are no residential uses for sulfosate, the acute aggregate exposure only includes food and water. Using the conservative assumptions of 100% of all crops treated and assuming all residues are at the tolerance level for all established and proposed tolerances, the aggregate exposure to sulfosate will utilize 12.3% of the acute RfD at the 95th percentile for the U.S. population. The estimated peak concentrations of sulfosate in surface and ground water are less than DWLOCs for sulfosate in drinking water as a contribution to acute aggregate exposure. Residues of sulfosate in drinking water do not contribute significantly to the aggregate acute human health risk considering the present use and uses proposed in this action.

ii. *Chronic risk.* Using the conservative exposure assumptions described above, the aggregate exposure to sulfosate from food will utilize 17.6% of the chronic RfD for the U.S. population. The estimated average concentrations of sulfosate in surface and ground water are less than DWLOCs for sulfosate in drinking water as a contribution to chronic aggregate exposure. Residues of sulfosate in drinking water do not contribute significantly to the aggregate chronic human health risk considering the present uses and uses proposed in this action.

2. *Infants and children.* The data base on sulfosate relative to prenatal and postnatal toxicity is complete. Because the developmental and reproductive effects occurred in the presence of parental (systemic) toxicity, these data do not suggest an increased prenatal or postnatal sensitivity of children and

infants to sulfosate exposure. Therefore, Zeneca concludes, upon the basis of reliable data, that a 100-fold uncertainty factor is adequate to protect the safety of infants and children and an additional safety factor is unwarranted.

i. *Acute risk.* Using the conservative exposure assumptions described above, the aggregate exposure to sulfosate from food will utilize 23.5% of the acute RfD at the 95th percentile for the most highly exposed group, children (1–6 years). The estimated peak concentrations of sulfosate in surface and ground water are less than DWLOCs for sulfosate in drinking water as a contribution to acute aggregate exposure. Residues of sulfosate in drinking water do not contribute significantly to the aggregate acute human health risk considering the present uses and uses proposed in this action.

ii. *Chronic risk.* Using the conservative exposure assumptions described above, we conclude that the percent of the RfD that will be utilized by aggregate exposure to residues of sulfosate is 47.8% for children (1–6 years), the most highly exposed group. The estimated average concentrations of sulfosate in surface and ground water are less than DWLOCs for sulfosate in drinking water as a contribution to chronic aggregate exposure. Residues of sulfosate in drinking water do not contribute significantly to the aggregate chronic human health risk considering the present uses and uses proposed in this action.

F. International Tolerances

There are no Codex maximum residue levels established for sulfosate.

[FR Doc. 00–17755 Filed 7–12–00; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00631; FRL–6393–5]

Final Test Guidelines; Notice of Availability

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of availability.

SUMMARY: EPA has established a unified library for test guidelines issued by the Office of Prevention, Pesticides and Toxic Substances (OPPTS) for use in testing chemical substances to develop data for submission to EPA under the Toxic Substances Control Act (TSCA), the Federal Food, Drug and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). These test guidelines represent

an Agency effort that began in 1991 to harmonize the test guidelines within OPPTS, as well as to harmonize the OPPTS test guidelines with those of the Organization for Economic Cooperation and Development (OECD). The process for developing and amending these test guidelines includes public participation and the extensive involvement of the scientific community, including peer review by the Scientific Advisory Panel (SAP) and the Scientific Advisory Board (SAB) and other expert scientific organizations. With this notice, EPA is announcing the availability of three final test guidelines for three health effects end points. These test guidelines (and their OPPTS guideline reference) are: Repeated Dose 28-Day Oral Toxicity Study in Rodents (OPPTS 870.3050), Reproduction/Developmental Toxicity Screening Test (OPPTS 870.3550), and Combined Repeated Dose Toxicity Study With the Reproduction/Developmental Toxicity Screening Test (OPPTS 870.3650).

FOR FURTHER INFORMATION CONTACT: *For general information contact:*

Toxic Substances Control Act (TSCA) information contact: TSCA Hotline at TAIS/7408, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 554-1404; fax number: (202) 554-5603; e-mail address: TSCA-Hotline@epa.gov.

Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) information contact: Communications Services Branch (7506C), Field and External Affairs Division, Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305-5017; fax number: (703) 305-5558.

For technical information contact: Chemical Control Division, Office of Pollution Prevention and Toxics (7405), Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 260-8130; e-mail address: ccd.citb@epa.gov.

SUPPLEMENTARY INFORMATION:

I. Does this Action Apply to Me?

This action is directed to the public in general. Although this action may be of particular interest to those persons who are or may be required to conduct testing of chemical substances under the Toxic Substances Control Act (TSCA), the Federal Food, Drug and Cosmetic Act (FFDCA), or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Agency has not attempted to describe all the specific entities that

may be affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the technical person listed in the **FOR FURTHER INFORMATION CONTACT**.

II. How Can I Get Additional Information, Including Copies of this Document or Other Related Documents?

A. Electronically

You may obtain electronic copies of this document, and certain other related documents that might be available electronically, from the EPA Internet Home Page at <http://www.epa.gov/>. To access this document, on the Home Page select "Laws and Regulations" and then look up the entry for this document under the "**Federal Register—Environmental Documents.**" You can also go directly to the **Federal Register** listings at <http://www.epa.gov/fedrgstr/>.

You may also obtain copies of test guidelines from the EPA Internet Home Page and the U.S. Government Printing Office (GPO). From the EPA Internet Home Page select "Information Resources/Test Methods/OPPTS Harmonized Test Guidelines" at http://www.epa.gov/OPPTS_Harmonized. Paper copies and disks of the guidelines are available from GPO, Washington, DC 20402, or by calling (202) 512-0132.

B. In Person

The Agency has established an official record for this proposed guideline under docket control number OPP-00631. The official record consists of the documents specifically referenced in this action, any public comments received during an applicable comment period, and other information related to this action, including any information claimed as confidential business information (CBI). This official record includes the documents that are physically located in the docket, as well as the documents that are referenced in those documents. The public version of the official record does not include any information claimed as CBI. The public version of the official record, which includes printed, paper versions of any electronic comments submitted during an applicable comment period, is available for inspection in the Public Information and Records Integrity Branch, Rm. 119, Crystal Mall x2, 1921 Jefferson Davis Highway, Arlington, VA, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The Public Information and Records Integrity Branch telephone number is (703) 305-5805.

III. What Action is EPA taking?

EPA is announcing the availability of three final health effects test guidelines. These guidelines are: Repeated Dose 28-Day Oral Toxicity Study in Rodents (OPPTS 870.3050), Reproduction/Developmental Toxicity Screening Test (OPPTS 870.3550), and Combined Repeated Dose Toxicity Study with the Reproduction/Developmental Toxicity Screening Test (OPPTS 870.3650). These guidelines are being made available today in order to establish a set of harmonized guidelines for use in test rules and other actions under TSCA. After establishment of these guidelines today, the Agency will then establish new TSCA test guidelines in Title 40 of the Code of Federal Regulations (CFR), but in the format specified for the CFR. TSCA test guidelines for the three endpoints are not now in existence but are needed for planned regulatory actions.

In publishing these harmonized test guidelines, EPA recognizes concerns have been expressed about animal testing. EPA is committed to avoiding unnecessary or duplicative animal testing. As part of this commitment, the Agency plays a important role in the federal Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM) (<http://iccvam.niehs.nih.gov/home.htm>) whose goals are: (1) To encourage the reduction of the number of animals used in testing; (2) to seek opportunities to replace test methods requiring animals with alternative test methods when acceptable alternative methods are available; and (3) to refine existing test methods to optimize animal use when there is no substitute for animal testing. Further, where testing is needed to develop scientifically adequate data, the Agency is committed to reducing the number of animals used for testing, including, whenever possible, by incorporating *in vitro* (non-animal) test methods or other alternative approaches that have been scientifically validated and have received regulatory acceptance. EPA considers these goals and commitments to be important considerations in developing health effects data; however, they must be balanced with the essential need to conduct scientifically sound chemical hazard/risk assessments in support of the Agency's mission. By using the test guidelines cited in today's notice, EPA believes that fewer animals will be used when it is necessary to conduct screening level testing to fill such data needs and these guidelines will yield scientifically sound data.

IV. How Were these Test Guidelines Developed?

These guidelines were adapted from the series of the Organization for Economic Cooperation and Development (OECD) Guidelines for Testing of Chemicals. The OECD guidelines which were adapted and are being announced for publication today are: OECD Guideline 407 (Repeated Dose 28-day Oral Toxicity in Rodents) for OPPTS 870.3050, OECD Guideline 421 (Reproduction/Developmental Toxicity Screening Test) for OPPTS 870.3550, and OECD Guideline 422 (Combined Repeated Dose Toxicity Study With the Reproduction/Developmental Toxicity Screening Test) for OPPTS 870.3650. EPA has retained the OECD guideline names. EPA scientists reviewed the OECD guidelines and reformatted them to the OPPTS harmonized guideline format with only minor editorial changes.

The OECD test guidelines were developed initially under the OECD Chemicals Testing Programme and are updated under the OECD Updating Programme for Test Guidelines and the OECD Test Guidelines Programme. The OECD test guideline process involves the use of multi-national panels of scientific and technical experts who develop guideline drafts which are submitted to a review panel. The review process is concluded by the endorsement of the guidelines by the OECD Chemicals Group and the OECD Environment Committee prior to the formal submission to the OECD Council. The OECD Council then adopts the guidelines and publishes them in the official OECD Guidelines for Testing of Chemicals.

V. Are there Any Applicable Voluntary Consensus Standards that EPA Should Consider?

This notice of availability does not involve a proposed regulatory action that would require the Agency to consider voluntary consensus

standards pursuant to section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104-113, section 12(d) (15 U.S.C. 272 note). Section 12(d) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standards bodies. The NTTAA requires

EPA to provide an explanation to Congress, through OMB, when the Agency decides not to use available and applicable voluntary consensus standards when the NTTAA directs the Agency to do so.

List of Subjects

Environmental protection, Chemical testing, Test guideline.

Dated: June 22, 2000.

Susan H. Wayland,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 00-17754 Filed 7-12-00; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL COMMUNICATIONS COMMISSION

[WT Docket No. 97-82; DA 00-1531]

Deadline for Final Ex Parte and Other Presentations on Proposed Revisions to Broadband Personal Communications Services (PCS) Rules Extended to July 17, 2000

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document extends the period for final *ex parte* and other presentations on issues raised in this proceeding pertaining to proposed revisions to portions of the broadband Personal Communications Services C and F block rules.

DATES: Final *ex parte* presentations are due July 17, 2000.

FOR FURTHER INFORMATION CONTACT: Audrey Bashkin, Attorney, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, at (202) 418-0660.

SUPPLEMENTARY INFORMATION: This is a summary of a public notice, WT Docket No. 97-82, DA 00-1531, released July 7, 2000. The complete text of the public notice is available for inspection and copying during normal business hours in the FCC Reference Information Center, 445 12th Street, S.W., Room CY-A257, Washington, D.C. 20554, and also may be purchased from the Commission's copy contractor, International Transcription Services, Inc., (ITS, Inc.), 1231 20th Street, N.W., Washington D.C. 20036, (202) 857-3800. It is also available on the Commission's website at <http://www.fcc.gov/wtb/auctions>.

1. On June 7, 2000, the Commission released a *Further Notice of Proposed Rulemaking* ("FNPRM"), 65 FR 37092 (June 13, 2000), in the above-referenced

proceeding. The *FNPRM* seeks comment on proposed revisions to portions of the broadband Personal Communications Services ("PCS") C and F block rules. The *FNPRM* established comment and reply comment deadlines for June 22, 2000 and June 30, 2000, respectively. The *FNPRM* also established 7 p.m., July 12, 2000 as the time and date after which *ex parte* and other presentations would be prohibited.

2. In order to provide interested parties additional time to make *ex parte* presentations, the period for final *ex parte* and other presentations on issues raised in the *FNPRM* is extended until 7 p.m. on July 17, 2000.

3. Pursuant to § 1.1200(a) of the Commission's rules, presentations on issues in the *FNPRM* will be prohibited after 7 p.m., July 17, 2000. 47 CFR 1.1200(a). In all other respects, parties are required to follow the procedures previously outlined in the *FNPRM*.

Federal Communications Commission.

Louis J. Sigalos,

Deputy Chief, Auctions and Industry Analysis Division.

[FR Doc. 00-17671 Filed 7-12-00; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket Nos. 96-98, 99-68; FCC 00-227]

Reciprocal Compensation; Inter-Carrier Compensation for ISP-Bound Traffic

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On March 24, 2000, the United States Court of Appeals for the D.C. Circuit vacated certain provisions of the Commission's Reciprocal Compensation Ruling regarding ISP-bound traffic, and remanded the matter to the Commission. The Commission seeks comment on the issues identified by the court in its decision, including the jurisdictional nature of ISP-bound traffic, the scope of the reciprocal compensation requirement, and the relevance of the concepts of "termination," "telephone exchange service," "exchange access service," and "information access." The Commission also seeks comment on any *ex parte* presentations filed after the close of the reply period on April 27, 1999, and on any new or innovative inter-carrier compensation arrangements for ISP-bound traffic that may have been considered or entered into during the pendency of this proceeding.

DATES: Comments are due on or before July 21, 2000, and reply comments are due on or before August 4, 2000.

ADDRESSES: Submit electronic comments and reply comments to <http://www.fcc.gov/e-file/ecfs.html>. Requests for filing instructions for e-mail comments may be sent to ecfs@fcc.gov. Comments and reply comments filed by paper must be filed with the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., TW-A325, Washington, D.C. 20554. Copies filed with International Transcription Services (ITS), the Commission's duplicating contractor, must be sent to 1231 20th Street, N.W., Washington, D.C. 20036, and copies to the Chief, Competitive Pricing Division, must be sent to 445 12th Street, S.W., TW-A225, Washington, D.C. 20554. See

SUPPLEMENTARY INFORMATION for further information on filing requirements.

FOR FURTHER INFORMATION CONTACT: Rodney McDonald, Common Carrier Bureau, Competitive Pricing Division, (202) 418-1520.

SUPPLEMENTARY INFORMATION: The Commission's Public Notice, Comment Sought on Remand of the Commission's Reciprocal Compensation Declaratory Ruling by the U.S. Court of Appeals for the D.C. Circuit, Pleading Cycle Established, CC Docket Nos. 96-98, 99-68, FCC 00-227, was adopted June 22, 2000, and released June 23, 2000. The item in its entirety is available for inspection and copying during normal business hours in the FCC Reference Center, 445 12th Street, S.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center. The complete text may also be obtained through the world wide web, at http://www.fcc.gov/Bureaus/Common_Carrier/Public_Notices, or may be purchased from the Commission's copy contractor, International Transcription Services, Inc., 1231 20th Street, N.W., Washington, D.C. 20036.

Public Notice

On February 26, 1999, the Commission released a Declaratory Ruling and Notice of Proposed Rulemaking (Reciprocal Compensation Ruling) to address the issue of inter-carrier compensation for the delivery of telecommunications traffic to an Internet service provider (ISP). (64 FR 14203, 64 FR 14239, March 24, 1999). In the Reciprocal Compensation Ruling, the Commission determined that ISP-

bound calls are not local calls subject to reciprocal compensation under our rules implementing section 251(b)(5) of the Act. 47 U.S.C. 251(b)(5). Using an "end-to-end" analysis of these calls, the Commission concluded that ISP-bound calls do not terminate at the ISP's local server, but instead continue to one or more Internet websites that are often located in another state. It therefore found that ISP-bound calls are jurisdictionally mixed, largely interstate, and thus not subject to reciprocal compensation. The Commission also acknowledged that there was no federal rule establishing an inter-carrier compensation mechanism for such traffic or governing what amounts, if any, should be paid. In the absence of a federal rule regarding the appropriate inter-carrier compensation for ISP-bound traffic, the Commission held that parties were bound by their interconnection agreements as interpreted and enforced by state commissions. The Commission sought comment, therefore, on a federal inter-carrier compensation mechanism for ISP-bound traffic.

On March 24, 2000, the United States Court of Appeals for the D.C. Circuit vacated certain provisions of the Reciprocal Compensation Ruling, and remanded the matter to the Commission. *Bell Atl. Tel. Companies v. F.C.C.*, 206 F.3d 1 (D.C. Cir. 2000). The court ruled that the Commission had not adequately justified the application of its jurisdictional analysis in determining whether a call to an ISP is subject to the reciprocal compensation requirement of section 251(b)(5). The court noted that (1) the Commission failed to apply its definition of "termination" to its analysis; and (2) cases upon which the Commission relied in its end-to-end analysis can be distinguished on the theory that they involve continuous communications switched by interexchange carriers (IXCs), as opposed to ISPs, which are not telecommunications providers. The court also found that a remand was required because the Commission did not provide a satisfactory explanation as to how its conclusions regarding ISP-bound traffic accord with the statutory definitions of "telephone exchange service" and "exchange access service."

The Commission seeks comment on the issues identified by the court in its decision. In particular, the Commission asks parties to comment on the jurisdictional nature of ISP-bound traffic, as well as the scope of the reciprocal compensation requirement of section 251(b)(5), and on the relevance of the concepts of "termination," "telephone exchange service," (47

U.S.C. 153(47)) "exchange access service," (47 U.S.C. 153(16)) and "information access." (47 U.S.C. 251(g); 47 U.S.C. 153(20)) In addition, the Commission seeks to update the record in the pending rulemaking proceeding by inviting parties to comment on any ex parte presentations filed after the close of the reply period on April 27, 1999. Finally, the Commission seeks comment regarding any new or innovative inter-carrier compensation arrangements for ISP-bound traffic that parties may be considering or may have entered into, either voluntarily or at the direction of a state commission, during the pendency of this proceeding.

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. 47 CFR 1.1200, 1.1206. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. 47 CFR 1.1206(b). Other rules pertaining to oral and written ex parte presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules, 47 CFR 1.1206(b).

Interested parties may file comments no later than July 21, 2000. Reply comments may be filed no later than August 4, 2000. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. (63 FR 24121, May 1, 1998) When filing comments, please reference CC Docket Nos. 96-98, 99-68.

Comments filed through ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties also may submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail message to ecfs@fcc.gov and include "get form <your e-mail address>" in the body of the message. A sample form and directions will be sent in reply.

An original and four copies of all comments and reply comments filed by paper must be filed with the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., TW—A325, Washington, D.C. 20554. In addition, one copy of each pleading must be filed with International Transcription Services (ITS), the Commission's duplicating contractor, at its office at 1231 20th Street, N.W., Washington, D.C. 20036, and one copy with the Chief, Competitive Pricing Division, 445 12th Street, S.W., TW—A225, Washington, D.C. 20554.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00-17666 Filed 7-12-00; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[MM Docket No. 98-35; FCC 00-191]

Broadcast Services; Radio Stations, Television Stations

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document is the Commission's Report in its 1998 biennial review of its broadcast ownership rules. Such biennial reviews are required by the Telecommunications Act of 1996. The intended effect of these reviews is to assure that the Commission's broadcast ownership rules are no more extensive than necessary in the public interest as the result of competition.

ADDRESSES: Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Roger Holberg, Mass Media Bureau, Policy and Rules Division, (202) 418-2134 or Dan Bring, Mass Media Bureau, Policy and Rules Division, (202) 418-2170.

SUPPLEMENTARY INFORMATION: This is a synopsis of the *Report* in MM Docket No. 98-35, FCC 00-191, adopted May 26, 2000, and released June 20, 2000. The complete text of this *Report* is available for inspection and copying during normal business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, SW, Washington, DC and may also be purchased from the Commission's copy contractor, International Transcription Service

(202) 857-3800, 445 12th Street, SW, Room CY-B402, Washington, DC. The *NPRM* is also available on the Internet at the Commission's website: <http://www.fcc.gov>.

Synopsis of Report

I. Introduction

1. This *Report* reviews our broadcast ownership rules as required by section 202(h) of the Telecommunications Act of 1996 (Public Law 104-104, 110 Stat. 56 (1996)) ("Telecom Act"). That section provides:

The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

Section 11(a) of the Communications Act of 1934, as amended, similarly provides that under the statutorily required review, the Commission "shall determine whether any such regulation is no longer necessary in the public interest as a result of meaningful economic competition" and requires that the Commission "shall repeal or modify any regulation it determines to be no longer necessary in the public interest." More recently, Congress has prescribed a period of 180 days from November 29, 1999, in which the Commission is to complete the 1998 biennial review of its broadcast ownership rules. (Section 5003, Pub. L. 106-113, 113 Stat. 1501 (1999).) The Conference Report for this 1999 Act states that within the subject period the Commission shall issue a report and if it concludes that it should retain any of the rules unchanged, it "shall issue a report that includes a full justification of the basis for so finding."

2. Six rules are reviewed in this *Report*: (1) the national TV ownership rule (including the "UHF discount"); (2) the local radio ownership rules; (3) the dual network rule; (4) the daily newspaper/broadcast cross-ownership rule; (5) the cable/television cross-ownership rule; and (6) an experimental broadcast station ownership rule. The *Report* provides a regulatory history of each rule, followed by a discussion of the competitive and diversity issues that justify our decision as to whether the rule remains in the public interest.

3. On March 12, 1998, we adopted a *Notice of Inquiry* ("NOI") in this proceeding seeking comment on the six rules included in this biennial ownership report. The NOI did not seek comment on the local television

ownership rule or one-to-a-market ownership rule because these rules were already the subject of pending proceedings and we reasoned that their examination in those proceedings complied with Congress' mandate that we review all of our ownership rules biennially beginning in 1998. On August 5, 1999, we adopted a *Report and Order* (*Report and Order* in MM Docket Nos. 91-221 & 87-8), relaxing our local television ownership rule and one-to-a-market ownership rule. Those decisions provided broadcasters with expanded opportunities to realize the efficiencies of television duopolies and local radio/television combinations in markets where an essential level of competition and diversity would be preserved. More specifically, we narrowed the geographic scope of the television duopoly rule from the Grade B contour approach to a "DMA" test. This new approach allows the common ownership of two television stations without regard to contour overlap if the stations are in separate Nielsen Designated Market Areas ("DMAs"). Additionally, it allows the common ownership of two television stations in the same DMA if their Grade B contours do not overlap or if eight independently owned, full-power and operational television stations will remain post merger, and one of the stations is not among the top four ranked stations in the market based on audience share. Furthermore, we adopted waiver criteria presuming, under certain circumstances, that a waiver to allow common local television station ownership is in the public interest where one of the stations is a "failed station," is a "failing station," or where the applicants can show that the combination will result in the construction and operation of an authorized but as yet "unbuilt" station. We also substantially relaxed the radio/television cross-ownership ("one-to-a-market") rule to permit more such combinations, including allowing a party to own as many as one TV station and seven radio stations under certain circumstances. These actions were taken in fulfillment of our obligations under section 202(h) of the Telecom Act and satisfy its requirements as to the subject rules.

4. In the instant phase of our biennial review of broadcast ownership rules, we conclude that the local radio ownership rules, the national television ownership rule (including the UHF discount), and cable/TV cross-ownership rule continue to serve the public interest and so retain these rules. As noted, we have just recently substantially relaxed our local

television ownership and one-to-a-market rules. It is currently too soon to tell what effect this will have on consolidation, competition and diversity. Until we have further information in this regard we believe that these rules remain necessary in the public interest in their current form. However, we will issue—*Notices of Proposed Rule Makings (NPRMs)* proposing modification of the dual network rule (64 FR 41393) and newspaper/broadcast cross-ownership rules. Additionally, in the case of the local radio ownership rule, we will issue an *NPRM* (65 FR 41401) seeking comment on alternative methods of correcting certain anomalies in the way we currently define radio markets and the way we count the number of stations in a radio market and the number of radio stations that an entity owns in a market. Finally, we conclude that the experimental broadcast station multiple ownership rule may no longer be in the public interest and will issue an *NPRM* proposing its elimination.

II. Background

5. For more than a half century, the Commission's regulation of broadcast service has been guided by the goals of promoting competition and diversity. These goals are separate and distinct, yet also related. Indeed, as recently as 1997, the Supreme Court noted that "[f]ederal policy * * * has long favored preserving a multiplicity of broadcast outlets regardless of whether the conduct that threatens it is motivated by anticompetitive animus or rises to the level of an antitrust violation." (*Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 117 S. Ct. 1174 (1997) ("Turner II"). (Citations omitted.)) The Supreme Court has also held that both of these goals are important and substantial public policies for First Amendment purposes. (*Turner Broadcasting System v. FCC*, 512 U.S. 622, 662 (1997) ("Turner I").) Competition is an important part of the Commission's public interest mandate, because it promotes consumer welfare and the efficient use of resources and is a necessary component of diversity. Diversity of ownership fosters diversity of viewpoints, and thus advances core First Amendment principles. As the Supreme Court has said, the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public * * * ." (*Associated Press v. United States*, 326 U.S. 1, 20 (1945); *accord Federal Communications Commission v.*

National Citizens Committee for Broadcasting, 436 U.S. 775 (1978).) Promoting diversity in the number of separately owned outlets has contributed to our goal of viewpoint diversity by assuring that the programming and views available to the public are disseminated by a wide variety of speakers.

6. This Report uses the framework for reviewing competition and diversity outlined in the *NOI* to evaluate, as required by the Telecom Act, whether the six rules included in this biennial review continue to be in the public interest. Thus, we assess current levels of competition in the market for delivered video programming, the advertising market, and the program production market to determine whether such competition has eliminated the need for the six rules. Our diversity analysis focuses upon the degree to which broadcast and non-broadcast media, operating within the framework of our ownership rules, advance the three types of diversity (*i.e.*, viewpoint, outlet and source) that our broadcast ownership rules have attempted to foster. Viewpoint diversity refers to the range of diverse and antagonistic opinions and interpretations presented by the media. Outlet diversity refers to a variety of delivery services (*e.g.*, broadcast stations, cable and DBS) that select and present programming directly to the public. Source diversity refers to the variety of program or information producers and owners.

III. Status of Media Marketplace

7. Our decision here concerning the broadcast ownership rules takes account of the ongoing changes in the structure of the broadcast industry. The UHF television discount, the daily newspaper/broadcast cross-ownership rule, the cable/television cross-ownership rule, and the experimental broadcast station ownership rule have not been examined for many years. In reviewing these rules, we recognize that there has been substantial growth in the number and variety of media outlets in local markets. In contrast, the national television ownership rule, the local radio ownership rules, and the dual network rule were modified in 1996 in accordance with section 202 of the Telecom Act. While there has been growth in the number and variety of media outlets since the Telecom Act, there have also been significant changes in the ownership structure of the broadcast industry during that period, chiefly consisting of extensive

consolidation in the radio and television industries.

8. Section 202(h) of the Telecom Act requires us to determine whether any of our broadcast ownership rules "are necessary in the public interest as the result of competition." We note that some commenters express the belief that this limits our review only to competitive matters and that our analysis must be devoid of diversity considerations. Because the statutory language requires reference to the public interest standard, and because diversity and competition have both been critical components of that standard, (*See, e.g., United States v. Storer Broadcasting Company*, 351 U.S. 192, 203 (1956); *FCC v. National Citizens Committee For Broadcasting*, 346 U.S. 775, 780–81, 794 (1978)). our review must consider diversity issues as well. Indeed, the United States Supreme court has identified as a "governmental purpose of the highest order" ensuring the public's access to "a multiplicity of information sources." (*Turner II*, *supra* at 90.) Also, there is support for our consideration of diversity in this context in the legislative history of the Telecom Act itself. As discussed in our recent local television ownership decision, Congress expressed diversity concerns with regard to at least two of our rules and, with respect to our review of the radio/television cross-ownership rule, expressly instructed the Commission to take into account not only the increased competition facing broadcasters but also "the need for diversity in today's radio marketplace." Finally in this regard, the statutory language appears to focus on whether the public interest basis for the rule has changed as a result of competition, and does not appear to be intended to limit the factors we should consider. Therefore, our public interest determination for each rule is based on an examination of both competition and diversity issues in light of competitive market conditions. The material below provides a brief overview of the number of outlets, ownership structure, and other information relevant to the current status of competition in the video, audio, and newspaper industries. The numbers alone, of course, are not sufficient to determine whether particular media compete with one another in relevant markets or whether different media are adequate substitutes for one another from a diversity perspective.

IV. Rules

A. National TV Ownership Rule and UHF Discount

1. Regulatory History

9. Section 73.3555(e)(1) sets forth the current national TV ownership rule. That section states:

No license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer, or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent.

10. Section 73.3555(e)(2) sets forth the "UHF discount." That section explains that "national audience reach" is based on the number of TV households in Nielsen Designated Market Areas (DMA), and that UHF TV stations are attributed with only 50% of the TV households in the DMA.

11. The Commission first adopted a national ownership limit for television broadcast stations in the 1940s by imposing numerical caps on the number of stations that could be commonly owned, and originally limited common ownership to no more than three stations nationwide. Several years later this was expanded to allow ownership of no more than five stations. In retaining the five station rule in 1953, the Commission explained:

The purpose of the multiple ownership rules is to promote diversification of ownership in order to maximize diversification of program and service viewpoint as well as to prevent any undue concentration of economic power contrary to the public interest and thus to carry out the underlying purpose of the Communications Act to effectuate the policy against monopolization of broadcast facilities and the preservation of the broadcasting system on a free competitive basis.

12. In 1954, the Commission adopted the "Seven Station Rule" by raising the multiple ownership limit from five stations to seven, with no more than five being VHF stations. The Commission believed that the more rapid and effective development of the UHF band warranted permitting the ownership of additional UHF stations. The Commission noted that it was aware of the serious problems confronting the development of the UHF service, especially in markets with VHF-only set saturation, and that it was in these areas particularly where the prestige, capital, and know-how of the networks and other multiple owners would be most effective in aiding UHF.

13. In 1984, the Commission eliminated the Seven Station Rule and established a six-year transitional period during which common ownership of twelve television broadcast stations would be permitted. The Commission determined that repeal of the Seven Station Rule would not adversely affect the Commission's traditional policy objectives of promoting viewpoint diversity and preventing economic concentration. The Commission explained that: (1) Changes in the broadcasting and communications markets, (2) new evidence of the positive effects of group ownership on the quality and quantity of public affairs and other programming responsive to community needs, and (3) the lack of relevance of a national ownership rule to the availability of diverse and independently owned radio and TV voices to individual consumers in their respective local markets led to the conclusion that the rule was unnecessary to ensure diversity of viewpoints. The Commission determined that the better focus for addressing viewpoint diversity and economic competition concerns was the number and variety of information and advertising outlets in local markets. Nevertheless, the Commission recognized the concerns of some commenters that, if the rule were repealed immediately and in its entirety, a significant restructuring of the broadcast industry might occur before all ramifications of such a change became apparent. Therefore, the Commission established a transitional limit of twelve television broadcast stations. The transitional limit would automatically sunset in six years unless experience showed that continued Commission involvement was warranted.

14. On reconsideration, the Commission, modified its decision. Specifically, the Commission (1) established an audience reach cap of 25 percent (defined as 25 percent of the national audience, calculated as a percentage of all Arbitron ADI television households), in addition to the twelve station limit, to better account for the effect that relaxation of the rule would have on population penetration; (2) attributed owners of UHF stations with only 50 percent of their ADI audience reach to take cognizance of the limitations inherent in UHF broadcasting; (3) permitted common ownership of an additional two television stations, provided that they were minority controlled; and (4) eliminated the automatic sunset provision. The stated objective was to

permit reasonable expansion so as to capture the benefits of group ownership while avoiding the possibility of potential disruptive restructuring of the national broadcast industry. The Commission explained that a numerical cap would prevent the acquisition of a tremendous number of stations in the smaller markets, thus reducing the possibility of disruptive restructuring in small markets, while an audience reach cap would temper dramatic changes in the ownership structure by the largest group owners in the largest markets. The Commission noted that its decision to use both a numerical cap and an audience reach cap was also predicated on concerns regarding the potential impact on industry structure. The Commission further explained that attributing UHF stations with 50 percent of an ADI market's audience reach was intended to address the fundamental disadvantage of UHF television in reaching viewers. The UHF Comparability Task Force found that: "Due to the physical nature of the UHF and VHF bands, delivery of television signals is inherently more difficult at UHF. It should be recognized that actual equality between these two services cannot be expected because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength." The Commission found it inadvisable to terminate the multiple ownership rules for television broadcast stations automatically at the end of six years. The Commission explained that (1) it was appropriate to proceed cautiously in relaxing the rules and (2) an automatic sunset of the ownership rules was unnecessary to achieve the Commission's policy objectives.

15. On March 7, 1996, the Commission amended the national television station multiple ownership rules to conform to the provisions in section 202(c)(1) of the Telecom Act. Specifically, the Commission eliminated the numerical limit on the number of broadcast television stations a person or entity could own nationwide and increased the audience reach cap on such ownership from 25 percent to 35 percent of television households.

16. In our *Notice of Inquiry* in this proceeding we sought comment on this rule. Particularly, we asked about its effect on competition in the national advertising market and the program production market at the national level. We also sought comment on the rule's effect on existing television networks and the formation of new networks and sought information on the economies of

scale that may have been realized as a result of the consolidation permitted by the Telecom Act. Finally, we asked whether the UHF discount should be retained, modified or eliminated in view of the decreasing disparity between VHF and UHF television and, in the event of a decision to modify the rule, whether and, if so, how group owners that exceed any new limits should be grandfathered.

2. Comments on National TV Ownership Rule

17. All of the major networks (ABC, CBS, Fox, and NBC) support total repeal of the national television ownership rule. These networks argue that abolition of the rule would have no effect on the level of diversity and competition in local markets, and retention of the rule hinders broadcasters from achieving economic efficiencies. These networks maintain that group owned stations provide more news and public affairs programming than non-group owned stations. They also argue that removal of the audience reach cap would promote the development of new broadcast television networks. Finally, they argue that the only two markets that may be affected by elimination of the rule, the national advertising market and the market for national exhibition rights to video programming, would remain unconcentrated.

3. Discussion of National TV Ownership Rule

18. We believe that the audience reach cap should be retained at its current level for the present. As an initial matter, Congress prescribed an increase in the cap from 25% to 35% in the Telecom Act. Several considerations motivate our decision not to change the national TV ownership rule. First, we believe that the effects of our recent change to the local television ownership rule should be observed and assessed before we make any alteration to the national limit. Second, the existing reach cap has already resulted in many group owners acquiring large numbers of stations nationwide since the cap was increased to 35 percent in 1996. We also believe that this trend needs further observation prior to any change in the cap. (We note, however, that on November 18, 1999, Fox Television Stations, Inc., filed an "Emergency Petition for Relief and Supplemental Comments" in this proceeding seeking, among other things, repeal of the national broadcast ownership rule. Also, on November 19, 1999, Viacom Inc. filed "Comments" in this proceeding seeking repeal of the same rule and,

additionally, the dual network rule. The original deadline for filing comments in this proceeding was May 22, 1998, with June 22, 1998, being the reply comment deadline. These deadlines were later extended, pursuant to the request of the National Association of Broadcasters, to July 21, 1998, and August 21, 1998, for comments and reply comments, respectively. *Order in MM Docket No. 98-35, DA 98-854* (released May 7, 1998). The Fox and Viacom filings, having been submitted nearly 18 months subsequent to these deadlines will not be considered in this proceeding. Simply, to do so would provide a precedent for subjecting our biennial review proceedings to unceasing comment cycles, and would deprive other parties of an ability to respond to these new matters absent establishment of new pleading cycles. Accordingly, they will not be considered herein but will be included in the record of our 2000 biennial review of broadcast ownership issues.)

19. One factor in our decision is the recent relaxation of our local television ownership rules. As noted above, those decisions provided increased flexibility for the creation of television duopolies and television/radio combinations in local markets while safeguarding an essential level of competition and diversity. We conclude that prudence dictates that we should monitor the impact of our recent decisions regarding local television ownership and any impact they may have on diversity and competition prior to relaxing the national reach cap. Commenters supporting relaxation or elimination of the cap make credible arguments in favor of their position. These arguments include the contention that elimination of, or increase in, the cap would allow additional economic efficiencies and more news and public affairs, increase minority ownership by removing the cap as an impediment to broadcasters obtaining attributable equity interests in minority-owned television stations, and promote the development of new broadcast television networks. We believe, however, that the competitive concerns of opponents of relaxation or elimination of the cap (*i.e.*, are that eliminating or expanding the reach cap would increase the bargaining power of networks over their affiliates, reduce the number of viewpoints expressed nationally, increase concentration in the national advertising market, and enlarge the potential for monopsony power in the program production market) are more convincing under current circumstances. Until we gain experience under the new local television

ownership rules we are disinclined to correspondingly relax them on the national level. While we will reexamine this decision in our future biennial reviews of broadcast ownership rules, we intend to proceed cautiously in this area at the present time.

20. Also, elimination of the 12 station numerical cap has already permitted group owners to acquire a large number of stations. The current rule permits a group owner to acquire a VHF station in every market below DMA 47 (*i.e.*, DMA 48 through DMA 210, a total of 163 stations) and still remain below the 35 percent audience reach cap. By holding UHF stations only, a group owner could acquire a station in every market below DMA 10 (*i.e.*, DMA 11 through DMA 210, a total of 200 stations) and still remain below the 35 percent audience reach cap. Data show that many group owners have acquired additional stations and increased their audience reach since the Telecom Act's passage.

21. Moreover, consolidation is a feature of other video media. In cable, the seven largest operators now serve almost 90 percent of all U.S. cable subscribers, which is up from 63 percent being served by the top 10 multiple system operators ("MSO") in 1990. Thirty-seven percent of satellite-delivered national programming networks are now vertically integrated with a cable MSO. In 1999, for example, one or more of the top six cable MSOs held an ownership interest in each of 101 vertically integrated national programming services. In addition, a significant percentage of the top national programming services are controlled by approximately eleven companies, including cable MSOs, broadcasters and other media entities. Of the top 50 programming services in terms of subscribership, 46 are owned by one or more of these 11 companies.

22. The evidence suggests that the television broadcast industry is still adapting to the recent relaxation of the national and local ownership rules and we wish to avoid actions with the potential for disruptive restructuring. For example, applications for duopolies under our new local television ownership rule were only filed this past November and we believe that we should monitor developments under this new rule prior to making any changes to the national television ownership reach cap.

23. We also intend to proceed cautiously because the Commission has previously recognized that a change in the audience reach cap may well influence the bargaining positions between broadcast television networks and their affiliates. We noted that in

some situations, relaxation of the national ownership limits could increase the bargaining power of networks by expanding their option to own rather than affiliate with broadcast television stations. In other situations, however, relaxation of the national ownership limits could increase the bargaining position of group-owned affiliates by creating larger, more powerful groups. In its comments, NASA (Network Affiliated Stations Alliance) asserts that the national ownership rule is the essential mechanism for maintaining the balance between networks and their affiliates to ensure that affiliates can program their stations in the interests of the communities they are licensed to serve. NASA argues that an increase in the audience reach cap will increase the bargaining power of networks. We believe that in considering relaxation of the national ownership rule we should act cautiously in light of the potential impact of this rule on the bargaining positions of networks and affiliates, particularly given the restructuring that may be taking place concurrently on the local level. We do not believe that consolidation of ownership of all or most of the television stations in the country in the hands of a few national networks would serve the public interest. The national networks have a strong economic interest in clearing all network programming, and we believe that independently owned affiliates play a valuable counterbalancing role because they have the right to decide whether to clear network programming or to air instead programming from other sources that they believe better serves the needs and interests of the local communities to which they are licensed. Independent ownership of stations also increases the diversity of programming by providing an outlet for non-network programming. We do not believe that the role played by independently owned affiliates is any less important today than it was four years ago when Congress determined that the public interest was served by maintaining a national ownership limit, albeit it at a slightly relaxed (35% rather than 25%) level.

4. Comments on the UHF Discount

24. A number of commenters advocate elimination or substantial modification of the UHF discount. These groups argue that the original basis for the discount appears to have fallen away. Specifically, the deficiencies in UHF reception that existed in the early years of television have largely been ameliorated by improved television receiver design and the fact that more

than two-thirds of all television homes now receive local signals via cable.

25. A number of commenters, however, support retention of the UHF discount. These commenters argue that the original basis for the discount remains. Specifically, these commenters maintain that cable carriage, must-carry rules, and improved receiver design have not created a level playing field between UHF and VHF stations. They argue that economic and technical disparities between UHF and VHF stations continue to disadvantage UHF stations.

5. Discussion of the UHF Discount

26. We believe that, for the present time, the UHF discount remains necessary in the public interest. As commenters note, there remains a UHF handicap that has not yet been overcome. Although roughly two-thirds of American viewers obtain their local television stations over a cable television system, still roughly one third do not. They rely on over-the-air reception. UHF stations have greater difficulty in reaching these viewers and cable headends—thereby hindering their ability to obtain cable carriage—because of their weaker signal. While the Commission has observed in other contexts that this UHF signal disparity has been ameliorated over the years it has not yet been eliminated. Additionally, because of the higher operating costs of UHF stations, particularly due to their higher power requirements, even when they can reach these viewers they still incur greater expenses than VHF stations in doing so and, thus, remain under a competitive handicap warranting a 50 percent discount.

27. As Univision points out in its comments, if there were no competitive disparity between VHF and UHF television, we would expect group owners to take advantage of the UHF discount by selling their VHF's and buying UHF's. The fact that few, if any, group owners have used this strategy suggests that the market recognizes a continuing competitive disparity between the two services. Accordingly, we cannot say the discount is no longer in the public interest as a result of competition.

28. While the technical and engineering evidence submitted by commenters continues to support the UHF discount, we believe that it will likely not continue to do so in the future. The information received in the proceeding suggests that the reach disparity between VHF and UHF stations differs from market-to-market and station-to-station. In addition, we

agree with commenters arguing that advances in technology now provide us with the tools to more accurately measure the household reach for each UHF station.

29. In this regard, we note that the existing UHF discount will likely not work well for DTV. Our efforts to replicate existing signal coverage provide DTV stations the ability to reach approximately the same number of television households they currently reach with NTSC stations. Thus, it is not clear that a VHF NTSC station assigned a UHF DTV channel should be permitted a UHF discount if the station reaches the same number of households as did its NTSC counterpart. Nor is it clear that a UHF NTSC station assigned a VHF DTV channel should lose the discount if the DTV station does not reach more households. In this regard, however, we note that, pursuant to section 5009(c) of Public Law 106–113, 113 Stat. 1501, Appendix I (1999), the Commission, on December 7, 1999, issued a Public Notice giving DTV licensees until December 31, 1999, in which to file notice that they intend to seek maximization of their DTV service area. One thousand three hundred and sixteen letters of notification manifesting the intent to file to maximize DTV stations' service areas were filed by that deadline. Accordingly, DTV licensees, including those operating on UHF channels, have been given the opportunity to maximize their DTV coverage areas, and not merely replicate their analog coverage. This should ameliorate at least some of the disparities between UHF and VHF stations' access to viewership in the digital context. Additionally, unlike analog signal reception, where picture quality gets progressively worse as distance from the antenna increases, digital reception is characterized by the so-called "cliff effect." That effect is characterized by DTV television receivers obtaining the same quality of reception at a distance from the transmitting antenna as is obtained close to it until such a point as the data stream is no longer useable by the receiver. At that point reception "falls off a cliff" and no picture or sound is produced. In other words, the reception quality remains high when an adequate signal is available. Effectively, as the average DTV signal strength gets weaker at the edge of a station's service area, the picture and sound will be produced for smaller percentages of time, until reception is considered unacceptable. Generally, DTV UHF viewers should have better quality reception at greater distances from the station than is

currently the case with respect to analog UHF reception. This, too, should allow DTV UHF stations to obtain better access to off-the-air viewers and should rectify the VHF/UHF disparity to an extent. We believe that under these circumstances, the eventual modification or elimination of the discount for DTV will be appropriate. Accordingly, at such time near the completion of the transition to digital television we will issue a Notice of Proposed Rulemaking proposing a phased-in elimination of the discount. We previously stated that until the UHF discount was addressed in the proceedings where it was under review, any entity that acquired stations during the interim period between the revision of the national reach cap pursuant to the Telecom Act, and a Commission decision on the UHF discount, and which complied with the 35 percent reach cap only by virtue of the UHF discount, would be subject to our eventual decision on the discount. This has remained the case during the pendency of the instant proceeding and we will continue to follow this policy until such time as the UHF discount is modified or eliminated.

B. Local Radio Ownership Rules

1. Regulatory History

30. In 1996, the Commission amended the local radio ownership rules to conform to provisions in section 202(b) of the Telecommunications Act of 1996. Section 73.3555(a)(1) of the Commission's rules (47 CFR 73.3555(a)(1)) sets forth the current local radio ownership rules. These rules currently allow: (1) Combinations of up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM), in markets with 45 or more commercial radio stations; (2) combinations of up to 7 commercial radio stations, not more than 4 of which are in the same service, in markets with between 30 and 44 commercial radio stations; (3) combinations of up to 6 commercial radio stations, not more than 4 of which are in the same service, in markets with between 15 and 29 commercial radio stations; (4) combinations of up to 5 commercial radio stations, not more than 3 of which are in the same service, if no party controls more than 50 per cent of the stations in the radio market, in radio markets with 14 or fewer commercial radio stations.

31. In 1938, the Commission adopted a strong presumption against granting radio licenses that would create duopolies (*i.e.*, common ownership of more than one station in the same

service in a particular community) based largely on the principle of "diversification of service." In the early 1940s this presumption against duopoly ownership became an absolute prohibition when the Commission (1) adopted rules governing commercial FM service and (2) prohibited the licensing of two AM stations in the same area to a single network. The AM rule barred overlap of AM stations where a "substantial portion of the applicant's existing station's primary service area" would receive service from the station in question, except upon a showing that the public interest would be served through such multiple ownership; and the FM rule prohibited the licensing of a new station which would serve "substantially the same area" as another station owned or operated by the same licensee. The Commission explained that the radio duopoly rules sought to promote economic competition and diversity of programming viewpoints through station-ownership diversity.

32. In 1964, the Commission abandoned its case-by-case adjudication approach and barred common ownership of radio stations when the predicted 1 mV/m contours of the stations overlapped. In adopting the rule, the Commission stated: "When two stations in the same broadcast service are close enough together so that a substantial number of people can receive both, it is highly desirable to have the stations owned by different people." The Commission explained that this objective flowed logically from two basic principles underlying the multiple ownership rules. First, in a system of broadcasting based upon free competition, it is more reasonable to assume that stations owned by different people will compete with each other, for the same audience and advertisers, than stations under the control of a single person or group. Second, the greater the diversity of ownership in a particular area, the less chance there is that a single person or group can have an inordinate effect, in a political, editorial, or similar programming sense, on public opinion at the regional level.

The Commission concluded that the rules were based upon the view of the First Amendment to the Constitution articulated by the Supreme Court in the *Associated Press* case—*i.e.*, a notion that the Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

33. In 1988, the Commission replaced the 1 mV/m contour-overlap duopoly

standard, which prohibited the common ownership of stations with overlapping 1 mV/m signal contours, with a more relaxed "principal city" contour-overlap standard that prohibited common ownership of AM stations when the predicted 5 mV/m contours overlapped and common ownership of FM stations when the predicted 3.16 mV/m contours overlapped. As such, the rule prohibited combinations of 2 AM or 2 FM stations in the same "principal city" but permitted AM/FM combinations within the same community. The Commission explained that efficiencies of common ownership might be realized by allowing radio broadcasters to own two or more radio stations in the same geographic area, although not in the same principal city. The Commission also explained that the goals of the duopoly rule remained the same: to promote economic competition and diversity of programming and viewpoints through local ownership diversity. The Commission noted a changed marketplace, with an increased number of broadcast stations, the introduction of new services and technologies, and the abundance of competition in local markets, as the compelling reasons to relax the local ownership regulation.

34. In 1992, the Commission again cited changed economic conditions in radio markets as a basis for further relaxing the local radio ownership rules. Specifically, the Commission permitted combinations of up to (i) 3 AM and 3 FM in markets with 40 or more stations, (ii) 3 AM and 2 FM in markets with 30 to 39 stations, (iii) 2 AM and 2 FM in markets with 15 to 29 stations and (iv) 3 stations (with no more than 2 in the same service) in markets with 14 or fewer stations. The Commission based the count of radio stations on the number of commercial radio stations meeting minimum audience survey reporting standards within an Arbitron designated radio metro market, or on overlapping principal community contours outside designated radio markets. Under cases (i)-(iii), combinations were permitted if the combined audience share did not exceed 25 percent. In case (iv), the combination was permitted if it would not result in a single party controlling 50 percent or more of the stations in the market. The Commission noted growth in the number of radio stations and increased competition from non-radio outlets such as cable and MTV. The Commission noted that stations faced declining growth in radio revenues and concluded that economic circumstances threatened radio's ability to serve the

public interest. The Commission explained that consolidation within the industry would allow radio broadcasters to realize economies of scale that would then generate greater programming investment and increase radio stations' competitiveness. In response to petitions for reconsideration, the Commission moderated the relaxation of its rules permitting combinations of up to (i) 2 AM/2 FM in markets with 15 or more stations, if the combined audience share did not exceed 25 percent; and (ii) 3 stations in markets of 14 or fewer stations, with no more than 2 in the same service, if the combination would not control 50 percent or more of the stations in the market. The Commission decided to count radio stations with reference to a contour overlap standard in all situations, not just those outside of Arbitron designated radio markets. Thus, the Commission defined the radio market "as that area encompassed by the principal community contours * * * of the mutually overlapping stations proposing to have common ownership. The number of stations in the market will be determined based on the principal community contours of all commercial stations whose principal community contours overlap or intersect the principal community contours of the commonly-owned and mutually overlapping stations." The Commission concluded "that adopting more moderate increases * * * in the permissible level of station ownership in certain local markets at this time will provide necessary relief while enabling us to monitor marketplace developments as they unfold."

35. Pursuant to the Telecommunications Act of 1996, the Commission further relaxed its local radio ownership rules in March 1996, as set forth. The Commission did not change from its 1992 reconsideration decision, however, how it defined the relevant radio market or which stations it counted.

36. In our biennial review *NOI*, we asked for comment on how the relaxation of local radio ownership rules under the Telecom Act has impacted competition, diversity and economic efficiencies within local radio markets. We noted that since the passage of the Telecom Act, the radio industry has experienced an ongoing trend towards increasing ownership concentration, both in terms of local and national radio markets; although the number of radio stations has increased, the number of owners has decreased. The *NOI* asked for comment on whether this trend has had a significant impact on local market competition among radio stations, and with other local media outlets, in terms

of the program delivery and local advertising markets. The *NOI* also asked for comment on whether radio ownership concentration has had a significant influence over the expression of viewpoint diversity and the level of news coverage within local radio markets. We noted in the *NOI* that the NTIA's 1997 annual report on minorities and broadcasting showed that there has been a drop in the number of minority-owned broadcast stations, and sought comment on the relationship between our ownership limits and the opportunities for minority and female broadcast station ownership. In addition, the *NOI* sought comment on whether our current counting method for purposes of applying the local radio ownership rules should be modified to more realistically account for the number of stations in a radio market.

2. Comments

37. Commenters were divided on whether the current local radio ownership rules, mandated by the Telecommunications Act, have produced positive or negative results. Commenters concerned about the effects of the rules on the marketplace ask the Commission to maintain or strengthen, the current rules.

38. Other commenters, however, rejoin that consolidation was the intent behind deregulation of local radio ownership restrictions, and that any resulting problems that may arise with market power should be left to antitrust authorities.

39. Commenters also differed on the Commission's methodology for counting stations in determining compliance with the ownership rules. Commenters such as Air Virginia, Americans for Radio Diversity (ARD), Greater Media, Inc., Press Communications, LLC, and Gross Communications Corporation argue that too many stations are counted under the Commission's current methodology. These commenters proposed to use an Arbitron or other rating service market definition, taking into account listener audience and station power, and to include only those stations that place a 1mV/m (FM) or 2 mV/m (AM) primary service contour over the furthest city limit of the market's principal city, or using Department of Commerce MSA definitions in place of Arbitron.

40. In contrast, some commenting parties urged the Commission to retain, or even expand, its current radio market definition and station count method.

3. Discussion

41. *Overview.* We conclude that our current local radio ownership rules, as mandated by the Telecommunications

Act of 1996, generally continue to serve the public interest. The longstanding goal of the Commission's local radio ownership restrictions has been to promote competition and viewpoint diversity within local radio markets. While some commenters argued that consolidation has had a positive impact on the economic viability of the radio industry, in terms of improved station profitability and increased value of radio ownership, and has also yielded potential benefits for both the listening public and advertisers, others raised significant concerns about the impact of radio ownership consolidation on both our competition and diversity goals.

42. We recognize that the industry has undergone significant consolidation since 1996. Moreover, we expect further consolidation as a result of our recent ownership decisions relaxing the television duopoly and one-to-a-market rules. We intend to monitor the consolidation and gather information regarding the overall impact on competition and diversity. As discussed more fully below, although we will maintain our current local radio ownership rules for the time being, we are persuaded that further proceedings are warranted to address certain definitional and methodological issues affecting our local radio ownership rules. Specifically, we will commence a proceeding to seek comment on alternative means of defining radio markets and alternative methods of calculating the total number of stations "in a market" and the number owned by a particular party in a market to correct anomalies in our current methodology. We believe that proceeding will lead to rules and procedures that will be easier to apply, provide more certainty for entities contemplating acquisitions, and result in a more rational and consistent application of our multiple ownership limits.

43. *Competition.* Relaxation of the ownership limits under the Telecom Act has produced financial benefits for the broadcast radio industry. Financial data indicate that the industry has made significant gains since passage of the Telecom Act. For the industry as a whole, station profitability has increased and station values have reached new heights. However, it is not clear whether these gains are the result of greater efficiencies, enhanced market power, or both.

44. We are concerned that increasing consolidation may be having adverse effects on competition, especially in the local radio advertising market. Current data show that in 85 out of a total of 270 Arbitron radio markets, two entities already control more than 80% of

advertising revenue; in 143 markets two entities control more than 70 percent of such. We recognize that many advertisers consider alternative media to be good substitutes for radio advertising. However, the Department of Justice (DOJ) has concluded that there are a significant number of advertisers that do not. In distinguishing radio advertising as a distinct market from that of television and newspaper advertising, the DOJ explains that (1) radio advertising is unique in reaching a mobile broadcast audience; (2) radio has a greater ability to target particular audience segments; and (3) radio can be more cost effective and more flexible in responding to changes in local advertising conditions. Additionally, as we noted in our recent *TV Ownership Order*, "[a] recent econometric study finds that other advertising media are not good substitutes for radio advertising and that radio advertising probably constitutes a separate antitrust market." Thus, for certain advertisers, newspapers, cable, and broadcast television stations do not constitute an effective substitute for radio stations. For these advertisers, the consolidation of local radio markets may raise significant competitive concerns.

45. *Diversity*. Consolidation of radio stations under group ownership might allow owners to increase investment in news coverage, through the acquisition of more sophisticated news coverage equipment and by maintaining larger, more efficient news staffs. Some commenters thus suggest that ownership concentration has fostered viewpoint diversity. For example, Fuller-Jeffrey Broadcasting Companies, Inc. believes that viewpoint diversity is "alive and well," and that pre-Telecom Act ownership limits had placed a severe economic strain on small to medium-sized companies. It also believes that the present level of consolidation should allow the radio industry to enjoy unprecedented success and stability, which will allow it to better contribute to the public interest. One impact of consolidation, it argues, has been to reduce unnecessary format duplication and to minimize audience overlap. Commenters such as NAB assert that the Commission should look at all media, including television, radio, cable, DBS, Internet and newspapers, along with smaller services such as MMDS and SMATV, when judging program diversity. NAB also finds that group owners do not impose their views on audiences.

46. The scale and scope efficiencies discussed above might in part arise from the consolidation of news coverage at commonly-owned stations, leading to a

lessening of viewpoint diversity and to a smaller local market for news talent. If this were the case, this would conflict with the longstanding intent of the radio multiple ownership rules to promote viewpoint diversity through independently owned local stations. Viewpoint diversity has traditionally been viewed in terms of the number of independent viewpoints expressed in local markets, in which case ownership consolidation could have a negative impact on both viewpoint and source diversity. A related concern is that even without the loss of news staffs, viewpoint expression might become homogenized within a commonly owned group of radio stations as a result of the sharing of common news facilities and a common corporate culture.

47. Several commenters lend support to these notions. Air Virginia notes a trend by large group-owned stations towards less news and public affairs and more revenue-generating entertainment programming, particularly with local marketing agreements ("LMAs"). Americans for Radio Diversity (ARD) believes that independent broadcasters are more likely to provide diverse and unbiased programming, and that group owners tend to ignore public service to demographic groups deemed to be small or unprofitable, which often impacts minorities and those of lower economic status. CME believes that consolidation has led to reduced public-affairs and local-news programming, since group owners increasingly use syndicated programming and out-sourcing to produce news and public affairs programs, often with the same production company as is used by competitors. It reports that, for example, Metro Networks Inc., a Houston-based company, provides all of the news programming to 10 Washington, D.C., radio stations. Metro, it states, is one of the fastest growing companies in the United States and its growth, according to one of its executives, has been due to the "out-sourcing" his company has found at many radio stations. Similarly, CME reports that Capstar Broadcasting uses ten announcers based in Austin, Texas, to record all between-song breaks and weather and traffic breaks for 37 of its stations in Texas, Arkansas and Louisiana.

48. In view of the large-scale consolidation in the radio industry, we believe that the existing local radio ownership limitations remain necessary to prevent further diminution of competition and diversity in the radio industry. It appears that while there may have been a number of salutary effects flowing from the consolidation that has taken place since 1996, largely

in financial strength and enhanced efficiencies, it cannot be said that consolidation has enhanced competition or diversity, and, indeed, may be having the opposite effect. There currently are hundreds of fewer licensees than there were four years ago and, in many communities, far fewer radio licensees compete against each other.

49. Our competition and diversity concerns outlined above lead us to conclude that the local radio ownership rules should not be further relaxed at this time. The industry is still adapting to the substantial relaxation of local ownership rules that followed enactment of the 1996 Act, and we expect consolidation to continue under our current ownership limits. While some commenters argue that we should tighten the ownership limits, we do not believe this appropriate given that Congress directed the Commission to adopt these limits in 1996.

50. *Market Definition and Counting Methodology*. Although we have decided to retain our ownership rule, our experience in administering the rule since its implementation in 1996 suggests several concerns that should be addressed, including our method of defining markets, counting the number of stations within them and counting the number of stations owned by a party in a radio market. These definitions and methodologies may be undermining Congress' intent in adopting the 1996 Act.

51. Our definition of a radio market and our method for counting the number of stations in a market were adopted in 1992. These were not altered when we amended our rules to implement section 202 of the 1996 Act. To evaluate whether a proposed transaction complies with our ownership rules, we first determine the boundaries of each market created by the transaction. A transaction may create more than one radio market. Our rules define a radio market as the "area encompassed by the principal community contours (i.e., predicted or measured 5 mV/m for AM stations and predicted 3.16 mV/m contour for FM stations) of the mutually overlapping stations proposed to have common ownership." Thus, we look to all stations that will be commonly owned after the proposed transaction is consummated and group these stations into "markets" based on which stations have mutually overlapping signal contours. A market is defined as the area within the combined contours of the stations to be commonly owned that have a common overlap. For example, suppose an applicant proposes to own stations A, B, C and D. The contours of

stations A, B and C each overlap the contours of the other two stations—that is, there is some area which the contours of all three stations have in common. Station D, on the other hand, overlaps the principal community contour of station A, but not those of stations B or C. Under our current definitions, the area encompassed by the combined contours of stations A, B and C form one “market” and the area within the combined contours of stations A and D form another market. This example assumes that stations A and D are same-service stations, and that at least one other station, B or C, is also in the same service as station A.

52. To determine the total number of stations “in the market,” as defined above, we count all stations whose principal community contours overlap the principal community contour of any one or more of the stations whose contours define the market. Thus, in the market formed by the contours of stations A, B and C, any station whose contour overlapped the contour of A, B or C would be counted as “in the market.” We use a different methodology, however, to determine the number of stations that any single entity is deemed to own in a given market. For this purpose, we only count those stations whose principal community contours overlap the common overlap area of *all* of the stations whose contours define the market. Thus, a station owned by the applicant that is counted as being “in the market” because its contour overlaps the contour of at least one of the stations that create the market will not be counted as a station owned by the applicant in the market unless its contour overlaps the area which the contours of *all* of the stations that define the market have in common. Referring to our example of the market formed by the contours of stations A, B and C, station D would be counted as “in the market” because its contour overlaps the contour of station A. But, station D would not be counted as a station owned by the applicant in the ABC market because station D’s contour does not also overlap the contours of stations B and C. In short, the applicant’s ownership of station D would not be counted against it in determining compliance with the ownership cap in the ABC market.

53. These definitions and methodologies may be producing unintended results that are contrary to Congress’ intent. In the 1996 Act, Congress directed us to adopt radio ownership limits that increase as the size of the market increases. Implicit in Congress’ statutory directive is: (1) a rational definition of radio “market”

that reflects the number of stations to which listeners in a particular community actually have access; and (2) a consistent definition of radio market when counting the number of stations in a market and when counting the number of stations an entity owns within that market.

54. The Commission’s current policies raise concerns on both counts. First, the Commission’s use of overlapping signal contours to assess the number of stations in the market can produce unrealistic results. For example, in a recent case in Wichita, Kansas, a 24-station market according to the commercial Arbitron rating service, the contour overlap approach counted 52 radio stations in the market, including several Oklahoma stations whose signals did not even reach Kansas. In other contexts, such as our television duopoly and one-to-a-market rules, we recently opted for market definitions based on commercial reality—as measured by ratings services like Arbitron and Nielsen—rather than contour overlaps. In changing our duopoly rule from a contour-based restriction to a DMA-based restriction, we stated that the DMAs “are a better measure of actual television viewing patterns, and thus serve as a good measure of the economic marketplace in which broadcasters, program suppliers and advertisers buy and sell their services and products.” We believe that the same reasoning could apply to radio markets. Arbitron markets reflect the number of stations that actually target listeners in a particular community because they are the listeners that advertisers pay to reach. We will issue an *NPRM* seeking comment on whether Arbitron markets (or a proxy in non-Arbitron areas) would be a more accurate measure of marketplace reality than our current approach.

55. Second, our current methodology for counting the number of stations a party owns in a market may result, as in the example discussed above, in a station being counted in the market for purposes of establishing the number of stations in the market but not being counted against a licensee’s cap on the number of stations it may own in that market. In one case, this would have led to a party being permitted, in effect, to own three stations in a four-station market because our method of counting the stations it owned in the market excluded one of its stations. See *In re Application of Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594 (1999). In *Pine Bluff*, a station that was logically in a market in terms of listenership and advertiser support, and, in fact, was counted for purposes of determining the total

number of stations in that market was not counted against a party’s ownership cap in that market because its principal city contour did not overlap the principal community contours of all stations that defined the market. In the 1996 Act, Congress provided that in markets with 14 or fewer commercial radio stations a party may own up to five commercial radio stations, but “may not own, operate, or control more than 50 percent of the stations in such market.” (Section 202(b)(1)(D) of the Telecommunications Act of 1996.) Yet, in *Pine Bluff*, application of our established policies led to one party owning three stations in what could reasonably be considered a four-station market. In *Pine Bluff* we recognized that this may appear to be an anomalous result but pointed out that it was produced by a methodology that had been consistently utilized since 1992 and that subsequent events in the market had rendered harmless the impact of this anomaly in that case.

56. This shifting market definition appears illogical and contrary to Congress’ intent. For instance, in the 1996 Act, Congress provided that:

[I]n a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in *such market*.

Thus, the plain language of the statute seems to require us to look at the same market—*i.e.*, to use the same definition of “market”—when determining the number of radio stations in the market and when counting the number of stations that an entity owns, operates, or controls within that market. As a logical matter, if a station has sufficient presence that it should be counted as contributing to the number of stations “in the market,” it seems appropriate to count it as being “in the market” for purposes of calculating the ownership cap.

57. We tentatively conclude that our definitions and methodologies in this area may be having effects inconsistent with what Congress intended. In addition, they may be undermining the legitimate expectations of broadcasters, advertisers and the public as to the size of their market, the number of stations in their market, and the number of stations that can be owned by an individual party in that market. To consider appropriate changes to our rules, we will issue an *NPRM* soliciting comment on proposed modifications of our rules in this area.

C. Dual Network Rule

1. Regulatory History

58. Section 73.658(g) (47 CFR 73.658(g)) sets forth the Commission's current dual network rule. It directly reflects the provisions of section 202(e) of the Telecom Act, which permits a television broadcast station to affiliate with a person or entity that maintains two or more networks of television broadcast stations unless such networks are composed of: (1) Two or more persons or entities that were "networks" on the date the Telecom Act was enacted; or (2) any such network and an English-language program distribution service that on the date of the Telecom Act's enactment provided 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television households. The Conference Report identified with precision the networks to which these definitions were to apply. It stated that the Commission was being directed to revise its dual network rule,

to permit a television station to affiliate with a person or entity that maintains two or more networks unless such dual or multiple networks are composed of (1) two or more of the four existing networks (ABC, CBS, NBC, Fox) or, (2) any of the four existing networks and one of the two emerging networks (WBTN, UPN). The conferees do not intend these limitations to apply if such networks are not operated simultaneously, or if there is no substantial overlap in the territory served by the group of stations comprising each such networks.

59. The Commission first adopted a dual network rule for broadcast radio networks in 1941 following an investigation to determine whether the public interest required "special regulations" for radio stations engaged in chain or other broadcasting. The rule provided that no license would be issued to a broadcast station affiliated with a network organization that maintained more than one broadcast network. The Commission extended the dual network rule to television networks in 1946. The Commission believed that permitting an entity to operate more than one network might preclude new networks from developing and affiliating with desirable stations because those stations might already be tied up by the more powerful network entity. In addition, the Commission expressed concern that dual networking could give a network too much market power. The dual network prohibition, therefore, was intended to remove barriers that would inhibit the

development of new networks, as well as to serve the Commission's more general diversity and competition goals. The dual network rule for broadcast television remained unchanged until 1996, when the Commission amended the rule, as noted above, to conform with the provisions in Section 202(e) of the Telecom Act.

2. Comments

60. Four parties (ABC, CBS, Paxson and WB) submitted comments regarding the dual network rule; all favored repeal. These four broadcast networks argue that the rule constrains their ability to restructure and achieve efficiencies of common ownership. They also argue that antitrust enforcement would be sufficient to address any anticompetitive concerns that might arise in the absence of the dual network rule.

3. Discussion

61. The current dual network rule differs markedly from the dual network rule that remained unchanged from 1946 to 1996. The latter prohibited a broadcast station from affiliating with a network organization that maintained more than one broadcast network. In contrast, the current rule effectively permits a broadcast station to affiliate with a network organization that maintains more than one broadcast network, unless such networks are created by a merger between ABC, CBS, Fox, or NBC, or a merger between one of these four established networks and UPN or WB. Thus, the current rule supports common ownership of multiple broadcast networks created through internal growth and new entry, and discourages common ownership of multiple broadcast networks created by mergers between specific network organizations.

62. Under the current dual network rule, all existing network organizations, and all new network organizations, may create and maintain multiple broadcast networks. There are no limits on the number of broadcast networks that may be maintained by a network organization, or the number of television stations that may affiliate with a network organization. As such, it is theoretically possible for a network organization with sufficient programming to enter into affiliation agreements with every broadcast television station, in every market, and supply all of their programming. The opportunity to create and maintain multiple broadcast networks places broadcast networks on more equal footing with cable, satellite and other

multichannel video programming distributors.

63. While the dual network rule gives all network organizations the opportunity to pursue any economic efficiencies that may arise from the maintenance of multiple broadcast networks, it restricts the manner in which specific network organizations become multiple broadcast networks. Specifically, the rule permits ABC, CBS, Fox and NBC to develop multiple broadcast networks by (1) creating new broadcast networks, (2) acquiring new broadcast networks created after passage of the Telecom Act, and (3) acquiring video networks from nonbroadcast media (e.g., cable or satellite) and moving them to broadcast, assuming they could find additional local stations with which to affiliate. However, the rule prohibits ABC, CBS, Fox, and NBC from developing multiple broadcast networks by merging with one another or UPN or WB.

64. We believe that the rule as it applies to UPN and WB may no longer be necessary in the public interest. Accordingly, we will adopt an *NPRM* seeking comment on modifying the dual-network rule. We recognize that program production and broadcast networking are complementary inputs with economic characteristics (e.g., large sunk costs and large transaction costs) that make vertical integration desirable. Since UPN and WB are nascent subsidiaries of large, well-established program producers, a merger of ABC or CBS or Fox or NBC with UPN or WB may be characterized as a merger of an established broadcast network with an established program producer. We believe that allowing such mergers may permit realization of substantial economic efficiencies without undue harm to our diversity and competition goals. However, because we are concerned about the effect of such a merger on our diversity goals, that *NPRM* seeks comment on what, if any, safeguards should be imposed to assure a minimal reduction in diversity assuming we alter the rule in some fashion.

65. We do not, however, believe that, at the present time, the dual network rule should be eliminated in its entirety. While there may be some economic efficiencies associated with mergers between established broadcast networks, we believe such mergers would raise significant competition and diversity concerns. As such, our forthcoming *NPRM* concerning the dual network rule will not propose elimination of that portion of the rule that prevents mergers between ABC, CBS, Fox, and NBC.

D. Daily Newspaper/Broadcast Cross-Ownership Rule

1. Regulatory History

66. Section 73.3555(d) of the Commission's rules sets forth the newspaper/broadcast cross-ownership rule. That section states:

No license for an AM, FM or TV broadcast station shall be granted to any party (including all parties under common control) if such party directly or indirectly owns, operates or controls a daily newspaper and the grant of such license will result in: (1) The predicted or measured 2 mV/m contour of an AM station, computed in accordance with § 73.183 or § 73.186, encompassing the entire community in which such newspaper is published; or (2) The predicted 1 mV/m contour for an FM station, computed in accordance with § 73.313, encompassing the entire community in which such newspaper is published; or (3) The Grade A contour of a TV station, computed in accordance with § 73.684, encompassing the entire community in which such newspaper is published.

67. The Commission adopted the newspaper/broadcast cross-ownership rule in 1975. Like all of the Commission's cross-ownership and multiple ownership rules in the broadcast context, the newspaper/broadcast cross-ownership rule rests on "the twin goals of promoting diversity of viewpoints and economic competition." In adopting the rule, the Commission made clear that its diversity goal is paramount; sometimes competition must "yield . . . to the even higher goals of diversity and the delivery of quality broadcasting service to the American people." The Commission explained that diversification of ownership promoted diversification of viewpoint in that "it is unrealistic to expect true diversity from a commonly owned station-newspaper combination. The divergence of their viewpoints cannot be expected to be the same as if they were antagonistically run." Thus, the Commission determined that, as a general rule, granting a broadcast license to an entity in the same community in which the entity also publishes a newspaper would harm local diversity, and should be prohibited. The Commission did not foreclose, however, waiver requests under certain circumstances, although it has only granted three waiver requests on a permanent basis. (The circumstances are: (1) where there is an inability to dispose of an interest in order to conform to the rules; (2) where the only sale possible is at an artificially depressed price; (3) where separate ownership and operation of the newspaper and the station cannot be supported in the locality; and (4) where,

for whatever reason, the purposes of the rule would be disserved by divestiture.)

68. In 1978, the Supreme Court, in *FCC v. National Citizens Committee for Broadcasting*, upheld the Commission's rules and waiver policies in their entirety. The Supreme Court found the Commission's diversity goal an important public policy that furthered the First Amendment values of public access to diverse and antagonistic sources of information. Although the Supreme Court noted the arguments of opponents of the rule to the contrary, it stated that "notwithstanding the inconclusiveness of the rulemaking record, the Commission acted rationally in finding that diversification of ownership would enhance the possibility of achieving greater diversity of viewpoints." The Supreme Court approvingly cited the lower court's observation that "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." It also confirmed the Commission's opinion in the *Second Report and Order in Docket 18110* that "it is unrealistic to expect true diversity from a commonly-owned station-newspaper combination. The divergency of their viewpoint cannot be expected to be the same as if they were antagonistically run." The Supreme Court noted the availability of waivers to underscore the reasonableness of the rule.

69. For several years in the 1980s and early 1990s, Congress precluded the Commission from spending authorized funds "to repeal, retroactively apply changes in, or to begin or continue a reexamination of the rules and the policies established to administer" the newspaper/broadcast cross-ownership rule. In the Commission's 1994 appropriation, however, Congress provided that the Commission could amend policies with respect to waivers of the newspaper/broadcast cross-ownership rule as it applied to radio. Subsequently, Congress dropped all restrictive language concerning the rule from the Commission's appropriations, and thus removed the statutory ban on the Commission's review of the rule itself.

70. Although the Telecommunications Act of 1996 addresses various broadcast cross-ownership issues, it does not address newspaper/broadcast cross-ownership issues; indeed, the legislative history of that Act reveals that the House of Representatives explicitly considered and rejected changes to the newspaper/broadcast cross-ownership rule. Thus, while the Commission now

has the authority and obligation to reevaluate the newspaper/broadcast cross-ownership rule, and its policy regarding waivers thereof, there is no explicit Congressional guidance on how that authority should be exercised. However, we believe that there may be certain circumstances in which the rule may not be necessary to achieve the rule's public interest benefits. We, therefore, will initiate a rulemaking proceeding to consider tailoring the rule accordingly.

71. As a result of issues raised in the merger of The Walt Disney Company and Capital Cities/ABC, Inc., in September 1996 we issued an *NOI* soliciting comment on the possible revision of our waiver policy as to newspaper/radio combinations. In that *NOI* we asked whether we should revise our waiver policy in ways that might make it less stringent and/or more objective, such as by adopting a voice count test. Subsequently, in the instant proceeding, we solicited comment on whether the overall newspaper/broadcast cross-ownership rule should be retained, modified or eliminated. (During the pendency of the newspaper/radio waiver policy proceeding, the Newspaper Association of America filed a petition for rulemaking to eliminate the newspaper/broadcast cross-ownership rule. In our *NOI* in the instant proceeding, we stated that we would incorporate NAA's petition in this proceeding, and invited comment on it. Additionally, on August 23, 1999, NAA filed an Emergency Petition for Relief. This petition, like NAA's prior Petition for Rulemaking, argues in favor of repeal of the newspaper/broadcast cross-ownership rule, although in this pleading NAA's arguments are based in part on the Commission's action in the *TV Ownership Order*. As with the pleadings filed by Fox and Viacom, this pleading will be treated as a late-filed comment and not considered in this proceeding. Rather, we will include these comments in the record of the 2000 biennial review.) In the biennial review *NOI* we expressed the view that permitting the owner of a broadcast TV or radio station to own a newspaper, or visa versa, could give a common owner the market power to unilaterally raise local radio, television, and/or newspaper advertising rates. However, we also expressed the belief that the broadcast media and newspapers were not likely to compete in the markets for delivered programming or program production and, accordingly, elimination of the rule would likely not have adverse competitive impact in these markets. We asked for comment

on alternatives to elimination of the rule and other possible economic effects from such elimination (e.g., benefits to the public from efficiencies to be realized from joint operations). Finally, we solicited comment on the effects elimination of the rule might have on our diversity concerns and specifically solicited comment on the arguments made in a Petition for Rulemaking filed by the Newspaper Association of America seeking repeal of the rule.

2. Comments

72. Opponents of the rule claim that the Commission has never empirically demonstrated that the rule furthers its competition and diversity objectives. In any event, they assert, media markets are dramatically more competitive and diverse now than when the Commission adopted the rule, such that the rule is no longer in the public interest, and perhaps is even unconstitutional on First Amendment or other grounds.

73. Proponents of the rule counter that many of the new media outlets, such as the Internet, OVS and DBS, do not add to viewpoint diversity on the local level. They also point out that new programs by the same broadcasters do not add to viewpoint diversity. Rule proponents also state that the rule does not prohibit all combinations, but rather only those in the same market; moreover, existing waiver policies allow combinations where a broadcaster or newspaper publisher is failing and cannot survive but for the combination.

3. Discussion

74. We believe the newspaper/broadcast cross-ownership rule continues to serve the public interest because it furthers our important and substantial policy of viewpoint diversity. We therefore conclude that, as a general matter, the rule should be retained. However, we believe that there may be circumstances in which the rule may not be necessary to achieve its intended public interest benefits. We, therefore, will initiate a rulemaking proceeding to consider tailoring the rule accordingly.

75. *Effects on Diversity.* While the media marketplace has changed since we adopted the rule, we find that the changes are insufficient to justify repeal and we will need to gather a more complete record to determine what modifications may be appropriate. First, many of the new media outlets do not yet appear to be substitutes for broadcast stations and newspapers on the local level for diversity purposes. As we have stated in the biennial review *NOI* and elsewhere, we are most concerned with viewpoint diversity at

the local level. This is because “[m]onopolization on the means of mass communication in a locality assures the monopolist control of information received by the public and based upon which it makes elective, economic, and other choices.” New outlets such as DBS and MMDS, however, typically do not provide locally originated programming. In addition, even though cable systems may originate local programming, they are required to dedicate PEG channels only if their franchise authorities require them to do so, and to provide leased access channels only as a function of their activated channels. There is no requirement that the material offered on cable access channels be locally originated or oriented. By contrast, as part of their public interest obligations, broadcasters are required to air programming that is responsive to issues facing their communities of license, and, although they are not required to do so, local daily newspapers typically cover local issues, endorse local candidates, and provide a platform for the presentation of local opinion. Thus, the fact remains that broadcast services, in particular broadcast television, and newspapers have been and continue to be the dominant sources of local news and public affairs information in any given market. The Commission has distinguished broadcast television from radio as having more visual impact and serving more people as a primary source of news. Almost 70% of American adults surveyed indicated that they use television as their primary source of news. Importantly, while the number of broadcast stations has increased in the past several years, the number of daily newspapers has decreased. On one hand, some commentators argue that this warrants the Commission allowing newspapers to combine with local broadcast stations in order to realize the economies of joint operation, helping them to preserve their newspaper. On the other hand, to the extent that this suggests that the survival of some newspapers may depend on their joint operation with local broadcast stations, we have a waiver standard that can accommodate such instances.

76. Second, we note that not all of the new media in a given market are available to all consumers in the market to the same extent as broadcast services and newspapers. Broadcast radio and TV are available free of charge to anyone who makes an investment in receiving equipment, and much of the public have such equipment; for example, 98.2% of Americans own a TV set. Similarly, newspapers are available to anyone for

a nominal charge. DBS, MMDS, and the Internet, however, are available only to those who both purchase or rent equipment *and*, except in the case of the Internet where some Internet Service Providers offer Internet connections free of direct charge, subscribe to a service, the monthly fees for which services are typically several times the cost of a newspaper subscription. In addition, in the case of the Internet, the sunk cost of a computer and the software necessary to browse the Internet is typically several times that of a radio or TV.

77. Third, although some grandfathered combinations report that efficiencies they have derived therefrom have enabled them to air more news and public affairs programming than their competitors such additional programming does not necessarily enhance our policy goal of viewpoint diversity if the additional programs all come from the same source. The Commission has previously explained that its cross-ownership and multiple ownership rules encourage “outlet” and “source” diversity as an indirect means to achieve viewpoint diversity:

The Commission has felt that without a diversity of outlets, there would be no real viewpoint diversity—if all programming passed through the same filter, the material and views presented to the public would not be diverse. Similarly, the Commission has felt that without diversity of sources, the variety of views would necessarily be circumscribed.

78. Thus, as the Commission stated when it adopted the newspaper/broadcast cross-ownership rule: “it is unrealistic to expect true diversity from a commonly-owned newspaper combination. The divergence of their viewpoints cannot be expected to be the same as if they were antagonistically run.”

79. We also emphasize that media markets are undergoing significant changes, occasioned by the Telecommunications Act of 1996 and our decision to relax other cross-ownership and multiple ownership rules and waiver policies. The Telecommunications Act directed the Commission to modify its radio ownership rules. Between the enactment of the Telecom Act and March 2000, the number of radio station owners declined by 22 percent from approximately 5,100 owners in March 1996, to about 4,000 in March 2000. In addition, we have recently amended our “TV duopoly” and “one-to-a-market” rules and waiver policies and we propose other changes to still other broadcast ownership rules or policies as a result of this biennial review. The response of the market to these rule

changes will provide us concrete, empirical information about their impact on our public policy goals for use in our future biennial reviews. Therefore, the dominance of broadcast services and newspapers in providing local news and public affairs information, may suggest that a measured approach to modifying the newspaper/broadcast cross-ownership rule is appropriate at this time.

80. *Effects on Competition.* With respect to competition, we also emphasize that the record was not clear on several points. First, it was not clear that grandfathered combinations derived efficiencies only from co-located combinations. For example, Chronicle provided information that its combination aired more news and public affairs programming than its competitors in a given market, but the combination that produced these benefits included both co-located and non-co-located broadcast stations and newspapers. The newspaper/broadcast cross-ownership rule only prohibits combinations in the same market. Second, it was not clear that the efficiencies grandfathered combinations derived could not be realized from non-attributable joint ventures. Managers of existing newspaper/broadcast combinations, as well as other commenters, report that the broadcast station and the newspaper keep separate news staffs in combination situations because the combination does not derive efficiencies from consolidation of such staff. Accordingly, it does not appear that mergers of newspapers and broadcast stations would produce such efficiencies. Third, it was not clear that the efficiencies of newspaper/broadcast combinations produced any meaningful benefits for advertisers, and therefore for viewers as consumers of the advertisers' goods. As indicated above, some commenters explain that grandfathered combinations have provided more news and public affairs programming, and one could extrapolate that this translates into more advertising and viewing options. There was no evidence, however, that any of these additional options translated into benefits for advertisers in the form of reduced rates, or corresponding benefit for viewers in the form of reduced prices for advertised products and services. Accordingly, we conclude that the newspaper/broadcast cross-ownership rule continues to provide important public interest benefits and that its elimination would not necessarily provide any offsetting benefits to competition.

81. Notwithstanding our general conclusion that the rule should be

retained, we recognize that there may be situations in which the rule may not be necessary to protect the public interest in diversity and competition. We wish to examine in greater detail such situations. There may be instances, for example, in which, given the size of the market and the size and type of the newspaper and broadcast outlet involved, sufficient diversity and competition would remain if a newspaper/broadcast combination were allowed. While the record contains several proposals for tailoring the rule to address this issue, we believe that a more complete record can and should be developed regarding the circumstances in which the rule may not be necessary to achieve its intended public interest benefits. We will examine whether the rule needs to be tailored to address contemporary market conditions. We will issue a notice of proposed rulemaking seeking comment on these and other potential modifications of our rule. While we generally believe that the newspaper/broadcast cross-ownership rule should be retained, this rulemaking will ensure that the rule is tailored to cover only those circumstances in which it is necessary to protect the public interest.

82. *Additional Matter.* In 1996, the Tribune Company, which publishes a newspaper in Fort Lauderdale, Florida, agreed to merge with Renaissance Communications Corporation, which owned six television stations including one in Miami, Florida. Although Tribune sought a permanent waiver of the newspaper/broadcast cross-ownership rule to permit this combination, the Commission granted the license transfer subject to the condition that Tribune divest itself of either the Ft. Lauderdale newspaper or the Miami television station within one year, expiring March 22, 1998. On March 6, 1998, Commission staff granted an extension of Tribune's temporary waiver subject to the review of the newspaper/broadcast cross-ownership in the instant proceeding and required that it come into compliance within six months of the completion of the 1998 biennial review (unless, of course, Tribune's combination was in compliance with any new cross-ownership rule adopted as a consequence of that review). We explained that an extension was appropriate because it would be unduly harsh for Tribune not to receive further interim relief given the confusion that may have resulted from the Commission's initial waiver decision with respect to its policy on interim waivers pending rulemaking. We also

stated that an extension would not so compromise our diversity and competition interests as to outweigh the substantial equitable considerations favoring the grant. Given our decision here to issue an *NPRM* seeking comment on possible modifications of the newspaper/broadcast cross-ownership rule, and the unusual circumstances that led to the prior extension of Tribune's waiver, including the withdrawal of the waiver opponent's opposition to the joint operation as long as Tribune continues to operate the newspaper and television station separately and the fact that we have found the joint operation does not so compromise our diversity and competition interests as to outweigh the substantial equitable considerations favoring the grant of an interim waiver, we will extend that temporary waiver, under the same terms and conditions now applicable, until the completion of the rulemaking.

E. Cable/Television Cross-Ownership Rule

1. Regulatory History

83. Section 76.501(a) of the Commission's rules sets forth the "cable/TV cross-ownership rule." That section states:

No cable television system (including all parties under common control) shall carry the signal of any television broadcast station if such system directly or indirectly owns, operates, controls, or has an interest in a TV broadcast station whose predicted Grade B contour . . . overlaps in whole or in part the service area of such system (i.e., the area within which the system is serving subscribers).

The Commission adopted the cable/TV cross-ownership rule in 1970. In doing so, the Commission noted its concerns about concentration in the broadcast industry, and stated that the rule would further the Commission's policy favoring diversity of control over local mass communications media, and thereby lead to diverse sources of programming. The Commission noted that it wished to avoid over-concentration of media control. On reconsideration, the Commission reiterated that its "adoption of these provisions—designed to foster diversification of control of the channels of mass communication—was guided by two principal goals, both of which have long been established as basic legislative policies. One of these goals is increased competition in the economic marketplace; the other is increased competition in the marketplace of ideas."

84. Congress codified and then repealed a statutory prohibition on

cable/TV cross-ownership. On October 30, 1984, the Cable Communications Policy Act of 1984 became law. Section 613(a)(1) of the Cable Act of 1984 codified the cable/TV cross-ownership rule. Section 202(i) of the Telecommunications Act of 1996, however, eliminated section 613(a)(1) of the Cable Act of 1984, thereby ending the statutory bar to cable/TV cross-ownership. In eliminating the bar, however, Congress stated: "The conferees do not intend that this repeal of the statutory prohibition should prejudice the outcome of any review by the Commission of its rules." The instant proceeding is the first one in which the Commission has reviewed the rule since its adoption.

85. In the Biennial Review *NOI* we solicited comment on the cable/TV cross-ownership rule. Specifically we asked for comment on the possible effects that repeal or relaxation of the rule might have on various markets, including the market for delivered programming, on the appropriate scope of the product and geographic advertising markets in which cable and broadcast television compete, and on whether cable/broadcast television combinations could exercise monopoly power in the program production markets. We defined this power in this context as the ability of the cable/television combination to artificially restrict the price paid for programming. Additionally, we sought comment on the impact on diversity of both the increased number of video outlets and allowing cable/television cross-ownership.

2. Comments

86. Twelve parties commented on the cable/TV cross-ownership rule; seven supported retention of the rule, and five supported repeal or modification. Opponents of the rule note that relevant markets are more competitive and diverse than when the Commission adopted the rule, and state that the rule no longer serves the public interest, and perhaps is even unconstitutional.

87. Proponents of the rule claim that the rule continues to serve the public interest because cable is the dominant competitor in the multichannel video programming distribution market, and thus serves as a "gatekeeper" to the delivered programming market. Proponents also contend that a cable/TV combination could harm competition in the advertising market by discriminating in favor of its television station and cable programming services, manipulating carriage and channel positioning and offering joint advertising rates, realizing economies of

scale, driving competitors out of the market and frustrating new entrants.

3. Discussion

88. As explained more fully below, we agree with proponents of the rule that it continues to serve the public interest because it furthers our important public policies of fostering competition and viewpoint diversity. The cable/TV cross-ownership rule promotes competition and diversity and prevents unfair discrimination against competitors, including in forms not covered by existing law. We therefore retain the rule.

89. *Effects on Competition.* We conclude that the rule continues to serve the public interest because it furthers our goal of competition in the delivered video programming market. This market includes an array of participants, such as operators or providers of broadcast television, cable systems, DBS, MMDS, OVS, SMATV, and possibly even the Internet and videocassettes for VCRs. Sixty-seven percent of American television households, however, subscribe to cable. In the context of discussing the status of competition in the market for the delivery of multichannel video programming, the Commission stated in its most recent *Cable Competition Report* that "[t]he market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry." Under these circumstances, we agree with proponents of the rule that cable, in many instances, functions as the "gatekeeper" to local markets for delivered video programming. As commenters point out, this status gives cable system operators both the incentive and the means to discriminate against their competitors with respect to such core issues as carriage and channel positioning as well as in areas not covered by statute or Commission rule such as joint advertising rates and promotions. As commenters also point out, a cable/TV combination would have even greater incentive and means to discriminate against others and in favor of its own broadcast affiliate in this fashion, and both the broadcast station and the cable system would stand to unfairly benefit.

90. The record indicates that current carriage and channel position rules prevent some of the discrimination problems, but not all of them. For example, opponents of relaxing the rule note that current law would not prevent discrimination through joint advertising sales and rates practices and joint promotions unavailable to competitors.

Additionally, although section 614(b)(6) of the Communications Act entitles a local commercial television station to be carried by a cable system on the same channel as it broadcasts over the air, Univision describes protracted disputes with a cable system in securing its "on air" channel, with one cable system shuffling Univision's channel position four times in four years. Univision also claims that a cable system abruptly changed the channel position of one of Univision's stations in order to provide that position to the cable system's own local news channel. Univision further claims that cable system operators sometimes otherwise delay carriage by denying that they receive an adequate signal from a station, which forces the broadcast station to divert resources away from obtaining quality programming and toward obtaining carriage and channel position. Other commenters also emphasize that cable systems can delete broadcasters from carriage through waiver, and that cable/TV combinations will be unlikely to offer retransmission consent agreements. Univision emphasizes that all of this anti-competitive behavior occurred in spite of the cable/TV cross-ownership rule, and claims that such behavior will only be exacerbated by cable/TV combinations that seek to favor their own broadcast affiliate over others.

91. Although, as we noted in the *NOI*, DTV holds the potential to enable broadcasters to compete better with cable in the multichannel video programming distribution market, the reality is that DTV is now nascent. In addition, because of the advent of DTV, our DTV must-carry rules are the subject of a pending proceeding. Modification of the cable/TV cross-ownership rule at this time could frustrate and undermine the potential that DTV holds for broadcasters if, as suggested by ALTV, a cable/TV combination, in order to give its own broadcast station a competitive advantage, denied carriage to a competitor and inhibited its DTV roll-out. We believe that it is particularly important to ensure stability and a level playing field as the technology of DTV reaches the marketplace and competitive forces determine its fate in the marketplace. Cable/DTV competition may ultimately provide a basis for some modification of the cable/TV cross-ownership rule, but we believe that time has not yet arrived.

92. *Effects on Diversity.* We also conclude that the cable/TV cross-ownership rule is necessary to further our goal of diversity at the local level. As we noted above, current media markets include a variety of

participants; as we also noted above in our discussion of the newspaper/broadcast cross-ownership rule, however, many new media do not contribute to diversity at the local level. Broadcasters contribute to local diversity through the fulfillment of their public interest obligations to air programming responsive to the issues facing their communities of license; cable contributes through PEG and leased access channels and to some degree through origination of local cable news channels. In the *TV Further Ownership Notice*, the Commission thus tentatively concluded that broadcast television and cable are to a certain extent substitutes for diversity purposes, but also stated:

[w]e tentatively see no reason to include in our diversity analysis the other electronic video media [beyond cable], such as MMDS, VCRs, and VDT, as substitutable for a broadcast television station. None of these has nearly the ubiquity of cable and most do not have the capability for local origination that cable has. All provide similar entertainment programming; however, our core concern with respect to diversity is news and public affairs programming especially with regard to local issues and events.

93. More recently, we reaffirmed this view in the *TV Ownership Order* where we stated that many of these alternative video delivery systems "are still establishing themselves in the marketplace and generally do not provide an independent source of local news and informational programming." While newspapers and radio contribute to local diversity, broadcast television and cable television are the only participants in the market for delivered news and public affairs *video* programming at the local level. The Commission has distinguished the influence of television from that of newspapers as being more immediate, and from that of both newspapers and radio as having more visual impact and serving more people as a primary source of news. The Commission has also noted that the public receives more news from television than from any other source; while broadcast television is the more dominant source of local news and public affairs programming, cable functions as the "gatekeeper" to broadcast television, as we have noted above. (In the *TV Ownership Order* we concluded that cable would not count as an independent local voice for the duopoly rule because there was an absence of factual data in the record indicating that cable is a substitute for broadcast television.) Cable/TV combinations thus would represent the consolidation of the only participants in

the video market for local news and public affairs programming, and would therefore compromise diversity.

94. Opponents of rule retention argue that cable does not control the content of its PEG channels and, therefore, contend that cable/TV combinations do not threaten diversity at the local level. However, PEG programming typically is not the cable programming that provides the closest substitute for broadcast local news and public affairs programming. The cable programming that is the closest substitute for such broadcast programming is originated by local cable systems. NCTA suggests that it is the efficiencies and synergies that could be derived from combining just this type of programming that makes the combinations desirable, and, in fact, contends that these efficiencies and synergies would enable combinations to produce more local news and public affairs programming, perhaps targeted at niche markets. Such cable/TV combinations, however, would erode the number of *independent* local news and public affairs voices in the market. As CME explains, "[e]ven if the common owner created a local cable news station, it would not be providing a diverse source of local news programming because of the common ownership."

95. The television industry has just begun adapting to the recent relaxation of our local television ownership rule. Further consolidation of local television broadcast stations will reduce the number of independent voices providing local news and public affairs programming. Prudence dictates that we monitor and ascertain the impact of these changes on diversity and competition before relaxing the cable/TV cross-ownership rule.

F. Experimental Broadcast Stations

1. Regulatory History

96. The multiple ownership rule for experimental broadcast stations was initially adopted in 1946. It generally limited ownership to one station. An exception is allowed when a showing is made that the program of research requires the licensing of two or more separate stations. In 1963 this rule was redesignated as 47 CFR 74.134. The rule currently reads:

§ 74.134 Multiple ownership. No persons (including all persons under common control) shall control, directly or indirectly, two or more experimental broadcast stations unless a showing is made that the program of research requires a licensing of two or more separate stations.

2. Comments

97. Only one comment was filed. NAB recommends repeal of this rule stating that broadcast auxiliary facilities are facing regulatory change and dislocation and, accordingly, there is now ever greater need for responsible use of experimental stations to develop solutions to these problems. While supporting elimination of what it characterizes as "this arbitrary restriction," it urges the Commission to ensure that such stations not endanger the interference-free service provided by other broadcasters.

3. Discussion

98. The rules authorizing experimental broadcast facilities seek to encourage experimentation and innovation in the provision of broadcast service to the public. A license for an experimental broadcast station will be issued for the purposes of carrying on research and experimentation for the development and advancement of new broadcast technology, equipment, systems or services which are more extensive or require other modes of transmission than can be accomplished by using a licensed broadcast station under an experimental authorization (47 CFR 74.102) Uses of experimental broadcast stations.). Most of the related rules are intended to prevent interference to existing services.

99. Experimental broadcast licenses are also subject to a broad variety of operating and reporting requirements, as well as a requirement that prohibits their commercial use. The licensee of an experimental broadcast station may make no charges nor ask for any payment, directly or indirectly, for the production or transmission of any programming or information used for experimental broadcast purposes (47 CFR 74.182(b)). Nor may it transmit program material unless it is necessary to the experiments being conducted, and no regular program service may be broadcast unless specifically authorized (47 CFR 74.182(a)). These commercial restrictions prevent entities from exploiting an experimental broadcast station for commercial purposes while functioning under the guise of an experimental authorization. The supplementary statement to be filed with an application for a construction permit (47 CFR 74.112), supplementary reports filed with an application for renewal of license (47 CFR 74.113), and the requirement to make a satisfactory showing of compliance with the general requirements of the Communications Act of 1934, as amended, to satisfy the licensing requirement (47 CFR 74.131),

allow for the oversight necessary to protect the goals of competition and diversity.

100. We find that elimination of the rule will have no adverse impact on our diversity and competition goals. Repeal of this multiple ownership rule would not affect the Commission's ability to ensure that experimental stations are used solely for their avowed purposes, which is separately covered under 47 CFR 74.102. Neither would it imply that any petitioner will necessarily be able to control multiple frequencies, since a license of an experimental broadcast station will not authorize the exclusive use of any frequency, under 47 CFR 74.131. The multiple ownership rule for experimental broadcast stations appears to have been originally adopted to limit the opportunities for the commercial use of experimental stations. The early history of the Federal Radio Commission and, later, the Federal Communications Commission with regard to commercial use of experimental stations demonstrates an ambivalence with regard to such use of these stations. The FRC initially permitted commercial use but, in 1933, prohibited any further commercial use of such stations. The FCC also initially prohibited their commercial use, then, in 1935, permitted some commercial use, and, still later (1936) again prohibited their commercial use. Rules for experimental stations adopted in the late 1930s, were intended to prevent commercial operations from predominating and interfering with experimentation. Our current rules prohibit the licensee of an experimental broadcast station from making charges or asking for payment, directly or indirectly, for the production or transmission of any programming or information used for experimental broadcast purposes.

101. We believe that the current requirement that such stations operate for research purposes and the proscriptions on the broadcast of a regular program service and the imposition of charges for the transmission of programming or information on experimental broadcast stations are sufficient to assure that, even absent the multiple ownership rule, licensees do not, under the guise of experimentation, obtain sufficient experimental stations to create, *sub rosa*, commercial broadcast services. These stations operate for research purposes and, thus, do not compete in the marketplace for programming or advertising and existing rules will provide safeguards against abuse in the absence of the experimental station multiple ownership rule. There existing

no competitive bar to the elimination of the multiple ownership rule applicable to them, we believe that the multiple ownership rule governing experimental broadcast stations may no longer be in the public interest. We will issue an *NPRM* proposing elimination of the rule.

V. Constitutional Issues

102. Commenters raised Constitutional arguments with respect to two of our rules. The newspaper/broadcast cross-ownership rule is objected to by several commenters on the grounds that it violates the First Amendment. Additionally, both that rule and the dual network rule are said to discriminate. In the case of the newspaper/broadcast cross-ownership rule, the discrimination is alleged to be between newspaper owners and other media owners. The dual network rule is claimed to discriminate against broadcast networks as opposed to cable networks as it allows mergers between broadcast and cable networks but not between broadcast networks themselves.

As an initial matter, our newspaper/broadcast cross-ownership rule has already been sustained by the Supreme Court. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978). Beyond that, it is well-established that a content-neutral regulation, such as the subject rule, will be sustained against claims that it violates the First Amendment if: (1) It advances important governmental interests unrelated to the suppression of free speech; and (2) does not burden substantially more speech than necessary to further those interests (the "O'Brien test"). *Turner II*, 520 U.S. at 189, citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968).

As we noted previously, the Supreme Court has determined that the preservation of media diversity is a government interest that is not only important, but is of the highest order (*Turner I*, 512 U.S. at 663; *Turner II*, 520 U.S. at 190), and is unrelated to the suppression of free speech. Therefore, the rule meets the first prong of the *O'Brien* test. Even were one to conclude that it confines free speech of newspaper owners by limiting their ownership of co-located broadcast stations, that burden is the minimum necessary to accomplish the diversity goal. It does not prevent newspaper publishers from owning broadcast outlets. It does not prevent them from entering into joint venture agreements with broadcasters in their community. Rather, it simply precludes them from owning—and therefore having ultimate editorial control over—broadcast and

newspaper outlets in the same community due to the impact of such common ownership on, especially, local viewpoint diversity. Accordingly, we believe that the newspaper/broadcast cross-ownership rule, to the extent it burdens free speech at all, does so to the minimum extent necessary. It therefore passes the constitutional test for such rules.

As to commenters' claims of discrimination, the Supreme Court has repeatedly held that "a classification neither involving fundamental rights nor proceeding along suspect lines * * * cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State University v. American Association of University Professors*, *Central State University*, (per curiam), 526 U.S. 124, 119 S.Ct. 1162, 1163 (1999), citing *Heller v. Doe*, 509 U.S. 312, 319–321, (1993), *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313–314 (1993), *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). We do not concede that a fundamental right is involved in the instant matter. It is well established that there is no unbridgeable First Amendment right to a broadcast license. See, e.g., *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 798–802 (1978); *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 101 (1973); *United States v. Weiner*, 701 F.Supp. 14 (U.S.D.C. Mass., 1988). As we noted above, protecting media diversity has been determined by the Supreme Court to be a governmental interest of the "highest order." We believe that the classifications inherent in both the newspaper/broadcast and cable/television cross-ownership restrictions are, under current conditions, necessary to promote that governmental interest and, therefore, do not violate the rights of any party to equal protection of the law.

VI. Conclusion

103. In this, the first of our biennial reviews of our broadcast ownership rules, we conclude that some regulations are no longer in the public interest in their current forms as a result of competition. These are: The dual network rule and the limitation on the multiple ownership of experimental broadcast stations. We will also adopt an *NPRM* to explore the manner in which we define radio markets and determine both the number of stations in a radio market and the number of radio stations owned by a party in such a market. We are, therefore, proposing to

modify or eliminate these rules in *NPRMs* we will issue. We also conclude, however, that, for now, the other ownership rules considered in this proceeding warrant retention. We will, of course, revisit our ownership rules biennially, as directed by the 1996 Act. Our future biennial reviews will be informed by the impact of the substantial changes we made to our television “duopoly” and “one-to-a-market” rules this past August.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00-17670 Filed 7-12-00; 8:45 am]

BILLING CODE 6712-01-U

FEDERAL COMMUNICATIONS COMMISSION

[WT Docket No 95-5; FCC 00-76]

Streamlining the Commission's Antenna Structure Clearance Procedure

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: In this document, the Commission responds to filings in WT Docket 95-5. We dismiss as moot a petition for partial reconsideration filed by the Wireless Cable Association International, Inc., deny a petition for partial reconsideration filed by Comp Comm, Inc., and grant in part and deny in part a petition for declaratory ruling filed by Teletech, Inc. In doing so, we conclude that the antenna structure registration procedures adopted in 1996 effectively allow us to meet our statutory responsibilities. In response to the petition for declaratory ruling, we provide clarification with respect to situations in which two or more parties locate facilities on the same tower. The effect is to retain in their entirety the rules adopted in a previous final rule.

FOR FURTHER INFORMATION CONTACT: Jamison Prime, Wireless Telecommunications Bureau, Public Safety and Private Wireless Division, (202) 418-0680.

SUPPLEMENTARY INFORMATION: The Memorandum Opinion and Order on Reconsideration was adopted March 1 and released March 8, 2000. The document is available, in its entirety, for inspection and copying during normal business hours in the FCC Reference Center, (Room CY-A257), 445 12th Street, SW, Washington, DC 20554. It may also be purchased from the Commission's copy contractor, International Transcription

Services, Inc. (ITS, Inc.), 1231 20th Street, NW, Washington, DC 20036, (202) 857-3800. In addition, it is available on the Commission's website at <http://www.fcc.gov/Bureaus/Wireless/Orders/2000/fcc00076.pdf>.

Summary of the Memorandum Opinion and Order on Reconsideration

1. Section 303(q) of the Communications Act of 1934, as amended, vests in the Federal Communications Commission (FCC) authority to require painting and/or lighting of antenna structures that might constitute a hazard to air navigation. Part 17 of the Commission's Rules contains the procedures the FCC uses to identify structures which might pose an air safety hazard and by which owners register their antenna structures with the FCC.

2. The Memorandum Opinion and Order on Reconsideration addresses several filings the FCC received in response to the original Report and Order issued in WT Docket 95-5; a petition for declaratory ruling and a separate petition for partial reconsideration both requesting that the Commission establish a specific accuracy standard for obtaining antenna structure data to be filed with the FCC; a petition for partial reconsideration requesting that the Commission adopt relaxed procedures for Multipoint Distribution Service (MDS) and Instructional Television Fixed Service (ITFS) licensees whose licensing data differ from data submitted by antenna structure owners on whose structures the MDS and ITFS licensees are located; and a petition requesting clarification of the FCC's registration requirements in circumstances involving multiple antenna structures on building rooftops and concerning cases of two or more parties located on the same antenna tower.

3. We conclude that a specific accuracy standard is unnecessary because the requirement that antenna structure owners first obtain a study from the Federal Aviation Administration ensures reliability of the antenna structure site data and promotes air safety. Additionally, we find that the request that the FCC adopt relaxed license correction procedures for MDS and ITFS licensees whose licensing data differ from data submitted by antenna structure owners on whose structures the MDS and ITFS licensees are located is moot, and therefore we do not modify these procedures. Any discrepancies between licensing data and antenna structure registration data would have occurred

when owners of existing antenna structures (including those structures on which MDS and ITFS licensees were sited) registered with the FCC. The time period for registering these existing structures ended on June 30, 1998.

4. We uphold the procedures adopted in 1995 that require all antenna structures meeting the registration criteria—including multiple structures atop the same rooftop—to be individually registered. Because the Commission's rules require a single registration for each antenna tower, we clarify that in those situations in which an owner of a supporting tower structure permits a third party to add a surmounting antenna, we will consider the owner of the supporting tower remains the “owner” for purposes of the FCC's antenna structure registration purposes. Thus, we grant the petition that requested this clarification.

5. Accordingly, it is ordered that, pursuant to sections 4(i) and 303(q) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i) and 303(q), and sections 1.2, 1.3 and 1.429 of the Commission's Rules, 47 CFR 1.2, 1.3 and 1.429, that the petitions filed in WT Docket 95-5 are granted in part and dismissed in part.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00-17668 Filed 7-12-00; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC-00-36-B (Auction No. 36); DA 00-1388]

Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Service Frequencies in the Lower 80 Channels

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces the procedures and minimum opening bids for the upcoming auction of licenses for the 800 MHz Specialized Mobile Radio Service Lower 80 Channels (“Auction No. 36”). It also announces that the beginning date of Auction No. 36 will be rescheduled to November 1, 2000. It was initially scheduled for September 13, 2000.

DATES: Auction No. 36 will begin November 1, 2000.

FOR FURTHER INFORMATION CONTACT: *Auctions and Industry Analysis Division:* M. Nicole Oden, Legal Branch

at (202) 418-0660, Kathy Garland or Bob Reagle, Auctions Operations Branch at (717) 338-2888; *Commercial Wireless Division*: JoAnn Epps, Licensing and Technical Analysis Branch at (202) 418-1342; *Media Contact*: Meribeth McCarrick at (202) 418-0654.

SUPPLEMENTARY INFORMATION: This is a summary of a public notice released June 23, 2000. The complete text of the public notice, including attachments, is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257), 445 12th Street, SW, Washington, D.C. 20554. It may also be purchased from the Commission's copy contractor, International Transcription Services, Inc. (ITS, Inc.) 1231 20th Street, NW, Washington, D.C. 20036, (202) 857-3800. It is also available on the Commission's web site at <http://www.fcc.gov>.

List of Attachments Available at the FCC

Attachment A—Licenses to be Auctioned
Attachment B—Auction Seminar Registration Form
Attachment C—Electronic Filing and Review of the FCC Form 175
Attachment D—Completing the FCC Form 175
Attachment E—Completing the FCC Form 159
Attachment F—Remote Bidding Software Order Form
Attachment G—Exponential Smoothing Formula and Calculation
Attachment H—Accessing the FCC Network
Attachment I—Summary of Documents Addressing the Anti-Collusion Rules

I. General Information

A. Introduction

1. This public notice announces the procedures and minimum opening bids for the upcoming auction of licenses for the 800 MHz Specialized Mobile Radio Service Lower 80 Channels ("Auction No. 36"). On March 23, 2000, in accordance with the Balanced Budget Act, Public Law 105-33, 111 Stat. 251 (1997) ("Balanced Budget Act") the Wireless Telecommunications Bureau ("Bureau") released a public notice seeking comment on the establishment of reserve prices or minimum opening bids and the procedures to be used in Auction No. 36. See Auction of Licenses for 800 MHz Specialized Mobile Radio (SMR) Frequencies in the Lower 80 Channels Scheduled for September 13, 2000, (*Auction No. 36 Comment Public Notice*) 65 FR 17272 (March 31, 2000). The Bureau received four comments and three reply comments in response to the *Auction No. 36 Comment Public Notice*.

2. The *Auction No. 36 Comment Public Notice* announced that Auction

No. 36 would begin on September 13, 2000. In this public notice, the Bureau announces that the beginning date of Auction No. 36 will be rescheduled to November 1, 2000.

i. Background of Proceeding

3. On December 15, 1995, the Federal Communications Commission (FCC or Commission) released *Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making (*800 MHz First Report and Order*), 61 FR 6212 (February 16, 1996). This document established geographic area licensing, auction and service rules for the "upper 200" 800 MHz SMR channels and set forth proposals for new licensing rules and auction procedures for the "lower 230" 800 MHz SMR channels. On July 10, 1997, the Commission released a Second Report and Order in the same proceeding (*800 MHz Second Report and Order*), 62 FR 41190 (July 31, 1997), that resolved pending issues and established technical and operational rules for the "lower 230" 800 MHz SMR channels. On October 8, 1999, the Commission released a Memorandum Opinion and Order on Reconsideration (*800 MHz Order on Reconsideration*), 64 FR 71042 (December 20, 1999) that completed the implementation of a new licensing framework for the 800 MHz SMR service.

ii. Licenses To Be Auctioned

4. The licenses available in this auction consist of sixteen non-contiguous 5 channel blocks (0.25 MHz) in each of 172 Economic Areas (EAs) and 3 EA-like areas, covering the United States, possessions or territories in the Northern Mariana Islands and Guam, American Samoa, the United States Virgin Islands and Puerto Rico. These licenses are listed in this public notice under Attachment A. The following table contains the Block/Frequency Band Limits Cross-Reference List for the 800 SMR Lower 80 Channels:

800 MHz SMR LOWER 80 CHANNELS [856-860 MHz Band]

Channel block	Channel No.	Base station frequencies (channel centers)
G	201, 241, 281, 321, 361	856-860.0125
H	202, 242, 282, 322, 362	856-860.0375

800 MHz SMR LOWER 80 CHANNELS—Continued [856-860 MHz Band]

Channel block	Channel No.	Base station frequencies (channel centers)
I	203, 243, 283, 323, 363	856-860.0625
J	204, 244, 284, 324, 364	856-860.0875
K	205, 245, 285, 325, 365	856-860.1125
L	206, 246, 286, 326, 366	856-860.1375
M	207, 247, 287, 327, 367	856-860.1625
N	208, 248, 288, 328, 368	856-860.1875
O	221, 261, 301, 341, 381	856-860.5125
P	222, 262, 302, 342, 382	856-860.5375
Q	223, 263, 303, 343, 383	856-860.5625
R	224, 264, 304, 344, 384	856-860.5875
S	225, 265, 305, 345, 385	856-860.6125
T	226, 266, 306, 346, 386	856-860.6375
U	227, 267, 307, 347, 387	856-860.6625
V	228, 268, 308, 348, 388	856-860.6875

Note: The allocation of channels available in spectrum blocks G through V are different in the U.S./Mexico and U.S./Canada border areas than noted in the prior table. The tables that follow indicate the channels assignable in the border areas. Also note that the channels listed for the U.S./Mexico border area are offset 12.5 kHz lower in frequency than the same channel as specified in § 90.613 of the Commission's rules.

UNITED STATES-MEXICO BORDER AREA, SMR CATEGORIES. [EA-Based SMR Category (83 Channels)]

Spectrum block	Offset channel Nos.
G	229-272-349
H	230-273-350
I	231-274-351
J	232-278-352
K	233-279-353
L	234-280-354
M	235-309-358
N	236-310-359
O	237-311-360
P	238-312-389
Q	239-313-390
R	240-314-391
S	269-318-392
T	270-319-393
U	271-320-394
V	228-268-308-348-388

UNITED STATES-CANADA BORDER
AREA, SMR CATEGORIES
[Region 7 & 8]—SMR Category (172
Channels)

Spectrum block	Channel Nos.
G	155-229-269-309-349
H	156-230-270-310-350
I	157-231-271-311-351
J	158-232-272-312-352
K	159-233-273-313-353
L	160-234-274-314-354
M	195-235-275-315-355
N	196-236-276-316-356
O	197-237-277-317-357
P	198-238-278-318-358
Q	199-239-279-319-359
R	200-240-280-320-360
S	225-265-305-345-385
T	226-266-306-346-386
U	227-267-307-347-387
V	228-268-308-348-388

B. Scheduling

i. Bifurcation

5. Some commenters responding to the *Auction No. 36 Comment Public Notice* argued that there should be no overlap between Auctions No. 34 and 36. The Bureau agrees that it may be burdensome for some bidders to participate in coinciding auctions. However, there was no consensus among commenters on how to resolve this potential problem. For reasons of administrative convenience, the Bureau chooses to maintain the bifurcated schedule for Auctions No. 34 and 36.

6. In addition, for reasons of administrative convenience and effective auction management, we will change the date for Auction No. 36, moving the date back to November 1, 2000. This change will not only provide for more efficient management of the auction, it will provide additional time between Auctions No. 34 and 36 to permit all interested parties, including incumbents and small businesses, sufficient time in which to evaluate the outcome of Auction No. 34 and prepare for Auction No. 36.

ii. Pacific Wireless' Petition for Reconsideration

7. Pacific Wireless seeks reconsideration of the Bureau's scheduling of Auctions No. 34 and 36 prior to the conclusion of the mandatory negotiation period for the relocation of incumbent licensees from the upper 200 channels, scheduled to conclude on December 4, 2000. SBT and PCIA also support postponement of the auctions, however, they advocate delay until the completion of the involuntary relocation phase that is scheduled to commence on December 4, 2000. Pacific Wireless

contends that holding the auctions prior to December 4, 2000, contravenes the Commission's prior decisions and is contrary to the interests of incumbents. We disagree with this contention and deny Pacific Wireless's Petition for Reconsideration. The *800 MHz Second Report and Order* stated that the licensing of the lower channels would not occur until "incumbents have had the opportunity to relocate to the lower channels." As Nextel and Southern correctly note, prior to Auction No. 36, incumbents on the upper 200 channels will have had approximately 18 months to relocate their systems. Although we recognize that upper channel incumbents are currently in the second phase of the three-phase process the Commission established, we believe that 18 months provides a reasonable opportunity for incumbents to relocate.

8. We agree with those commenters who stated that going forward with Auctions No. 34 and 36 will facilitate the relocation process by providing EA licensees with additional relocation spectrum and incumbents with a more certain picture of their relocation options. Accordingly, we will not delay the start of Auction No. 36 until the close of the mandatory negotiation period for relocation of incumbent licensees on the upper 200 channels.

C. Rules and Disclaimers

i. Relevant Authority

9. Prospective bidders must familiarize themselves thoroughly with the Commission's rules relating to the 800 MHz band, contained in title 47, part 90 of the *Code of Federal Regulations*, and those relating to application and auction procedures, contained in title 47, part 1 of the *Code of Federal Regulations*.

10. Prospective bidders must also be thoroughly familiar with the procedures, terms and conditions (collectively, "Terms") contained in this public notice; the *Auction No. 34 Comment Public Notice*, *800 MHz First Report and Order*, *800 MHz Second Report and Order*, and the *800 MHz Order on Reconsideration*.

11. The terms contained in the Commission's rules, relevant orders and public notices are not negotiable. The Commission may amend or supplement the information contained in our public notices at any time, and will issue public notices to convey any new or supplemental information to bidders. It is the responsibility of all prospective bidders to remain current with all Commission rules and with all public notices pertaining to this auction. Copies of most Commission documents,

including public notices, can be retrieved from the FCC Internet node via anonymous ftp @ftp.fcc.gov or the FCC Auctions World Wide Web site at <http://www.fcc.gov/wtb/auctions>. Additionally, documents may be obtained for a fee by calling the Commission's copy contractor, International Transcription Service, Inc. (ITS), at (202) 314-3070. When ordering documents from ITS, please provide the appropriate FCC number (for example, FCC 99-270 for the *800 MHz Order on Reconsideration*).

ii. Prohibition of Collusion

12. To ensure the competitiveness of the auction process, the Commission's rules prohibit applicants for the same geographic license area from communicating with each other during the auction about bids, bidding strategies, or settlements. This prohibition begins with the filing of short-form applications and ends on the down payment due date. Bidders competing for licenses in the same geographic license areas are encouraged not to use the same individual as an authorized bidder. A violation of the anti-collusion rule could occur if an individual acts as the authorized bidder for two or more competing applicants, and conveys information concerning the substance of bids or bidding strategies between the authorized bidders is authorized to represent in the auction. Also, if the authorized bidders are different individuals employed by the same organization (e.g., law firm or consulting firm), a violation could similarly occur. In such a case, at a minimum, applicants should certify on their applications that precautionary steps have been taken to prevent communication between authorized bidders and that applicants and their bidding agents will comply with the anti-collusion rule.

13. However, the Bureau cautions that merely filing a certifying statement as part of an application will not outweigh specific evidence that collusive behavior has occurred, nor will it preclude the initiation of an investigation when warranted. Applicants that apply to bid for "all markets" would be precluded from communicating with all other applicants after filing the FCC Form 175 short-form application. However, applicants may enter into bidding agreements before filing their FCC Form 175, as long as they disclose the existence of the agreement(s) in their Form 175. If parties agree in principle on all material terms prior to the short-form filing deadline, those parties must be identified on the short-form

application under § 1.2105(c), even if the agreement has not been reduced to writing. If the parties have not agreed in principle by the filing deadline, an applicant would not include the names of those parties on its application, and may not continue negotiations with other applicants for the same geographic license areas. By signing their FCC Form 175 short form applications, applicants are certifying their compliance with § 1.2105(c). In addition, § 1.65 of the Commission's rules requires an applicant to *maintain* the accuracy and completeness of information furnished in its pending application and to notify the Commission within 30 days of any substantial change that may be of decisional significance to that application. Thus, § 1.65 requires an auction applicant to notify the Commission of any violation of the anti-collusion rules immediately upon learning of such violation. A summary listing of documents from the Commission and the Bureau addressing the application of the anti-collusion rules may be found in Attachment I.

iii. Due Diligence

14. Potential bidders should be aware that certain applications (including those for modification), waiver requests, petitions to deny, petitions for reconsideration, and applications for review are pending before the Commission that relate to particular applicants or incumbent licensees. In addition, certain decisions reached in the SMR proceeding are subject to judicial appeal and may be the subject of additional reconsideration or appeal. We note that resolution of these matters could have an impact on the availability of spectrum for EA licensees in the 800 MHz SMR general category and upper bands. While the Commission will continue to act on pending applications, requests and petitions, some of these matters may not be resolved by the time of the auction. Potential bidders are solely responsible for investigating and evaluating the degree to, which such pending matters may affect spectrum availability in areas where they seek EA licenses. Potential bidders are strongly encouraged to conduct their own research prior to Auction No. 36, and encouraged to continue such research during the auction, in order to determine the existence of pending proceedings that might affect their decisions regarding participation in the auction.

15. To aid potential bidders, the Commission will release a subsequent public notice listing pending matters that relate to licenses or applications that affect the 800 MHz SMR general

category and upper bands. The Commission will make available for public inspection the pleadings and related filings in those matters pending before the Commission.

16. In addition, potential bidders may research the Bureau's licensing databases on the World Wide Web in order to determine which frequencies are already licensed to incumbent licensees. Because some of our incumbent 800 MHz licensing records have not yet been converted to the Bureau's new Universal Licensing System (ULS), potential bidders may have to select other databases to perform research for the frequency(s) of interest. The research options will allow potential bidders to download licensing data, as well as to perform queries online.

17. 800 MHz band Incumbent Licenses: Licensing records for the 800 MHz band are contained in the Bureau's Land Mobile database and may be researched on the internet at <http://www.fcc.gov/wtb> by selecting the "Databases" link at the top of the page. Potential bidders may download a copy of the licensing database by selecting "Download the Wireless Databases" and choosing the appropriate files under "Land Mobile Database Files—47 CFR part 90." Alternatively, potential bidders may query the Bureau's licensing records online by selecting "Search the Wireless Databases Online."

18. The Commission makes no representations or guarantees regarding the accuracy or completeness of information that has been provided by incumbent licensees and incorporated into the databases. Potential bidders are strongly encouraged to physically inspect any sites located in or near the geographic area for which they plan to bid.

19. Potential bidders should direct questions regarding the search capabilities described to the FCC Technical Support Hotline at (202) 414-1250 (voice) or (202) 414-1255 (TTY), or via email at ulscmm@fcc.gov. The hours of service for the hotline are 7 a.m. to 10 p.m. EST, Monday through Friday, 8 a.m. to 7 p.m. EST, Saturday, and 12 p.m. to 6 p.m. EST, Sunday. In order to provide better service to the public, all calls to the hotline are recorded.

iv. Incumbent Licensees

20. Potential bidders are reminded that there are incumbent licensees operating on frequencies that are subject to the upcoming auction. Incumbent licensees retain the exclusive right to use those channels within their self-defined service areas. The holder of an

EA authorization thus will be required to implement its facilities to protect incumbents from harmful interference. These limitations may restrict the ability of such geographic area licenses to use certain portions of the electromagnetic spectrum or provide service to certain areas in their geographic license areas. Specifically, an EA authorization holder will be required to coordinate with the incumbent licensees by using the interference protection criteria referenced in § 90.683 and § 90.693 of the Commission's rules. However, operational agreements are encouraged between the parties. Should an incumbent lose its license, the incumbent's service area(s) will convey to the relevant authorized holder of the EA, and the authorized EA licensee will be entitled to operate within the forfeited service area(s) without being subject to further competitive bidding.

v. Bidder Alerts

21. All applicants must certify on their FCC Form 175 applications under penalty of perjury that they are legally, technically, financially and otherwise qualified to hold a license, and not in default on any payment for Commission licenses (including down payments) or delinquent on any non-tax debt owed to any Federal agency. Prospective bidders are reminded that submission of a false certification to the Commission is a serious matter that may result in severe penalties, including monetary forfeitures, license revocations, exclusion from participation in future auctions, and/or criminal prosecution.

22. The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that a FCC auction represents an opportunity to become a FCC licensee in this service, subject to certain conditions and regulations. A FCC auction does not constitute an endorsement by the FCC of any particular services, technologies or products, nor does a FCC license constitute a guarantee of business success. Applicants should perform their individual due diligence before proceeding, as they would with any new business venture.

23. As is the case with many business investment opportunities, some unscrupulous entrepreneurs may attempt to use Auction No. 36 to deceive and defraud unsuspecting investors. Common warning signals of fraud include the following: (a) The first contact is a "cold call" from a telemarketer, or is made in response to an inquiry prompted by a radio or television infomercial; (b) The offering materials used to invest in the venture

appear to be targeted at IRA funds, for example by including all documents and papers needed for the transfer of funds maintained in IRA accounts; (c) The amount of the minimum investment is less than \$25,000. (d) The sales representative makes verbal representations that: (i) the Internal Revenue Service ("IRS"), Federal Trade Commission ("FTC"), Securities and Exchange Commission ("SEC"), FCC, or other government agency has approved the investment; (ii) the investment is not subject to state or federal securities laws; or (iii) the investment will yield unrealistically high short-term profits. In addition, the offering materials often include copies of actual FCC releases, or quotes from FCC personnel, giving the appearance of FCC knowledge or approval of the solicitation. Information about deceptive telemarketing investment schemes is available from the FTC at (202) 326-2222 and from the SEC at (202) 942-7040. Complaints about specific deceptive telemarketing investment schemes should be directed to the FTC, the SEC, or the National Fraud Information Center at (800) 876-7060. Consumers who have concerns about specific 800 MHz proposals may also call the FCC Consumer Center at (888) CALL-FCC ((888) 225-5322).

vi. National Environmental Policy Act (NEPA) Requirements

24. Licensees must comply with the Commission's rules regarding the National Environmental Policy Act (NEPA). The construction of an 800 MHz facility is a federal action and the licensee must comply with the Commission's NEPA rules for each such facility. The Commission's NEPA rules require, among other things, that the licensee consult with expert agencies having NEPA responsibilities, including the U.S. Fish and Wildlife Service, the State Historic Preservation Office, the Army Corp of Engineers and the Federal Emergency Management Agency (through the local authority with jurisdiction over floodplains). The licensee must prepare environmental assessments for facilities that may have a significant impact in or on wilderness areas, wildlife preserves, threatened or endangered species or designated critical habitats, historical or archaeological sites, Indian religious sites, floodplains, and surface features. The licensee must also prepare environmental assessments for facilities that include high intensity white lights in residential neighborhoods or excessive radio frequency emission.

D. Auction Specifics

i. Auction Date

25. The auction will begin on Wednesday, November 1, 2000. The initial schedule for bidding will be announced by public notice at least one week before the start of the auction. Unless otherwise announced, bidding on all licenses will be conducted on each business day until bidding has stopped on all licenses.

ii. Auction Title

26. Auction No. 36—800 MHz SMR Lower 80 Channels

iii. Bidding Methodology

27. The bidding methodology for Auction No. 36 will be simultaneous multiple round bidding. Bidding will be permitted only from remote locations, either electronically (by computer) or telephonically.

iv. Pre-Auction Dates and Deadlines

28. These are important dates relating to Auction No. 36:

Auction Seminar—September 18, 2000
Short-Form Application (FCC FORM 175)—September 29, 2000; 6:00 p.m. EST

Upfront Payments (via wire transfer)—October 16, 2000; 6:00 p.m. EST
Orders for Remote Bidding Software—October 17, 2000; 5:30 p.m. EST

Mock Auction—October 30, 2000
Auction Begins—November 1, 2000

v. Requirements For Participation

29. Those wishing to participate in the auction must:

- Submit a short form application (FCC Form 175) electronically by 6:00 p.m. EST, September 29, 2000.
- Submit a sufficient upfront payment and a FCC Remittance Advice Form (FCC Form 159) by 6:00 p.m. EST, October 16, 2000.
- Comply with all provisions outlined in this public notice.

vi. General Contact Information

30. The following is a list of general contact information relating to Auction No. 36:

General Auction Information

General Auction Questions

Seminar Registration

Orders for Remote Bidding Software

FCC Auctions Hotline (888) 225-5322, Press Option #2 or direct (717) 338-2888; Hours of service: 8 a.m.–5:30 p.m. EST

Auction Legal Information

Auction Rules, Policies, Regulations

Auctions and Industry Analysis

Division, Legal Branch, (202) 418-0660; Commercial Wireless

Division, (202) 418-0620
Licensing Information

Rules, Policies, Regulations

Licensing Issues

Due Diligence

Incumbency Issues

Technical Support

Electronic Filing Assistance

Software Downloading

FCC Auctions Technical Support

Hotline, (202) 414-1250 (Voice),

(202) 414-1255 (TTY), Hours of

service: 7 a.m.–10:00 p.m. EST,

Monday–Friday; 8 a.m.–7:00 p.m.

EST, Saturday; 12:00 p.m.–6:00

p.m. EST, Sunday

Payment Information

Wire Transfers

Refunds

FCC Auctions Accounting Branch,

(202) 418-1995, (202) 418-2843

(Fax)

Telephonic bidding—Will be furnished only to qualified bidders

FCC Copy Contractor

Additional Copies of Commission Documents

International Transcription Services, Inc., 445 12th Street, SW Room CY-B400, Washington, DC 20554, (202) 314-3070

Press Information—Meribeth McCarrick (202) 418-0654

FCC Forms—(800) 418-3676 (outside Washington, DC), (202) 418-3676 (in the Washington Area)

FCC Internet Sites—<http://www.fcc.gov/formpage> <http://www.fcc.gov/wtb/auctions> <http://www.fcc.gov/ftp://ftp.fcc.gov>

II. Short-Form (FCC Form 175) Application Requirements

31. Guidelines for completion of the short-form (FCC Form 175) are set forth on Attachment D. The short-form application seeks the applicant's name and address, legal classification, status, bidding credit eligibility, identification of the authorization(s) sought, the authorized bidders and contact persons.

A. Ownership Disclosure Requirements (Form 175 Exhibit A)

32. All applicants must comply with the uniform part 1 ownership disclosure standards and provide information required by §§ 1.2105 and 1.2112 of the Commission's rules. Specifically, in completing Form 175, applicants will be required to file an "Exhibit A" providing a full and complete statement of the ownership of the bidding entity. The ownership disclosure standards for the short-form are set forth in § 1.2112 of the Commission's rules.

B. Consortia and Joint Bidding Arrangements (Form 175 Exhibit B)

33. Applicants will be required to identify on their short-form applications any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other agreements or understandings which relate in any way to the licenses being auctioned, including any agreements relating to post-auction market structure. *See* 47 CFR 1.2105(a)(2)(viii) and 1.2105(c)(1). Applicants will also be required to certify on their short-form applications that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bids, bidding strategies, or the particular licenses on which they will or will not bid. *See* 47 CFR 1.2105(a)(2)(ix). Where applicants have entered into consortia or joint bidding arrangements, applicants must submit an "Exhibit B" to the FCC Form 175.

34. A party holding a non-controlling, attributable interest in one applicant will be permitted to acquire an ownership interest, form a consortium with, or enter into a joint bidding arrangement with other applicants for licenses in the same geographic license area provided that (i) the attributable interest holder certify that it has not and will not communicate with any party concerning the bids or bidding strategies of more than one of the applicants in which it holds an attributable interest, or with which it has formed a consortium or entered into a joint bidding arrangement; and (ii) the arrangements do not result in a change in control of any of the applicants. While the anti-collusion rules do not prohibit non-auction related business negotiations among auction applicants, bidders are reminded that certain discussions or exchanges could broach on impermissible subject matters because they may convey pricing information and bidding strategies.

C. Small Business Bidding Credits (Form 175 Exhibit C)

i. Eligibility

35. Bidding credits are available to small businesses and very small businesses as defined in 47 CFR 90.912(b). For purposes of determining which entities qualify as very small businesses or small businesses, the Commission will consider the gross revenues of the applicant, its controlling interests, and the affiliates of the applicant and its controlling interests. The Commission does not impose

specific equity requirements on controlling interests. Once principals or entities with a controlling interest are determined, only the revenues of those principals or entities, the applicant and their affiliates will be counted in determining small business eligibility. The term "control" includes both *de facto* and *de jure* control of the applicant. Typically, ownership of at least 50.1 percent of an entity's voting stock evidences *de jure* control. *De facto* control is determined on a case-by-case basis. The following are some common indicia of control:

- The entity constitutes or appoints more than 50 percent of the board of directors or management committee;
- The entity has authority to appoint, promote, demote, and fire senior executives that control the day-to-day activities of the licensee; or
- The entity plays an integral role in management decisions.

36. A consortium of small businesses, or very small businesses is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of small or very small business in § 90.912. Thus, each consortium member must disclose its gross revenues along with those of its affiliates, controlling interests, and controlling interests' affiliates. We note that although the gross revenues of the consortium members will not be aggregated for purposes of determining eligibility for small or very small business credits, this information must be provided to ensure that each individual consortium member qualifies for any bidding credit awarded to the consortium.

ii. Application Showing

37. Applicants should note that they will be required to file supporting documentation as Exhibit C to their FCC Form 175 short form applications to establish that they satisfy the eligibility requirements to qualify as a small business or very small business (or consortia of small or very small businesses) for this auction. Specifically, for Auction No. 36, applicants applying to bid as small or very small businesses (or consortia of small or very small businesses) will be required to disclose on Exhibit C to their FCC Form 175 short-form applications, separately and in the aggregate, the gross revenues for the preceding three years of each of the following: (i) The applicant; (ii) the applicant's affiliates; (iii) the applicant's controlling interests; and (iv) the affiliates of the applicant's controlling interests. Certification that

the average gross revenues for the preceding three years do not exceed the applicable limit is not sufficient. If the applicant is applying as a consortium of very small or small businesses, this information must be provided for each consortium member.

iii. Bidding Credits

38. Applicants that qualify under the definitions of small business, and very small business (or consortia of small or very small businesses) as set forth in 47 CFR 90.912, are eligible for a bidding credit that represents the amount by which a bidder's winning bids are discounted. The size of an 800 MHz lower band bidding credit depends on the average gross revenues for the preceding three years of the bidder and its controlling interests and affiliates:

- A bidder with average gross revenues of not more than \$15 million for the preceding three years receives a 25 percent discount on its winning bids for 800 MHz lower band licenses ("small business");
- A bidder with average gross revenues of not more than \$3 million for the preceding three years receives a 35 percent discount on its winning bids for 800 MHz lower band licenses ("very small business").

39. Bidding credits are not cumulative: qualifying applicants receive either the 25 percent or the 35 percent bidding credit, but not both.

40. Bidders in Auction No. 36 should note that unjust enrichment provisions apply to winning bidders that use bidding credits and subsequently assign or transfer control of their licenses to an entity not qualifying for the same level of bidding credit. *See* 47 CFR 90.910(b). Finally, bidders should also note that there are no installment payment plans in Auction No. 36.

D. Other Information (Form 175 Exhibits D and E)

41. Applicants owned by minorities or women, as defined in 47 CFR 1.2110(b)(2), may attach an exhibit (Exhibit D) regarding this status. This applicant status information is collected for statistical purposes only and assists the Commission in monitoring the participation of "designated entities" in its auctions. Applicants wishing to submit additional information may do so in Exhibit E (Miscellaneous Information) to the FCC Form 175.

E. Minor Modifications to Short-Form Applications (FCC Form 175)

42. After the short-form filing deadline (September 29, 2000), applicants may make only minor changes to their FCC Form 175

applications. Applicants will not be permitted to make major modifications to their applications (e.g., change their license selections or proposed service areas, change the certifying official or change control of the applicant or change bidding credits). See 47 CFR 1.2105. Permissible minor changes include, for example, deletion and addition of authorized bidders (to a maximum of three) and revision of exhibits. Applicants should make these changes on-line, and submit a letter summarizing the changes to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW, Room 4-A760, Washington, DC 20554. A separate copy of the letter should be submitted to M. Nicole Oden, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW, Room 4-A337, Washington, D.C. 20554, briefly summarizing the changes. Questions about other changes should be directed to M. Nicole Oden at (202) 418-0660.

F. Maintaining Current Information in Short-Form Applications (FCC Form 175)

43. Applicants have an obligation under 47 CFR 1.65, to maintain the completeness and accuracy of information in their short-form applications. Amendments reporting substantial changes of possible decisional significance in information contained in FCC Form 175 applications, as defined by 47 CFR 1.2105(b)(2), will not be accepted and may in some instances result in the dismissal of the FCC Form 175 application.

III. Pre-Auction Procedures

A. Auction Seminar

44. On Monday, September 18, 2000, the FCC will sponsor a free seminar for Auction No. 36 at the Federal Communications Commission, located at 445 12th Street, SW, Washington, D.C. The seminar will provide attendees with information about pre-auction procedures, conduct of the auction, FCC remote bidding software, and the 800 MHz band service and auction rules. The seminar will also provide an opportunity for prospective bidders to ask questions of FCC staff.

45. To register, complete the registration form (Attachment B) and submit it by Friday, September 15, 2000. Registrations are accepted on a first-come, first-served basis.

B. Short-Form Application (FCC Form 175)—Due September 29, 2000

46. In order to be eligible to bid in this auction, applicants must first submit a FCC Form 175 application. This application must be submitted electronically and received at the Commission by 6:00 p.m. EST on September 29, 2000. Late applications will not be accepted.

47. There is no application fee required when filing a FCC Form 175. However, to be eligible to bid, an applicant must submit an upfront payment. See Part III.D.

i. Electronic Filing

48. Applicants must file their FCC Form 175 applications electronically. See 47 CFR 1.2105(a). Applications may generally be filed at any time beginning at noon on September 18, 2000 until 6:00 p.m. EST on September 29, 2000. Applicants are strongly encouraged to file early, and are responsible for allowing adequate time for filing their applications. Applicants may update or amend their electronic applications multiple times until the filing deadline on September 29, 2000.

49. Applicants must press the "Submit Form 175" button on the "Submit" page of the electronic form to successfully submit their FCC Forms 175. Any form that is not submitted will not be reviewed by the FCC. Information about accessing the FCC Form 175 is included in Attachment C. Technical support is available at (202) 414-1250 (voice) or (202) 414-1255 (text telephone (TTY)); the hours of service are 7 a.m. to 10 p.m. EST, Monday through Friday, 8 a.m. to 7 p.m. EST, Saturday, and 12 p.m. to 6 p.m. EST, Sunday.

ii. Completion of the FCC Form 175

50. Applicants should carefully review 47 CFR 1.2105, and must complete all items on the FCC Form 175. Instructions for completing the FCC Form 175 are in Attachment D of this public notice. Applicants are encouraged to begin preparing the required attachments for FCC Form 175 prior to submitting the form. Attachments C and D provide information on the required attachments and appropriate formats.

iii. Electronic Review of FCC Form 175

51. The FCC Form 175 electronic review software may be used to review and print applicants' FCC Form 175 information. Applicants may also view other applicants' completed FCC Form 175s after the filing deadline has passed and the FCC has issued a public notice explaining the status of the applications.

For this reason, it is important that applicants do not include their Taxpayer Identification Numbers (TINs) on any Exhibits to their FCC Form 175 applications. There is no fee for accessing this system. See Attachment C for details on accessing the review system.

C. Application Processing and Minor Corrections

52. After the deadline for filing the FCC Form 175 applications has passed, the FCC will process all timely submitted applications to determine which are acceptable for filing, and subsequently will issue a public notice identifying: (i) those applications accepted for filing (including FCC account numbers and the licenses for which they applied); (ii) those applications rejected; and (iii) those applications which have minor defects that may be corrected, and the deadline for filing such corrected applications.

53. As described more fully in the Commission's rules, after the September 29, 2000, short form-filing deadline, applicants may make only minor corrections to their FCC Form 175 applications. Applicants will not be permitted to make major modifications to their applications (e.g., change their license selections, change the certifying official, change control of the applicant, or change bidding credit eligibility).

D. Upfront Payments—Due October 16, 2000

54. In order to be eligible to bid in the auction, applicants must submit an upfront payment accompanied by a FCC Remittance Advice Form (FCC Form 159). After completing the FCC Form 175, filers will have access to an electronic version of the FCC Form 159 that can be printed and faxed to Mellon Bank in Pittsburgh, PA. All upfront payments must be received at Mellon Bank, by 6:00 p.m. EST on October 16, 2000.

Please note that:

- All payments must be made in U.S. dollars.
- All payments must be made by wire transfer.
- Upfront payments for Auction No. 36 go to a lockbox number different from the ones used in previous FCC auctions, and different from the lockbox number to be used for post-auction payments.
- Failure to deliver the upfront payment by the October 16, 2000 deadline will result in dismissal of the application and disqualification from participation in the auction.

i. Making Auction Payments by Wire Transfer

55. Wire transfer payments must be received by 6:00 p.m. EST on October 16, 2000. To avoid untimely payments, applicants should discuss arrangements (including bank, closing schedules) with their banker several days before they plan to make the wire transfer, and allow sufficient time for the transfer to be initiated and completed before the deadline. Applicants will need the following information:

ABA Routing Number: 043000261

Receiving Bank: Mellon Pittsburgh

BNF: FCC/AC 910-1203

OBI Field: (Skip one space between each information item)

"AUCTIONPAY"

TAXPAYER IDENTIFICATION NO.:

(same as FCC Form 159, block 26)

PAYMENT TYPE CODE (enter "A36U")

FCC CODE 1 (same as FCC Form 159, block 23A: "36")

PAYER NAME (same as FCC Form 159, block 2)

LOCKBOX NO. x358425

Note: The BNF and Lockbox number are specific to the upfront payments for this auction; do not use BNF or Lockbox numbers from previous auctions.

56. Applicants must fax a completed FCC Form 159 to Mellon Bank at (412) 209-6045 or (412) 236-5702 at least one hour before placing the order for the wire transfer (but on the same business day). On the cover sheet of the fax, write "Wire Transfer—Auction Payment for Auction Event No. 36." Bidders should confirm receipt of their upfront payment at Mellon Bank by contacting their sending financial institution.

ii. FCC Form 159

57. A completed FCC Remittance Advice Form (FCC Form 159) must be faxed to Mellon Bank in order to accompany each upfront payment. Proper completion of FCC Form 159 is critical to ensuring correct credit of upfront payments. Detailed instructions for completion of FCC Form 159 are included in Attachment E. An electronic version of the FCC Form 159 is available after filing the FCC Form 175. The FCC Form 159 can be completed electronically, but must be filed with Mellon Bank via facsimile.

iii. Amount of Upfront Payment

58. In the *Amendment of Part 1 of the Commission's Rules, Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making, (Part 1 Order, MO&O and NPRM)* 62 FR 13540 (March 21, 1997), the Commission delegated to the Bureau the authority and discretion to determine an

appropriate upfront payment for each license being auctioned. In the *Auction No. 36 Comment Public Notice*, the Bureau proposed upfront payments for Auction No. 36. Specifically, the Bureau proposed calculating the upfront payment on a license-by-license basis, using the following formula:

License population * \$0.001 (the result rounded to the nearest hundred for levels below \$10,000.00 and to the nearest thousand for levels above \$10,000.00) with a minimum of no less than \$1,000.00 per license.

In this public notice, we adopt this formula.

59. Please note that upfront payments are not attributed to specific licenses, but instead will be translated to bidding units to define a bidder's maximum bidding eligibility. For Auction No. 36, the amount of the upfront payment will be translated into bidding units on a one-to-one basis; e.g., a \$25,000 upfront payment provides the bidder with 25,000 bidding units. The total upfront payment defines the maximum amount of bidding units on which the applicant will be permitted to bid (including standing high bids) in any single round of bidding. Thus, an applicant does not have to make an upfront payment to cover all licenses for which the applicant has selected on FCC Form 175, but rather to cover the maximum number of bidding units that are associated with licenses on which the bidder wishes to place bids and hold high bids at any given time.

60. In order to be able to place a bid on a license, in addition to having specified that license on the FCC Form 175, a bidder must have an eligibility level that meets or exceeds the number of bidding units assigned to that license. At a minimum, an applicant's total upfront payment must be enough to establish eligibility to bid on at least one of the licenses applied for on the FCC Form 175, or else the applicant will not be eligible to participate in the auction.

61. In calculating its upfront payment amount, an applicant should determine the maximum number of bidding units it may wish to bid on in any single round, and submit an upfront payment covering that number of bidding units. In order to make this calculation, an applicant should add together the upfront payments for all licenses on which it seeks to bid in any given round. Bidders should check their calculations carefully, as there is no provision for increasing a bidder's maximum eligibility after the upfront payment deadline.

Note: An applicant may, on its FCC Form 175, apply for every license being offered, but

its actual bidding in any round will be limited by the bidding units reflected in its upfront payment.

iv. Applicant's Wire Transfer Information for Purposes of Refunds

62. The Commission will use wire transfers for all Auction No. 36 refunds. To ensure that refunds of upfront payments are processed in an expeditious manner, the Commission is requesting that all pertinent information as listed be supplied to the FCC. Applicants can provide the information electronically during the initial short form-filing window after the form has been submitted. Wire Transfer Instructions can also be manually faxed to the FCC, Financial Operations Center, Auctions Accounting Group, ATTN: Michelle Bennett or Gail Glasser, at (202) 418-2843 by October 16, 2000. Should the payer fail to submit the requested information, the refund will be returned to the original payer. For additional information, please call (202) 418-1995

Name of Bank

ABA Number

Contact and Phone Number

Account Number to Credit

Name of Account Holder

Correspondent Bank (if applicable)

ABA Number

Account Number

(Applicants should also note that implementation of the Debt Collection Improvement Act of 1996 requires the FCC to obtain a Taxpayer Identification Number (TIN) before it can disburse refunds.) Eligibility for refunds is discussed in Part V.D.

E. Auction Registration

63. Approximately ten days before the auction, the FCC will issue a public notice announcing all qualified bidders for the auction. Qualified bidders are those applicants whose FCC Form 175 applications have been accepted for filing and have timely submitted upfront payments sufficient to make them eligible to bid on at least one of the licenses for which they applied.

64. All qualified bidders are automatically registered for the auction. Registration materials will be distributed prior to the auction by two separate overnight mailings, each containing part of the confidential identification codes required to place bids. These mailings will be sent only to the contact person at the contact address listed in the FCC Form 175.

65. Applicants that do not receive both registration mailings will not be able to submit bids. Therefore, any qualified applicant that has not received both mailings by noon on Friday,

October 27, 2000 should contact the Auctions Hotline at (717) 338-2888. Receipt of both registration mailings is critical to participating in the auction and each applicant is responsible for ensuring it has received all of the registration material.

66. Qualified bidders should note that lost login codes, passwords or bidder identification numbers can be replaced only by appearing in person at the FCC Auction Headquarters located at 445 12th St., SW, Washington, DC 20554. Only an authorized representative or certifying official, as designated on an applicant's FCC Form 175, may appear in person with two forms of identification (one of which must be a photo identification) in order to receive replacement codes. Qualified bidders requiring replacement codes must call technical support prior to arriving at the FCC to arrange preparation of new codes.

F. Remote Electronic Bidding Software

67. Qualified bidders are allowed to bid electronically or telephonically. If choosing to bid electronically, each bidder must purchase their own copy of the remote electronic bidding software. Electronic bids will only be accepted from those applicants purchasing the software. However, the software may be copied by the applicant for use by its authorized bidders at different locations. The price of the FCC's remote bidding software is \$175.00 and must be ordered by Tuesday, October 17, 2000. For security purposes, the software is only mailed to the contact person at the contact address listed on the FCC Form 175. Please note that auction software is tailored to a specific auction, so software from prior auctions will not work for Auction No. 36. If bidding telephonically, the telephonic bidding phone number will be supplied in the first Federal Express mailing of confidential login codes. Qualified bidders that do not purchase the software may only bid telephonically. To indicate your bidding preference, a FCC Bidding Preference/Remote Software Order Form can be accessed when submitting the FCC Form 175. Bidders should complete this form electronically, print it out, and fax to (717) 338-2850. A manual copy of this form is also included as Attachment F in this public notice.

G. Mock Auction

68. All qualified bidders will be eligible to participate in a mock auction on Monday, October 30, 2000. The mock auction will enable applicants to become familiar with the electronic software prior to the auction. Free

demonstration software will be available for use in the mock auction. Participation by all bidders is strongly recommended. Details will be announced by public notice.

IV. Auction Event

69. The first round of bidding for Auction No. 36 will begin on Wednesday, November 1, 2000. The initial bidding schedule will be announced in a public notice listing the qualified bidders, which is released approximately 10 days before the start of the auction.

A. Auction Structure

i. Simultaneous Multiple Round Auction

70. In the *Auction No. 36 Comment Public Notice*, we proposed to award the 2,800 licenses in the 800 MHz lower band in a single, simultaneous multiple round auction. We received no comment on this issue. We conclude that it is operationally feasible and appropriate to auction the 800 MHz lower band licenses through a single, simultaneous multiple round auction.

ii. Maximum Eligibility and Activity Rules

71. In the *Auction No. 36 Comment Public Notice*, we proposed that the amount of the upfront payment submitted by a bidder would determine the initial maximum eligibility (as measured in bidding units) for each bidder. We received no comments on this issue.

72. For Auction No. 36 we will adopt this proposal. The amount of the upfront payment submitted by a bidder determines the initial maximum eligibility (in bidding units) for each bidder. The total upfront payment does not define the total dollars a bidder may bid on any given license.

73. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until the end before participating. Bidders are required to be active on a specific percentage of their maximum eligibility during each round of the auction.

74. A bidder's activity level in a round is the sum of the bidding units associated with licenses on which the bidder is active. A bidder is considered active on a license in the current round if it is either the high bidder at the end of the previous bidding round and does not withdraw the high bid in the current round, or if it submits an acceptable bid in the current round (see "Minimum Accepted Bids" in Part IV.B.(iii)). The

minimum required activity level is expressed as a percentage of the bidder's maximum bidding eligibility, and increases by stage as the auction progresses.

iii. Activity Rule Waivers and Reducing Eligibility

75. Each bidder will be provided five activity rule waivers that may be used in any round during the course of the auction. Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required minimum level. An activity rule waiver applies to an entire round of bidding and not to a particular license. We are satisfied that our practice of providing five waivers over the course of the auction provides a sufficient number of waivers and maximum flexibility to the bidders, while safeguarding the integrity of the auction.

76. The FCC automated auction system assumes that bidders with insufficient activity would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver (known as an "automatic waiver") at the end of any round where a bidder's activity level is below the minimum required unless: (i) there are no activity rule waivers available; or (ii) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the minimum requirements.

77. A bidder with insufficient activity that wants to reduce its bidding eligibility rather than use an activity rule waiver must affirmatively override the automatic waiver mechanism during the round by using the reduce eligibility function in the software. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described in "Auction Stages" (see Part IV.A.iv discussion). Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility.

78. Finally, a bidder may proactively use an activity rule waiver as a means to keep the auction open without placing a bid. If a bidder submits a proactive waiver (using the proactive waiver function in the bidding software) during a round in which no bids are submitted, the auction will remain open and the bidder's eligibility will be preserved. An automatic waiver invoked in a round in which there are no new valid bids or withdrawals will not keep the auction open.

iv. Auction Stages

79. We conclude that the Auction No. 36 will be composed of three stages, which are each defined by an increasing activity rule. The following paragraphs describe the activity levels for each stage of the auction. The FCC reserves the discretion to further alter the activity percentages before and/or during the auction.

80. *Stage One*: During the first stage of the auction, a bidder desiring to maintain its current eligibility will be required to be active on licenses that represent at least 80 percent of its current bidding eligibility in each bidding round. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage One, reduced eligibility for the next round will be calculated by multiplying the sum of bidding units of the bidder's standing high bids and valid bids during the current round by five-fourths ($\frac{5}{4}$).

81. *Stage Two*: During the second stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on 90 percent of its current bidding eligibility. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). During Stage Two, reduced eligibility for the next round will be calculated by multiplying the sum of bidding units of the bidder's standing high bids and valid bids during the current round by ten-ninths ($\frac{10}{9}$).

82. *Stage Three*: During the third stage of the auction, a bidder desiring to maintain its current eligibility is required to be active on 98 percent of its current bidding eligibility. Failure to maintain the required activity level will result in a reduction in the bidder's bidding eligibility in the next round of bidding (unless an activity rule waiver is used). In this stage, reduced eligibility for the next round will be calculated by multiplying the sum of bidding units of the bidder's standing high bids and valid bids during the current round by fifty-fortyninths ($\frac{50}{49}$).

Caution: Since activity requirements increase in each auction stage, bidders must carefully check their current activity during the bidding period of the first round following a stage transition. This is especially critical for bidders that have standing high bids and do not plan to submit new bids. In past auctions, some bidders have inadvertently lost bidding eligibility or used an activity rule waiver because

they did not re-verify their activity status at stage transitions. Bidders may check their activity against the required minimum activity level by using the bidding software's bidding module.

v. Stage Transitions

83. Auction No. 36 will start in Stage One and will advance to the next stage (*i.e.*, from Stage One to Stage Two, and from Stage Two to Stage Three) when, in each of three consecutive rounds of bidding, the high bid has increased on 10 percent or less of the licenses being auctioned (as measured in bidding units). However, the Bureau will retain the discretion to regulate the pace of the auction by announcement. This determination will be based on a variety of measures of bidder activity, including, but not limited to, the auction activity level, the percentages of licenses (as measured in bidding units) on which there are new bids, the number of new bids, and the percentage increase in revenue.

vi. Auction Stopping Rules

84. Auction No. 36 will employ a simultaneous stopping rule. Under this rule, bidding will remain open on all licenses until bidding stops on every license. The auction will close for all licenses when one round passes during which no bidder submits a new acceptable bid on any license, applies a proactive waiver, or withdraws a previous high bid. After the first such round, bidding closes simultaneously on all licenses.

85. The Bureau retains the discretion to invoke the other versions of the simultaneous stopping rule. This modified version will close the auction for all licenses after the first round in which no bidder submits a proactive waiver, a withdrawal, or a new bid on any license on which it is not the standing high bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a license for which it is the standing high bidder will not keep the auction open under this modified stopping rule.

86. The Bureau also retains the discretion to keep an auction open even if no new acceptable bids or proactive waivers are submitted and no previous high bids are withdrawn in a round. In this event, the effect will be the same as if a bidder had submitted a proactive waiver. Thus, the activity rule will apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use an activity rule waiver (if it has any left).

87. In addition, the Bureau reserves the right to declare that the auction will end after a specified number of

additional rounds ("special stopping rule"). If the Bureau invokes this special stopping rule, it will accept bids in the final round(s) only for licenses on which the high bid increased in at least one of the preceding specified number of rounds. The Bureau proposed to exercise this option only in circumstances such as where the auction is proceeding very slowly, where there is minimal overall bidding activity or where it appears likely that the auction will not close within a reasonable period of time. Before exercising this option, the Bureau is likely to attempt to increase the pace of the auction by, for example, moving the auction into the next stage where bidders will be required to maintain a higher level of bidding activity, increasing the number of bidding rounds per day.

vii. Auction Delay, Suspension, or Cancellation

88. For Auction No. 36, by public notice or by announcement during the auction, the Bureau may delay, suspend or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and competitive conduct of competitive bidding. In such cases the Bureau may elect to: resume the auction starting from the beginning of the current round; resume the auction starting from some previous round; or cancel the auction in its entirety. Network interruption may cause the Bureau to delay or suspend the auction. We emphasize that exercise of this authority is solely within the discretion of the Bureau, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers.

B. Bidding Procedures

i. Round Structure

89. The initial bidding schedule will be announced in the public notice listing the qualified bidders, which is released approximately 10 days before the start of the auction. This public notice will be included in the registration mailings. The round structure for each bidding round contains a single bidding round followed by the release of the round results. Multiple bidding rounds may be conducted in a given day. Details regarding round results formats and locations will be included in a *Qualified Bidder Public Notice*.

90. The FCC has discretion to change the bidding schedule in order to foster

an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The FCC may increase or decrease the amount of time for the bidding rounds and review periods, or the number of rounds per day, depending upon the bidding activity level and other factors.

ii. Reserve Price or Minimum Opening Bid

91. The Bureau adopts minimum opening bids for Auction 36, which are reducible at the discretion of the Bureau. Congress has enacted a presumption that unless the Commission determines otherwise, minimum opening bids or reserve prices are in the public interest.

92. The Bureau adopts the following proposed formula to calculate minimum opening bids for each license:

License population * \$0.001 (the result rounded to the nearest hundred for results less than \$10,000.00 and to the nearest thousand for results greater than \$10,000.00) with a minimum of no less than \$1,000.00 per license.

93. The Bureau concludes that this adopted formula best meets the objectives of our authority in establishing reasonable minimum opening bids. The Bureau has noted in the past that the reserve price and minimum opening bid provision is not a requirement to maximize auction revenue but rather a protection against assigning licenses at unacceptably low prices and that we must balance the revenue raising objective against our other public interest objectives in setting the minimum bid level. *See* Auction of 800 MHz SMR Upper 10 MHz Band, Minimum Opening Bids or Reserve Prices, 62 FR 55251 (October 23, 1997). For the sake of auction integrity and fairness, minimum opening bids must be set in a manner that is consistent across licenses.

94. As a final safeguard against unduly high pricing, minimum opening bids are reducible at the discretion of the Bureau. This will allow the Bureau flexibility to adjust the minimum opening bids if circumstances warrant. The Bureau emphasizes, however, that such discretion will be exercised, if at all, sparingly and early in the auction, *i.e.*, before bidders lose all waivers and begin to lose substantial eligibility. During the course of the auction, the Bureau will not entertain any bidder requests to reduce the minimum-opening bid on specific licenses.

iii. Bid Increments and Minimum Accepted Bids

95. For Auction No. 36 the Bureau adopts a smoothing methodology to calculate minimum bid increments. The smoothing methodology is designed to vary the increment for a given license between a maximum and minimum value based on the bidding activity on that license. This methodology allows the increments to be tailored to the activity level of a license, decreasing the time it takes for active licenses to reach their final value. The formula used to calculate this increment is included as Attachment G.

96. The Bureau adopts the initial values for the maximum of 0.2 or 20 percent of the license value and a minimum of 0.1 or 10 percent of the license value. The Bureau retains the discretion to change the minimum bid increment if it determines that circumstance so dictate. The Bureau will do so by announcement in the Automated Auction System. Under its discretion, the Bureau may also implement an absolute dollar floor for the bid increment to further facilitate a timely close of the auction. The Bureau may also use its discretion to adjust the minimum bid increment without prior notice if circumstances warrant. As an alternative approach, the Bureau may, in its discretion, adjust the minimum bid increment gradually over a number of rounds as opposed to single large changes in the minimum bid increment (e.g., by raising the increment floor by one percent every round over the course of ten rounds). The Bureau also retains the discretion to use alternate methodologies, such as a flat percentage increment for all licenses, for Auction No. 36 if circumstances warrant.

iv. High Bids

97. Each bid will be date- and time-stamped when it is entered into the FCC computer system. In the event of tie bids, the Commission will identify the high bidder on the basis of the order in which the Commission receives bids. The bidding software allows bidders to make multiple submissions in a round. As each bid is individually date- and time-stamped according to when it was submitted, bids submitted by a bidder earlier in a round will have an earlier date and time stamp than bids submitted later in a round.

v. Bidding

98. During a bidding round, a bidder may submit bids for as many licenses as it wishes, subject to its eligibility, as well as withdraw high bids from previous bidding rounds, remove bids

placed in the same bidding round, or permanently reduce eligibility. Bidders also have the option of making multiple submissions and withdrawals in each bidding round. If a bidder submits multiple bids for a single license in the same round, the system takes the last bid entered as that bidder's bid for the round and the date- and time-stamp of that bid reflects the latest time the bid was submitted.

99. Please note that all bidding will take place remotely either through the automated bidding software or by telephonic bidding. (Telephonic bid assistants are required to use a script when entering bids placed by telephone. Telephonic bidders are therefore reminded to allow sufficient time to bid, by placing their calls well in advance of the close of a round. Normally four to five minutes are necessary to complete a bid submission.) There will be no on-site bidding during Auction No. 36.

100. A bidder's ability to bid on specific licenses in the first round of the auction is determined by two factors: (i) The licenses applied for on FCC Form 175; and (ii) the upfront payment amount deposited. The bid submission screens will be tailored for each bidder to include only those licenses for which the bidder applied on its FCC Form 175. A bidder also has the option to further tailor its bid submission screens to call up specified groups of licenses.

101. The bidding software requires each bidder to login to the FCC auction system during the bidding round using the FCC account number, bidder identification number, and the confidential security codes provided in the registration materials. Bidders are strongly encouraged to download and print bid confirmations after they submit their bids.

102. The bid entry screen of the Automated Auction System software for Auction No. 36 allows bidders to place multiple increment bids. Specifically, high bids may be increased from one to nine bid increments. A single bid increment is defined as the difference between the standing high bid and the minimum acceptable bid for a license. The bidding software will display the bid increment for each license.

103. To place a bid on a license, the bidder must increase the standing high bid by one to nine times the bid increment. This is done by entering a whole number between 1 and 9 in the bid increment multiplier (Bid Mult) field in the software. This value will determine the amount of the bid (Amount Bid) by multiplying the bid increment multiplier by the bid increment and adding the result to the

high bid amount according to the following formula:

Amount Bid = High Bid + (Bid Mult * Bid Increment)

Thus, bidders may place a bid that exceeds the standing high bid by between one and nine times the bid increment. For example, to bid the minimum acceptable bid, which is equal to one bid increment, a bidder will enter "1" in the bid increment multiplier column and press submit.

104. For any license on which the FCC is designated as the high bidder (*i.e.*, a license that has not yet received a bid in the auction or where the high bid was withdrawn and a new bid has not yet been placed), bidders will be limited to bidding only the minimum acceptable bid. In both of these cases no increment exists for the licenses, and bidders should enter "1" in the Bid Mult field. Note that in this case, any whole number between 1 and 9 entered in the multiplier column will result in a bid value at the minimum acceptable bid amount. Finally, bidders are cautioned in entering numbers in the Bid Mult field because, as explained in the following section, a high bidder that withdraws its standing high bid from a previous round, even if mistakenly or erroneously made, is subject to bid withdrawal payments.

vi. Bid Removal and Bid Withdrawal

105. In Auction No. 36, the Bureau will limit the number of rounds in which bidders may place withdrawals to two rounds. These rounds will be at the bidder's discretion and there will be no limit on the number of bids that may be withdrawn in either of these rounds. Withdrawals during the auction will still be subject to the bid withdrawal payments specified in 47 CFR 1.2104(g). Bidders should note that abuse of the Commission's bid withdrawal procedures could result in the denial of the ability to bid on a market. If a high bid is withdrawn, the license will be offered in the next round at the second highest bid price, which may be less than, or equal to, in the case of tie bids, the amount of the withdrawn bid, without any bid increment. The Commission will serve as a "place holder" on the license until a new acceptable bid is submitted on that license.

106. Procedures. Before the close of a bidding round, a bidder has the option of removing any bids placed in that round. By using the "remove bid" function in the software, a bidder may effectively "unsubmit" any bid placed within that round. A bidder removing a bid placed in the same round is not

subject to withdrawal payments. Removing a bid will affect a bidder's activity for the round in which it is removed; *i.e.* a bid that is subsequently removed does not count toward the bidder's activity requirement.

107. Once a round closes, a bidder may no longer remove a bid. However, in the next round, a bidder may withdraw standing high bids from previous rounds using the "withdraw bid" function (assuming that the bidder has not exhausted its withdrawal allowance). A high bidder that withdraws its standing high bid from a previous round during the auction is subject to the bid withdrawal payments specified in 47 CFR 1.2104(g). The procedure for withdrawing a bid and receiving a withdrawal confirmation is essentially the same as the bidding procedure described in "High Bids," Part IV.B.iv.

108. Calculation. Generally, the Commission imposes payments on bidders that withdraw high bids during the course of an auction. Specifically, a bidder ("Bidder X") that withdraws a high bid during the course of an auction is subject to a bid withdrawal payment equal to the difference between the amount withdrawn and the amount of the subsequent winning bid. If a high bid is withdrawn on a license that remains unsold at the close of the auction, Bidder X will be required to make an interim payment equal to three (3) percent of the net amount of the withdrawn bid. This payment amount is deducted from any upfront payments or down payments that Bidder X has deposited with the Commission. If, in a subsequent auction, that license receives a valid bid in an amount equal to or greater than the withdrawn bid amount, then no final bid withdrawal payment will be assessed, and Bidder X may request a refund of the interim three (3) percent payment. If, in a subsequent auction, the winning bid amount for that license is less than Bidder X's withdrawn bid amount, then Bidder X will be required to make a final bid withdrawal payment, less the three percent interim payment, equal to either the difference between Bidder X's net withdrawn bid and the subsequent net winning bid, or the difference between Bidder X's gross withdrawn bid and the subsequent gross winning bid, whichever is less.

vii. Round Results

109. Bids placed during a round will not be published until the conclusion of that bidding period. After a round closes, the Commission will compile reports of all bids placed, bids withdrawn, current high bids, new

minimum accepted bids, and bidder eligibility status (bidding eligibility and activity rule waivers), and post the reports for public access. Reports reflecting bidders' identities and bidder identification numbers for Auction No. 36 will be available before and during the auction. Thus, bidders will know in advance of this auction the identities of the bidders against which they are bidding.

viii. Auction Announcements

110. The FCC will use auction announcements to announce items such as schedule changes and stage transitions. All FCC auction announcements will be available on the FCC remote electronic bidding system, as well as the Internet.

ix. Maintaining the Accuracy of FCC Form 175 Information

111. As noted in Part II.E., after the short-form filing deadline, applicants may make only minor changes to their FCC Form 175 applications. For example, permissible minor changes include deletion and addition of authorized bidders (to a maximum of three) and certain revision of exhibits. Filers must make these changes on-line, and submit a letter summarizing the changes to: Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Room 4-A760, Washington, D.C. 20554. A separate copy of the letter should be mailed to M. Nicole Oden, Auctions and Industry Analysis Division, Room 4-A337, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554. Questions about other changes should be directed to M. Nicole Oden, Auctions and Industry Analysis Division at (202) 418-0660.

V. Post-Auction Procedures

A. Down Payments and Withdrawn Bid Payments

112. After bidding has ended, the Commission will issue a public notice declaring the auction closed, identifying the winning bids and bidders for each license, and listing withdrawn bid payments due.

113. Within ten business days after release of the auction closing public notice, each winning bidder must submit sufficient funds (in addition to its upfront payment) to bring its total amount of money on deposit with the Government to 20 percent of its net winning bids (actual bids less any

applicable bidding credits). See 47 CFR 1.2107(b). In addition, by the same deadline all bidders must pay any withdrawn bid amounts due according to 47 CFR 1.2104(g), as discussed in "Bid Removal and Bid Withdrawal," Part IV.B.vi. (Upfront payments are applied first to satisfy any withdrawn bid liability, before being applied toward down payments.)

B. Long-Form Application

114. Within ten business days after release of the auction closing public notice, winning bidders must electronically submit a properly completed long-form application and required exhibits for each 800 MHz license won through the auction. Winning bidders that are small businesses or very small businesses must include an exhibit demonstrating their eligibility for bidding credits. See 47 CFR 1.2112(b). Further filing instructions will be provided to auction winners at the close of the auction.

C. Default and Disqualification

115. Any high bidder that defaults or is disqualified after the close of the auction (*i.e.*, fails to remit the required down payment within the prescribed period of time, fails to submit a timely long-form application, fails to make full payment, or is otherwise disqualified) will be subject to the payments described in 47 CFR 1.2104(g)(2). In such event the Commission may re-auction the license or offer it to the next highest bidder (in descending order) at their final bid. See 47 CFR 1.2109(b) and (c). In addition, if a default or disqualification involves gross misconduct, misrepresentation, or bad faith by an applicant, the Commission may declare the applicant and its principals ineligible to bid in future auctions, and may take any other action that it deems necessary, including institution of proceedings to revoke any existing licenses held by the applicant. See 47 CFR 1.2109(d).

D. Refund of Remaining Upfront Payment Balance

116. All applicants that submitted upfront payments but were not winning bidders for an 800 MHz license may be entitled to a refund of their remaining upfront payment balance after the conclusion of the auction. No refund will be made unless there are excess funds on deposit from that applicant after any applicable bid withdrawal payments have been paid.

117. Qualified bidders that have exhausted all of their activity rule waivers, have no remaining bidding eligibility, and have not withdrawn a

high bid during the auction must submit a written refund request. If the refund instructions were completed electronically, only a written request for the refund is necessary. If not, the request must also include wire transfer instructions and a Taxpayer Identification Number ("TIN"). Send refund request to: Federal Communications Commission, Financial Operations Center, Auctions Accounting Group, Shirley Hanberry, 445 12th Street, S.W., Room 1-A824, Washington, D.C. 20554.

118. Bidders are encouraged to file their refund information electronically using the refund information portion of the FCC Form 175, but bidders can also fax their information to the Auctions Accounting Group at (202) 418-2843. Once the information has been approved, a refund will be sent to the party identified in the refund information. Refund processing generally takes up to two weeks to complete. Bidders with questions about refunds should contact Michelle Bennett or Gail Glasser at (202) 418-1995.

Federal Communications Commission.

Margaret Wiener,

Deputy Chief, Auctions & Industry Analysis Division, Wireless Telecommunications Bureau.

[FR Doc. 00-17672 Filed 7-12-00; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

[Report No. AUC-00-31-H (Auction No. 31); DA 00-1486]

Auction of Licenses in the 747-762 AND 777-792 MHz Bands Scheduled for September 6, 2000; Procedures Implementing Package Bidding for Auction No. 31

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: This document announces revised procedures to allow for package bidding for the upcoming auction of licenses for services in the 747-762 and 777-792 MHz bands ("Auction No. 31"). These procedures are designed to be efficient, and to avoid both the risk of bidders winning licenses they do not desire (*exposure problems*) and the difficulty that multiple bidders desiring the single licenses (or smaller packages) that constitute a larger package may have in outbidding a single bidder bidding for the larger package (*threshold problems*). The procedures are also designed to allow the auction to proceed

at an appropriate pace; to encourage straightforward bidding and deter gaming; and to be simple for straightforward bidders, while permitting bidders to employ flexible backup strategies.

DATES: Auction No. 31 is scheduled for September 6, 2000.

FOR FURTHER INFORMATION CONTACT:

Howard Davenport, Attorney, Auctions Legal Branch; Joel Rabinovitz, Attorney, Auctions Legal Branch, or Craig Bomberger, Analyst, Auctions Operations Branch, at (202) 418-0660. *Media Contact:* Meribeth McCarrick at (202) 418-0654.

SUPPLEMENTARY INFORMATION: This is a summary of a public notice released July 3, 2000 ("Auction No. 31 Public Notice"). The complete text of the *Auction No. 31 Public Notice*, including all attachments, is available for inspection and copying during normal business hours in the FCC Reference Center (Room CY-A257), 445 12th Street, SW, Washington, DC. It may also be purchased from the Commission's copy contractor, International Transcription Services, Inc., (ITS, Inc.) 1231 20th Street, NW, Washington, DC 20036, (202) 857-3800. It is also available on the Commission's website at <http://www.fcc.gov/wtb/auctions>.

List of Attachments available at the FCC:

- Appendix A—List of Commenters
- Attachment A—Licenses to be Auctioned
- Attachment B—FCC Auction Seminar Registration Form
- Attachment C—Electronic Filing and Review of the FCC Form 175
- Attachment D—Guideline for Completion of FCC Form 175 and Exhibits
- Attachment E—Accessing the FCC Network to Submit FCC Form 175 Applications

I. Introduction and General Information

A. Introduction

1. The public notice announces revised procedures to allow for package bidding for the upcoming auction of licenses for services in the 747-762 and 777-792 MHz bands ("Auction No. 31"). See Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules, *First Report and Order*, 65 FR 3139 (January 20, 2000). On February 18, 2000, the Wireless Telecommunications Bureau ("Bureau") announced the procedures and minimum opening bids for Auction No. 31. See Auction of Licenses in the 747-762 and 777-792

MHz Bands, *Auction No. 31 Procedures Public Notice*, 65 FR 12251 (March 8, 2000) and *Postponement PN*, 65 FR 30598 (May 12, 2000). On May 18, 2000, the Bureau released a public notice seeking comment on modifying those procedures to allow combinatorial (or "package") bidding for Auction No. 31. See Auction of Licenses in the 747–762 and 777–792 MHz Bands Scheduled for September 6, 2000; Comment Sought on Modifying the Simultaneous Multiple Round Auction Design to Allow Combinatorial (Package) Bidding, *Auction No. 31 Package Bidding Comment Public Notice*, 65 FR 35636 (June 5, 2000). On June 22, 2000, the Commission adopted the *700 MHz Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in which it stated that the Bureau may implement a combinatorial auction design for Auction No. 31 pursuant to its existing delegated authority if, after review of the comments, the Bureau finds combinatorial bidding to be appropriate and feasible.

2. In general, package bidding should be an improvement over our usual auction design when (a) there are strong complementarities among licenses for some bidders, and (b) the pattern of those complementarities varies for different bidders. Under these circumstances, package bidding should yield the more efficient outcome, with licenses being sold to those bidders who value them the most. The comments we previously received in this docket have suggested these conditions are true for Auction No. 31. For example, some potential bidders have expressed the importance of acquiring a nationwide footprint, and others the importance of acquiring all 30 MHz in a region. The comments we received in response to the *Auction No. 31 Package Bidding Comment Public Notice* largely concur that package bidding is appropriate for the types of licenses being sold in Auction No. 31.

3. Under the procedures we establish here, bidders may place bids on individual licenses, as under our usual auction procedures, and may also place all-or-nothing bids on up to twelve packages of licenses of their own design at any point during the auction. This approach allows bidders to better express the value of any synergies (benefits from combining complementary items) that may exist among licenses. The winning bids are the set of "consistent" bids on individual licenses and packages that maximize total revenue when the auction closes. Consistent bids are bids

that (i) do not overlap and (ii) are made or renewed by an individual bidder in the same round (bids made by an individual bidder in different rounds are treated as mutually exclusive under the procedures we are establishing for this auction).

4. The specific procedures we establish are designed to meet a number of objectives. They are designed to be efficient, and to avoid both *exposure problems*—the risk of bidders winning licenses they do not desire—and *threshold problems*—the difficulty that multiple bidders desiring the single licenses (or smaller packages) that constitute a larger package may have in outbidding a single bidder bidding for the larger package. The procedures are also designed to allow the auction to proceed at an appropriate pace; to encourage straightforward bidding and deter gaming; and to be simple for straightforward bidders while permitting bidders to employ flexible backup strategies.

5. As a general matter, bidders in our simultaneous multiple round auction that wish to acquire a certain combination of licenses, and only that combination, may face an *exposure problem*. Although they desire either all of the licenses or none, by bidding on the licenses individually they risk winning only some of the licenses. They therefore risk either acquiring licenses they do not desire or paying more for each license than they would have paid if they knew that the license was not going to be part of the combination they desired. With the package bidding procedures we establish today, however, this risk can be avoided. For example, a bidder desiring an aggregation of all six 20 MHz licenses in order to implement a nationwide service could bid on the six licenses as a package and thereby avoid the risk of winning only some of the desired licenses or of paying more for those licenses than it wishes.

6. Allowing package bidding, however, introduces a *threshold problem*—the difficulty that multiple bidders for the single licenses (or smaller packages) that constitute a larger package may have in outbidding a single bidder on the larger package, even though the multiple bidders may value the sum of the parts more than the single bidder values the whole. This may occur because bidders for parts of a larger package each have an incentive to hold back in the hope that a bidder for another part will increase its bid sufficiently for the bids on the pieces collectively to beat the bid on the larger package. The package bidding

procedures that we establish are designed to facilitate the emergence of bids that will overcome this problem.

7. The changes we adopt from our initial package bidding proposal respond to three design weaknesses that were identified by commenters. First, the proposal to allow only nine specific packages was too restrictive. Second, in some circumstances the rules could have resulted in bidders being caught with retained but non-winning bids that they no longer wished to hold. This possibility could have chilled bidding and made bidders unable to switch to backup strategies. Third, the pace of the auction could be too slow because there were inadequate incentives for bidders to make bids that would be or could become provisional winning bids, as opposed to bids that merely preserved bidders' eligibility but were unlikely to become winning. In addition, implementation of package bidding procedures for Auction No. 31 makes unnecessary the nationwide bid withdrawal procedure we established in the *Auction No. 31 Procedures Public Notice*.

B. Auction Specifics

i. Auction Procedures and New Dates and Deadlines

8. The auction procedures announced in the February 18, 2000, *Auction No. 31 Procedures Public Notice* remain in effect except as modified by (a) the dates announced in the May 2, 2000, *Postponement Public Notice*, and (b) the package bidding and other auction procedures established here. The new schedule is as follows:

Filing Window Opens for FCC Form 175—July 17, 2000
 Bidder Seminar—July 24, 2000
 Filing Deadline for FCC Form 175—August 1, 2000, 6:00 p.m. EDT
 Upfront Payment Deadline—August 18, 2000, 6:00 p.m. EDT
 Mock Auction—August 31, 2000
 Auction Start Date—September 6, 2000

ii. Licenses and Packages To Be Auctioned

9. The licenses available in this auction consist of one 20 megahertz license (consisting of paired 10 megahertz blocks) and one 10 megahertz license (consisting of paired 5 megahertz blocks) in each of six regions to be known as the 700 MHz Band Economic Area Groupings ("700 MHz Band EAGs"). These licenses are listed in this public notice in Attachment A and are shown in the following table.

700 MHz BAND EAGS

	Northeast	Mid-Atlantic	Southeast	Great Lakes	Central/Mountain	Pacific
10 MHz ..	WXEAG701-C	WXEAG702-C	WXEAG703-C	WXEAG704-C	WXEAG705-C	WXEAG706-C
20 MHz ..	WXEAG701-D	WXEAG702-D	WXEAG703-D	WXEAG704-D	WXEAG705-D	WXEAG706-D

10. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed to permit bidders to submit all-or-nothing bids on nine packages of licenses: A global package of all of the licenses; a nationwide package of either 10 MHz or 20 MHz consisting of the six 10 MHz or the six 20 MHz licenses, respectively; or six regional 30 MHz packages consisting of the 10 MHz license and the 20 MHz license for a particular 700 MHz Band EAG. We also sought comment on whether the Commission should allow all possible packages composed of the twelve individual licenses, or only certain additional packages.

11. We agree with some of the commenters that limiting packages to those identified by the Commission is overly restrictive and may lead to inefficient results. On the other hand, we are also concerned that allowing an unlimited number of packages would be needlessly complex and could facilitate strategic bidding. It is highly unlikely that any serious bidder actually needs to bid on all 4,095 combinations of licenses that are possible in this auction. Moreover, allowing bidders to bid upon an unlimited number of packages would introduce the risk of bidders "parking" bids, which could lead to an unacceptable pace for the auction. "Parking" is the placing of a bid that a bidder does not expect to become a winning bid for the purpose of maintaining eligibility and/or keeping the auction open. Finally, from a purely practical view, allowing 4,095 possible packages may lead to computational difficulties.

12. Bidders will be permitted to create and bid on up to twelve different packages of their own choosing during the course of the auction. Each variation of a package is considered a separate package. This is a somewhat larger number than the nine packages originally proposed, and does not wed bidders to the Commission's choice of packages (although bidders may very well choose to bid on some of the packages already identified.) We believe that this provides bidders with sufficient flexibility to achieve any reasonable business plan, while maintaining simplicity for bidders and the Commission, as well as limiting the opportunity for "parking" on an unlimited number of packages. Bidders

will not be required to identify or create their packages before start of the auction, but may create their packages as the auction progresses. Bidders may modify or delete a package after they create the package but before they bid on it. Once a bidder bids on a package, however, the package may not be modified or deleted and counts as one of the bidder's twelve allowable packages. Bidders are limited to bidding on, and hence creating packages from, those licenses which they selected on their FCC Form 175 and for which they have eligibility. Bidders may therefore wish to save one or more of their opportunities to create packages for use near the end of the auction.

iii. Bidding Methodology

13. The bidding methodology for Auction No. 31 will be simultaneous multiple round combinatorial (package) bidding. Bidding will be permitted only from remote locations, either electronically (by computer) or telephonically.

iv. Requirements for Participation

14. Those wishing to participate in the auction must:

- Submit a short form application (FCC Form 175) electronically by 6:00 p.m. EDT, August 1, 2000.
- Submit a sufficient upfront payment and a FCC Remittance Advice Form (FCC Form 159) by 6:00 p.m. EDT, August 18, 2000.
- Comply with all provisions outlined in this public notice and the February 18, 2000, *Auction No. 31 Procedures Public Notice*.
- Comply with all rules set forth in the Commission's orders in WT Docket No. 99-168, Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules.

v. Auction Registration and Remote Electronic Bidding Software

15. Procedures for replacement of lost security identification and access to remote electronic bidding software will be announced in a future Public Notice.

II. Auction Event

16. The first round of bidding for Auction No. 31 will begin on September 6, 2000. The initial bidding schedule will be announced in the public notice

listing the qualified bidders, which is released approximately 10 days before the start of the auction.

A. Auction Structure

i. Simultaneous Multiple Round With Package Bidding

17. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed to award 12 licenses in the 700 MHz bands in a single, simultaneous multiple round auction with package bidding. When we refer to "simultaneous multiple round" we mean without package bidding; when we refer to "package bidding" we mean simultaneous multiple round with package bidding. We conclude that it is appropriate and operationally feasible to implement the package bidding design described for Auction No. 31. We believe that package bidding provides many advantages over our current simultaneous multiple round auction design. For the reasons we stated in the introduction, we believe that package bidding will allow bidders in this auction to take advantage of any synergies that exist among licenses and will lead to the most efficient outcome consistent with our objectives under section 309(j) of the Communications Act of 1934.

18. While commenters stated that we (and they) have not had sufficient time to consider package bidding and that more study is needed, in fact the Commission has been considering the possibility of implementing combinatorial bidding since 1994. Congress has also instructed us to experiment with this form of bidding. In 1997, the Commission awarded research and development contracts to consultants to provide and test combinatorial bidding approaches. Experiments and tests were completed this spring demonstrating that combinatorial bidding is feasible and generally leads to more efficient auction results. The material presented at the Combinatorial Bidding Conference that occurred this spring also supported the view that it was feasible to implement combinatorial bidding for this auction. We have made these studies and papers presented at the Conference available on the Commission's web site. In addition, the delay of the auction date provided more time to implement this auction

design. We conclude that there has been sufficient time to implement a proper package bidding auction design for this auction. We also have carefully considered the comments submitted in response to the *Auction No. 31 Package Bidding Comment Public Notice* which were very helpful in our process of determining the procedures for implementing package bidding. We are confident that the procedures we establish today adequately address the concerns raised in the comments.

19. Finally, we note that the auction will not occur for another two months. We believe that this time is sufficient for bidders to understand the package bidding procedures and to develop appropriate auction strategies. Moreover, we have endeavored, to the extent possible, to make the package bidding procedures similar to the simultaneous multiple round auction procedures with which bidders are familiar. We therefore believe that bidders will be able to grasp the new procedures quickly. We also plan on extensive bidder education efforts and will be available both before and during the auction to answer any questions bidders might have.

ii. Maximum Eligibility

20. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed no change in upfront payments established for individual licenses. We proposed to calculate bidding units and associated upfront payment for a package by adding together the bidding units and associated upfront payments of the individual licenses that make up the package. We conclude that the bidding units for a package will be calculated by adding together the bidding units of the individual licenses that make up the package.

21. We also proposed no change in our procedure for determining initial maximum eligibility, which calculates initial maximum eligibility based on the bidding units represented by a bidder's upfront payment. We noted, however, that, under some circumstances, bidders might wish to purchase more eligibility than the total bidding units associated with all licenses. We conclude that we will not change our procedure for determining initial maximum eligibility.

iii. Activity Rules

22. In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until the end before participating. Bidders are required to be active on a specific percentage of their

maximum eligibility during each round of the auction if they wish to maintain their current eligibility.

23. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed that in each round of the auction a bidder desiring to maintain its current eligibility would be required to be active on licenses encompassing at least 50 percent of its current eligibility. For a bidder that failed to meet the activity requirement in a given round, we would reduce the bidder's eligibility for the next round to two times its activity in the current round. Thus, a bidder's eligibility in the current round would be the lesser of: (i) Its eligibility in the previous round, or (ii) twice its activity in the previous round.

24. We adopt the 50 percent activity requirement. We reserve the right, however, to increase to two-thirds the proportion of bidding units on which bidders must be active to retain their current eligibility. The two-thirds limit will ensure that bidders retain the flexibility to switch from bidding on a 20 MHz package to a 30 MHz package with the equivalent population. Any such change will be announced to bidders prior to the beginning of the round in which the change takes effect.

25. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed that a bid would be considered "active" if it was either a "retained" bid from the previous round or an accepted bid in the current round. A "retained" bid was defined as a provisionally winning bid or a bid that has the potential to become a provisionally winning bid because of changes in other bids in subsequent rounds. The bidding units associated with licenses on which a bidder was active, including retained bids, would count towards the bidder's activity. To account for the possibility of overlapping bids, which by definition can not simultaneously be part of the winning set, we proposed to measure a bidder's activity in a round as the *maximum* number of bidding units associated with the bidder's active bids that could simultaneously be in a provisional winning set.

26. Several of the commenters criticize the proposal to use retained bids. Also, under the procedures we establish today, we have not implemented the concept of "retained" bids as the term was used in the *Auction No. 31 Package Bidding Comment Public Notice*. We therefore cannot establish the activity rule originally proposed in the *Auction No. 31 Package Bidding Comment Public Notice*.

27. To determine activity in the current round, we will count accepted

new bids made in the current round and provisionally winning bids that are "renewed" in the current round. Bids placed in a prior round no longer count towards a bidder's activity, except for bids that are provisionally winning bids at the end of the previous round. Therefore, a bidder is active on a license or package in the current round if (i) it has a bid on the license or package that is part of the provisionally winning set at the end of the previous round, or (ii) it submits a new accepted bid or renews a provisionally winning bid for the license or package in the current round.

28. A bidder's activity level in a round is the maximum number of bidding units that the bidder can win considering only the licenses and packages on which the bidder is active—*i.e.*, counting the set of bids with the most bidding units in the case of mutually exclusive bids. For example, suppose license A has 10 bidding units associated with it; license B, 20; and license C, 20. If the only bids made by a bidder were on packages AB and BC its activity would be 40 since AB and BC are mutually exclusive (*i.e.*, license B is included in both packages, but can only be awarded as part of one package) and the package BC has more bidding units. Counting activity as the maximum number of bidding units a bidder could win makes activity a measure of (i) a bidder's potential contribution to moving the auction along and (ii) the maximum amount of bidding units associated with active licenses for which the bidder could be financially responsible and for which it therefore must have eligibility (as determined by the bidder's upfront payment).

iv. Activity Rule Waivers and Reducing Eligibility

29. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed that each bidder in the auction would be provided five activity rule waivers that may be used in any round during the course of the auction. Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required minimum level. An activity rule waiver applies to an entire round of bidding and not to a particular license.

30. Based upon our experience in previous auctions, we adopt our proposal that each bidder be provided five activity rule waivers that may be used in any round during the course of the auction. We are satisfied that our practice of providing five waivers over the course of the auction provides a sufficient number of waivers and

maximum flexibility to the bidders, while safeguarding the integrity of the auction.

31. We also proposed that bidders would not have the ability to apply waivers proactively, as they can under our current simultaneous multiple round auction format. We received no comment on this issue. We adopt our proposal.

32. We proposed, with the exception of the proactive waiver rule described, no other changes to activity rule waivers and reducing eligibility. Thus, automatic waivers and reducing eligibility will continue to function as described.

33. The FCC automated auction system assumes that bidders with insufficient activity would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver at the end of any round where a bidder's activity level is below the minimum required unless: (i) There are no activity rule waivers available; or (ii) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the minimum requirements.

34. A bidder with insufficient activity that wants to reduce its bidding eligibility rather than use an activity rule waiver must affirmatively override the automatic waiver mechanism during the round by using the reduce eligibility function in the software. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described in the previous section. Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility.

v. Auction Stages and Stage Transitions

35. As stated in section II.B.iii. Activity Rules, in the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed that in each round of the auction a bidder desiring to maintain its current eligibility would be required to be active on licenses encompassing at least 50 percent of its current eligibility. We sought comment on whether we should instead adopt multiple stages with increasing activity requirements.

36. We adopt our proposal for a 50 percent activity requirement, but we retain the discretion during the auction to increase to two-thirds the proportion of bidding units on which bidders must be active to retain their current eligibility. The two-thirds limit will ensure that bidders retain the flexibility to switch from bidding on a 20 MHz package to a 30 MHz package with the

equivalent population. Any such change will be announced to bidders prior to the beginning of the round in which the change takes effect.

vi. Auction Stopping Rules

37. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed to employ a two-round simultaneous stopping rule approach. A two-round simultaneous stopping rule means that all licenses remain open until two consecutive rounds have occurred in which no new bids are accepted. After the second consecutive such round, bidding closes simultaneously on all licenses. Thus, unless circumstances dictate otherwise, bidding would remain open on all licenses until bidding stops on every license.

38. The Bureau also sought comment on a modified version of the two-round simultaneous stopping rule that would close the auction for all licenses after the second consecutive round in which no bidder submits a new accepted bid on any license on which it is not the provisional winning bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a license for which it is the provisional winning bidder would not keep the auction open under this modified rule.

39. Based on our experience in past auctions with a simultaneous stopping rule that closed the auction after one round of no new bids (or withdrawals or proactive waivers), we believe that the two-round stopping rule we proposed allows adequate time for bidders. We therefore adopt the two-round simultaneous stopping rule we proposed, with one clarification. Renewed bids are not considered new bids for purposes of the stopping rule; in other words, a round in which the only bids that are placed are renewed bids is considered a round with no new bids for purposes of the stopping rule.

40. As in previous auctions, the Bureau proposed to retain the discretion to keep an auction open even if no new accepted bids are submitted. The activity rule would apply as usual, and a bidder with insufficient activity will either lose bidding eligibility or use a remaining activity rule waiver. We also proposed that the Bureau reserve the right to declare that the auction will end after a specified number of additional rounds ("special stopping rule"). The Bureau would exercise this option only in certain circumstances, such as, for example, where the auction is proceeding very slowly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time.

Before exercising this option, the Bureau is likely to attempt to increase the pace of the auction, for example, by increasing the number of bidding rounds per day, and/or by increasing the amount of the minimum bid increments for the limited number of licenses where there is still a high level of bidding activity. We received no comments on these proposals, and we retain the discretion to keep an auction open or to implement a "special stopping rule." Any such change will be announced to bidders before it takes effect.

vii. Auction Delay, Suspension, or Cancellation

41. We proposed no change to the procedures regarding auction delay, suspension, or cancellation. By public notice or by announcement during the auction, the Bureau may delay, suspend or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and competitive conduct of competitive bidding. In such cases, the Bureau, in its sole discretion, may elect to: resume the auction starting from the beginning of the current round; resume the auction starting from some previous round; or cancel the auction in its entirety. Network interruption may cause the Bureau to delay or suspend the auction. We emphasize that exercise of this authority is solely within the discretion of the Bureau, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers

B. Bidding Procedures

i. Round Structure

42. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed no changes in the round structure from those we have already adopted for Auction No. 31. We, adopt our proposal to use the round structure previously announced. Thus, the Commission will use an automated auction system to conduct the package bidding auction format. The initial bidding schedule will be announced in a public notice to be released at least one week before the start of the auction, and will be included in the registration mailings. The package bidding format will consist of sequential bidding rounds, each followed by the release of round results. Multiple bidding rounds may be conducted in a single day. Details regarding the location and format of round results will be included in the same public notice.

43. The Bureau has discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The Bureau may increase or decrease the amount of time for the bidding rounds and review periods, or the number of rounds per day, depending upon the bidding activity level and other factors. Any changes will be announced to bidders before they take effect.

ii. Reserve Price or Minimum Opening Bid

44. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed no change in the minimum opening bids from those we previously adopted for the individual licenses. For a package, we proposed to calculate the minimum, opening bid by adding together the minimum opening bids of the individual licenses that make up the package. We adopt our proposal for the minimum opening bids for individual licenses. For a package, we adopt our proposal that the minimum opening bid is the sum of the minimum opening bids of the individual licenses that make up the package. We retain the discretion to lower the minimum opening bids during the auction.

iii. Minimum Accepted Bids and Bid Increments

45. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed that for a bid to be accepted in any round it must be $x\%$ greater than the minimum amount to have become a retained bid in the previous round, where the Bureau will specify the value of x . This was analogous to the minimum accepted bid rule in a simultaneous multiple round auction. We also sought comment on other methods for calculating the minimum accepted bid. We noted that one possibility was to determine the bid increment as the maximum of (i) the increment as calculated and (ii) an increment based on the total revenue (the provisionally winning bids) in the previous round. Another possibility was to determine the minimum accepted bid by allocating the total amount needed to beat the provisional winners ("the shortfall approach"). We also proposed to set the minimum increment for a license or package initially at five percent and retain the discretion to vary the minimum bid increments in each round of the auction by announcement prior to each round.

46. We conclude that our original proposal for basing minimum accepted bids on retained bids did not comport

well with other elements of our proposed package bidding procedures (e.g., the use of contingent "or" bids or allowing cancellation of retained but non-provisionally winning bids) nor with other elements of the package bidding procedures we establish today (e.g., allowing bidders to place mutually exclusive bids across rounds). With any of those procedures, the determination of retained bids as potentially winning bids is complicated. Accordingly, it is necessary to modify our proposal.

47. The major purpose of a minimum accepted bid rule is to ensure the proper pacing for the auction even if bidders act strategically. In the case of package bidding, a properly designed minimum accepted bid rule also can facilitate bids that overcome the threshold problem (the potential difficulty of combining small packages to beat larger ones). We believe that simplicity, while obviously desirable, ranks as a lesser factor. In this regard we note that bidders will not be required to calculate minimum accepted bids themselves, but will have the minimum accepted bids provided to them by the bidding software.

48. We adopt a variation of our first proposed alternative method for calculating minimum accepted bids. The minimum accepted bid for any license or package will be the greater of: (i) the minimum opening bid; (ii) the bidder's own previous high bid on that package plus $x\%$, where the Bureau will specify the value of x in each round; and (iii) the number of bidding units for the license or package multiplied by the lowest \$/bidding unit on any provisionally winning package in the last 5 rounds. We retain the discretion to change the minimum accepted bid, and to do so on a license-by-license and package-by-package basis, if circumstances so dictate. We will notify bidders of any such change before it takes effect.¹

49. Part (i) of the formula simply ensures consistency with the minimum opening bids we have adopted. With regard to part (ii) of the formula, by using a bidder's own prior bid as a base we ensure that the price each bidder faces is rising, generally in small steps

¹ As described further in section II.B.iv, Last and Best Bids, and section II.B.v, Renewed Bids, there are two exceptions to the minimum accepted bid requirement. First, bidders who choose to place no further bids in the auction may place one last set of bids at any amount between their previous high bid and the minimum accepted bid. Second, at any time bidders may "renew" their highest previous bid on a license or package without increasing the bid; however, a bidder is not conferred activity credit for renewing a non-provisionally winning bid. Because bids in each round are considered mutually exclusive, renewing a provisionally winning bid does not double count that bid towards a bidder's total activity credit.

above the amount it has indicated it is willing to pay. Moreover, we find that when we allow for mutually exclusive bids across rounds² and package bidding, there are disadvantages to requiring a bidder to beat a high bid on a package or license. One effect of allowing mutually exclusive bids is that a bid does not necessarily have to be the highest bid on a particular package or license in order for it to be a provisional winner. An example will illustrate this point.

Bidder 1 places a bid of 50 on Package A, and Bidder 2 places a bid of 50 on Package B. In the next round, Bidder 1 places a bid of 100 on Package B, which is mutually exclusive with its bid of 50 on Package A from the previous round. If Bidder 3 is allowed to bid 40 on Package A, even though it is not higher than Bidder 1's bid of 50, Bidder 3 will become a provisional winner (assuming that these are the only bids). Bidder 3's bid of 40 on Package A plus Bidder 1's bid of 100 on Package B totals 140, and this total is higher than Bidder 1's bid of 50 on Package A plus Bidder 2's bid of 50 on Package B which totals only 100. We wish to encourage such bids. Moreover, Bidder 3 may not have bid if it were required to beat Bidder 1's bid of 50 on Package A, which is not the efficient outcome.

Under part (iii) of the formula, we calculate the least expensive provisionally winning "unit price" (the provisionally winning bid for a license or package divided by the number of bidding units associated with the bid) for the five prior rounds. To perform this calculation, we examine all of the provisionally winning bids for the five prior rounds. We then divide each of those provisionally winning bids by the number of bidding units associated with it, to yield a "unit price" for each provisionally winning bid. Finally, we determine the lowest unit price of all of the provisionally winning bids (in other words, the lowest unit price that any bidder has bid for any provisionally license or package in the prior five rounds). To apply part (iii) of the formula to a new bid, we multiply that lowest unit price by the bidding units associated with the license or package for which the bidder is bidding. It is possible, and indeed likely, that the lowest unit rate will come from a different license or package than the one on which the bidder is bidding.

50. Part (iii) of the formula essentially requires that bids on any license or package be not too far from the provisionally winning bids; unless we

² As discussed in more detail in section II.B.vi.b, Winning and Provisionally Winning Bids, bids that are made by the same bidder in different rounds are treated as being mutually exclusive, or as contingent "or" "bids". The bidder may win with the bids in one round, or the other, but not both.

include such a provision, bids might not become competitive without many rounds of bidding. Part (iii) thereby facilitates bids that will overcome the threshold problem. By using the least expensive provisionally winning rate for any license or package over the previous five rounds, we believe that we have ensured that minimum accepted bids will not be too high. Although we recognize that part (iii) may not meet some commenters' concerns about simplicity, omitting part (iii) would adversely and unacceptably affect the pace of the auction. We also believe that the rule as a whole will discourage "parking" because any minimum accepted bid has a reasonable chance of becoming a provisional winner. "Parking" is the placing of a bid that a bidder does not expect to become a winning bid for the purpose of maintaining eligibility and/or keeping the auction open.

51. We retain the discretion to limit minimum accepted bids when circumstances warrant, and to do so on a round-by-round, package-by-package and license-by-license basis. We believe that this discretion, along with our discretion to increase the time for the bidding rounds and review periods and the number of rounds per day, which we will exercise with sensitivity to the needs of bidders to study round results and adjust their bidding strategies, is sufficient to meet commenters' concerns of having adequate time in which to make decisions involving potentially hundreds of millions of dollars.

52. We note that part (ii) of the minimum accepted bid rule is specific to each bidder. It may therefore be the case that different bidders will have different minimum accepted bids on the same license or package. We do not believe that this will yield an inefficient result because when part (ii) applies the bidder's new bid is based on an amount that it has already bid and therefore indicated it is willing to pay. Moreover, any inefficiency or inequity caused by part (ii) of this rule is mitigated by the ability of bidders to renew bids without increasing them and by the last and best bid procedure, described in the next section, which allows a bidder to make a final set of bids without regard to the minimum accepted bid rule.

53. As has become standard in our auctions, we also proposed that we would use "click box" bidding. Specifically, we proposed to allow package bids to increase by one increment in each round, while bids on individual licenses could increase by one to nine increments.

54. Under our previously adopted procedures, a bid increment was

defined as $x\%$ of the standing high bid, where x was specified by the Bureau, and the minimum accepted bid was the standing high bid plus $x\%$. Thus, if x was equal to 10, bidders were permitted to make bids of the standing high bid plus 10%, plus 20%, etc., with the maximum bid being equal to the standing high bid plus 90%. Under the procedures we establish today, however, there are no standing high bids and minimum accepted bids are not based on standing high bids. We believe, however, that the prior definition of a bid increment is one that is easy for bidders to understand. Accordingly, we believe our new definition of a bid increment should be analogous to the old definition. Accordingly, for this auction, we are defining a bid increment as $x\%$ of the minimum accepted bid, where the minimum accepted bid is determined as discussed. As under our previously established procedures, the Bureau will specify the value of x in each round. The Bureau also retains the discretion to change the bid increment, and to do so on a license-by-license and package-by-package basis, if circumstances so dictate. Any such change will be announced to bidders prior to the beginning of the round in which the change takes effect.

55. Several commenters disagreed with our proposal to restrict bidders from raising a bid on a package by more than one increment. Because we believe that the minimum bid rule we are adopting helps overcome the threshold problem, we no longer find it necessary to adopt that restriction. We note that we currently use click box bidding in our simultaneous multiple round auctions. Click box bidding eliminates the use of trailing digits for bid signaling. It also helps prevent bidders from making mistakes when placing their bids. The nine-increment limit constrains jump bidding to some degree while generally not preventing a bidder from making up in a single bid the entire shortfall necessary to become a provisional winner. We therefore adopt our proposal to use click box bidding and to allow bids on either individual licenses or packages to increase by one to nine increments. We reserve the right to change the number of possible increments. Any such change will be announced to bidders prior to the beginning of the round in which the change takes effect.

iv. Last and Best Bids

56. Bidders that wish to drop out of the auction or that believe they are about to lose their bidding eligibility will have the opportunity before they drop out to make a "last and best" bid

on any packages for which they remain eligible. Such bids may be of any amount (in thousand dollar increments) between their previous high bid and the minimum accepted bid. This is a limited exception to the minimum accepted bid rule and to click box bidding. If a bidder chooses this option, it will not be permitted to make any further bids during the auction.

57. We adopt this procedure primarily as a method of ensuring that there are no tie bids at the end of the auction. Several commenters had expressed their concern that, especially with click box bidding, bidders could submit tie bids. We believe that this procedure provides a fair and efficient way to break ties should they occur, although it is not limited to those situations where there is a tie. An example of how this procedure would break a tie is provided at the beginning of section II.B.vi, Winning and Provisionally Winning Bids. The procedure also allows bidders to bid the maximum amount they are willing to pay for a package regardless of how the Commission sets the minimum accepted bid, and thus mitigates the possible inefficiency that would result from setting minimum accepted bids too high.

v. Renewed Bids

58. Without regard to the minimum accepted bid requirement, a bidder may "renew" in the current round the highest previous bid it made on any license or package; that is, it may resubmit the bid without increasing the amount bid. No activity credit will be conferred for renewing a non-provisionally winning bid (provisionally winning bids, however, receive activity credit whether or not they are renewed). Renewed bids will be treated as being made in the current round.

59. Allowing bidders to renew bids provides several benefits. For example, because bids made in different rounds are treated as mutually exclusive, if a bidder wishes to win both a license for which it is the provisional winner and another license, it must bid on both licenses in a single round. Therefore, unless we provide bidders an opportunity to renew their provisionally winning bids without increasing them, provisionally winning bidders that desired additional licenses would be forced to raise their bids on the licenses for which they were already provisional winners. Allowing bidders to renew bids also mitigates the potential concern that we are not retaining all potentially winning bids and a bidder may not be able to submit a new bid on a license

or package on which it previously bid because the bid increment is too high.

vi. Winning and Provisionally Winning Bids

60. The first part of this section describes how we will determine the winning and provisionally winning bids from among the bids we examine. The second part describes the universe of bids we will examine and includes a discussion of retained bids, contingent "or" bids, and bid cancellation.

Section A

61. In the *Auction No. 31 Package Bidding Comment Public Notice*, we defined winning bids as the set of gross bids on individual licenses and packages that maximizes gross revenue when the auction closes, assigning each license to only one party (a bidder or, in the case of unsold licenses, the Commission).³ We defined provisionally winning bids as the set of bids that maximize revenue in a particular round (*i.e.*, they would win if the auction were to close in that round), assigning each license to only one party (a bidder or the Commission).

62. No commenter disagrees with how we proposed to determine the winning bids. Accordingly, we adopt our proposal with a clarification to take into account the fact that, we will treat the bids it makes in different rounds as mutually exclusive (as explained in section b). The *winning bids* are the set of "consistent" bids (bids that (i) do not overlap and (ii) are made or renewed by an individual bidder in the same round) that maximize total revenue when the auction closes. The *provisionally winning bids* are the consistent bids that maximize total revenue in a particular round. The Bureau is developing computer software to perform these tasks.⁴

63. We note that, in the case of a tie among bids, the algorithm we are using to calculate the winning and provisionally winning bids selects the winning bid randomly.⁵ The procedure

we are adopting for last and best bids, described in section II.B.iv, should help ensure that the winning bid is not the result of a tie. In the case of a tie, the bidder(s) whose bid is not chosen has the opportunity in the next round to make another bid. If the bidder believes that the minimum bid increment is too high and so would ordinarily cease bidding on that license or package, it still has the opportunity, using the last and best bid procedure, to make one final bid on the license or package (which may be as little as \$1,000 more).⁶ The bidder whose bid was chosen randomly then has the opportunity in the next round to beat the new bid.⁷

Bidder 1 and Bidder 2 both bid \$100 million on License A in Round 20. The algorithm randomly selects Bidder 1 as the provisional winner. In round 21, Bidder 2 may make the minimum accepted bid on License A, for example, \$105 million, in which case bidding on the license would simply continue. If, however, Bidder 2 does not value License A at \$105 million, and if it wishes to cease bidding on all other licenses and packages, it may use the last and best bid option to place any bid it wishes on License A between \$100,001,000 and \$104,999,000 (in thousand dollar increments). (If Bidder 2 wishes to continue to bid on other licenses or packages, it may use the last and best bid option at a later point in the auction.) Bidder 2 therefore bids \$103.5 million on License A, the maximum amount it is willing to bid. Bidder 2 is not permitted to place any new bids in the auction. In Round 22, Bidder 1 has the opportunity to place the minimum accepted bid on License A, for example, \$108.67 million, thereby beating Bidder 2. But if Bidder 1 believes that the minimum bid is too high, Bidder 1 also has the opportunity to choose the last and best bid option to place any bid it wishes on License A between \$103,501,000 and \$108,670,100. He therefore bids \$104 million, and is not permitted to place any new bids in the auction. If no other bidders bid on License A, Bidder 1 would be awarded the license at a price of \$104 million.

We therefore believe that by adopting the last and best bid procedure, we have mitigated any adverse effects the algorithm may have on winning bids. We acknowledge, however, a bidder that submits a tie bid and whose bid is not selected as part of the provisionally winning set will have a higher minimum accepted bid in the next round than the bidder whose bid was

selected and who need not raise its bid in order to be considered active on that license or package.

64. We also proposed that licenses on which no bids have been submitted would be treated as if the minimum opening bid had been submitted. SBC/BellSouth state that licenses for which no bids have been made should be treated as having a bid of \$0. Prof. Paul Milgrom ("Milgrom") disagrees.

65. In determining provisionally winning bids, individual licenses on which no bids are available to be considered when solving for the provisionally winning set will be treated as having a bid at the minimum opening bid. We believe that at the end of the auction there will not be any licenses on which bids no bids have been made (either directly or as part of a package), and if it appears that this will occur, the Commission retains the discretion during the auction to lower the minimum opening bid and the minimum accepted bid. Thus, the question of how to treat licenses for which no bids are currently available is one that mostly affects the pace of the auction and the computational simplicity in the early rounds. We believe that treating the licenses as having bids at the opening minimum bid is the better course.

Section B

66. *Mutually Exclusive Bids.* In order to determine the provisionally winning bids at the end of each round, we proposed to consider both the bids made in the current round and "retained" bids. We defined "retained" bids as the provisionally winning bids plus bids that have the potential to become provisionally winning bids because of changes in other bids in subsequent rounds. Somewhat simplified, retained bids were the standing high bids for any package or license (except that a bid on a package that was not greater than the sum of the bids on its best components would not be retained).

67. Commenters have various views of our proposed use of retained bids in calculating provisionally winning bids. Some commenters suggest that we retain all bids. If some or all bids are retained, commenters variously suggest that we permit non-provisionally winning bids to be cancelled, or that we permit contingent "or" bids. Contingent "or" bids would allow bidders to specify that they wish to win one bid or the other, but not both. We had proposed both of these alternatives in the *Auction No. 31 Package Bidding Public Notice*. We agree with those commenters that state

³ If the action closes with any license(s) unsold, those license(s) remain held by the FCC. As stated, in determining the set of bids that maximizes gross revenue, FCC held licenses will be treated as having a bid at the minimum opening bid.

⁴ For example, we are using the ILOG CPLEX, version 6.5 software for our solving algorithm. Prior to the auction date, the Bureau will release further information describing the computer software in detail. Further, we will make available a bidder aid for bidders to be able to determine for themselves what bid amount would have been necessary to beat the other bids and become a provisional winner in the prior round.

⁵ To ensure randomness, we will use a National Institute of Standards and Technology ("NIST") tested pseudorandom generator, which will permute the order of the set of all bids prior to consideration by the solving algorithm.

⁶ The bidder would ordinarily choose the best and final bid option only when it has decided to stop bidding and drop out of the auction altogether.

⁷ If, however, the bidder whose bid is not chosen chooses not to bid and no other bidder makes a higher bid (and the provisionally winning bidder does not make a mutually exclusive bid on a different license or package), then the provisional winner will become the winner at the end of the auction.

that without one of these procedures (cancellation or contingent "or" bids) bidders face the risk that they will have retained but non-provisionally winning bids that they do not desire, which both consumes some of their eligibility and leads to the possibility that they ultimately may win more licenses than they wish. This risk could make bidders unable to switch to backup strategies and could generally chill bidding.

68. In the *Auction No. 31 Package Bidding Public Notice*, we noted that contingent "or" bids could provide a bidder greater flexibility to aggressively bid on licenses that it considers substitutes by overcoming the exposure problem. For computational simplicity and transparency, we proposed a number of restrictions on the use of "or" bids. We also noted that we would need to modify our method for determining retained bids. With regard to bid cancellation, we noted that it could avoid the possible complexity of "or" bids while overcoming exposure problems and thereby allow bidders to explore bids that would overcome the threshold problem. On the other hand, by allowing potential partnering bids to be cancelled, bid cancellation could also make it more difficult to overcome the threshold problem. It also could facilitate adverse strategic bidding, and adversely affect the pace of the auction. Finally, we noted that if we permitted bid cancellation, we would probably retain all bids and modify the activity rules and the procedures for calculating minimum accepted bids.

69. We conclude that calculating provisionally winning bids using the definition of retained bids as set forth in the *Auction No. 31 Package Bidding Comment Public Notice* does not necessarily "retain" all potentially winning bids when bidders are permitted to submit bids that are mutually exclusive across rounds ("or" bids). As illustrated in section II.B.iii., Minimum Accepted Bids and Bid Increments, a bid does not have to be the highest bid on a particular package in order for it to be a provisional winner. The definition of retained bids, however, would not retain a bid unless it was the highest bid on a particular package.

70. We also conclude that it is not computationally feasible at this time to calculate provisionally winning bids using all of the bids that are made throughout the auction (i.e., to retain all bids) when "or" bids are permitted. Similarly, we conclude that permitting unrestricted "or" bids is computationally too complicated to implement for this auction. Finally, we do not favor allowing bidders to freely

cancel bids because, as stated, bid cancellation could be used strategically and because other bidders on a smaller package attempting to beat a larger package need some certainty about what bids are available in order to overcome the threshold problem.

71. We conclude that the nature of package bidding requires that we devise some system for retaining non-provisionally winning bids so that more than just the bids made in the current round are considered in determining the new provisionally winning bids. Otherwise, it would be very difficult to overcome the threshold problem. Bidders on individual licenses or smaller packages need to know what other bids are available that, when considered along with their bids, could beat a larger package.

72. We believe that the following procedure meets our objectives and responds to the design weaknesses discussed. First, we will treat the bids a bidder makes in the current round as mutually exclusive with the bids that same bidder made in prior rounds. If a bidder does not want a bid from the previous round (including a provisionally winning bid) to be considered mutually exclusive with bids made in the current round, it can resubmit the bid in the current round. A bidder may either "renew" a bid without increasing the amount bid or increase the bid.⁸

73. Second, to determine the provisionally winning bids, we will consider (i) the bids made by each bidder in the most recent two rounds in which that bidder placed new or renewed bids and (ii) all provisionally winning bids from the prior round. This approach ensures that bidders in the current round will have bids by other bidders available for them to "partner" with so they can make a bid that would have made them a provisional winner in the last round.⁹ It thereby assists bidders in overcoming the threshold problem. This approach also helps ensure that bidding is sincere since bidders are held to their bids even after they stop bidding. Bidders should be willing to pay the amount they

⁸ As stated, "renewing" a non-provisionally winning bid confers no activity credit, while making a minimum accepted bid does. On the other hand, a bidder receives activity for a bid that is a provisionally winning bid at the end of the last round, whether or not it renews the bid.

⁹ The use of the term "partner" does not imply collusion among bidders and collusion is strictly prohibited by the Commission's Rules. See 47 CFR 1.2105(c). It simply refers to the fact that in order to beat a larger package, a bidder on an individual license or smaller package needs others to bid on the other licenses or packages that make up the larger package.

previously bid even if they are not willing to raise their bids.

74. The auction design we establish today therefore takes elements from both, contingent "or" bids and bid cancellation. By making a bidder's own bids mutually exclusive across rounds, we have implicitly provided for a limited number of "or" bids without the imposition of excessive computational burdens. Moreover, by considering only a bidder's two most recent rounds in which it made a bid (either an accepted new bid or a renewed bid), plus any provisionally winning bids, we have essentially cancelled all of the bidder's other bids.

75. More importantly, treating each participant's bids across rounds as mutually exclusive meets the objectives that both of these methods were attempting to accomplish without either the complications or the risks. As with "or" bids and bid cancellation, bidders may pursue back-up strategies without exposing themselves to the risk that they will win both sets of licenses. Also, bidders may achieve all of the flexibility of using "or" bids within a round by bidding straightforwardly across rounds. And by considering a bidder's two most recent rounds of bids in which accepted new bids or renewed bids were made (plus its provisionally winning bids), we allow bidders to explore ways to partner with other bids in order to beat bids on larger packages. Yet the bidding method we are adopting, by automatically canceling bids instead of leaving it to the bidder's discretion, lessens the risk of strategic bidding. We believe that this bidding method meets both the commenters' concerns and their desires.

vii. Bidding

76. During a bidding round, a bidder may submit individual bids for as many licenses as it wishes, subject to its eligibility; may submit bids on any packages it has designed, subject to its eligibility and a limit of bidding on twelve different packages throughout the auction; may renew bids it has previously made; may remove bids placed in that round before the round closes; may use an activity rule waiver, and may permanently reduce eligibility. Bidders may make certain mutually exclusive bids (i.e., overlapping bids) in a bidding round. For example, a bidder may place a bid on License A and a bid on a package consisting of Licenses A and B. The bids are mutually exclusive because it is not possible that both bids can become provisionally winning bids. Bidders have the option of making multiple submissions and removals in each bidding round.

77. Bidders should note that all bidding will take place remotely either through the automated bidding software or by telephonic bidding. (Telephonic bid assistants are required to use a script when entering bids placed by telephone. Telephonic bidders are therefore reminded to allow sufficient time to bid by placing their calls well in advance of the close of a round, especially since this is the first combinatorial auction conducted by the Commission. For the simultaneous multiple round auctions, normally, four to five minutes were necessary to complete a bid submission. Bid submissions may take longer for combinatorial auctions.) There will be no on-site bidding during Auction No. 31.

78. A bidder's ability to bid on specific licenses and packages in the first round of the auction is determined by two factors: (i) The licenses applied for on FCC Form 175; and (ii) the upfront payment amount deposited. The bid submission screens will be tailored for each bidder to include only those licenses for which the bidder applied on its FCC Form 175. Bidders must create packages on the package creation screen before they are permitted to bid on the packages. Bidders are reminded that they will be able to create only those packages (i) that contain only the licenses for which they applied on FCC Form 175, and (ii) for which they have eligibility based on their upfront payments.

79. The bidding software requires each bidder to log in to the FCC auction system during the bidding round using its FCC-supplied security identification. Procedures for obtaining security information and accessing the FCC auction system will be announced in a future Public Notice. Bidders are strongly encouraged to download and print bid confirmations *after* they submit their bids.

80. The bid entry screen of the automated auction system software for Auction No. 31 allows bidders to place multiple increment bids. In addition to placing the minimum accepted bid, bidders may increase the minimum accepted bid by from one to nine bid increments. The bidding software will display allowable bids for each license and package created by the bidder.

81. To place a new bid on a license or package, the bidder must place a minimum accepted bid, and may place a bid up to nine times the bid increment. A bidder may also place a renewed bid on a license or package. Both actions are done by clicking the desired bid amount in the Amount Bid box displayed on the bidding screen and then clicking the submit button.

viii. Bid Removal and Bid Withdrawal

82. Bid "removal" is the voiding of a bid made in the current round. Bid "withdrawal" is the voiding of a provisionally winning bid. Bid "cancellation" is the voiding of a non-provisionally winning bid. We discuss bid cancellation in section II.B.vi.b, Winning and Provisionally Winning Bids. For the reasons set forth and in section II.B.vi.b, we permit only the removal of bids placed in the current round. The withdrawal or cancellation of bids made in previous rounds is *prohibited*.

83. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed to retain the bid removal procedures that we previously established. Spectrum Exchange endorses the proposal and no commenter objects. Accordingly, we retain the bid removal procedures previously announced. At any time before the close of a bidding round, a bidder has the option of removing any bids placed in that round. By using the remove bid function in the software, a bidder may effectively "unsubmit" any bid placed within that round. This is not the same as withdrawing a bid, which, in our simultaneous multiple round auction system, can occur in rounds subsequent to the round in which the high bid was placed. A bidder removing a bid placed in the same round is not subject to withdrawal payments. *See* 47 CFR 1.2104(g). Once a round closes, a bidder may no longer remove a bid.

84. We also proposed not to allow bidders to withdraw provisionally winning bids from previous rounds. If a bid is declared the winner and the bidder does not pay the amount due, it is liable for a default payment as set forth in the Commission's Rules.

85. We believe that by making bids placed in different rounds mutually exclusive, we have eliminated a bidder's exposure risk when changing strategies. Bidders will win at most one set of bids, not both. Moreover, the bid withdrawal procedure was designed to allow bidders to back out of failed aggregations—to avoid winning some licenses that are worth less to them than the amount bid without the other licenses they need to implement their business plan. Therefore, since bidders may make package bids on all combinations of licenses with significant complementarities, the use of withdrawals to mitigate such risk is no longer necessary. Moreover, while there is no offsetting benefit from allowing bid withdrawals, there would still be potential harm. Withdrawals may be

used strategically to provide incorrect price signals during the auction and lead other bidders to place inefficient bids. Also, when withdrawals are permitted, one cannot ensure that the auction will proceed at an acceptable pace. Moreover, the harm associated with withdrawals is likely to be more severe in auctions with package bidding since a single withdrawal of a bid (on either an individual license or a package) can affect the entire provisionally winning set. Accordingly, we will *not* permit bidders to withdraw their provisionally winning bids.

86. Finally, we proposed that the previously announced special 30 MHz nationwide bid withdrawal procedure would no longer apply. No commenter objects. We believe that such a special procedure is unnecessary once package bidding is generally permitted. Accordingly, upon approval by the Commission, we will not apply the previously announced special 30 MHz nationwide bid withdrawal procedure.¹⁰

ix. Bid Composition Restriction

87. We sought comment on bid composition restrictions to deter bidders without complementarities from strategically bidding on large packages in order to create a threshold problem for competitors that want only parts of the larger package. For example, the Milgrom-McAfee bid composition restriction would not allow a bidder that is active in a round on a package, but not on a subset of that package, to bid subsequently for the subset. No commenter believes that such a bid composition restriction is necessary for this auction. We agree. Therefore, we are not adopting any restrictions on bid composition (other than limiting bidders to creating and bidding on at most twelve packages).

x. Default

88. In the *Auction No. 31 Package Bidding Comment Public Notice*, we proposed to modify the default procedures and rules to take into account package bidding. In the 700 MHz *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, the Commission stated that after the Bureau has reviewed the record in this proceeding and determined

¹⁰ In the 700 MHz *First Report and Order*, the Commission directed the Bureau to adopt a special 30 MHz nationwide withdrawal rule if it was operationally feasible to do so. Accordingly, the Bureau established such a rule in the *Auction No. 31 Procedures Public Notice*. As discussed in section II.B.x, Default, the Commission has stated that prior to the due date for the filing of short form applications for Auction No. 31, it will adopt any rule changes necessary to implement package bidding.

whether or not to implement package bidding, which we do today, it will adopt any necessary rule changes, such as changes to the general competitive bidding default payment rule, in a further reconsideration order to be adopted prior to the due date for the filing of short forms for Auction No. 31. Accordingly, we leave for the Commission the discussion of the proposed modifications to the default rule and the comments received to that proposal.

xi. Round Results

89. Although we did not propose any changes to the round results that would be provided, the modified procedures we establish today change some of the results that will be reported. As we stated in the *Auction No. 31 Procedures Public Notice*, bids placed during a round will not be published until the conclusion of that bidding period. After a round closes, the Commission will compile reports of all bids placed, provisionally winning bids, whether or not there were ties for the provisionally winning bids, and bidder eligibility status (bidding eligibility and activity rule waivers), and post the reports for public access. Reports reflecting bidders' identities and bidder identification numbers for Auction No. 31 will be available before and during the auction. Thus, bidders will know in advance of this auction the identities of the bidders against which they are bidding.

xii. Auction Announcements

90. The Commission will use auction announcements to announce items such as schedule changes. All Commission

auction announcements will be available on the FCC Extranet and on the Internet.

xiii. Maintaining the Accuracy of FCC Form 175 Information

91. As we stated in the *Auction No. 31 Procedures Public Notice*, after the short-form filing deadline, applicants may make only minor changes to their FCC Form 175 applications. For example, permissible minor changes include deletion and addition of authorized bidders (to a maximum of three) and certain revisions to exhibits. Impermissible changes include changes to the selection of licenses on which the applicant wishes to bid. Filers must make these changes on-line, and submit a letter to: Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. A separate copy of the letter should be mailed to Howard Davenport, Auctions and Industry Analysis Division, briefly summarizing the changes. Questions about other changes should be directed to Howard Davenport, Auctions and Industry Analysis Division at (202) 418-0660.

C. Post-Auction Procedures: Refund of Remaining Upfront Payment Balance

92. The package bidding procedures we adopt here necessitate a slight change in the post-auction procedures regarding the refund of a bidder's remaining upfront payment balance. Because a bidder with no provisionally winning bids during the auction may still be a winning bidder at the end of the last round of the auction, bidders

may not drop out of the auction completely. Accordingly, bidders are no longer eligible for a refund of their upfront payments before the close of the auction. The refund procedures are therefore as follows:

93. All applicants that submitted upfront payments but were not winning bidders for a 700 MHz license may be entitled to a refund of their remaining upfront payment balance after the conclusion of the auction. At the end of the auction, those bidders who are eligible for a refund must submit a written refund request which includes wire transfer instructions, a Taxpayer Identification Number ("TIN"), and a copy of their bidding eligibility screen print, to: Federal Communications Commission, Financial Operations Center, Auctions Accounting Group, Shirley Hanberry, 445 12th Street, SW, Room 1-A824, Washington, DC 20554.

94. Bidders are encouraged to file their refund information electronically using the Refund Information portion of the FCC Form 175, but bidders can also fax their request to the Auctions Accounting Group at (202) 418-2843. Once the request has been approved, a refund will be sent to the party identified in the refund information. Refund processing generally takes up to two weeks to complete. Bidders with questions about refunds should contact Michelle Bennett or Gail Glasser at (202) 418-1995.

Federal Communications Commission.

Margaret Wiener,

Deputy Chief, Auctions and Industry Analysis Division Wireless Telecommunications Bureau.

ATTACHMENT—AUCTION NO. 31; LICENSES TO BE AUCTIONED

Economic area grouping	License numbers	License bandwidth (MHz)	Description	Population (1990)	Bidding units	Upfront payment	Minimum opening bid
EAG701	WXEAG701-C	10	Northeast	41,567,654	14,000,000	\$14,000,000	\$40,000,000
EAG702	WXEAG702-C	10	Mid-Atlantic	42,547,218	14,000,000	14,000,000	40,000,000
EAG703	WXEAG703-C	10	Southeast	44,516,919	14,000,000	14,000,000	40,000,000
EAG704	WXEAG704-C	10	Great Lakes	41,560,906	14,000,000	14,000,000	40,000,000
EAG705	WXEAG705-C	10	Central/Mountain ...	40,926,284	14,000,000	14,000,000	40,000,000
EAG706	WXEAG706-C	10	Pacific	41,427,686	14,000,000	14,000,000	40,000,000
Subtotal .....	.....	.....	.....	.....	84,000,000	84,000,000	240,000,000
EAG701	WXEAG701-D	20	Northeast	41,567,654	28,000,000	28,000,000	80,000,000
EAG702	WXEAG702-D	20	Mid-Atlantic	42,547,218	28,000,000	28,000,000	80,000,000
EAG703	WXEAG703-D	20	Southeast	44,516,919	28,000,000	28,000,000	80,000,000
EAG704	WXEAG704-D	20	Great Lakes	41,560,906	28,000,000	28,000,000	80,000,000
EAG705	WXEAG705-D	20	Central/Mountain ...	40,926,284	28,000,000	28,000,000	80,000,000
EAG706	WXEAG706-D	20	Pacific	41,427,686	28,000,000	28,000,000	80,000,000
Subtotal .....	.....	.....	.....	.....	168,000,000	168,000,000	480,000,000
Total .....	.....	.....	.....	.....	252,000,000	252,000,000	720,000,000

[FR Doc. 00-17673 Filed 7-12-00; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[CS Docket No. 00-30; DA 00-1432]

En Banc Hearing on America Online, Inc and Time Warner, Inc. Applications for Transfer of Control

AGENCY: Federal Communications Commission.

ACTION: Notice of Hearing.

SUMMARY: The Federal Communications Commission (FCC) will hold an en banc hearing to discuss issues pertinent to the joint applications of America Online, Inc. ("AOL") and Time Warner, Inc. (Time Warner) for Commission approval of the transfer of control to AOL Time Warner, a new entity, of licenses and authorizations now held by AOL and Time Warner. AOL and Time Warner, as well as consumer, community, and industry representatives will be invited to participate as panelists.

DATES: The hearing will be held on Thursday, July 27, 2000 from 1:00 p.m. to 5:00 p.m.

ADDRESSES: The hearing will be held at the Federal Communications Commission, Commission Meeting Room, 445 12th Street, S.W., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Linda Senecal, 202-418-7044. News Media Contact: Michelle Russo, 202-418-2358.

SUPPLEMENTARY INFORMATION: A transcript of the en banc will be available 10 days after the event on the FCC's Internet site. The URL address for the FCC's Internet Home Page is <http://www.fcc.gov>. Transcripts may be obtained from the FCC's duplicating contractor, International Transcription Service (ITS) at (202) 857-3800 or fax (202) 857-3805 or TTY (202) 293-8810. ITS may be reached by e-mail at: service@itsdocs.com. ITS's Internet address is <http://www.itsdocs.com>. The transcript is available to individuals with disabilities requiring accessible formats (electronic ASCII text, Braille, large print, and audiocassette) by contacting Brian Millin at (202) 418-7426 (Voice), (202) 418-7365 (TTY), or by sending an email to access@fcc.gov. The en banc can be viewed over George Mason University's Capitol Connection via the Internet by calling (703) 993-3100 for more information. The audio portion of the en banc will be broadcast live on the Internet via the

Commission's Internet audio/video broadcast page at <http://www.fcc.gov/realaudio>. The en banc can also be heard via telephone, for a fee, from National Narrowcast Network, telephone (202) 966-2211 or fax (202) 966-1770. Users must have an account with National Narrowcast prior to the en banc. Audio and video tapes of the en banc may be purchased from Infocus, 341 Victory Drive, Herndon, Virginia 20170, by calling Infocus at (703) 834-0100 or by faxing Infocus at (703) 834-0111.

Dated: July 6, 2000.

John Norton,

Division Chief, Policy and Rules Division, Cable Services Bureau.

[FR Doc. 00-17667 Filed 7-12-00; 8:45 am]

BILLING CODE 6712-01-P

FEDERAL COMMUNICATIONS COMMISSION

[Report No. 2423]

Petition for Reconsideration of Action in Rulemaking Proceeding

July 7, 2000.

Petition for Reconsideration has been filed in the Commission's rulemaking proceeding listed in this Public Notice and published pursuant to 47 CFR Section 1.429(e). The full text of this document is available for viewing and copying in Room CY-A257, 445 12th Street, SW., Washington, DC or may be purchased from the Commission's copy contractor, ITS, Inc. (202) 857-3800. Oppositions to this petition must be filed by July 28, 2000. See Section 1.4(b)(1) of the Commission's rules (47 CFR 1.4(b)(1)). Replies to an opposition must be filed within 10 days after the time for filing oppositions has expired.

Subject: Implementation of Section 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996 (WT Docket No. 96-198).

Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities

Number of Petitions Filed: 1.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 00-17664 Filed 7-12-00; 8:45 am]

BILLING CODE 6712-01-M

FEDERAL DEPOSIT INSURANCE CORPORATION

Sunshine Act Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 1:36 p.m. on Monday, July 10, 2000, the Board of Directors of the Federal Deposit Insurance Corporation met in closed session to consider matters relating to the Corporation's supervisory, corporate, and receivership activities.

In calling the meeting, the Board determined, on motion of Ms. Julie L. Williams, acting in the place and stead of Director John D. Hawke, Jr. (Comptroller of the Currency), seconded by Vice Chairman Andrew C. Hove, Jr., concurred in by Director Ellen S. Seidman (Director, Office of Thrift Supervision), and Chairman Donna Tanoue, that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no notice earlier than July 6, 2000, of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10)).

The meeting was held in the Board Room of the FDIC Building located at 550-17th Street, N.W., Washington, D.C.

Dated: July 10, 2000.

Federal Deposit Insurance Corporation.

James D. LaPierre,

Deputy Executive Secretary.

[FR Doc. 00-17859 Filed 7-11-00; 8:45 am]

BILLING CODE 6714-01-M

FEDERAL ELECTION COMMISSION

Sunshine Act Meeting

AGENCY: Federal Election Commission.

Date & Time: Tuesday, July 18, 2000 at 10:00 a.m.

Place: 999 E Street, N.W., Washington, D.C.

Status: This meeting will be closed to the public.

Items To Be Discussed:

Compliance matters pursuant to 2 U.S.C. § 437g.

Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.

Matters concerning participation in civil actions or proceedings or arbitration.

Internal personnel rules and procedures or matters affecting a particular employee.

Date & Time: Thursday, July 20, 2000 at 10:00 a.m.
Place: 999 E Street, N.W., Washington, D.C. (Ninth Floor).

Status: This meeting will be open to the public.

Items To Be Discussed:

Correction and Approval of Minutes.
 Advisory Opinion 2000-14: New York State Committee of the Working Families Party by counsel, Michael Trister.

Administrative Matters.

Person To Contact for Information: Mr. Ron Harris, Press Officer, Telephone: (202) 694-1220.

Mary W. Dove,

Acting Secretary.

[FR Doc. 00-17832 Filed 7-11-00; 10:41 am]

BILLING CODE 6715-01-M

FEDERAL MARITIME COMMISSION

Notice of Agreement(s) Filed

The Commission hereby gives notice of the filing of the following agreement(s) under the Shipping Act of 1984. Interested parties can review or obtain copies of agreements at the Washington, DC offices of the Commission, 800 North Capitol Street, NW., Room 962. Interested parties may submit comments on an agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days of the date this notice appears in the **Federal Register**.

Agreement No.: 201104.

Title: Marine Terminal Agreement between Compania Chilena de Navegacion Interoceanica S.A. and The City and County of San Francisco.

Parties: The City and County of San Francisco, Compania Chilena de Navegacion Interoceanica S.A.

Synopsis: The agreement provides for the non-exclusive right to use a municipal pier for berthing, loading and discharging cargoes. The agreement runs through July 31, 2005.

Dated: July 7, 2000.

By Order of the Federal Maritime Commission.

Theodore A. Zook,

Assistant Secretary.

[FR Doc. 00-17651 Filed 7-12-00; 8:45 am]

BILLING CODE 6730-01-P

FEDERAL MARITIME COMMISSION

Ocean Transportation Intermediary License Applicant

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission an application for licenses as Non-Vessel Operating Common Carrier and Ocean

Freight Forwarder—Ocean Transportation Intermediary pursuant to section 19 of the Shipping Act of 1984 as amended (46 U.S.C. app. 1718 and 46 CFR 515).

Persons knowing of any reason why the following applicants should not receive a license are requested to contact the Office of Transportation Intermediaries, Federal Maritime Commission, Washington, D.C. 20573.

Non-Vessel Operating Common Carrier Ocean Transportation Intermediary Applicants

Logistics Advantage, Inc., 1805 South Elm Street, Alhambra, CA 91803, Officer: Frank Wong, President, (Qualifying Individual)

Principal Container Line Inc., 515 N. Sam Houston Parkway East, Suite 175, Houston, TX 77060, Officers: Jerome (Joe) Sopher, President, (Qualifying Individual), Noel McEvoy, Director

Cargo Express Northwest, Inc., 354 NE Greenwood Ave., Suite 207, Bend, Oregon 97701, Officers: Joseph M. Pfender, President, (Qualifying Individual), Robert Pfender, Director
 Port of Palm Cold Storage, 1016 Clemons Street, Suite 400, Jupiter, FL 33477, Officer: Michael K. Drew, President, (Qualifying Individual)

Non-Vessel Operating Common Carrier and Ocean Freight Forwarder Transportation Intermediary Applicants

International Transport Logistics, Inc., 8998-1 Blount Island Blvd., Blount Island Marine Terminal, Jacksonville, FL 32226, Officers: Bernard S. Sain, President, (Qualifying Individual), Jason Sain, Vice President
 Trans Port Agencies, Inc., 1204 Lynda Lane, Warminster, PA 18974, Officers: Joseph G. O'Donnell, President, (Qualifying Individual), Theresa A. O'Donnell, Exec. Vice President
 Air Sea Cargo Network, Inc., 33511 Western Avenue, Union City, CA 94587, Officers: Y. Elizabeth Searle, President, (Qualifying Individual), Robert G. Searle, Vice President

Dated: July 7, 2000.

Theodore A. Zook,

Assistant Secretary.

[FR Doc. 00-17650 Filed 7-12-00; 8:45 am]

BILLING CODE 6730-01-P

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company

Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at www.ffiec.gov/nic/.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than August 7, 2000.

A. Federal Reserve Bank of Atlanta (Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. Citizens Bancshares, Inc., Crawfordville, Florida; to become a bank holding company by acquiring 100 percent of the voting shares of Citizens Bank—Wakulla, Crawfordville, Florida.

B. Federal Reserve Bank of Kansas City (D. Michael Manies, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. The Jack and Katherine Dickey Family Limited Partnership, Weatherford, Oklahoma; to become a bank holding company by acquiring 59.6 percent of the voting shares of First Farm Credit Corporation, Weatherford, Oklahoma, and thereby indirectly acquire Southwest National Bank, Weatherford, Oklahoma.

In connection with this application Southwest Capital, LLC, Weatherford, Oklahoma; has applied to become a bank holding company by acquiring 5 percent of the voting shares of The Jack and Katherine Dickey Family Limited Partnership, Weatherford, Oklahoma, and thereby indirectly acquire First Farm Credit Corporation, Weatherford,

Oklahoma, and Southwest National Bank, Weatherford, Oklahoma. Comments regarding these applications must be received not later than August 1, 2000.

C. Federal Reserve Bank of San Francisco (Maria Villanueva, Consumer Regulation Group) 101 Market Street, San Francisco, California 94105-1579:

1. Heritage Commerce Corp, San Jose, California; to merge with Western Holdings Bancorp, Los Altos, California, and thereby indirectly acquire Bank of Los Altos, Los Altos, California.

Board of Governors of the Federal Reserve System, July 7, 2000.

Robert deV. Frierson,

Associate Secretary of the Board.

[FR Doc. 00-17675 Filed 7-12-00; 8:45 am]

BILLING CODE 6210-01-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

White House Commission on Complementary and Alternative Medicine Policy; Notice of Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. appendix 2), notice is given of the first meeting of the White House Commission on Complementary and Alternative Medicine Policy. The purpose of the meeting is to convene the Commission and to begin receiving public testimony from individuals and organizations interested in the subject of federal policy regarding complementary and alternative medicine. Comments received at the meeting will be used by the Commission to identify and frame the issues and develop the agenda for subsequent meetings. Comments should focus on the following issues:

(1) The education and training of health care practitioners in complementary and alternative medicine;

(2) Coordinated research to increase knowledge about complementary and alternative medicine practices and products;

(3) The provision to health care professionals of reliable and useful information about complementary and alternative medicine that can be made readily accessible and understandable to the general public; and

(4) Guidance for appropriate access to and delivery of complementary and alternative medicine.

Some Commission members may participate by telephone conference. The meeting is open to the public and opportunities for statements by the public will be provided on July 14, from 11:30 a.m.-12:30 p.m.

Name of Committee: White House Commission on Complementary and Alternative Medicine Policy.

Date: July 13-14, 2000.

Time: July 13—2:00 p.m.–5:30 p.m.
July 14—8:30 a.m.–5:00 p.m.

Place: Hubert H. Humphrey Building, Room 800, 200 Independence Avenue, SW., Washington, DC 20201.

Contact Person: Stephen Groft, Pharm. D., Executive Director, 6701 Rockledge Drive, Room 1010, Bethesda, MD 20817-1813, Phone: (301) 435-6199, Fax: (301) 480-1691.

Because of the need to obtain the views of the members as soon as possible and because of the early deadline for the report(s) required of the Commission, this notice is being provided at the earliest possible time.

Supplementary Information: The President established the White House Commission on Complementary and Alternative Medicine Policy on March 7, 2000 by Executive Order 13147. The mission of the White House Commission on Complementary and Alternative Medicine Policy is to provide a report, through the Secretary of the Department of Health and Human Services, on legislative and administrative recommendations for assuring that public policy maximizes the benefits of complementary and alternative medicine to Americans.

Public Participation

The meeting is open to the public with attendance limited by the availability of space on a first come, first serve basis. Members of the public who wish to present oral statements should contact Dr. Stephen C. Groft by telephone, fax, or mail as shown above as soon as possible, but at least 4 days before the meeting. A one-page summary of the presentation should accompany any request. The chairperson will reserve time for presentations by persons requesting to speak and asks that oral statements be limited to five minutes. The order of persons wanting to make a statement will be assigned in the order in which requests are received.

Individuals unable to make oral presentations can mail their written comments to the staff office of the Commission at least 4 business days prior to the meeting for distribution to the Commission and inclusion in the public record.

Any person attending the meeting who has not requested an opportunity to speak in advance of the meeting will be allowed to make a brief oral presentation at the conclusion of the meeting, if time permits, at the chairperson's discretion.

Due to time constraints, only one representative from each organization will be allowed to present oral testimony.

Persons needing special assistance, such as sign language interpretation or other special accommodations, should contact the Commission staff at the address or telephone number listed below as soon as possible.

Dated: July 6, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00-17695 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[Program Announcement 00148]

Breast & Cervical Cancer Early Detection Activities; Notice of Availability of Funds

A. Purpose

The Centers for Disease Control and Prevention (CDC) announces the availability of fiscal year (FY) 2000 funds for a cooperative agreement program for Breast & Cervical Cancer Early Detection Activities. This program focuses on serving women in the American Indian/Alaska Native populations.

In August 1994, Congress passed the National Breast and Cervical Cancer Mortality Prevention Act (Pub. L. 101-354). The NBCCEDP program was established to eliminate disparity and provide comprehensive breast and cervical cancer screening services for all women at or below 250 percent of the official poverty line. The American Indian/Alaska Natives (AI/AN) are the only ethnic group specifically mentioned as a priority population in the law. CDC is committed to achieving the health promotion and disease prevention objectives of "Healthy People 2010," a national activity to reduce morbidity and mortality and improve the quality of life. This announcement is related to the focus area of cancer. For the conference copy of "Healthy People", visit the internet address site: <<http://www.health.gov/healthypeople>>.

The purpose of this announcement is to provide Breast and Cervical Cancer Early Detection Activities reaching the maximum number of eligible American Indian/Alaska Native women possible. This will be done by:

1. Enhancing tribal grantee capacity to plan, implement, monitor and evaluate screening, referral and follow-up, case management, public education and outreach, professional education, quality assurance, surveillance, evaluation, partnership development and community involvement in their NBCCEDP screening services.

2. Enhancing the State grantee capacity to understand the unique issues preventing American Indian/Alaska Native women from being screened and to work more effectively to reach tribal women in their states. In a recent meeting at CDC, tribal leaders urged CDC to help build their capacity for developing, implementing and monitoring programs when tribal expertise in a given area was not available. This includes, when possible, respecting their preference for technical assistance to be provided by American Indians for programs serving American Indians and by funding programs directly instead of channeling funds through states for American Indian/Alaska Native programs. See Attachment I for additional background information.

B. Eligible Applicants

Assistance will be provided only to a nonprofit organization with extensive experience serving the American Indian/Alaska Natives populations with the management of women health care programs, including Breast and Cervical Cancer Early Detection Activities. Therefore, eligible organizations should have staff in key positions with evidence of 5 or more years experience. Provide proof of nonprofit status, see AR-15 in Attachment II for additional detail information. The eligible applicants should demonstrate the following:

1. Knowledge and experience in the development of American Indian/Alaska Native women health programs;
2. Have members who are from, or have worked in and are familiar with, each of the 12 Indian Health Service Areas; and
3. Have extensive knowledge of the unique health service delivery issues for American Indian/Alaska Native women and have experience in working with IHS, tribes, tribal organizations, and state staff to identify effective strategies to deliver culturally competent services to this population;
4. Have a past history of demonstrated success in planning, implementing and monitoring health programs such as:
 - a. Director of Health of the Navajo Nation
 - b. Director of California Indian Health Board

- c. Director of Oklahoma City Indian Clinic
- d. Director of Inter-Tribal Council of Michigan
- e. Advisors to the Indian Health Service on AI/AN women's health issues

Limited competition is justified under this Program Announcement due to the limited number organizations that have expertise serving American Indian/Alaska Natives populations with the management of women health care programs, including Breast and Cervical Cancer Early Detection Activities.

Note: Public Law 104-65 states that an organization described in section 501(c)(4) of the Internal Revenue Code of 1986 that engages in lobbying activities is not eligible to receive Federal funds constituting an award, grant, cooperative agreement, contract, loan, or any other form.

C. Availability of Funds

Approximately \$300,000 is available in FY 2000 to fund one award. It is expected that the award will begin on or before September 30, 2000, for a 12-month budget period within a project period of up to 3 years.

Funding estimates may change. A continuation award within an approved project period will be made on the basis of satisfactory progress as evidenced by required reports and the availability of funds.

Use of Funds

Cooperative agreement funds may not be expended to provide inpatient hospital or treatment services. Treatment is defined as any service recommended by a clinician, including medical and surgical intervention provided in the management of a diagnosed condition.

D. Program Requirements

Breast and Cervical Cancer Early Detection Program activities should adhere to current accepted public health recommendations by the U.S. Preventive Services Task Force, or current Division of Cancer Prevention and Control (DCPC) guidance (See Attachment Public Law 101-354)

In conducting activities to achieve the purpose of this program, the recipient shall be responsible for activities under 1. (Recipient Activities), and CDC shall be responsible for conducting activities under 2. (CDC Activities.)

1. Recipient Activities

- a. Collaborate with tribal grantees in the development of annual workplans which will use goals, objectives, activities and time frames that are realistic, measurable and relevant for

reaching American Indian/Alaska Native women for screening.

- b. Facilitate meetings with states and tribes/tribal organizations within those states to develop realistic and culturally sensitive approaches for screening women.

- c. Conduct culturally effective Professional education to National Breast and Cervical Cancer Early Detection Program (NBCCEDP) sponsored tribes, tribal organizations and states working directly with tribes.

- d. Participate in CDC-sponsored annual trainings, meetings, and conferences for AI/AN grantees designed to increase culturally appropriate health care delivery and cultural sensitivity for cooperative agreement grantees.

- e. Monitor and evaluate the program including process and outcome measures.

2. CDC Activities

- a. Assist with providing orientation to staff on the unique requirements of the NBCCEDP program by consultation and technical assistance in the planning and evaluation or program activities.

- b. Collaborate in the development of workshops planning outreach strategies for tribal grantees and states screening AI/AN women.

- c. Provide consultation and technical assistance on guidance on NBCCEDP management topics to be considered for technical assistance.

- d. Assist in developing and planning annual trainings, meetings, and conferences designed to increase culturally appropriate health care delivery and cultural sensitivity for cooperative agreement grantees.

E. Application Content

Use the information in the "Program Requirements," "Other Requirements," and "Evaluation Criteria" sections to develop the application content. Your application will be evaluated on the criteria listed, so it is important to follow them in laying out your program plan. The narrative should be no more than 20 (twenty) double-spaced pages, printed on one side, with one-inch margins, and unreduced 12 point font.

The narrative should contain:

1. Statement of Need—Identify opportunities for enhancement/improvement addressing existing gaps in the support of AI/AN BCCEDP activities. Describe the extent to which the proposed activities will fill existing gaps.
2. Objectives—Establish and submit short-and long-term objectives for each activity proposed in Section 1 (statement of need) above. Objectives

must be specific, measurable, attainable, time phased, and realistic.

3. **Operational Plan**—Submit an operational plan that addresses means for achieving each of the objectives established in Section 2 (objectives) above. Provide a concise description of each component or major activity and how it will be implemented. The plan must identify and establish a time line for the completion of each component or major activity.

4. **Evaluation Plan**—Submit a quantitative plan for monitoring progress toward achieving each of the objectives stated in Section 2 (objectives) above.

5. **Organizational Capacity/Program Management**—Describe the capacity of the organization/group to perform the technical assistance activities relating to Breast and Cervical Programs. Provide an organizational chart and a curricula vitae (not to exceed 2 pages per person) for each member of the organization that will be providing technical assistance.

6. **Budget**—Submit a detailed budget and narrative justification for the activities that is consistent with the purpose of the program and the proposed activities.

F. Submission and Deadline

Submit an original and two copies of PHS 5161-1 (OMB Number 0937-0189) on or before August 15, 2000, submit the application to the Grants Management Specialist identified in the "Where to Obtain Additional Information" section of this announcement.

Deadline: The application will be considered as meeting the deadline if it is either:

- Received on or before the stated deadline date; or
- Sent on or before the deadline date. (Applicant must request a legibly dated U.S. Postal Service postmark or obtain a legibly dated receipt from a commercial carrier or the U.S. Postal Service. Private metered postmarks shall not be acceptable proof of timely mailing.)

Late Application: If the application does not meet the criteria in 1.a. or 1.b. above it will be a considered late application and will be returned to the applicant.

G. Evaluation Criteria

The application will be evaluated according to the following criteria by an independent review group appointed by CDC.

1. **Statement of Need.** The extent to which the applicant identifies specific opportunities and existing gaps related to the purpose of the program. (10 points)

2. **Objectives.** The degree to which short-and long-term objectives are specific, measurable, attainable, time phased, and realistic. (15 points)

3. **Operational Plans.** The adequacy of the applicant's plan to carry out the proposed activities, including the extent to which the applicant plans to work collaboratively with other organizations and individuals who may have an impact on breast and cervical cancer prevention and control objectives. (30 points)

4. **Organizational Capacity/Program Management.** The extent to which the organization appears to have the organizational capacity and program management to develop and manage the program. The extent to which proposed staff appear to be qualified and possess capacity to perform the technical assistance described. The extent to which staff has expertise working with American Indian/Alaska Natives populations with the management of women health care programs, including Breast and Cervical Cancer Early Detection Activities. (30 points)

5. **Evaluation Plan.** The extent to which the evaluation plan appears capable of monitoring progress toward meeting project objectives. (15 points)

6. **Budget.** The extent to which each line-item budget and narrative justification is reasonable and consistent with the purpose and objectives of the program. (Not weighted)

H. Other Requirements

Technical Reporting Requirements

Provide CDC with the original plus two copies of the following:

- Annual written progress report must be submitted 30 days after the end of each budget period.
- Financial status report (FSR) must be submitted 90 days after the end of each budget period.
- Final financial and performance reports, must be submitted 90 days after the end of the project period.

Send all reports to the Grants Management Specialist identified in the "Where to Obtain Additional Information" section of this announcement.

The following additional requirements are applicable to this program. For a complete description of each, see Attachment II in the application package.

AR-9	Paperwork Reduction Act Requirements
AR-10	Smoke-Free Workplace Requirements
AR-11	Healthy People 2010
AR-12	Lobbying Restrictions
AR-15	Proof of Non Profit Status

I. Authority and Catalog of Federal Domestic Assistance Number

This program is authorized under sections 301(a), 317(k)(2) of the Public Health Service Act (42 U.S.C. 241(a) and 247b(k)(2)), as amended. The Catalog of Federal Domestic Assistance Number for this program is 93.283.

J. Where To Obtain Additional Information

To obtain additional information contact: Cynthia Collins, Grants Management Specialist, Grants Management Branch, Procurement and Grants Office, Announcement 00148, Centers for Disease Control and Prevention (CDC), Room 3000, 2920 Brandywine Road, Atlanta, GA 30341, telephone (770) 488-2757, E-mail address: CCollns@CDC.GO

See also the CDC home page on the Internet:
<http://www.cdc.gov>

For program technical assistance, contact: Annie Voigt, Program Consultant, Section C, Program Services Branch, Division of Cancer Prevention and Control, National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention (CDC), 4770 Buford Highway, NE., Mailstop K-57, Atlanta, GA 30341-3724, telephone (770) 488-4707, fax (770) 488-3230.

Dated: July 7, 2000.

Mary Anne Bryant,

Acting Director, Procurement and Grants Office Centers for Disease Control and Prevention (CDC).

[FR Doc. 00-17702 Filed 7-12-00; 8:45 am]

BILLING CODE 4163-18-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Cooperative Agreements to Develop Core State-Based Surveillance Model Programs, RFA OH-00-007, and Development of New or Enhanced Models for State-Based Occupational Surveillance, RFA OH-00-008

In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), the Centers for Disease Control and Prevention (CDC) announces the following meeting.

Name: Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Cooperative Agreements to Develop Core State-Based Surveillance

Model Programs, RFA OH-00-007, and Development of New or Enhanced Models for State-Based Occupational Surveillance, RFA OH-00-008.

Times and Dates: 8 a.m.–8:30 a.m., August 2, 2000 (Open).

8:30 a.m.–5 p.m., August 2, 2000 (Closed).

8 a.m.–5 p.m., August 3, 2000 (Closed).

Place: Embassy Suites, 1900 Diagonal Road, Alexandria, Virginia 22314.

Status: Portions of the meeting will be closed to the public in accordance with provisions set forth in section 552b(c)(4) and (6), Title 5 U.S.C., and the Determination of the Associate Director for Management and Operations, CDC, pursuant to Public Law 92-463.

Matters to be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to RFA-OH-00-007 and RFA OH-00-008.

Contact Person for More Information: Michael J. Galvin, Jr., Ph.D., Health Science Administrator, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health, 1600 Clifton Road, N.E., m/s D30 Atlanta, Georgia 30333. Telephone 404/639-3525, e-mail mtg3@cdc.gov.

The Director, Management Analysis and Services office has been delegated the authority to sign Federal Register notices pertaining to announcements of meetings and other committee management activities, for both the Centers for Disease Control and Prevention and the Agency for Toxic Substances and Disease Registry.

Dated: July 7, 2000.

Julia M. Fuller,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention CDC.

[FR Doc. 00-17700 Filed 7-12-00; 8:45 am]

BILLING CODE 4163-19-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 00D-1360]

Draft Guidance for Industry: Food-Contact Substance Notification System; Availability

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing the availability of a draft guidance document entitled "Preparation of Premarket Notifications for Food Contact Substances: Administrative." This document is intended to provide guidance for industry regarding the preparation of premarket notifications for food-contact substances (FCS). FDA is providing this draft guidance as part

of its implementation of the premarket notification process for FCS established by the Food and Drug Administration Modernization Act of 1997 (FDAMA).

DATES: Submit written comments on this draft guidance by September 26, 2000 to ensure their adequate consideration in the preparation of the final document.

ADDRESSES: Submit written requests for single copies of the draft guidance entitled "Preparation of Premarket Notifications for Food Contact Substances: Administrative" to the Office of Premarket Approval (HFS-200), Food and Drug Administration, 200 C St. SW., Washington, DC 20204. The document may also be obtained by calling the Office of Premarket Approval at 202-418-3080 or by fax at 202-418-3131. See the **SUPPLEMENTARY INFORMATION** section for electronic access to this guidance.

Submit written comments concerning this draft guidance to the Dockets Management Branch (HFA-305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Comments should be identified with the docket number found in brackets in the heading of this document.

FOR FURTHER INFORMATION CONTACT: Mitchell Cheeseman, Center for Food Safety and Applied Nutrition (HFS-215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-418-3083.

SUPPLEMENTARY INFORMATION:

I. Background

FDAMA (Public Law 105-115) amended section 409 of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348) to establish a premarket notification (PMN) process as the primary method for authorizing new uses of food additives that are FCS. A "food contact substance" is defined in section 409(h)(6) of the act as "any substance intended for use as a component of materials used in manufacturing, packing, packaging, transporting, or holding food if such use is not intended to have any technical effect in such food." FDA expects most new uses of FCS that previously would have been regulated by issuance of a listing regulation in response to a food additive petition or would have been exempted from the requirement of a regulation under the threshold of regulation process (21 CFR 170.39) will be the subject of PMN's. FDA is announcing the availability of a draft guidance document entitled "Preparation of Premarket Notifications for Food Contact Substances: Administrative." This document is

intended to provide guidance for industry regarding the preparation of premarket notifications for FCS. FDA is providing this draft guidance as part of its implementation of the premarket notification process for FCS established by FDAMA. Elsewhere in this issue of the **Federal Register** FDA is proposing regulations necessary to implement the notification process for FCS.

II. Significance of Guidance

This draft guidance document represents the agency's current thinking on the data and information that should be submitted in a premarket notification for the use of a FCS. This draft guidance document does not create or confer any rights for or on any person and does not operate to bind FDA or the public. An alternative approach may be used if such approach satisfies the requirements of the applicable statute and regulations.

This draft guidance document is a level 1 guidance under the agency's good guidance practices (62 FR 8961, February 27, 1997).

III. Comments

Interested persons may submit to the Dockets Management Branch (address above) written comments regarding the draft guidance document by September 26, 2000. Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. The draft guidance and received comments are available for public examination in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday. Such comments will be considered when determining whether to amend the draft guidance.

VI. Electronic Access

The draft guidance may also be accessed on the Internet site for the Center for Food Safety and Applied Nutrition at <http://www.cfsan.fda.gov>.

Dated: June 27, 2000.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 00-17654 Filed 7-12-00; 8:45 am]

BILLING CODE 4160-01-F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Office of the Director; Notice of Meeting

Pursuant to Pub. L. 92-463, notice is hereby given of a meeting of the Advisory Committee to the Director, NIH.

The entire meeting will be open to the public as indicated below, with attendance limited to space available. Individuals who plan to attend and need special assistance, such as sign language interpretation or other reasonable accommodations, should inform the Contact Person listed below in advance of the meeting. The meeting will take place via conference call with the members. A speaker phone will be installed in the conference room for the public to listen to the discussion.

Name of Committee: Advisory Committee to the Director, NIH.

Date: July 14, 2000.

Time: 12-1 p.m.

Agenda: To discuss and provide advice on the first part of the Report from the Working Group on NIH Oversight of Clinical Gene Transfer Research.

Place: National Institutes of Health, 1 Center Drive, Building 1, Room 151, Bethesda, Maryland 20892.

Contact Person: Ms. Janice C. Ramsden, Special Assistant to the Acting Director, NIH, National Institutes of Health, Building 1, Room 235, Bethesda, Maryland 20892, jr52h@nih.gov, Telephone: (301) 496-0959.

This notice is being published less than fifteen days in advance of the meeting due to scheduling conflicts among the members.

Dated: July 6, 2000.

LaVerne Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00-17690 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Drug Abuse; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussion could disclose confidential trade secrets or commercial property such as patentable material,

and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute on Drug Abuse Special Emphasis Panel "Brain Bank".

Date: July 19, 2000.

Time: 9:30 am to 5:00 pm.

Agenda: To review and evaluate contract proposals.

Place: Hilton Towers, 20 W. Baltimore Street, Baltimore, MD.

Contact Person: Lyle Furr, Contract Review Specialist, Office of Extramural Affairs, National Institute on Drug Abuse, National Institutes of Health, DHHS, 6001 Executive Boulevard, Room 3158, MSC 9547, Bethesda, MD 20892-9547, (301) 435-1439.

(Catalogue of Federal Domestic Assistance Program Nos. 93.277, Drug Abuse Scientist Development Award for Clinicians, Scientist Development Awards and Research Scientist Awards; 93.278, Drug Abuse National Research Service Awards for Research Training; 93.279, Drug Abuse Research Programs, National Institutes of Health, HHS)

Dated: July 5, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00-17691 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Neurological Disorders and Stroke; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Neurological Disorders and Stroke Special Emphasis Panel.

Date: August 2, 2000.

Time: 2:00 pm to 4:00 pm.

Agenda: To review and evaluate contract proposals.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Phillip F. Wiethorn, MA, Scientific Review Administrator, Scientific Review Branch, NINDS/NIH/DHHS, Neuroscience Center, 6001 Executive Blvd., Suite 3208, MSC 9529, Bethesda, MD 20892-9529, 301-496-9223.

(Catalogue of Federal Domestic Assistance Program Nos. 93.853, Clinical Research Related to Neurological Disorders; 93.854, Biological Basis Research in the Neurosciences, National Institutes of Health, HHS)

Dated: July 5, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00-17692 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute on Aging; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in section 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Aging Special Emphasis Panel.

Date: July 19-20, 2000.

Time: 6:30 pm to 4:30 pm.

Agenda: To review and evaluate grant applications.

Place: 5520 Wisconsin Avenue, Chevy Chase, MD 20815.

Contact Person: Jeffrey M. Chernak, PhD, The Bethesda Gateway Building, 7201 Wisconsin Avenue Suite 2C212, Bethesda, MD 20892, (301) 496-9666.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.866, Aging Research, National Institutes of Health, HHS)

Dated: July 6, 2000.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy*

[FR Doc. 00-17693 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Child Health and Human Development; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Child Health and Human Development Special Emphasis Panel.

Date: July 27-28, 2000.

Time: 8:00 am to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: Holiday Inn—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.

Contact Person: Jon M. Ranhand, PhD, Scientist Review Administrator, Division of Scientific Review, National Institute of Child Health, and Human Development, NIH, 6100 Executive Blvd., Room 5E03, Bethesda, MD 20892, (301) 435-6884.

(Catalogue of Federal Domestic Assistance Program Nos. 93.209, Contraception and Infertility Loan Repayment Program; 93.864, Population Research; 93.865, Research for Mothers and Children; 93.929, Center for Medical Rehabilitation Research, National Institutes of Health, HHS)

Dated: July 5, 2000.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 00-17694 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Mental Health; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Mental Health Special Emphasis Panel.

Date: August 2, 2000.

Time: 1:00 pm to 3:30 pm.

Agenda: To review and evaluate grant applications.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Gerald E. Calderone, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Rm 6150, MSC 9608, Bethesda, MD 20892-9608, 301-443-1340.

Name of Committee: National Institute of Mental Health Special Emphasis Panel.

Date: August 3, 2000.

Time: 1:00 pm to 2:30 pm.

Agenda: To review and evaluate grant applications.

Place: Neuroscience Center, National Institutes of Health, 6001 Executive Blvd., Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Gerald E. Calderone, PhD, Scientific Review Administrator, Division of Extramural Activities, National Institute of Mental Health, NIH, Neuroscience Center, 6001 Executive Blvd., Rm 6150, MSC 9608, Bethesda, MD 20892-9608, 301-443-1340. (Catalogue of Federal Domestic Assistance Program Nos. 93.242, Mental Health Research Grants; 93.281, Scientist Development Award, Scientist Development Award for Clinicians, and Research Scientist Award, 93.282, Mental Health National Research Service Awards for Research Training, National Institutes of Health, HHS)

Dated: July 6, 2000.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 00-17696 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, ZDK1 GRB-1(01).

Date: July 26-27, 2000.

Time: 8:00 am to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: Sheraton Crystal City, 1800 Jefferson Davis Highway, Arlington, VA 22202

Contact Person: Carolyn Miles, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, Room 641, 6707 Democracy Boulevard, National Institutes of Health, Bethesda, MD 20892, (301) 594-7791.

(Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: July 6, 2000.

LaVerne Y. Stringfield,

*Director, Office of Federal Advisory
Committee Policy.*

[FR Doc. 00-17697 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Diabetes and Digestive and Kidney Diseases; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, ZDK1 GRB-4(03).

Date: July 14, 2000.

Time: 3:00 pm to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: 6707 Democracy Boulevard, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: William E. Elzinga, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, Room 647, 6707 Democracy Boulevard, National Institutes of Health, Bethesda, MD 20892-6600, (301) 594-8895.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, ZDK1 GRB-6 (O2).

Date: July 27-28, 2000.

Time: 8:00 am to 5:00 pm.

Agenda: To review and evaluate grant applications.

Place: Double Tree Hotel, 1750 Rockville Pike, Rockville, MD 20852.

Contact Person: Neal A. Musto, PhD, Scientific Review Administrator, Review Branch, DEA, NIDDK, Room 651, 6707 Democracy Boulevard, National Institutes of Health, Bethesda, MD 20892-6600, (301) 594-7798.

Name of Committee: National Institute of Diabetes and Digestive and Kidney Diseases Special Emphasis Panel, ZDK1 GRB-D(02).

Date: July 31, 2000.

Time: 11:00 am to 12:00 pm.

Agenda: To review and evaluate grant applications.

Place: 6707 Democracy Blvd, 2 Democracy Plaza, Rm 653, Bethesda, MD 20892, (Telephone Conference Call).

Contact Person: Ann A. Hagan, PhD, Chief, DEA, NIDDK, Room 653, 6707 Democracy Boulevard, National Institutes of Health, Bethesda, MD 20892, (301) 594-8886. (Catalogue of Federal Domestic Assistance Program Nos. 93.847, Diabetes, Endocrinology and Metabolic Research; 93.848, Digestive Diseases and Nutrition Research; 93.849, Kidney Diseases, Urology and Hematology Research, National Institutes of Health, HHS)

Dated: July 6, 2000.

LaVerne Y. Stringfield,

Director, Office of Federal Advisory Committee Policy.

[FR Doc. 00-17698 Filed 7-12-00; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Receipt of Applications for Permit

Endangered Species

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, *as amended* (16 U.S.C. 1531, *et seq.*):

Applicant: Vincent E. Cucci, Jr., Bernardsville, NJ, PRT-030012.

The applicant requests a permit to import the sport-hunted trophy of two male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Paul Labrecque, Lincoln, ME, PRT-030066.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Applicant: Wayne A. Bliss, Ossineke, MI, PRT-030067.

The applicant requests a permit to import the sport-hunted trophy of one male bontebok (*Damaliscus pygargus dorcas*) culled from a captive herd maintained under the management program of the Republic of South Africa, for the purpose of enhancement of the survival of the species.

Marine Mammals

Applicant: James L. Scull, Jr., Rapid City, SD, PRT-029977.

The applicant requests a permit to import a polar bear (*Ursus maritimus*) sport-hunted from the Lancaster Sound polar bear population, Northwest Territories, Canada for personal use.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, VA 22203 and must be received by the Director within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review, *subject to the requirements of the Privacy Act and Freedom of Information Act*, by any party who submits a written request for a copy of such documents to the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 700, Arlington, Virginia 22203. Phone: (703/358-2104); FAX: (703/358-2281).

Dated: July 7, 2000.

Kristen Nelson,

Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 00-17773 Filed 7-12-00; 8:45 am]

BILLING CODE 4310-55-P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID-010-0777-XQ]

Notice of Meeting

AGENCY: Lower Snake River District, Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Lower Snake River District Resource Advisory Council will meet in Boise. Potential agenda topics are sage grouse habitat management, off highway vehicle use, and other resource management issues.

DATES: August 21, 2000. The meeting will begin at 9:00 a.m. Public comment periods will be held at 9:30 a.m. and 3:00 p.m.

ADDRESSES: The meeting will be held at the Lower Snake River District Office, located at 3948 Development Avenue, Boise, Idaho.

FOR FURTHER INFORMATION CONTACT: Barry Rose, Lower Snake River District Office, 3948 Development Avenue, Boise, Idaho 83705, 208-384-3393.

Katherine Kitchell,

District Manager.

[FR Doc. 00-17699 Filed 7-12-00; 8:45 am]

BILLING CODE 4310-84-U

DEPARTMENT OF THE INTERIOR

National Park Service

Telecommunications Facilities; Construction and Operation: Lake Mead National Recreation Area, Clark County, NV

AGENCY: Lake Mead National Recreation Area, NPS, DOI.

ACTION: Public Notice.

SUMMARY: Public notice is hereby given that Lake Mead National Recreation Area has determined that an application by NEXTEL of Nevada to co-locate on an existing communications tower in the River Mountains near the Southern Nevada Water Treatment Plant Surge Tanks is categorically excluded from the requirements of NEPA.

EFFECTIVE DATE: Comments on the proposal will be accepted on or before August 30, 2000

ADDRESSES: Interested parties should contact Superintendent, Lake Mead National Recreation Area, 601 Nevada Highway, Boulder City, Nevada 89005. Further information may be obtained by contacting Nancy Hendricks (702) 293-8949.

SUPPLEMENTARY NOTICE: The initial application made by NEXTEL of Nevada requests permission to Co-locate on the existing tower in the River Mountains. The Superintendent will consider and evaluate all comments received before authorizing NEXTEL to proceed with the permitting process.

Dated: June 21, 2000.

William K. Dickinson,

Acting Superintendent, Lake Mead National Recreation Area.

[FR Doc. 00-17777 Filed 7-12-00; 8:45 am]

BILLING CODE 4310-70-M

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 731-TA-859 (Final)]

Circular Seamless Stainless Steel Hollow Products From Japan; Notice of Commission Determination not to Conduct a Portion of the Hearing in Camera

AGENCY: U.S. International Trade Commission.

ACTION: Commission determination not to close any part of the hearing to the public.

SUMMARY: The Commission has determined to deny the requests of respondents to conduct a portion of its hearing in the above-captioned reviews scheduled for July 12, 2000, in camera. See Commission rules 201.13 and 201.36(b)(4) (19 CFR §§ 201.13 and 201.36(b)(4)).

FOR FURTHER INFORMATION CONTACT: Rhonda M. Hughes, Office of General Counsel, U.S. International Trade Commission, telephone 202-205-3103, e-mail hughes@usitc.gov. Hearing-impaired individuals are advised that

information on this matter may be obtained by contacting the Commission's TDD terminal on 202-205-1810.

SUPPLEMENTARY INFORMATION: The Commission's policy and practice is to conduct its hearings in public in all but the most unusual circumstances. See 19 CFR § 201.36. The Commission has determined that, in light of the nature of this investigation, it will be able to assess adequately all arguments raised by the parties without resorting to the extraordinary measure of an in camera hearing. Accordingly, the Commission has determined that the public interest would be best served by a hearing that is entirely open to the public. See 19 CFR § 201.36(c)(1).

Authority: This notice is provided pursuant to Commission Rule 201.35(b) (19 CFR 201.35(b)).

Issued: July 10, 2000.

By order of the Commission.

Donna R. Koehnke,
Secretary.

[FR Doc. 00-17776 Filed 7-12-00; 8:45 am]

BILLING CODE 7020-02-U

NUCLEAR REGULATORY COMMISSION

Agency Information Collection Activities: Submission for OMB Review; Comment Request

AGENCY: Nuclear Regulatory Commission (NRC).

ACTION: Notice of the OMB review of information collection and solicitation of public comment.

SUMMARY: The NRC has recently submitted to OMB for review the following proposal for the collection of information under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). The NRC hereby informs potential respondents that an agency may not conduct or sponsor, and that a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Information pertaining to the requirement to be submitted:

1. Type of submission, new, revision, or extension: Revision.
2. The title of the information collection: 10 CFR Part 150, "Exemptions and Continued Regulatory Authority in Agreement States and in Offshore Waters under Section 274".
3. The form number, if applicable: Not applicable.
4. How often the collection is required:

10 CFR 150.16(b), 150.17(c), and 150.19(c) require the submission of reports following specified events, such as the theft or unlawful diversion of licensed radioactive material. The source material inventory reports required under 10 CFR 150.17(b) must be submitted annually by certain licensees.

5. Who is required or asked to report:

Agreement State licensees authorized to possess source or special nuclear material at certain types of facilities, or at any one time and location in greater than specified amounts.

6. An estimate of the number of responses: 12.

7. The number of annual respondents: 9 Agreement State licensees.

8. The number of hours needed annually to complete the requirement or request: 35 hours.

9. An indication of whether Section 3507(d), Pub. L. 104-13 applies: Not applicable.

10. Abstract: 10 CFR Part 150 provides certain exemptions from NRC regulations for persons in Agreement States. Part 150 also defines activities in Agreement States and in offshore waters over which NRC regulatory authority continues, including certain information collection requirements. The information is needed to permit NRC to make reports to other governments and the International Atomic Energy Agency in accordance with international agreements. The information is also used to carry out NRC's safeguards and inspection programs.

A copy of the final supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW (lower level), Washington, DC. OMB clearance requests are available at the NRC worldwide web site (<http://www.nrc.gov/NRC/PUBLIC/OMB/index.html>). The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions should be directed to the OMB reviewer by August 14, 2000: Erik Godwin, Office of Information and Regulatory Affairs (3150-0032), NEOB-10202, Office of Management and Budget, Washington, DC 20503.

Comments can also be submitted by telephone at (202) 395-3087.

The NRC Clearance Officer is Brenda Jo. Shelton, 301-415-7233.

Dated at Rockville, Maryland, this 7th day of July, 2000.

For the Nuclear Regulatory Commission.
Beth C. St. Mary,
*Acting NRC Clearance Officer, Office of the
 Chief Information Officer.*
 [FR Doc. 00-17769 Filed 7-12-00; 8:45 am]
BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-309-OLA; ASLBP No. 00-780-03-OLA]

Maine Yankee Atomic Power Company; Establishment of Atomic Safety and Licensing Board

Pursuant to delegation by the Commission dated December 29, 1972, published in the **Federal Register**, 37 FR 28,710 (1972), and Sections 2.105, 2.700, 2.702, 2.714, 2.714a, 2.717, 2.721 of the Commission's Regulations, all as amended, an Atomic Safety and Licensing Board is being established to preside over the following proceeding.

Maine Yankee Atomic Power Company
 Maine Yankee Atomic Power Station

This Board is being established pursuant to a notice of consideration of issuance of amendment to facility operating license, proposed no significant hazards consideration determination, and opportunity for a hearing published by the Commission on May 17, 2000, in the **Federal Register** (65 FR 31,354, 31,357). The January 13, 2000 license amendment request at issue would add a license condition that requires Maine Yankee Atomic Power Company to implement and maintain in effect all provisions of the License Termination Plan. Two petitioners, Friends of the Coast—Opposing Nuclear Pollution and the State of Maine, seek to intervene and request a hearing regarding the amendment request.

The Board is comprised of the following administrative judges:

Thomas S. Moore, Chairman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555

Thomas D. Murphy, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555

Dr. Thomas S. Elleman, Atomic Safety and Licensing Board Panel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555

All correspondence, documents and other materials shall be filed with the Judges in accordance with 10 C.F.R. § 2.701.

Issued at Rockville, Maryland, this 7th day of July 2000.

G. Paul Bollwerk, III,
*Chief Administrative Judge, Atomic Safety
 and Licensing Board Panel.*
 [FR Doc. 00-17782 Filed 7-12-00; 8:45 am]
BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 40-3453-MLA-5; ASLBP No. 00-781-07-MLA]

Moab Mill Reclamation Trust; Designation of Presiding Officer

Pursuant to delegation by the Commission, *see* 37 FR 28,710 (Dec. 29, 1972), and the Commission's regulations, *see* 10 CFR §§ 2.1201, 2.1207, notice is hereby given that (1) a single member of the Atomic Safety and Licensing Board Panel is designated as Presiding Officer to rule on petitions for leave to intervene and/or requests for hearing; and (2) upon making the requisite findings in accordance with 10 CFR § 2.1205(h), the Presiding Officer will conduct an adjudicatory hearing in the following proceeding:

Moab Mill Reclamation Trust Moab, Utah

The hearing will be conducted pursuant to 10 CFR Part 2, Subpart L, of the Commission's Regulations, "Informal Hearing Procedures for Adjudications in Materials and Operator Licensing Proceedings." This proceeding concerns a May 17, 2000 request for hearing submitted by petitioner Sarah M. Fields. The request was filed in response to a March 31, 2000 request from Moab Mill Reclamation Trust (MMRT) to revise site-reclamation milestones in its source material license for the Moab, Utah facility. The notice of receipt of the MMRT request to revise site-reclamation milestones and opportunity for hearing was published in the **Federal Register** on April 17, 2000 (65 FR 20,490).

The Presiding Officer in this proceeding is Administrative Judge Charles Bechhoefer. Pursuant to the provisions of 10 CFR §§ 2.722, 2.1209, Administrative Judge Frederick J. Shon has been appointed to assist the Presiding Officer in taking evidence and in preparing a suitable record for review.

All correspondence, documents, and other materials shall be filed with Judges Bechhoefer and Shon in accordance with 10 CFR § 2.1203. Their addresses are:

Administrative Judge Charles Bechhoefer,
 Presiding Officer, Atomic Safety and
 Licensing Board Panel, U.S. Nuclear

Regulatory Commission, Washington, DC 20555-0001
 Administrative Judge Frederick J. Shon,
 Special Assistant, Atomic Safety and
 Licensing Board Panel, U.S. Nuclear
 Regulatory Commission, Washington, DC 20555-0001

Issued at Rockville, Maryland, this 7th day of July 2000.

G. Paul Bollwerk, III,
*Chief Administrative Judge, Atomic Safety
 and Licensing Board Panel.*
 [FR Doc. 00-17781 Filed 7-12-00; 8:45 am]
BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket Nos. 50-272 and 50-311]

Public Service Electric and Gas Co.; Notice of Withdrawal of Application for Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (the Commission) has granted the request of Public Service Electric and Gas Company (PSE&G, or the licensee) to withdraw its November 24, 1999, application, as supplemented by letter dated February 10, 2000, for the proposed amendment to Facility Operating License Nos. DPR-70 and DPR-75 for the Salem Nuclear Generating Station, Unit Nos. 1 and 2 (Salem), located in Salem County, New Jersey.

The proposed amendment would have revised charcoal filter testing requirements defined in the Salem Technical Specifications (TSs) for the Auxiliary Building Ventilation (ABV) System, the Control Room Envelope Air Conditioning System (CREACS), and the Fuel Handling Building Ventilation (FHV) System to be consistent with Generic Letter 99-02, "Laboratory Testing of Nuclear-Grade Activated Charcoal," dated June 3, 1999.

The Commission had previously issued a Notice of Consideration of Issuance of Amendment published in the **Federal Register** on May 17, 2000 (65 FR 31359). However, by letter dated May 31, 2000, the licensee withdrew the proposed change. The May 31, 2000, letter also provided a new application for a license amendment to change the Salem TSs concerning ABV, CREACS, and FHV charcoal filter testing which effectively superceded PSE&G's original November 24, 1999, request.

For further details with respect to this action, see the application for amendment dated November 24, 1999, supplemental letter dated February 10, 2000, and the licensee's letter dated May 31, 2000, which withdrew the

application for license amendment. The above documents are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC, and accessible electronically through the ADAMS Public Electronic Reading Room link at the NRC Web site (<http://www.nrc.gov>).

Dated at Rockville, Maryland, this 6th day of July 2000.

For the Nuclear Regulatory Commission.

Robert J. Fretz,

Project Manager, Section 2, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 00-17770 Filed 7-12-00; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 72-11]

Sacramento Municipal Utility District; Notice of Issuance of Materials License SNM-2510, Rancho Seco Independent Spent Fuel Storage Installation

The U.S. Nuclear Regulatory Commission (NRC or the Commission) has issued a Materials License under the provisions of Title 10 of the Code of Federal Regulations, Part 72 (10 CFR Part 72), to the Sacramento Municipal Utility District (SMUD), authorizing receipt and storage of spent fuel into an independent spent fuel storage installation (ISFSI) located on site at its Rancho Seco Nuclear Generating Station in Sacramento County, California.

The function of the ISFSI is to provide interim storage in a dry cask storage system for up to 228.8 metric tons of uranium contained in intact and damaged fuel assemblies and associated control components from the prior operation of the Rancho Seco Nuclear Generating Station. The dry cask storage system that is authorized for use is a Rancho Seco site-specific model of the NUHOMS-24P storage system designed by Transnuclear West Inc. The license for an ISFSI under 10 CFR Part 72 is issued for 20 years, but the licensee may seek to renew the license, if necessary, prior to its expiration.

The Commission's Office of Nuclear Material Safety and Safeguards (NMSS) has completed its environmental, safeguards, and safety reviews in support of issuance of this license.

Following receipt of the application filed October 4, 1991, a "Notice of Consideration of Issuance of Materials License for the Storage of Spent Fuel and Opportunity for Hearing" was

published in the **Federal Register** on January 13, 1992 (57 FR 1286). The "Environmental Assessment (EA) Related to the Construction and Operation of the Rancho Seco Nuclear Generating Station Independent Spent Fuel Storage Installation and Finding of No Significant Impact," was issued and noticed in the **Federal Register** (59 FR 41797, August 15, 1994) in accordance with 10 CFR Part 51. The scope of the EA included the construction and operation of an ISFSI on the Rancho Seco Nuclear Generating Station site including impacts derived from use of the NUHOMS-24P storage system.

The staff has completed its safety review of the Rancho Seco ISFSI site application and safety analysis report. The NRC staff's "Safety Evaluation Report for the Rancho Seco Independent Spent Fuel Storage Installation," was issued on June 30, 2000. Materials License SNM-2510, the staff's Environmental Assessment, Safety Evaluation Report, and other documents related to this action are available electronically for public inspection at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, or from the Publicly Available Records (PARS) component of NRC's document system (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/NRC/ADAMS/index.html> (the Public Electronic Reading Room).

Dated at Rockville, Maryland, this 30th day of June 2000.

For the Nuclear Regulatory Commission.

E. William Brach,

Director, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 00-17767 Filed 7-12-00; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[NUREG-0940]

Enforcement Actions: Significant Actions Resolved

AGENCY: Nuclear Regulatory Commission.

ACTION: Request for comments.

SUMMARY: The Nuclear Regulatory Commission (NRC) is announcing its intent to use the NRC website to communicate a consolidation of enforcement actions and to discontinue publication of the paper document, NUREG-0940, "Enforcement Actions: Significant Actions Resolved," which contains significant enforcement actions that have been issued. The NRC is

taking this action because this material is now available electronically on the NRC website. The Commission is also seeking public comment on this action.

DATES: The comment period expires September 11, 2000. Unless the Commission takes further action, the final edition of NUREG-0940 will be the edition published in the summer of 2000.

ADDRESSES: Submit written comments to David L. Meyer, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop T-6D59, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m., Federal workdays. Copies of comments received may be examined at the NRC Public Document Room, 2120 L Street, NW. (Lower Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: Renee Pedersen, Senior Enforcement Specialist, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001 (301) 415-2741, e-mail rmp@nrc.gov.

SUPPLEMENTARY INFORMATION:

Background

In 1982, the Enforcement Staff of the NRC's then Office of Inspection and Enforcement commenced publishing NUREG-0940, "Enforcement Actions: Significant Actions Resolved." This NUREG is a compilation of the letters, Notices, and Orders sent to licensees with respect to significant enforcement actions (also referred to as escalated actions) issued in a period of time, most recently, six months. The NUREG has been published to assist licensees in taking action to improve safety by avoiding future violations similar to those described in the publication. The NUREG was also published to comply with Commission direction to distribute a list of persons subject to prohibition orders issued under the Deliberate Misconduct Rule (January 13, 1998; 63 FR 1890).

NUREG-0940 is now published twice a year. It is distributed to all power reactor site managers, approximately 2500 materials licensees, and all of the states. The latest issue of NUREG-0940, Vol. 18, No. 1, published August 1999, contained a total of 847 printed pages.

The Office of Enforcement (OE) has established a Home page on the NRC website (www.nrc.gov/OE). The OE Home page contains information on the OE staff, the current Enforcement Policy, the text of escalated Enforcement Actions issued since 1996, upcoming

predecisional enforcement and regulatory conferences, guidance documents (e.g., the Enforcement Manual and Enforcement Guidance Memoranda (EGMs)), and a discussion of discrimination for raising safety concerns. This site includes links to other related sites and a search capability. All orders that currently prohibit or restrict individuals from employment in licensed activities are posted on the OE Home page.

The Office of Enforcement also publishes an annual report which describes enforcement activities occurring during each fiscal year. The report addresses significant policy changes, highlights significant enforcement actions, and includes summaries of cases involving exercise of discretion, discrimination, and actions involving individuals. Various statistical tables and figures are included. The annual report is also available on the OE Home page.

Discussion

NUREG-0940 was first published as a paper document, as this was the only effective way to communicate with licensees as a group and to give widespread circulation to actions taken by the NRC in enforcing regulatory requirements. Now, escalated actions that are published in the NUREG are also available to licensees and the public on the NRC website, under the Office of Enforcement Home page. All orders are published in the **Federal Register** immediately after issuance, and are also available on the website after publication.

Preparing and publishing NUREG-0940 in paper form is expensive when the cost of paper and postage are taken into account. The NRC believes that the purpose of NUREG-0940 can now be accomplished more effectively and far more efficiently by posting actions promptly on the NRC website. Whereas NUREG-0940 is prepared every six months, and the delay from issuance of an action to publication can be as much as 9 months, posting actions on the Internet is immediate. Continuing to publish material in paper form when the current information is immediately available electronically is not a judicious use of NRC resources. Providing the same information via the Internet is a more effective and efficient method of communicating this information to NRC stakeholders.

For the above reasons, the NRC believes that publication of NUREG-0940 is no longer needed. The next issue will contain a notice that will advise recipients that unless the NRC receives sufficient public comment in

support of continuing this publication, NRC will cease publication with that issue and describe where on the Internet this information can be obtained. The NRC will also accept and consider comments from persons who are not currently on the mailing list. Those comments should be submitted as indicated above.

Dated at Rockville, Maryland, this 30th day of June 2000.

For the Nuclear Regulatory Commission.

R. William Borchardt,

Director, Office of Enforcement.

[FR Doc. 00-17771 Filed 7-12-00; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

[Docket No. 50-263]

Northern States Power Co.; Monticello Nuclear Generating Plant; Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an amendment to Facility Operating License No. DPR-22, issued to Northern States Power Company (NSP or the licensee) for operation of the Monticello Nuclear Generating Plant, located in Wright County, Minnesota.

Environmental Assessment

Identification of the Proposed Action

The proposed action would revise Technical Specification (TS) Chapter 6 to allow use of generic titles for personnel in lieu of plant-specific titles, update the TS table of contents to reflect changes due to the amendment, and correct typographical errors.

The proposed action is in accordance with the licensee's application for amendment dated May 4, 2000.

The Need for the Proposed Action

The proposed action would provide clarity to the TSs and remove an unnecessary NRC and licensee burden with no increase in safety when titles are changed.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed action and concludes that the changes to the TSs are administrative in nature.

The proposed action will not significantly increase the probability or consequences of accidents, no changes are being made in the types of any effluents that may be released off site,

and there is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

With regard to potential nonradiological impacts, the proposed action does not involve any historic sites. It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (i.e., the "no action" alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

This action does not involve the use of any resources not previously considered in the Final Environmental Statement for Monticello.

Agencies and Persons Consulted

In accordance with its stated policy, on June 22, 2000, the staff consulted with the Minnesota State official, Ms. N. Campbell of the Department of Commerce, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's application dated May 4, 2000, which is available for public inspection at the Commission's Public Document Room, The Gelman Building, 2120 L Street, NW., Washington, DC. Publicly available records will be accessible electronically from the ADAMS Public Library component on the NRC Web site, <http://www.nrc.gov> (the Electronic Reading Room).

Dated at Rockville, Maryland, this 7th day of July 2000.

For the Nuclear Regulatory Commission.

Carl F. Lyon,

Project Manager, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 00-17768 Filed 7-12-00; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Experts' Meeting on High-Burnup Fuel Behavior Under Postulated Accident Conditions

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of meeting.

SUMMARY: The Nuclear Regulatory Commission will hold a meeting to further develop a Phenomena Identification and Ranking Table (PIRT) for loss of coolant accidents (LOCAs). PIRTs have been used at NRC since 1988, and they provide a structured way to obtain a technical understanding that is needed to address certain issues. About twenty of the world's best technical experts are participating in this activity, and the experts represent a balance between industry, universities, foreign researchers, and regulatory organizations. The current PIRT activity is addressing postulated LOCAs for a BWR and a PWR.

DATES: July 25-27, 2000, 8:30 am-5:30 pm.

ADDRESSES: Room T10A1 (TWFN) of the Nuclear Regulatory Commission, 11545 Rockville Pike, Rockville, MD.

SUPPLEMENTARY INFORMATION: The meeting agenda will be posted on the NRC Web site at www.nrc.gov/RES/meetings.htm by July 17, 2000. The meeting is open to the public. Attendees will need to obtain a visitor badge at the TWFN building lobby.

FOR FURTHER INFORMATION CONTACT: Dr. Ralph Meyer, SMSAB, Division of Systems Analysis and Regulatory Effectiveness, Office of Nuclear Regulatory Research, Washington, D.C. 20555-0001, telephone (301) 415-6789.

Dated at Rockville, Maryland, this 10th day of July 2000.

For the Nuclear Regulatory Commission.

Farouk Eltawila,

Director, Division of Systems Analysis and Regulatory Effectiveness, Office of Nuclear Regulatory Research.

[FR Doc. 00-17766 Filed 7-12-00; 8:45 am]

BILLING CODE 7590-01-P

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards, Subcommittee Meeting on Thermal-Hydraulic Phenomena; Notice of Meeting

The ACRS Subcommittee on Thermal-Hydraulic Phenomena will hold a meeting on August 8-9, 2000, Room T-2B3, 11545 Rockville Pike, Rockville, Maryland.

Most of the meeting will be closed to public attendance to discuss proprietary information per 5 U.S.C. 552b(c)(4) pertinent to Siemens Power Corporation.

The agenda for the subject meeting shall be as follows:

*Tuesday, August 8, 2000—8:30 a.m.
Until the Conclusion of Business*

*Wednesday, August 9, 2000—8:30 a.m.
Until the Conclusion of Business*

The Subcommittee will begin review of Siemens Power Corporation S-RELAP5 thermal-hydraulic systems code. The purpose of this meeting is to gather information, analyze relevant issues and facts, and to formulate proposed positions and actions, as appropriate, for deliberation by the full Committee.

Oral statements may be presented by members of the public with the concurrence of the Subcommittee Chairman. Written statements will be accepted and made available to the Committee. Electronic recordings will be permitted only during those portions of the meeting that are open to the public, and questions may be asked only by members of the Subcommittee, its consultants, and staff. Persons desiring to make oral statements should notify the cognizant ACRS staff engineer named below five days prior to the meeting, if possible, so that appropriate arrangements can be made.

During the initial portion of the meeting, the Subcommittee, along with any of its consultants who may be present, may exchange preliminary views regarding matters to be considered during the balance of the meeting.

The Subcommittee will then hear presentations by and hold discussions with representatives of the Siemens Power Corporation, the NRC staff, and other interested persons regarding this review.

Further information regarding topics to be discussed, whether the meeting has been canceled or rescheduled, and the Chairman's ruling on requests for the opportunity to present oral statements and the time allotted

therefor, can be obtained by contacting the cognizant ACRS staff engineer, Mr. Paul A. Boehnert (telephone 301/415-8065) between 7:30 a.m. and 4:15 p.m. (EDT). Persons planning to attend this meeting are urged to contact the above named individual one or two working days prior to the meeting to be advised of any potential changes to the agenda, etc., that may have occurred.

Dated: July 7, 2000.

Howard J. Larson,

Acting Associate Director for Technical Support, ACRS/ACNW.

[FR Doc. 00-17783 Filed 7-12-00; 8:45 am]

BILLING CODE 7590-01-P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 33-7872]

Revision of the Commission's Auditor Independence Requirements

AGENCY: Securities and Exchange Commission.

ACTION: Notice of hearings.

SUMMARY: On June 27, 2000, the Securities and Exchange Commission (the "Commission") approved proposed rule amendments (the "Proposing Release") regarding auditor independence (Securities Act Release No. 33-7870). Copies of the Proposing Release are available on the Commission's website at www.sec.gov. In connection with those proposals, the Commission announced that it will hold public hearings. The purpose of the hearings is to give the Commission the benefit of the views of interested members of the public regarding the issues raised and questions posed in the Proposing Release. The Commission is announcing that the initial public hearing will be held on July 26, 2000 in Washington, D.C. Additional public hearings will be held in September.

DATES: The initial public hearing will be held on July 26, 2000 in Washington, D.C. Additional public hearings will be held in September. The following information pertains to the July 26th hearing. The hearing on July 26 will begin at 9:00 a.m. Those who wish to testify at the hearing must submit a written request to the Commission. The Commission must receive these requests on or before July 17, 2000. Persons requesting to testify must also submit three copies of their oral statements or a summary of their intended testimony to the Commission. The Commission must receive these submissions on or before July 21, 2000. Those who do not wish to appear at the hearings may

submit written testimony on or before the end of the comment period for the Proposing Release, which is 75 days after publication of the Proposing Release in the **Federal Register**, for inclusion in the public comment file. Additional information regarding the September hearings will be forthcoming.

ADDRESSES: The July 26, 2000 hearing will be held in the William O. Douglas Room of the Commission's headquarters at 450 Fifth Street, N.W., Washington, D.C. 20549. Persons submitting requests to appear or written testimony in lieu of testifying should file three copies of the request or testimony with Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549. Persons requesting to appear should also submit three copies of their oral statement or summary of their testimony to the same address. Requests to appear and copies of oral statements or summaries of intended testimony may be filed electronically at the following e-mail address: rule-comments@sec.gov. The words "Request to Testify" should be clearly noted on the subject line of the request. All requests and other submissions also should refer to Comment File No. S7-13-00. Copies of all requests and other submissions and transcripts of the hearings will be available for public inspection and copying in the Commission's Public Reference Room at 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted requests and other materials will be posted on the Commission's internet web site (www.sec.gov).

FOR FURTHER INFORMATION CONTACT: John M. Morrissey, Deputy Chief Accountant, or W. Scott Bayless, Associate Chief Accountant, Office of the Chief Accountant, at (202) 942-4400.

SUPPLEMENTARY INFORMATION:

I. Summary of Rule Proposals

The public hearings concern the Commission's proposed rule amendments regarding auditor independence. As more fully described in the Proposing Release, the proposals modernize the Commission's requirements by providing governing principles for determining whether an auditor is independent in light of: investments by auditors or their family members in audit clients, employment relationships between auditors or their family members and audit clients, and the scope of services provided by audit firms to their audit clients. The proposals would, among other things, significantly reduce the number of audit firm employees and their family members whose investments in audit

clients are attributed to the auditor. They would also identify certain non-audit services that, if provided to an audit client, would impair an auditor's independence. The scope of services proposals would not extend to services provided to non-audit clients. The proposal also would provide a limited exception for accounting firms that have certain quality controls and satisfy other conditions. Finally, the proposals would require companies to disclose in their annual proxy statements certain information about, among other things, non-audit services provided by their auditors during the last fiscal year. The Commission will consider the hearing record in connection with its rulemaking proposals.

II. Procedures for Hearing

After July 17, 2000, the Commission will publish a schedule of appearances. Based on the number of requests received, the Commission may not be able to accommodate all requests for the July 26 hearing. It also may limit the time for formal presentations or group presentations into a series of panels. Time will be reserved for members of the Commission and Commission staff to pose questions to each witness concerning his or her testimony as well as other matters pertaining to the Proposing Release. The Commission has designated Jonathan G. Katz, Secretary of the Commission, as the hearing officer. As noted, the Commission will hold additional public hearings in September. The Commission will issue other orders designating additional hearing officers as necessary.

Dated: July 7, 2000.

By the Commission.

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 00-17725 Filed 7-12-00; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43013; File No. SR-Amex-00-12]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the American Stock Exchange LLC Relating to Procedures for the Review of Initial Listing Decisions

July 6, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"),¹ and Rule 19b-4 thereunder,² notice is hereby given that on February

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

28, 2000, the American Stock Exchange LLC (the "Amex" or "Exchange") filed with the Securities and Exchange Commission ("SEC" or "Commission") the proposed rule change as described in Items I, II, and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Amex proposes to adopt new Part 12 of the Amex Company Guide to establish procedures for the review of initial listing determinations. The text of the proposed rule change is available at the Amex and the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The Amex proposes to establish new procedures for the review of initial listing determinations. Amex original listing criteria, set forth in Part 1 of the Amex Company Guide, provide quantitative and qualitative criteria for the original listing of securities on the Exchange. Section 101 of the Amex Company Guide currently provides that the approval of a listing application is a matter solely within the discretion of the Exchange. Thus, the Exchange currently has the discretion to list the securities of an applicant that may not satisfy each of the listing guidelines and to deny the listing of an applicant's securities that do satisfy those guidelines. Furthermore, under the Exchange's existing procedures, original listing determinations are made by different entities. The ultimate discretion to list applicants that do not satisfy each of the guidelines is vested

with the Exchange's Committee on Securities;³ however, the Amex Staff generally determines whether to deny a listing or whether an applicant should be considered by the Committee on Securities at all.⁴

The Exchange believes that the existing process is not sufficiently transparent to applicants and also operates to create inefficiencies in the listing process. To address these concerns, the Exchange proposes to implement specific procedures governing the review of initial listing determinations. The proposed rules are modeled on the Nasdaq listing process.⁵

Proposed Part 12 codifies the procedures for the review of Amex Staff listing determinations by a subcommittee of the Committee on Securities (as defined in proposed Section 1204) and also sets forth the procedures with respect to appeals from the subcommittee to the Amex Adjudicatory Council (as defined in Section 1205) or the Amex Board of Governors. Under the proposed rules, Exchange determinations to limit or prohibit the initial listing of an applicant's securities will continue to be made by the Listing Qualifications Department or the Listing Investigations Department.

The Exchange will notify applicants of a decision to deny an application, citing the specific quantitative or qualitative standards in Part 1 of the Amex Company Guide that were not met. The Exchange will notify the applicant that, upon request, the applicant will be provided an opportunity for a hearing under these procedures. The applicant will be solely responsible for presenting the arguments in favor of listing to the subcommittee. Presently, such burden rests with the Exchange Staff.

An applicant may request a written or oral hearing within 7 days of the date of the Staff's determination to deny the application.⁶ Such hearings will be scheduled, to the extent practicable, within 45 days of the date the request

is filed. The applicant will be provided at least 10 days notice of the hearing unless the applicant waives such notice. Proposed Section 1203 specifies written materials that the applicant may submit in connection with a hearing.

Proposed Section 1204 provides that all hearings will be conducted before a subcommittee of the Committee on Securities ("Subcommittee") consisting of at least two persons. Following the hearing, the Subcommittee must issue a written decision ("Subcommittee Decision") citing specific grounds for the Subcommittee's determination. The Subcommittee will promptly provide its decision to the applicant and will also provide notice that the applicant may request review by the Adjudicatory Council⁷ within 15 days of the date of the Subcommittee Decision.⁸ The applicant will also be notified that the Adjudicatory Council may call for review of the Subcommittee Decision within 45 days, at the request of one or more of the Council's members, as provided in proposed Section 1205. The applicant will be promptly informed of the reasons for the review. Any such review does not operate as a stay of the Subcommittee Decision, unless the Adjudicatory Council's call for review specifies to the contrary.

The Adjudicatory Council will consider the written record and can hold additional hearings. It may also recommend that the Amex Board consider the matter. The Adjudicatory Council will issue a written decision that affirms, modifies or reverses the Subcommittee Decision. The Adjudicatory Council will set forth specific grounds for the decision and provide notice that the Amex Board may call the decision for review at any time before its next meeting which is at least 15 days after the decision.

Such review by the Amex Board will be solely at the Board's discretion. Governors that serve on the Adjudicatory Council will not participate in the Board review.⁹ If the Board conducts a discretionary review, the applicant will be provided with a written decision affirming, modifying or

reversing the Adjudicatory Council's decision. The Board may also remand the matter to the Adjudicatory Council, the Committee on Securities, or the Amex Staff, with appropriate instructions. The Board's decision constitutes final action of the Exchange and will take immediate effect unless it specifies to the contrary.¹⁰

Proposed Section 1207 describes the documents included in the written record. The Exchange will provide the applicant with a list of the documents in the written record and a copy of any documents in the record that are not in applicant's possession or control, at least 3 days in advance of the deadline for the applicant's submissions. Proposed Section 1208 states that the written record for the review, as well as any documents excluded from the written record, will be maintained until the date upon which the decision becomes final, including, if applicable, upon conclusion of any Commission or federal court review.

Time is computed within proposed Part 12 procedures based on calendar days. In computing any period of time, the day of the act event or default from which the period of time begins is not included. The last day of the period is included, unless it is a Saturday, Sunday, federal holiday or Amex holiday.¹¹

Finally, proposed Section 1211 prohibits the Amex Staff or an applicant from making any communication relevant to the merits of a proceeding with anyone who is participating in or advising in the consideration of a matter (members of the Committee on Securities, the Adjudicatory Council, the Amex Board, and Amex Staff), unless the applicant and the appropriate Amex Staff have been provided notice and an opportunity to participate in the communication. The Amex represents that the purpose of this limitation is to prevent non-record information from being considered in rendering a decision. The Exchange currently expects that Amex Staff generally will waive their rights under this provision in the interest of providing a non-adversarial business forum for listing decisions.

2. Statutory Basis

The Amex believes that the proposed rule change is consistent with Section 6(b) of the Act¹² in general and furthers

³ The Committee on Securities is appointed by the Amex Board and consists of six non-floor, financial professionals and six Floor members. Of the six non-floor financial professionals, not less than three must be affiliated with a member organization.

⁴ The Committee on Securities also has the discretion to deny listing to an applicant which is recommended by the Staff

⁵ See NASD 4800 Series Rules.

⁶ The Amex will not charge a hearing fee to appeal the Exchange Staff's listing determination. Telephone conversation between Michael Cavalier, Associate General Counsel, Amex, and Susie Cho, Attorney, Division of Market Regulation ("Division"), Commission, April 19, 2000.

⁷ The Amex Adjudicatory Council, is established by the Amex Board pursuant to Article II, Section 6 of the Amex Constitution. The Council consists of six individuals, all of whom are nominated by the Amex Nominating Committee and elected by the regular and options principal members voting together as a single class. Three of the Council's members are Floor Governors and three are Public Governors.

⁸ The Amex will not charge a hearing fee to appeal the Subcommittee's determination. Telephone conversation between Michael Cavalier, Associate General Counsel, Amex, and Susie Cho, Attorney, Division of Market Regulation ("Division"), Commission, April 19, 2000.

⁹ See Proposed Section 1206(a).

¹⁰ The Commission notes that any applicant aggrieved by a final action of the Amex may apply for review to the Commission in accordance with Section 19 of the Act.

¹¹ See Proposed Section 1210.

¹² 15 U.S.C. 78f(b).

the objectives of Section 6(b)(5)¹³ in particular in that it is designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the Amex consents, the Commission will:

A. by order approve the proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filings will also be available for inspection and copying at the principal office of the Amex. All submissions should refer to File No. SR-Amex-00-12 and should be submitted by August 3, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.¹⁴

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 00-17724 Filed 7-12-00; 8:45 am]

BILLING CODE 8010-01-M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-43014; File No. SR-BSE-00-09]

Self-Regulatory Organizations; Notice of Filing and Immediate Effectiveness of Proposed Rule Change by the Boston Stock Exchange Relating to Its Membership and Other Fees, Floor Operations Fees, and Transaction Fees Schedules

July 6, 2000.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 ("Act")¹, notice is hereby given that on July 3, 2000, the Boston Stock Exchange ("BSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II, and III below, which items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to amend the Exchange's Membership and Other Fees, Floor Operation Fees and Transaction Fees schedules. The proposed fee changes are below. Deletions are in brackets. Additions are italicized.

MEMBERSHIP AND OTHER FEES			
(1) <i>Membership</i>			
Membership Dues	\$[600.00] 750.00	per membership per quarter.	
* * *			
SRO Fee	\$100.00	per month.	
* * *			
(2) <i>Electronic File Access and Processing</i>			
[Open Order Match	\$200.00	per month].	
* * *			
FLOOR OPERATION FEES			
* * *			
(3) <i>Specialist Trade Processing</i>			
Odd Lot Trades (Includes CSI issues)	\$[.00].05	per order (\$400 maximum per account).	
* * *			
TRANSACTION FEES			
1. <i>Trade Recording and Comparison Charges</i>			
• All other executions (excluding automated non-BSE executions)			
First 2,500 trades per month	\$.29	per 100 shares.	
Next 2,500 trades per month	\$.25	per 100 shares.	
Next 2,500 trades per month	\$.15	per 100 shares.	
Over 7,500 trades per month	\$.04	per 100 shares.	
Floor Brokered non-BSE executions	\$.05	per 100 shares.	

¹³ 15 U.S.C. 78f(b)(5).

¹⁴ 17 CFR 200.30-3(a)(12).

¹⁵ 15 U.S.C. 78s(b)(1).

<i>Automated non-BSE executions</i>	<i>\$.05 per 100 net non-BSE automated shares.</i>
Maximum charge per side (single-sided)	\$50.00.
Maximum charge per side (cross)	\$25.00.
(all trades accumulate for volume discounts)	

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II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of the basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

The purpose of the proposed rule change is to amend the Exchange's Membership and Other Fees, Floor Operation Fees, and Transaction Fees schedules to allow the Exchange to continue to charge in an equitable manner for the products and services it offers while at the same time continuing to provide quality markets at competitive prices.

The proposed changes to the Membership and Other Fees schedule will (1) eliminate the \$200 per month charge for electronic file transmissions of Open Order Match files; (2) increase Membership Dues to \$750 per quarter; and (3) implement a \$100 per month SRO fee for off-floor firms. The SRO fee is being implemented to help offset the costs of providing and the systems necessary to monitor and maintain the BSE's Execution Quality Program.²

The proposed change to the Floor Operation Fees Schedule will implement a \$0.05 per odd lot trade (trades of less than 100 shares) fee for all specialists. This fee will be capped at \$400 per month per account. The BSE currently does not charge a fee for these trades. Because of the significant growth in volume the BSE has experienced from odd trading, these fees will help to

fund the necessary additional system capacity as this business continues to grow.

The BSE also proposed to change its Transaction Fee Schedule to now distinguish between BSE and non-BSE generated transaction fees for the purpose of capping monthly-automated transaction fees at \$50,000. Currently, the BSE accumulates both BSE and non-BSE automated transaction fees when determining if a firm's monthly-automated transaction fees should be capped at \$50,000. The BSE proposes to change the accumulation method to accumulate BSE automated executions only for purposes of the \$50,000 transaction fee cap. In addition, for those firms that provide BSE specialists with the capability of routing order flow to other exchanges (for example, through DOT³ terminals) and that also route orders to the BSE, Trade Recording and Comparison fees on net automated non-BSE share volume will not be charged a flat rate of \$0.05 per 100 shares as opposed to the sliding scale rates currently levied on non-BSE volume. For example, assume a firm that provides DOT services to the trading floor also routes business to the BSE. Also assume total volume routed to the BSE for the month is 500,000 shares and total non-BSE volume executed through their DOT terminals is 1,000,000 shares per month. Non-BSE shares for the month would be \$250 (1,000,000 non-BSE shares minus 500,000 BSE shares=500,000 net non-BSE shares at a rate of \$0.05 per 100 shares). However, if a firm routes more volume to the BSE than is executed through their DOT terminals, no fees will be charged on any of their automated non-BSE volume.

The basis for the proposed rule change is Section 6(b)(5) of the Act,⁴ in that the proposed rule change is designed to promote just and equitable principles of trade; to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in

securities; to remove impediments to and perfect the mechanism of a free and open market and a national market system; and in general, to protect investors and the public interest; and is not designed to permit unfair discrimination between customers, issuers, brokers, or dealers.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

The Exchange has neither solicited nor received comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective on July 3, 2000, pursuant to Section 19(b)(3) of the Act⁵ and subparagraph (f) of Rule 19b-4.⁶ At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written

² The BSE's Execution Quality Program involves building, maintaining, and updating the systems necessary to develop and provide execution quality statistics to customers and the BEAM system, which provides the Exchange with real-time capabilities to monitor specialist-trading activity. Telephone conversation between Kathy Marshall, Vice President-Finance, BSE, and Karl Varner, Special Counsel, Commission (July 7, 2000).

³ DOT is the New York Stock Exchange's ("NYSE") Designated Order Turnaround System, an application that permits NYSE members to route market orders and day limit orders on an automated basis directly to the appropriate specialist on the NYSE trading floor. See Securities Exchange Act Release No. 16649 (March 13, 1980) 45 FR 18541.

⁴ 15 U.S.C. 78f(b)(5).

⁵ 15 U.S.C. 78s(b)(3).

⁶ 17 C.F.R. 240.19b-4.

communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the BSE. All submissions should refer to File No. BSE-00-09 and should be submitted by August 3, 2000.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.⁷

Margaret H. McFarland,
Deputy Secretary.

[FR Doc. 00-17723 Filed 7-12-00; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

[Public Notice 3362]

Culturally Significant Objects Imported for Exhibition Determinations: " 'La Divine Comtesse,' Photographs of the Countess de Castiglione "

AGENCY: Department of State.

ACTION: Notice.

SUMMARY: Notice is hereby given of the following determinations: Pursuant to the authority vested in me by the Act of October 19, 1965 (79 Stat. 985, 22 U.S.C. 2459), the Foreign Affairs Reform and Restructuring Act of 1998 (112 Stat. 2681, *et seq.*), Delegation of Authority No. 234 of October 1, 1999, and Delegation of Authority No. 236 of October 19, 1999, as amended, I hereby determine that the objects to be included in the exhibition " 'La Divine Comtesse,' Photographs of the Countess de Castiglione," imported from abroad for the temporary exhibition without profit within the United States, are of cultural significance. These objects are imported pursuant to loan agreements with foreign lenders. I also determine that the exhibition or display of the exhibit objects at the Metropolitan Museum of Art, New York, NY from on about September 18, 2000 to on or about December 31, 2000, is in the national interest. Public Notice of these Determinations is ordered to be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: For further information, including a list of exhibit objects, contact Paul Manning, Attorney-Adviser, Office of the Legal Adviser, U.S. Department of State

(telephone: 202/619-5997). The address is U.S. Department of State, SA-44, 301 4th Street, S.W., Room 700, Washington, D.C. 20547-0001.

Dated: June 26, 2000.

William B. Bader,

Assistant Secretary for Educational and Cultural Affairs, Department of State.

[FR Doc. 00-17746 Filed 7-12-00; 8:45 am]

BILLING CODE 4710-08-U

DEPARTMENT OF STATE

[Public Notice 3358]

Bureau of Educational and Cultural Affairs; Program Title: Near East and North Africa Democracy Initiative

NOTICE: Request for Proposals.

SUMMARY: The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs of the United States Department of State announces an open competition for grants under the Near East and North Africa Democracy Initiative. U.S. public and private non-profit organizations meeting the provisions described in IRS regulation 26 CFR 1.501(c) may submit proposals to develop and implement exchange programs involving participants from Tunisia. Two grant awards are anticipated, as outlined below.

PROGRAM INFORMATION

Overview

The Office of Citizen Exchanges of the Bureau of Educational and Cultural Affairs, U.S. Department of State, consults with and supports American public and private nonprofit organizations in developing and implementing multi-phased, often multi-year, exchanges of professionals, academics, youth leaders, public policy advocates, etc. These exchanges address issues crucial to both the United States and the foreign countries involved, they represent focused, substantive, and cooperative interaction among counterparts, and they entail both theoretical and experiential learning for all participants. A primary goal is the development of sustained, international, institutional and individual linkages. In addition to providing a context for professional development and collaborative, international problem-solving, these projects are intended to introduce Foreign participants and their American counterparts to one another's political, social, and economic structures. Desirable components of an exchange may be local citizen involvement and activities that orient foreign participants to American society and culture.

The Near East and North African Democracy Initiative is based on the premise that people-to-people exchanges that focus on enhancing human capacity and on encouraging and strengthening democratic initiatives nurture the social, political, and economic development of society. In response to the aspirations of this program, the Office of Citizen Exchanges solicits proposals for two exchange projects that respond to the project foci and guidelines suggested below.

1. *Citizen Participation and Advocacy: Building and Strengthening Non-governmental Organizations.*

Social and political activism, encouraged, focused, and channeled through non-governmental organizations, is a basic underpinning of democratic society. Strengthening NGO advocacy skills, management, grassroots support, recruitment and motivation of volunteers, fundraising and financial management, media relations, and networking for mutual support and reinforcement encourages democratic development. Among other emphases, this project should focus on computer training and on developing cooperation between educators and NGO's for community action. Participants in this exchange should be leaders and potential leaders (social activists; public policy advocates; professionals) of NGO's. It is essential that organizations submitting proposals in this category recognize that democratic activism and foreign involvement with local NGO's must be carefully thought out and approached with sensitivity and subtlety. Close consultation with American Mission officers is critical. Grant requests should not exceed \$125,000. ECA anticipates awarding one grant under this theme.

2. *Developing Leadership for Democratic Institutions.*

Political democracy is characterized by the existence of diverse political groupings, representing varying approaches to governing and service, from which an electorate may choose its leadership. Such groupings represent viable governing potential only when, under informed and skilled leadership, they are organized, more or less unified in perspective, able to articulate policy alternatives and to communicate with the electorate, capable of attracting workers and motivating volunteers, and able to raise funds and manage finances. The development of skilled leadership, upon which all other requirements depend, is the goal of this project. Participants should be leaders or potential leaders of nascent political parties in Tunisia. Applicants should

⁷ 17 CFR 200.30-3(a)(12).

focus on democratic orientation, development of the skills necessary for successful organizational management and leadership, and both theoretical and experiential introduction to best practices in party building and strengthening. Grant requests should not exceed \$125,000. ECA anticipates awarding one grant under this theme.

Activities for the above projects might include:

1. Initial needs assessment/orientation travel (if necessary) by American organizers to develop contacts and relationships with both American Mission officers and counterpart organizations/individuals in Tunisia

2. A U.S.-based program, including orientation to program purposes and to U.S. society, discussions, site visits, limited shadowing or internship opportunities

3. A return visit by selected American professionals to collaborate with participants in the U.S.-based program in conducting workshops, seminars, on-site training, networking

4. Longer, intensive internship in the U.S. for two or three selected Tunisian participants

The Office of Citizen Exchanges encourages applicants to be creative in planning project implementation. Activities may include both theoretical orientation and experiential, community-based initiatives designed to achieve concrete objectives.

Applicants should, in their proposals, identify any partner organizations and/or individuals in the U.S. with which/whom they are proposing to collaborate and justify on the basis of experience, accomplishments, etc.

Selection of Participants

Successful applications should include a description of an open, merit-based participant selection process. Applicants should anticipate working closely with the Public Affairs Section of U.S. Embassy in Tunis in selecting participants, with the Embassy retaining the right to nominate participants and to advise the grantee regarding participants recommended by other entities.

Public Affairs Section Involvement

The Public Affairs Sections of the U.S. Embassies (PAS) play an important role in project implementation. Posts evaluate project proposals, coordinate planning with the grantee organization and in-country partners, facilitate in-country activities, nominate participants and vet grantee nominations, observe in-country activities, debrief participants, and evaluate project impact. U.S. Missions are responsible for issuing IAP-66 forms in order for foreign

participants to obtain the necessary J-1 visas for entry to the United States. They also serve as a link to in-country partners and participants.

Though project administration and implementation are the responsibility of the grantee, the grantee is expected to inform the PAS in participating countries of its operations and procedures and to coordinate with and involve PAS officers in the development of project activities. The PAS should be consulted regarding country priorities, political and cultural sensitivities, current security issues, and related logistic and programmatic issues.

Visa Regulations

Foreign participants on programs sponsored by ECA are granted J-1 Exchange Visitor visas by the U.S. Embassy in the sending country. All programs must comply with J-1 visa regulations. Please refer to Solicitation Package for further information.

Budget Guidelines

Applicants must submit a comprehensive line item budget based on guidance provided in the Proposal Submission Instructions (PSI) of the Solicitation Package. Maximum award amounts are cited above. Grants awarded to organizations with less than four years of experience in conducting international exchange programs will not be considered under this competition.

Applicants must submit a comprehensive budget for the entire program. Awards may not exceed the amounts cited in the guidelines above. There must be a summary budget as well as breakdowns reflecting both administrative and program budgets. Applicants may provide separate sub-budgets for each program component, phase, location, or activity to provide clarification. Proposals should present evidence of cost sharing—in cash or in kind—representing approximately 33% or more of the total cost of the exchange project.

Allowable costs include the following:

- (1) Direct program expenses
- (2) Administrative expenses, including indirect costs

Please refer to the Solicitation Package for complete budget guidelines and formatting instructions.

Announcement Title and Number

All correspondence with the Bureau concerning this RFP should reference the above title and number ECA PE/C-00-70.

FOR FURTHER INFORMATION, CONTACT: The Office of Citizen Exchanges, ECA/PE/C,

Room 224, U.S. Department of State, 301 4th Street, SW., Washington, DC 20547, attention: Thomas Johnston. Telephone number 202/260-0299 or 202/619-5325; fax number 202/619-4350; Internet address to request a Solicitation Package, tjohnsto@pd.state.gov. The Solicitation Package contains detailed award criteria, required application forms, specific budget instructions, and standard guidelines for proposal preparation. Please specify Bureau Program Officer Thomas Johnston on all inquiries and correspondence.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFP deadline has passed, Bureau staff may not discuss this competition with applicants until the proposal review process has been completed.

To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's website: <http://exchanges.state.gov/education/rfps>. Please read all information before downloading.

Deadline for Proposals: All proposal copies must be received at the Bureau of Educational and Cultural Affairs by 5 p.m. Washington, D.C. time on Friday, October 6, 2000. Faxed documents will not be accepted at any time. Documents postmarked the due date but received on a later date will not be accepted. Each applicant must ensure that the proposals are received by the above deadline.

Applicants must follow all instructions in the Solicitation Package. The original and ten copies of the application should be sent to: U.S. Department of State, SA-44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/C-00-70, Program Management, ECA/EX/PM, Room 336, 301 4th Street, SW, Washington, DC 20547.

Applicants must also submit the "Executive Summary" and "Proposal Narrative" sections of the proposal on a 3.5" diskette, formatted for DOS. These documents must be provided in ASCII text (DOS) format with a maximum line length of 65 characters. The Bureau will transmit these files electronically to the Public Affairs section at the US Embassy for its review, with the goal of reducing the time it takes to get embassy comments for the Bureau's grants review process.

Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be

balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into the total proposal. Public Law 104-319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Proposals should reflect advancement of this goal in their program contents, to the full extent deemed feasible.

Year 2000 Compliance Requirement (Y2K Requirement)

The Year 2000 (Y2K) issue is a broad operational and accounting problem that could potentially prohibit organizations from processing information in accordance with Federal management and program specific requirements including data exchange with the Bureau. The inability to process information in accordance with Federal requirements could result in grantees' being required to return funds that have not been accounted for properly.

The Bureau therefore requires all organizations use Y2K compliant systems including hardware, software, and firmware. Systems must accurately process data and dates (calculating, comparing and sequencing) both before and after the beginning of the year 2000 and correctly adjust for leap years.

Additional information addressing the Y2K issue may be found at the General Services Administration's Office of Information Technology website: <http://www.itpolicy.gsa.gov>.

Review Process

The Bureau will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as by the Public Diplomacy section of the U.S. Mission overseas. Eligible proposals

will be forwarded to panels of State Department officers for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Under Secretary for Public Diplomacy and Public Affairs. Final technical authority for assistance awards (grants or cooperative agreements) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered, and all carry equal weight in the proposal evaluation.

1. Quality of the program idea: Proposals should be substantive, well thought out, focused on issues of demonstrable relevance to all proposed participants, and responsive, in general, to the exchange suggestions and guidelines provided above.

2. Implementation Plan and Ability to Achieve Objectives: A detailed project implementation plan should establish a clear and logical connection between the interest, the expertise, and the logistic capacity of the applicant and the objectives to be achieved. The plan should discuss, in concrete terms, how the institution proposes to achieve the objectives. Institutional resources—including personnel—assigned to the project should be adequate and appropriate to achieve project objectives. The substance of workshops and site visits should be included as an attachment, and the responsibilities of U.S. participants and in-country partners should be clearly described.

3. Institution's Record/Ability: Proposals should include an institutional record of successful exchange programs, with reference to responsible fiscal management and full compliance with reporting requirements. The Bureau will consider the demonstrated potential of new applicants and will evaluate the performance record of prior recipients of Bureau grants as reported by the Bureau grant staff.

4. Follow-on Activities: Proposals should provide a plan for sustained follow-on activity (building on the linkages developed under the grant and the activities initially funded by the grant, after grant funds have been depleted), ensuring that Bureau-supported projects are not isolated events.

5. Project Evaluation/Monitoring: Proposals should include a plan to monitor and evaluate the project's implementation, both as the activities

unfold and at the end of the program. Reports should include both accomplishments and problems encountered. A discussion of survey methodology or other disclosure/measurement techniques, plus a description of how outcomes are defined in terms of the project's original objectives, is recommended. Successful applicants will be expected to submit a report after each project component is concluded or semi-annually, whichever is less frequent.

6. Impact: Proposed projects should, through the establishment of substantive, sustainable individual and institutional linkages and encouraging maximum sharing of information and cross-boundary cooperation, enhance mutual understanding among communities and societies.

7. Cost Effectiveness and Cost Sharing: Administrative costs should be kept low. Proposal budgets that provide evidence of cost sharing, comprised of cash or in-kind contributions, representing 33 percent or more of the total cost of the exchange will be given priority consideration. Cost sharing may be derived from diverse sources, including private sector contributions and/or direct institutional support.

8. Support of Diversity: Proposals should demonstrate support for the Bureau's policy on diversity. Features relevant to this policy should be cited in program implementation (selection of participants, program venue, and program evaluation), program content, and program administration.

Authority: Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87-256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Notice: The terms and conditions published in this RFP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to revise, reduce, or increase proposal budgets in accordance with the needs of the program

and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures.

Dated: June 27, 2000.

Evelyn S. Lieberman,

Under Secretary for Public Diplomacy and Public Affairs, U.S. Department of State.

[FR Doc. 00-17254 Filed 7-12-00; 8:45 am]

BILLING CODE 4710-11-P

DEPARTMENT OF STATE

[Public Notice 3359]

Bureau of Educational and Cultural Affairs; A Writer's Perspective on Contemporary Social Issues in the United States

NOTICE: Request for Proposals.

SUMMARY: The Office of Citizen Exchanges, Bureau of Educational and Cultural Affairs of the U.S. Department of State, announces a competition for a project designed for Vietnam titled A Writer's Perspective on Contemporary Social Issues in the United States. U.S. public and private non-profit organizations meeting the provisions described in IRS regulation 26 CFR 1.501 (c) may submit proposals.

Program Information:

Overview: Within Vietnam there is a lack of understanding of U.S. culture and society. This circumstance derives from decades of isolation and often makes Vietnamese cautious about cooperating with the U.S. One of the best ways to promote increased understanding of the U.S. is to enable Vietnamese writers, artists, journalists and academics to meet and discuss with American writers and academic specialists on contemporary social issues and observe how American social critics express concerns over these issues.

The proposed program would bring a delegation of 13 Vietnamese to the United States for a three-week study tour. During the study tour, members of the delegation should meet with range of writers who write on social and political issues. These meetings will explore how American writers, both fiction and nonfiction, influence the public's perception of contemporary political and social questions. A key element of the project is how writers define their role as social and political critics and how the written word can

play a role in framing the issues confronting society. Additional meetings should be scheduled with American journalists from both the print and the electronic media who write about contemporary social issues. Finally, the study tour should permit the participants to experience the ethnic and cultural diversity of the U.S. It is anticipated that the program will be conducted between September 2000 and December 2000. The grant should be awarded by mid-July. Applicants should identify the local organizations and individuals with whom they are proposing to collaborate and describe in detail previous cooperative programming and/or contacts.

Programs must comply with J-1 visa regulations. Please refer to Solicitation Package for further information.

Budget Guidelines

Grants awarded to eligible organizations with less than four years of experience in conducting international exchange programs will be limited to \$60,000. The total requested from the Bureau not exceed \$190,000. Please note: All funding decisions are subject to final Congressional action. Additional budget guidelines are explained in the Solicitation Package.

Allowable costs for the program include the following:

1. International and domestic air fares; visas; transit costs; ground transportation costs.

2. Per Diem. For the U.S. program, organizations have the option of using a flat \$160/day for program participants or the published U.S. Federal per diem rates for individual American cities. For activities outside the U.S., the published Federal per diem rates must be used. NOTE: U.S. escorting staff must use the published Federal per diem rates, not the flat rate. Per diem rates may be accessed at {www.usia.gov/agency/ebur-ref.html}.

3. Interpreters: If needed, interpreters for the U.S. program are provided by the State Department's Language Services Division. Typically, a pair of simultaneous interpreters is provided for every four visitors who need interpretation. Bureau grants do not pay for foreign interpreters to accompany delegations from their home country. Grant proposal budgets should contain a flat \$160/day per diem for each Department of State interpreter, as well as home-program-home air transportation of \$400 per interpreter plus any U.S. travel expenses during the program. Salary expenses are covered centrally and should not be part of an applicant's proposed budget.

4. Book and cultural allowance: Participants are entitled to and escorts are reimbursed a one-time cultural allowance of \$150 per person, plus a participant book allowance of \$50. U.S. staff do not get these benefits.

5. Consultants. May be used to provide specialized expertise or to make presentations. Daily honoraria generally do not exceed \$250 per day. Subcontracting organizations may also be used, in which case the written agreement between the prospective grantee and subcontractor should be included in the proposal.

6. Room rental, which generally should not exceed \$250 per day.

7. Materials development. Proposals may contain costs to purchase, develop, and translate materials for participants.

8. One working meal per project. Per capita costs may not exceed \$5-8 for a lunch and \$14-20 for a dinner, excluding room rental. The number of invited guests may not exceed participants by more than a factor of two-to-one.

9. A return travel allowance of \$70 for each participant which is to be used for incidental expenditures incurred during international travel.

10. All Bureau-funded delegates will be covered under the terms of a Bureau-sponsored health insurance policy. The premium is paid by the Bureau directly to the insurance company.

11. Other costs necessary for the effective administration of the program, including salaries for grant organization employees, benefits, and other direct and indirect costs per detailed instructions in the application package.

Announcement Title and Number: All correspondence with the Bureau concerning this RFP should reference the above title and number ECA/PE/C-00-55.

FOR FURTHER INFORMATION, CONTACT: The Office of Citizen Exchanges, ECA/PE/C, Room 224, U.S. Department of State, 301 4th Street, SW., Washington, DC 20547, telephone number 202/619-5326 and fax number 202/260-0440, Internet address, ctoles@usia.gov to request a Solicitation Package. The Solicitation Package contains detailed award criteria, required application forms, specific budget instructions, and standard guidelines for proposal preparation.

Please specify Bureau Program Officer Raymond H. Harvey on all other inquiries and correspondence.

Please read the complete **Federal Register** announcement before sending inquiries or submitting proposals. Once the RFP deadline has passed, Bureau staff may not discuss this competition

with applicants until the proposal review process has been completed.

To Download a Solicitation Package Via Internet: The entire Solicitation Package may be downloaded from the Bureau's website at <http://e.usia.gov/education/rfps>. Please read all information before downloading.

Deadline for Proposals: All proposal copies must be received at the Bureau of Educational and Cultural Affairs by 5 p.m. Washington, DC time on Thursday, September 28, 2000. Faxed documents will not be accepted at any time. Documents postmarked the due date but received on a later date will not be accepted. Each applicant must ensure that the proposals are received by the above deadline.

Applicants must follow all instructions in the Solicitation Package. The original and ten copies of the application should be sent to: U.S. Department of State, SA-44, Bureau of Educational and Cultural Affairs, Ref.: ECA/PE/C-00-55, Program Management, ECA/EX/PM, Room 336, 301 4th Street, SW, Washington, DC 20547.

Applicants must also submit the "Executive Summary" and "Proposal Narrative" sections of the proposal on a 3.5" diskette, formatted for DOS. These documents must be provided in ASCII text (DOS) format with a maximum line length of 65 characters. The Bureau will transmit these files electronically to the Public Affairs section at the U.S. Embassy for its review, with the goal of reducing the time it takes to get embassy comments for the Bureau's grants review process.

Diversity, Freedom and Democracy Guidelines

Pursuant to the Bureau's authorizing legislation, programs must maintain a non-political character and should be balanced and representative of the diversity of American political, social, and cultural life. "Diversity" should be interpreted in the broadest sense and encompass differences including, but not limited to ethnicity, race, gender, religion, geographic location, socio-economic status, and physical challenges. Applicants are strongly encouraged to adhere to the advancement of this principle both in program administration and in program content. Please refer to the review criteria under the 'Support for Diversity' section for specific suggestions on incorporating diversity into the total proposal. Public Law 104-319 provides that "in carrying out programs of educational and cultural exchange in countries whose people do not fully enjoy freedom and democracy," the

Bureau "shall take appropriate steps to provide opportunities for participation in such programs to human rights and democracy leaders of such countries." Proposals should reflect advancement of this goal in their program contents, to the full extent deemed feasible.

Year 2000 Compliance Requirement (Y2K Requirement)

The Year 2000 (Y2K) issue is a broad operational and accounting problem that could potentially prohibit organizations from processing information in accordance with Federal management and program specific requirements including data exchange with the Bureau. The inability to process information in accordance with Federal requirements could result in grantees' being required to return funds that have not been accounted for properly.

The Bureau therefore requires all organizations use Y2K compliant systems including hardware, software, and firmware. Systems must accurately process data and dates (calculating, comparing and sequencing) both before and after the beginning of the year 2000 and correctly adjust for leap years.

Additional information addressing the Y2K issue may be found at the General Services Administration's Office of Information Technology website at <http://www.itpolicy.gsa.gov>.

Review Process

The Bureau will acknowledge receipt of all proposals and will review them for technical eligibility. Proposals will be deemed ineligible if they do not fully adhere to the guidelines stated herein and in the Solicitation Package. All eligible proposals will be reviewed by the program office, as well as the Public Diplomacy section overseas, where appropriate. Eligible proposals will be forwarded to panels of Bureau officers for advisory review. Proposals may also be reviewed by the Office of the Legal Adviser or by other Department elements. Final funding decisions are at the discretion of the Department of State's Under Secretary for Public Diplomacy and Public Affairs. Final technical authority for assistance awards (grants or cooperative agreements) resides with the Bureau's Grants Officer.

Review Criteria

Technically eligible applications will be competitively reviewed according to the criteria stated below. These criteria are not rank ordered and all carry equal weight in the proposal evaluation:

1. *Quality of Program Idea:* Proposals should exhibit originality, substance,

precision, and relevance to the Agency mission.

2. *Program Planning/Ability to Achieve Program Objectives:* Detailed agenda and relevant work plan should demonstrate substantive undertakings and logistical capacity. Agenda and plan should adhere to the program overview and guidelines described above. Objectives should be reasonable, feasible, and flexible. Proposals should clearly demonstrate how the institution will meet the program objectives and plan.

3. *Multiplier Effect/Impact:* Proposed programs should strengthen long-term mutual understanding, including maximum sharing of information and establishment of long-term institutional and individual linkages.

4. *Support of Diversity:* Proposals should demonstrate the substantive support of the Bureau's policy on diversity. Achievable and relevant features should be cited in both program administration (selection of participants, program venue, and program evaluation) and program content (orientation and wrap-up sessions, program meetings, resource materials, and follow-up activities).

5. *Institutional Capacity/Reputation/Ability:* Proposed personnel and institutional resources should be adequate and appropriate to achieve the program's or project's goal. Proposals should demonstrate an institutional record of successful exchange programs, including responsible fiscal management and full compliance with all reporting requirements for past Bureau grants as determined by USIA's Office of Contracts. The Bureau will consider the past performance of prior recipients and the demonstrated potential of new applicants.

6. *Follow-on Activities:* Proposals should provide a plan for continued follow-on activity (without Bureau support) which ensures that Bureau-supported programs are not isolated events.

7. *Evaluation Plan:* Proposals should provide a plan for a thorough and objective evaluation of the program/project by the grantee institution.

8. *Cost-Effectiveness/Cost Sharing:* The overhead and administrative components of the proposal, including salaries and honoraria, should be kept as low as possible. All other items should be necessary and appropriate. Proposals should maximize cost-sharing through other private sector support as well as institutional direct funding contributions.

Authority: Overall grant making authority for this program is contained in the Mutual Educational and Cultural Exchange Act of 1961, Public Law 87-256, as amended, also known as the Fulbright-Hays Act. The purpose of the Act is "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries * * *; to strengthen the ties which unite us with other nations by demonstrating the educational and cultural interests, developments, and achievements of the people of the United States and other nations * * * and thus to assist in the development of friendly, sympathetic and peaceful relations between the United States and the other countries of the world." The funding authority for the program above is provided through legislation.

Notice

The terms and conditions published in this RFP are binding and may not be modified by any Bureau representative. Explanatory information provided by the Bureau that contradicts published language will not be binding. Issuance of the RFP does not constitute an award commitment on the part of the Government. The Bureau reserves the right to reduce, revise, or increase proposal budgets in accordance with the needs of the program and the availability of funds. Awards made will be subject to periodic reporting and evaluation requirements.

Notification

Final awards cannot be made until funds have been appropriated by Congress, allocated and committed through internal Bureau procedures.

Dated: June 27, 2000.

Evelyn S. Lieberman,

Under Secretary for Public Diplomacy and Public Affairs, U.S. Department of State.

[FR Doc. 00-17255 Filed 7-12-00; 8:45 am]

BILLING CODE 4710-11-P

DEPARTMENT OF TRANSPORTATION

Coast Guard

[USCG-2000-7608]

Chemical Transportation Advisory Committee

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: The Subcommittee of the Chemical Transportation Advisory Committee (CTAC) on Environmental Response will meet to discuss its tasking and current applicable response standards. The Subcommittee is tasked to identify, review, and make recommendations to the Coast Guard on

current industry standards and guidelines for hazardous material response organizations that represent best practices for ensuring safe and effective emergency response operations to marine transportation-related chemical spill incidents. This meeting will be open to the public.

DATES: The Subcommittee will meet on Thursday, August 3, 2000, from 9:00 am to 4 pm. The meeting may close early if all business is finished. Written material and requests to make oral presentations should reach the Coast Guard on or before July 31, 2000. Requests to have a copy of your material distributed to each member of the subcommittee should reach the Coast Guard on or before July 30, 2000.

ADDRESSES: The Subcommittee will meet in room 6319, U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC. Send written material and requests to make oral presentations to Commander Robert F. Corbin, Commandant (G-MSO-3), U.S. Coast Guard Headquarters, 2100 Second Street SW., Washington, DC 20593-0001.

FOR FURTHER INFORMATION CONTACT: Lieutenant Susan Klein, Coast Guard Technical Representative to the Subcommittee, telephone 202-267-0417, or Lieutenant Gregory F. Herold, Deputy Assistant to the Executive Director of CTAC, telephone 202-267-1217, fax 202-267-4570.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agenda of Meeting

The agenda of the Subcommittee of the Chemical Transportation Advisory Committee (CTAC) on Environmental Response includes the following:

- (1) Introduction of Subcommittee members.
- (2) Brief overview of Subcommittee tasking and desired outcome.
- (3) Discussion of current applicable regulatory requirements and industry best practice response standards.
- (4) Evaluation of the need to provide certain criteria or best practices to the field.
- (5) Development of future Subcommittee activities.

Procedural

The meeting is open to the public. Please note that the meeting may close early if all business is finished. All attendees at the meeting are encouraged to fully review the Subcommittee's task statement prior to the meeting. Copies of the Subcommittee's task statement can be obtained from Lieutenant Susan

Klein, telephone 202-267-0417, or Lieutenant Gregory F. Herold, telephone 202-267-1217, fax 202-267-4570. It is also available from the CTAC Internet Website at: www.uscg.mil/hq/g-m/advisory/ctac. At the discretion of the Subcommittee Chair, members of the public may make oral presentations during the meeting. If you would like to make an oral presentation at the meeting, please notify the Coast Guard Technical Representative to the Subcommittee and submit written material on or before July 31, 2000. If you would like a copy of your material distributed to each member of the Subcommittee in advance of a meeting, please submit 25 copies to the Coast Guard Technical Representative to the Subcommittee no later than July 30, 2000.

Information on Services for Individuals With Disabilities

For information on facilities or services for individuals with disabilities, or to request special assistance at the meeting, contact the Deputy Assistant to the Executive Director of CTAC as soon as possible.

Dated: July 3, 2000.

Peter A. Richardson,

Acting Director of Standards, Marine Safety and Environmental Protection.

[FR Doc. 00-17676 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-15-M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. MC-F-20972]

Laidlaw Inc., et al.; Control and Merger; 918897 Ontario Inc., B. R. Babcock Limited, Babcock Coach Lines Limited, Lee Line Corp., and Lee Charter Services, Inc.

AGENCY: Surface Transportation Board.

ACTION: Notice Tentatively Approving Finance Application.

SUMMARY: In an application filed under 49 U.S.C. 14303, Laidlaw Inc. (Laidlaw), a noncarrier, seeks to acquire indirect control, through its subsidiary, Laidlaw Transit Ltd. (Transit Ltd.), of 918897 Ontario Inc. (Babcock), a noncarrier, and B. R. Babcock Limited (BRB), and Babcock Coach Lines Limited (BCL), motor passenger carriers, and subsequently to merge Babcock, BRB, and BCL into Transit Ltd. Laidlaw also seeks to acquire indirect control, through its subsidiary, Laidlaw Transit, Inc. (Transit, Inc.), of the operating assets of Lee Line Corp. (LLC), a motor passenger carrier, the transfer of LLC's

operating authority to Lee Charter Services, Inc. (LCS), and the voluntary surrender of such authority by LCS. Persons wishing to oppose the application must follow the rules under 49 CFR 1182.5 and 1182.8. The Board has tentatively approved the transaction, and, if no opposing comments are timely filed, this notice will be the final Board action.

DATES: Comments must be filed by August 28, 2000. Applicants may file a reply by September 11, 2000. If no comments are filed by August 28, 2000, this notice is effective on that date.

ADDRESSES: Send an original and 10 copies of any comments referring to STB Docket No. MC-F-20972 to: Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, N.W., Washington, DC 20423-0001. In addition, send one copy of comments to applicants' representative: Fritz R. Kahn, 1920 N Street (8th Floor), N.W., Washington, DC 20036-1601.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar, (202) 565-1600. [TDD for the hearing impaired: 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: Applicants submit that, on March 5, 1999, Transit Ltd. and Brian Babcock, an individual noncarrier resident in the Province of Ontario, Canada and the owner of Babcock, entered into an agreement whereby all of the capital stock of Babcock was transferred to an independent voting trustee pending Board approval of Transit Ltd's acquisition of Babcock and the merger of Babcock, BRB, and BCL into Transit Ltd. Applicants also submit that, by agreement dated February 8, 1999, Transit, Inc. agreed to acquire the operating assets of LLC for the purpose of continuing LLC's charter service under Transit, Inc's operating authority. The February 8, 1999 agreement also provides for the transfer of LLC's operating authority to LCS and the voluntary surrender of such authority by LCS. The existing shares of LCS are also currently held by a separate, independent voting trust.

Laidlaw currently controls motor passenger carriers, which include Transit Ltd. (MC-102189) and Transit, Inc. (MC-161299). These carriers' operations in the United States, with the exception of Greyhound Lines, Inc. (Greyhound), are largely limited to charter and special operations. Greyhound holds federally issued operating authority in Docket No. MC-1515 and provides mainly nationwide,

scheduled regular-route operations.¹ Applicants state that, although they do not intend to change the nature of the acquired companies' operations, the traveling public in the United States and Canada will benefit through applicants' centralized management functions.

Under 49 U.S.C. 14303(b), we must approve and authorize a transaction we find consistent with the public interest, taking into consideration at least: (1) the effect of the transaction on the adequacy of transportation to the public; (2) the total fixed charges that result; and (3) the interest of affected carrier employees.

Applicants have submitted the information required by 49 CFR 1182.2, including information demonstrating that the proposed transaction is consistent with the public interest under 49 U.S.C. 14303(b). Specifically, applicants have shown that the proposed transaction will have a positive effect on the adequacy of transportation to the public and will result in no increase in fixed charges and no changes in employment. See 49 CFR 1182.2(a)(7). Additional information may be obtained from applicants' representative.

On the basis of the application, we find that the proposed transaction is consistent with the public interest and should be authorized. If any opposing comments are timely filed, this finding will be deemed vacated and, unless a final decision can be made on the record as developed, a procedural schedule will be adopted to reconsider the application. See 49 CFR 1182.6(c). If no opposing comments are filed by the expiration of the comment period, this decision will take effect automatically and will be the final Board action.

Board decisions and notices are available on our website at: "WWW.STB.DOT.GOV."

This decision will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The proposed control and merger is approved and authorized, subject to the filing of opposing comments.

2. If timely opposing comments are filed, the findings made in this decision will be deemed as having been vacated.

¹ By letter filed June 13, 2000, Laidlaw informed the Board that, in prior proceedings, it incorrectly described Greyhound as a subsidiary of Laidlaw Inc. Laidlaw now states that, through transactions effected as of the date of its March 16, 1999 acquisition of control of Greyhound, Greyhound became a subsidiary of Laidlaw Transportation, Inc., a noncarrier controlled by Laidlaw Inc. Accordingly, Laidlaw indicates that Greyhound is an indirect subsidiary of Laidlaw Inc.

3. This decision will be effective on August 28, 2000, unless timely opposing comments are filed.

4. A copy of this notice will be served on: (1) the U.S. Department of Transportation, Federal Motor Carrier Safety Administration—HMCE-20, 400 Virginia Avenue, S.W., Suite 600, Washington, DC 20024; (2) the U.S. Department of Justice, Antitrust Division, 10th Street & Pennsylvania Avenue, N.W., Washington, DC 20530; and (3) the U.S. Department of Transportation, Office of the General Counsel, 400 7th Street, S.W., Washington, DC 20590.

Decided: July 7, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams,
Secretary.

[FR Doc. 00-17778 Filed 7-12-00; 8:45 am]

BILLING CODE 4915-00-P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Advisory Circular 21-2J, Export Airworthiness Approval Procedures

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of availability.

SUMMARY: This notice announces the availability of Advisory Circular 21-2J, Export Airworthiness Approval Procedures. Advisory Circular 21-2J provides information and guidance concerning an acceptable means, but not the only means, of demonstrating compliance with the requirements of Title 14 Code of Federal Regulations, part 21, Certification Procedures for Products and Parts, regarding Export Airworthiness Certification approvals.

ADDRESSES: Copies of AC 21-2J can be obtained from the following: U.S. Department of Transportation, Subsequent Distribution Office, Ardmore East Business Center, 3341 Q 75th Ave, Landover, MD 20785. Issued in Washington, DC on June 27, 2000.

Frank P. Paskiewicz,

Manager, Production and Airworthiness Certification Division, AIR-200.

[FR Doc. 00-17789 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration**

[Summary Notice No. PE-2000-21]

Petitions for Exemption; Summary of Petitions Received; Disposition of Petitions Issued**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATE: Comments on petitions received must identify the petition docket number involved and must be received on or before July 24, 2000.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC-200), Petition Docket No. __, 800 Independence Avenue, SW., Washington, D.C. 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-200), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, D.C. 20591; telephone (202) 267-3132.

FOR FURTHER INFORMATION CONTACT: Cherie Jack (202) 267-7271, Forest Rawls (202) 267-8033, or Vanessa Wilkins (202) 267-8029 Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, D.C., on July 10, 2000.

Donald P. Byrne,
Assistant Chief Counsel for Regulations.

Petitions for Exemption*Docket No.:* 013SW*Petitioner:* ERA Aviation, Inc.*Section of the FAR Affected:* 14 CFR § 29.1

Description of Relief Sought: To allow certification as a Category B rotorcraft with a maximum weight of 20,500 pounds and 10 or more passenger seats.

Docket No.: 30085*Petitioner:* MD Helicopters, Inc.*Section of the FAR Affected:* 14 CFR § H36.105(c)(1)

Description of Relief Sought: To permit MDHI to use 0.9V_{NE}, never to exceed, flyover airspeed, instead of the traditional options of 0.9V_H (airspeed at maximum continuous power) or 0.45 V_H+65 knots, whichever is less, for level flyover noise certification tests of its Model MD900 helicopter.

[FR Doc. 00-17785 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Federal Aviation Administration**

[Summary Notice No. PE-2000-22]

Petitions for Exemption: Summary of Petitions Received; Dispositions of Petitions Issued**AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of petitions for exemption received and of dispositions of prior petitions.

SUMMARY: Pursuant to FAA's rulemaking provisions governing the application, processing, and disposition of petitions for exemption (14 CFR Part 11), this notice contains a summary of certain petitions seeking relief from specified requirements of the Federal Aviation Regulations (14 CFR Chapter I), dispositions of certain petitions previously received, and corrections. The purpose of this notice is to improve the public's awareness of, and participation in, this aspect of FAA's regulatory activities. Neither publication of this notice nor the inclusion or omission of information in the summary is intended to affect the legal status of any petition or its final disposition.

DATES: Comments on petitions received must identify the petition docket number involved and must be received on or before August 3, 2000.

ADDRESSES: Send comments on any petition in triplicate to: Federal Aviation Administration, Office of the Chief Counsel, Attn: Rule Docket (AGC-200), Petition Docket No. __, 800 Independence Avenue, SW., Washington, D.C. 20591.

The petition, any comments received, and a copy of any final disposition are filed in the assigned regulatory docket and are available for examination in the Rules Docket (AGC-200), Room 915G, FAA Headquarters Building (FOB 10A), 800 Independence Avenue, SW., Washington, D.C. 20591; telephone (202) 267-3132.

FOR FURTHER INFORMATION CONTACT:

Cherie Jack (202) 267-7271, Forest Rawls (202) 267-8033, or Vanessa Wilkins (202) 267-8029 Office of Rulemaking (ARM-1), Federal Aviation Administration, 800 Independence Avenue, SW., Washington, DC 20591.

This notice is published pursuant to paragraphs (c), (e), and (g) of § 11.27 of Part 11 of the Federal Aviation Regulations (14 CFR Part 11).

Issued in Washington, DC, on July 10, 2000.

Donald P. Byrne,
Assistant Chief Counsel for Regulations.

Dispositions of Petitions*Docket No.:* 29422*Petitioner:* Gulfstream Aerospace Corporation*Section of the FAR Affected:* 14 CFR 43.9(a)(4), 43.11(a)(3), appendix B to part 43, and 145.57(a)*Description of Relief Sought/*

Disposition: To allow Gulfstream qualified technicians and inspection personnel to use electronic signatures in lieu of physical signatures to satisfy approval for return-to-service signature requirements for the completions processes for Gulfstream aircraft.

*Grant, 04/03/2000, Exemption No. 7163.**Docket No.:* 28422*Petitioner:* Broward County, Florida Public Works Department*Section of the FAR Affected:* 14 CFR 137.53(c)(2)*Description of Relief Sought/*

Disposition: To permit Broward to conduct aerial applications of insecticide materials from a Beechcraft C-45H aircraft (Registration No. N850BC, Serial No. 51-1184A) without the aircraft being equipped with a device that is capable of jettisoning at least one-half of the aircraft's maximum authorized load of agricultural materials within 45 seconds when operating over a congested area.

Grant, 04/04/2000, Exemption No. 6470B.

Docket No.: 23869

Petitioner: The Uninsured Relative Workshop, Inc.

Section of the FAR Affected: 14 CFR 105.43(a)

Description of Relief Sought/

Disposition: To permit employees, representatives, and other volunteer experimental test jumpers under TURWI's control to make tandem parachute jumps while wearing a dual-harness, dual-parachute pack that has at least one main parachute and one approved auxiliary parachute. That exemption also permits pilots in command of aircraft involved in these operations to allow such persons to make these parachute jumps.

Grant, 04/05/2000, Exemption No. 4943L.

Docket No.: 29661

Petitioner: Experimental Aircraft Association, Small Aircraft Manufacturers Association, and National Association of Flight Instructors

Section of the FAR Affected: 14 CFR 91.319(a)(1) and (2)

Description of Relief Sought/

Disposition: To permit members of the Experimental Aircraft Association, the Small Aircraft Manufacturers Association, and the National Association of Flight Instructors who own certain amateur- and kit-built aircraft certificated in the experimental category to receive compensation for the use of the aircraft for the purpose of conducting aircraft-specific flight training and flight reviews under 14 CFR 61.56.

Grant, 04/06/2000, Exemption No. 7162.

Docket No.: 27258

Petitioner: Air Methods Corporation

Section of the FAR Affected: 14 CFR 135.143(c)(2)

Description of Relief Sought/

Disposition: To permit AMC to operate certain aircraft under the provisions of part 135 without a TSO-C112 (Mode S) transponder installed.

Grant, 04/13/2000, Exemption No. 5720C.

Docket No.: 29940

Petitioner: Parker Hannifin Corporation

Section of the FAR Affected: 14 CFR 145.45(f)

Description of Relief Sought/

Disposition: To permit Parker to make its Inspection Procedures Manual (IPM) available electronically to its supervisory and inspection personnel rather than give a copy to each.

Grant, 04/16/2000, Exemption No. 7185.

Docket No.: 27729

Petitioner: Skydive Sebastian, Inc.

Section of the FAR Affected: 14 CFR 105.43(a)

Description of Relief Sought/

Disposition: To permit SSI to allow nonstudent parachutists who are foreign nationals to use parachutes that do not meet the parachute equipment and packing requirements of the Federal Aviation Regulations.

Grant, 04/17/2000, Exemption No. 7169.

Docket No.: 29510

Petitioner: Cessna Aircraft Company

Section of the FAR Affected: 14 CFR 145.45(f)

Description of Relief Sought/

Disposition: To permit Cessna to distribute electronically its IPM to all repair station personnel, rather than give a paper copy of the IPM to each of its supervisory and inspection personnel.

Grant, 04/17/2000, Exemption No. 7170.

Docket No.: 27577

Petitioner: Aviall

Section of the FAR Affected: 14 CFR 145.45(f)

Description of Relief Sought/

Disposition: To permit to maintain one copy of its repair station IPM at each facility rather than give a copy of the IPM to each of its supervisory and inspection personnel.

Grant, 04/17/2000, Exemption No. 5940C.

Docket No.: 28468

Petitioner: Honolulu Community College Aeronautics.

Section of the FAR Affected: 14 CFR 65.75(b)

Description of Relief Sought/

Disposition: To permit HCC to use a continuous practical examination program in which students undergo FAA oral and practical testing concurrent with HCC's training program as an integral part of the education process, rather than conducting the oral and practical tests upon students' successful completion of the training program, and to allow HCC to use AERO Testing Board Members to administer the continuous oral and practical examinations to students of HCC's approved 14 CFR part 147 program at times and places identified in HCC's operations handbook.

Grant, 04/17/2000, Exemption No. 6764A.

Docket No.: 28590

Petitioner: Human Flight, Inc.

Section of the FAR Affected: 14 CFR 105.43(a)

Description of Relief Sought/

Disposition: To permit Human Flight employees, representatives, and other volunteer test jumpers under Human Flight's direction and control and Human Flight certified tandem instructors to continue to make

tandem/parachute jumps while wearing a dual-harness, dual-parachute pack having at least one main parachute and one approved auxiliary parachute packed in accordance with § 105.43(a), and to permit pilots in command of aircraft involved in these operations to continue to allow such persons to make these parachute jumps.

Grant, 04/17/2000, Exemption No. 6650C.

Docket No.: 25060

Petitioner: Boeing Commercial Airplane Group

Section of the FAR Affected: 14 CFR 21.197

Description of Relief Sought/

Disposition: To permit Boeing to conduct training of Boeing's pilot flight crewmembers while operating under special flight permits issued for the purpose of production flight testing.

Grant, 04/17/2000, Exemption No. 4936D.

Docket No.: 29948

Petitioner: East Coast Aviation Service, Ltd., dba Executive Airlines

Section of the FAR Affected: 14 CFR 135.143(c)(2)

Description of Relief Sought/

Disposition: To permit Executive Airlines to operate certain aircraft under part 135 without a TSO-C112 (Mode S) transponder installed in the aircraft.

Grant, 04/19/2000, Exemption No. 7171.

Docket No.: 29984

Petitioner: Norman L. Westerbuhr and Crossville Flying Association

Section of the FAR Affected: 14 CFR 135.251, 135.255, 135.353, appendixes I and J to part 121

Description of Relief Sought/

Disposition: To permit Mr. Westerbuhr and CFA to conduct local sightseeing flights at the Crossville Memorial Airport, Crossville, Tennessee for an event on May 27, 2000, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements of part 135.

Grant, 04/19/2000, Exemption No. 7172.

Docket No.: 29972

Petitioner: Western North Carolina Air Museum

Section of the FAR Affected: 14 CFR 135.251, 135.255, 135.353, and appendixes I and J to part 121

Description of Relief Sought/

Disposition: To permit WNCAM to conduct local sightseeing flights at Hendersonville, North Carolina airport for WNCAM's Air Fair on May 6 and 7, 2000, for compensation or hire, without complying with certain

anti-drug and alcohol misuse prevention requirements of part 135.
Grant, 04/19/2000, Exemption No. 7173.
Docket No.: 29933
Petitioner: Air Care, Inc.
Section of the FAR Affected: 14 CFR 135.143(c)(2)
Description of Relief Sought/
Disposition: To permit Air Care to operate certain aircraft under part 135 without a TSO-C112 (Mode S) transponder installed in the aircraft.
Grant, 04/19/2000, Exemption No. 7174.
Docket No.: 29634
Petitioner: Petaluma Area Pilots Association
Section of the FAR Affected: 14 CFR 135.251, 135.255, 135.353, and appendixes I and J to part 121
Description of Relief Sought/
Disposition: To permit PAPA to conduct local sightseeing flights at Petaluma Municipal Airport, for PAPA's "Penny-A-Pound" charitable event on Father's Day weekend in June 2000 and June 2001, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements.
Grant, 04/19/2000, Exemption No. 6981A.
Docket No.: 29973
Petitioner: Mirabella Yachts, Inc.
Section of the FAR Affected: 14 CFR 135.143(c)(2)
Description of Relief Sought/
Disposition: To permit Mirabella to operate certain aircraft under part 135 without a TSO-C112 (Mode S) transponder installed in the aircraft.
Grant, 04/21/2000, Exemption No. 7178.
Docket No.: 29993
Petitioner: Davis Aerospace Technical High School and Black Pilots of America
Section of the FAR Affected: 14 CFR 135.251, 135.255, 135.353, and appendixes I and J to part 121
Description of Relief Sought/
Disposition: To permit DATHS and BPA to conduct local sightseeing flights at Davis Aerospace Technical High School, Detroit, Michigan for its annual open house on May 21, 2000, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements.
Grant, 04/21/2000, Exemption No. 7177.
Docket No.: 29902
Petitioner: Brim Equipment Leasing, Inc., dba Brim Aviation
Section of the FAR Affected: 14 CFR 135.143(c)(2)
Description of Relief Sought/
Disposition: To permit Brim to operate certain aircraft under part 135

without a TSO-C112 (Mode S) transponder installed in the aircraft.
Grant, 04/21/2000, Exemption No. 7176.
Docket No: 29971
Petitioner: DeKalb Peachtree Airport
Section of the FAR Affected: 14 CFR 135.251, 135.255, 135.353, and appendixes I and J to part 121
Description of Relief Sought/
Disposition: To permit DPA to conduct local sightseeing flights at DeKalb Peachtree Airport for its Good Neighbor Day Open House/Airshow on June 3, 2000, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements of part 135.
Grant, 04/21/2000, Exemption No. 7175.
Docket No.: 29935
Petitioner: Friends of Allen County Airport
Section of the FAR Affected: 14 CFR 135.251, 135.255, 135.353, and appendixes I and J to part 121
Description of Relief Sought/
Disposition: To permit FACA to conduct local sightseeing flights at Allen County Airport, Iola, Kansas for a fly-in and open house on May 6, 2000, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements of part 135.
Grant, 04/21/2000, Exemption No. 7179.
Docket No.: 29962
Petitioner: Challenged Child, Inc. and friends
Section of the FAR Affected: 14 CFR 135.251, 135.255, 135.353, and appendixes I and J to part 121
Description of Relief Sought/
Disposition: To permit Challenged Child to conduct local sightseeing flights at the Gainesville, Georgia airport for charitable airlifts on May 6 and 7, 2000, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements of part 135.
Grant, 04/21/2000, Exemption No. 7180.
Docket No.: 29411
Petitioner: Spirit Aviation Incorporated
Section of the FAR Affected: 14 CFR 135.225(g)
Description of Relief Sought/
Disposition: To permit Spirit Aviation to conduct takeoffs in single-pilot, turbine-powered airplanes where takeoff visibility is one-half of a mile down to 1,800 feet (ft) runway visual range (RVR), subject to certain conditions and limitations.
Denial, 04/23/2000, Exemption No. 7186.
Docket No.: 29942
Petitioner: Metro Ambulance Group
Section of the FAR Affected: 14 CFR 135.143(c)(2)

Description of Relief Sought/
Disposition: To permit MAG to operate certain aircraft under part 135 without a TSO-C112 (Mode S) transponder installed in the aircraft.
Grant, 04/25/2000, Exemption No. 7182.
Docket No.: 28148
Petitioner: Capital City Air Carrier, Inc.
Section of the FAR Affected: 14 CFR 135.143(c)(2)
Description of Relief Sought/
Disposition: to permit CCAC to operate certain aircraft under part 135 without a TSO-C112 (Mode S) transponder installed in the aircraft.
Grant, 04/25/2000, Exemption No. 7181.
Docket No.: 29965
Petitioner: Hageland Aviation Services, Inc.
Section of the FAR Affected: 14 CFR 135.143(c)(2)
Description of Relief Sought/
Disposition: To permit HAS to operate certain aircraft under part 135 without a TSO-C112 (Mode S) transponder installed in the aircraft.
Grant, 04/25/2000, Exemption No. 7183.
Docket No.: 30007
Petitioner: Charlie Wells Aviation Scholarship
Section of the FAR Affected: 14 CFR 135.251, 135.255, 135.353, and appendixes I and J to part 121
Description of Relief Sought/
Disposition: To permit CWMAS to conduct local sightseeing flights at Capital Airport, Springfield, Illinois for scholarship fund raising flights on April 29 and 30, 2000, for compensation or hire, without complying with certain anti-drug and alcohol misuse prevention requirements of part 135.
Grant, 04/26/2000, Exemption No. 7184.
Docket No.: 29092
Petitioner: Pratt & Whitney Engine Services, Inc.,
Section of the FAR Affected: 14 CFR 145.45(f)
Description of Relief Sought/
Disposition: To permit PWES to assign IPMs to key individuals within departments and to strategically place an adequate number of IPMs for access by all employees, in lieu of giving a copy of the IPM to each of its supervisory and inspection personnel.
Grant, 04/28/2000, Exemption No. 6750A.

[FR Doc. 00-17786 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF TRANSPORTATION**Maritime Administration****[Docket Number: MARAD-2000-7620]****Requested Administrative Waiver of the Coastwise Trade Laws****AGENCY:** Maritime Administration, Department of Transportation.**ACTION:** Invitation for public comments on a requested administrative waiver of the Coastwise Trade Laws for the vessel SPICE.

SUMMARY: As authorized by Public Law 105-383, the Secretary of Transportation, as represented by the Maritime Administration (MARAD), is authorized to grant waivers of the U.S.-build requirement of the coastwise laws under certain circumstances. A request for such a waiver has been received by MARAD. The vessel, and a description of the proposed service, is listed below. Interested parties may comment on the effect this action may have on U.S. vessel builders or businesses in the U.S. that use U.S.-flag vessels. If MARAD determines that in accordance with Pub.L. 105-383 and MARAD's regulations at 46 CFR part 388 (65 FR 6905; February 11, 2000) that the issuance of the waiver will have an unduly adverse effect on a U.S.-vessel builder or a business that uses U.S.-flag vessels, a waiver will not be granted.

DATES: Submit comments on or before August 14, 2000.

ADDRESSES: Comments should refer to docket number MARAD-2000-7620. Written comments may be submitted by hand or by mail to the Docket Clerk, U.S. DOT Dockets, Room PL-401, Department of Transportation, 400 7th St., SW, Washington, DC 20590-0001. You may also send comments electronically via the Internet at <http://dmses.dot.gov/submit/>. All comments will become part of this docket and will be available for inspection and copying at the above address between 10 a.m. and 5 p.m., E.T., Monday through Friday, except federal holidays. An electronic version of this document and all documents entered into this docket is available on the World Wide Web at <http://dms.dot.gov>.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Transportation, Maritime Administration, MAR-832 Room 7201, 400 Seventh Street, SW, Washington, DC 20590. Telephone 202-366-4357.

SUPPLEMENTARY INFORMATION: Title V of Pub.L. 105-383 provides authority to the Secretary of Transportation to administratively waive the U.S.-build requirements of the Jones Act, and other

statutes, for small commercial passenger vessels (less than 12 passengers). This authority has been delegated to the Maritime Administration per 49 CFR 1.66, Delegations to the Maritime Administrator, as amended. By this notice, MARAD is publishing information on a vessel for which a request for a U.S.-build waiver has been received, and for which MARAD requests comments from interested parties. Comments should refer to the docket number of this notice and the vessel name in order for MARAD to properly consider the comments. Comments should also state the commenter's interest in the waiver application, and address the waiver criteria given in § 388.4 of MARAD's regulations at 46 CFR Part 388.

Vessel Proposed for Waiver of the U.S.-Build Requirement

(1) Name of vessel and owner for which waiver is requested: Name of vessel: SPICE. Owner: Tom and Terri Laird

(2) Size, capacity and tonnage of vessel: According to the Applicant: Length = 41.0 feet, Breadth = 10.2 feet, Depth = 6.7 feet, Capacity = 6 passengers, Gross tonnage = 14, Net Tonnage = 12.

(3) Intended use for vessel, including geographic region of intended operation and trade: According to the applicant: The vessel will be chartered for coastwise cruising from Eastport Maine to Montauk, New York including Long Island Sound.

(4) Date and place of construction and (if applicable) rebuilding: Date of construction: 1954. Place of construction: Abeking & Rasmussen, Lemwerder Germany.

(5) A statement on the impact this waiver will have on other commercial passenger vessel operators: According to the applicant: There are numerous small private charters operating in coastwise waters throughout New England. In recent years the healthy economy and increased tourism have created a market for additional vessels. Vintage wooden vessels such as SPICE are rare and particularly sought after.

(6) A statement on the impact this waiver will have on U.S. shipyards: According to the applicant: SPICE was fitted out in the US and has been maintained by US boatyards since she was delivered in 1954. A significantly greater amount of money has been spent in the US than in Germany on the original purchase, for example, the current annual maintenance costs are equal to two times the initial purchase price. She will continue to be maintained by US yards.

Dated: July 10, 2000.

By Order of the Maritime Administrator.

Joel C. Richard,*Secretary, Maritime Administration.*

[FR Doc. 00-17756 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-81-P**DEPARTMENT OF TRANSPORTATION****Coast Guard****[CGD8-00-015]****Houston/Galveston Navigation Safety Advisory Committee Meeting****AGENCY:** Coast Guard, DOT.**ACTION:** Notice of meetings.

SUMMARY: The Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC) and its working committees will meet to discuss waterway improvements, aids to navigation, Houston/Galveston-area projects impacting safety on the Houston Ship Channel, and various other navigation safety matters in the Houston/Galveston area. All meetings will be open to the public.

DATES: The next meeting of HOGANSAC will be held on Tuesday, September 12, 2000 from 10:00 a.m. to approximately 12:30 p.m. The meeting of the Committee's working groups will be held on Tuesday, August 22, 2000 at 9:00 a.m. The meetings may adjourn early if all business is finished. Members of the public may present written or oral statements at either meeting.

ADDRESSES: The HOGANSAC meeting will be held in the conference room of the Corps of Engineers facility in Galveston. The Corps of Engineers building is located at 2000 Fort Point Road. The working group meeting will be held at the Houston Port Authority building, 111 East Loop North, Houston, Texas.

FOR FURTHER INFORMATION CONTACT: Captain Wayne Gusman, Executive Director of HOGANSAC, telephone (713) 671-5199, or Commander Peter Simons, Executive Secretary of HOGANSAC, telephone (713) 671-5164.

SUPPLEMENTARY INFORMATION: Notice of this meeting is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2.

Agendas of the Meetings

Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC). The tentative agenda includes the following:

(1) Opening remarks by the Committee Sponsor (RADM Pluta) (or the Committee Sponsor's

representative), Executive Director (CAPT Gusman) and Chairman (Tim Leitzell).

(2) Approval of the May 24, 2000 minutes.

(3) Status of dredging projects.

(4) Barge lanes.

(5) Facility mooring depths data collection.

(6) Presentation by the National Oceanic and Atmospheric Administration on an experimental nowcast/forecast system for Galveston Bay.

(7) New business.

Working Committee Meeting. The tentative agenda for the working committee meeting includes the following:

(1) Presentation by each work group of its accomplishments and plans for the future.

(2) Review and discuss the work completed by each work group.

Work groups were formed to examine the following issues: hurricane contingency plan, PORTS funding/TCOON operability, dredging and related issues, barge lanes, electronic navigation systems, port emergency communications committee/internet site, AtoN knockdowns, VTS radio frequency congestion. All work groups may not necessarily report out at this session. Further, work group reports may not necessarily include discussions on all issues within the particular work group's area of responsibility. All meetings are open to the public. Please note that the meetings may adjourn early if all business is finished. Members of the public may make oral presentations during either meeting.

Information on Services for the Handicapped

For information on facilities or services for the handicapped or to request special assistance at the meetings, contact the Executive Director as soon as possible.

Dated: June 29, 2000.

Paul J. Pluta,

Rear Admiral, U.S. Coast Guard, Commander, Eighth Coast Guard District.

[FR Doc. 00-17678 Filed 7-12-00; 8:45 am]

BILLING CODE 4910-15-U

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

July 3, 2000.

The Department of Treasury has submitted the following public information collection requirement(s) to

OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104-13. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, Room 2110, 1425 New York Avenue, NW., Washington, DC 20220.

DATES: Written comments should be received on or before August 14, 2000 to be assured of consideration.

INTERNAL REVENUE SERVICE (IRS)

OMB Number: 1545-0046.

Form Number: IRS Form 982.

Type of Review: Extension.

Title: Reduction of Tax Attributes Due to Discharge of Indebtedness (and Section 1082 Basis Adjustment).

Description: Internal Revenue Code section 108 allows taxpayers to exclude from gross income amounts attributable to discharge of indebtedness in title 11 cases, insolvency, or a qualified farm indebtedness. Code section 1081(b) allows corporations to exclude from gross income amounts attributable to certain transfers of property. The data is used to verify adjustments to basis of property and reduction of tax attributes.

Respondents: Business or other for-profit, Individuals or households, Farms, Federal Government, State, Local or Tribal Government.

Estimated Number of Respondents/Recordkeepers: 1,000.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	5 hr., 18 min.
Learning about the law or the form.	2 hr., 44 min.
Preparing and sending the form to the IRS.	2 hr., 22 min.

Frequency of Response: On occasion.

Estimated Total Reporting/

Recordkeeping Burden: 10,290 hours.

OMB Number: 1545-0059.

Form Number: IRS Form 4137.

Type of Review: Extension.

Title: Social Security and Medicare Tax on Unreported Tip Income.

Description: Section 3102 requires an employee who receives tips subject to Social Security and Medicare tax to compute tax due on these tips if the employee did not report them to his or her employer. The data is used to help verify that the Social Security and Medicare tax on tip income is correctly computed.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 76,000.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	26 min.
Learning about the law or the form.	7 min.
Preparing the form ...	26 min.
Copying, assembling, and sending the form to the IRS.	20 min.

Frequency of Response: Annually.

Estimated Total Reporting/

Recordkeeping Burden: 101,080 hours.

OMB Number: 1545-0062.

Form Number: IRS Form 3903.

Type of Review: Extension.

Title: Moving Expenses.

Description: Internal Revenue Code (IRC) section 217 requires itemization of various allowable moving expenses. Form 3903 is filed with Form 1040 by individuals claiming employment related moves. The data is used to help verify that the expenses are deductible and that the deduction is computed correctly.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 678,678.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	33 min.
Learning about the law or the form.	9 min.
Preparing the form ...	13 min.
Copying, assembling, and sending the form to the IRS.	14 min.

Frequency of Response: Annually.

Estimated Total Reporting/

Recordkeeping Burden: 773,693 hours.

OMB Number: 1545-0139.

Form Number: IRS Form 2106.

Type of Review: Revision.

Title: Employee Business Expenses.

Description: Internal Revenue Code (IRC) section 62 allows employees to deduct their business expenses to the extent of reimbursement in computing "Adjusted Gross Income". Expenses in excess of reimbursements are allowed as an itemized deduction. Unreimbursed meals and entertainment are allowed to the extent of 50% of the expense. Form 2106 is used to figure these expenses.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 762,514.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	2 hr., 11 min.
Learning about the law or the form.	26 min.

Preparing the form ...	14 min.
Copying, assembling, and sending the form to the IRS.	35 min.

Frequency of Response: Annually.
Estimated Total Reporting/
Recordkeeping Burden: 3,189,745 hours.
OMB Number: 1545-0162.
Form Number: IRS Form 4136.
Type of Review: Extension.
Title: Credit for Federal Tax Paid on Fuels.

Description: Internal Revenue Code (IRC) section 34 allows a credit for Federal excise tax for certain fuel uses. This form is used to figure the amount of the income tax credit. The data is used to verify the validity of the claim for the type of nontaxable or exempt use.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions, Farms.

Estimated Number of Respondents/
Recordkeepers: 619,851.

Estimated Burden Hours Per
Respondent/Recordkeepers:

Recordkeeping	16 hr., 29 min.
Learning about the law or the form.	6 min.
Preparing and send- ing the form to the IRS.	22 min.

Frequency of Response: Annually.
Estimated Total Reporting/
Recordkeeping Burden: 2,618,453 hours.
OMB Number: 1545-0215.
Form Number: IRS Forms 5712 and 5712-A.

Type of Review: Revision.

Title: Election To Be Treated as a Possessions Corporation Under Section 936 (5712); and Election and Verification of the Cost Sharing or Profit Split Method Under Section 936(h)(5) (5712-A).

Description: Domestic corporations may elect to be treated as possessions corporations on Form 5712. This election allows the corporation to take a tax credit. Possession corporations may elect on Form 5712-A to share their taxable income with their affiliates under Internal Revenue Code section 936(h)(5). These forms are used by the IRS to ascertain corporations are entitled to the credit and if they may share their taxable income with their affiliates.

Respondents: Business or other for-profit, Farms, Federal Government, State, Local or Tribal Government.

Estimated Number of Respondents/
Recordkeepers: 2,600.

Estimated Burden Hours Per
Respondent/Recordkeeper:

	Form 5712	Form 5712-A
Record- keeping.	4 hr., 32 min.	5 hr., 44 min.
Learning about the law or the form.	35 min.	1 hr., 0 min.
Preparing and sending the form to the IRS.	42 min.	1 hr., 8 min.

Frequency of Response: Annually.
Estimated Total Reporting/
Recordkeeping Burden: 20,258 hours
OMB Number: 1545-0712.
Form Number: IRS Form 6198.
Type of Review: Extension.
Title: At-Risk Limitations.
Description: Internal Revenue Code (IRC) section 465 requires taxpayers to limit their at-risk loss to the lesser of the loss or their amount at risk. Form 6198 is used by taxpayers to determine their deductible loss and by IRS to verify the amount deducted.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions, Farms.

Estimated Number of Respondents/
Recordkeepers: 185,167.
Estimated Burden Hours Per
Respondent/Recordkeeper:

Recordkeeping	1 hr., 12 min.
Learning about the law or the form.	1 hr., 0 min.
Preparing the form ...	1 hr., 26 min.
Copying, assembling, and sending the form to the IRS.	20 min.

Frequency of Response: Annually.
Estimated Total Reporting/
Recordkeeping Burden: 735,113 hours.
OMB Number: 1545-0770.
Regulation Project Number: FI-182-78 NPRM.

Type of Review: Extension.
Title: Transfers of Securities Under Certain Agreements.

Description: Section 1058 of the Internal Revenue Code provides tax-free treatment for transfers of securities pursuant to a securities lending agreement. The agreement must be in writing and is used by the taxpayer, in a tax audit situation, to justify nonrecognition treatment of gain or loss on the exchange of the securities.

Respondents: Business or other for-profit, Individuals or households, Not-for-profit institutions.

Estimated Number of Respondents:
11,742.

Estimated Burden Hours Per
Respondent: 50 minutes.

Frequency of Response: On occasion.
Estimated Total Reporting Burden:
9,781 hours.

OMB Number: 1545-1035.
Form Number: IRS Form 8611.
Type of Review: Extension.
Title: Recapture of Low-Income Housing Credit.

Description: Internal Revenue Code (IRC) section 42 permits owners of residential rental projects providing low-income housing to claim a credit against their income tax. If the property is disposed of or it fails to meet certain requirements over a 15-year compliance period and a bond is not posted, the owner must recapture on Form 8611 part of the credit(s) taken in prior years.

Respondents: Business or other for-profit, Individuals or households.
Estimated Number of Respondents/
Recordkeepers: 1,200.

Estimated Burden Hours Per
Respondent/Recordkeeper:

Recordkeeping	7 hr., 40 min.
Learning about the law or the form.	1 hr., 0 min.
Preparing and send- ing the form to the IRS.	1 hr., 11 min.

Frequency of Response: Annually.
Estimated Total Reporting/
Recordkeeping Burden: 10,855 hours.

OMB Number: 1545-1057.
Form Number: IRS Form 8800.
Type of Review: Extension.

Title: Application for Additional Extension of Time to File U.S. Return for a Partnership, REMIC, or for Certain Trusts.

Description: Form 8800 is used by partnerships, real estate mortgage investment conduits (REMICs), and by certain trusts to request an additional extension of time (up to 3 months) to file Form 1065, Form 1041, or Form 1066. Form 8800 contains data needed by the IRS to determine whether or not a taxpayer qualifies for such an extension.

Respondents: Business or other for-profit, Farms.

Estimated Number of Respondents/
Recordkeepers: 20,000.

Estimated Burden Hours Per
Respondent/Recordkeeper: 11 minutes.

Frequency of Response: Annually.
Estimated Total Reporting/
Recordkeeping Burden: 3,800 hours.
OMB Number: 1545-1163.

Form Number: IRS Form 8822.
Type of Review: Extension.
Title: Change of Address.

Description: Form 8822 is used by taxpayers to notify the Internal Revenue Service that they have changed their home or business address or business location.

Respondents: Individuals or households, Business or other for-profit,

Not-for-profit institutions, Farms, Federal Government, State, Local or Tribal Government.

Estimated Number of Respondents: 1,500,000.

Estimated Burden Hours Per Respondent: 16 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 387,501 hours.

OMB Number: 1545-1350.

Form Number: IRS Form 9465.

Type of Review: Extension.

Title: Installment Agreement Request.

Description: Form 9465 is used by the public to provide identifying account information and financial ability to enter into an installment agreement for the payment of taxes. The form is used by IRS to establish a payment plan for taxes owed to the Federal Government, if appropriate, and to inform taxpayers about the application fee and their financial responsibilities.

Respondents: Individuals or households.

Estimated Number of Respondents: 760,000.

Estimated Burden Hours Per Respondent:

Learning about the law or the form.	17 min.
Preparing the form ...	26 min.
Copying, assembling, and sending the form to the IRS.	20 min.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 805,600 hours.

OMB Number: 1545-1441.

Form Number: IRS Form 2106-EZ.

Type of Review: Revision.

Title: Unreimbursed Employee Business Expenses.

Description: Internal Revenue Code (IRC) section 62 allows employees to deduct their business expenses to the extent of reimbursement in computing "Adjusted Gross Income". Expenses in excess of reimbursements are allowed as an itemized deduction. Unreimbursed meals and entertainment are allowed to the extent of 50% of the expense. Form 2106-EZ is used to figure these expenses.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 3,337,019.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping	40 min.
Learning about the law or the form.	12 min.
Preparing the form ...	24 min.

Copying, assembling, and sending the form to the IRS.	20 min.

Frequency of Response: Annually.

Estimated Total Reporting/Recordkeeping Burden: 5,339,230 hours.

OMB Number: 1545-1442.

Regulation Project Number: PS-79-93 Final.

Type of Review: Extension.

Title: Grantor Trust Reporting Requirements.

Description: The information required by these regulations is used by the Internal Revenue Service to ensure that items of income, deduction, and credit of a trust treated as owned by the grantor or another person are properly reported.

Respondents: Business or other for-profit, Individuals or households.

Estimated Number of Respondents: 1,840,000.

Estimated Burden Hours Per Respondent: 30 minutes.

Frequency of Response: Annually.

Estimated Total Reporting Burden: 920,000 hours.

OMB Number: 1545-1679.

Form Number: IRS Form 2031.

Type of Review: Extension.

Title: Revocation of Exemption From Self-Employment Tax for Use by Ministers, Members of Religious Orders, and Christian Science Practitioners.

Description: Form 2031 is used by certain individuals wishing to revoke their election to be exempt from social security coverage and self-employment taxes.

Respondents: Individuals or households.

Estimated Number of Respondents/Recordkeepers: 5,000.

Estimated Burden Hours Per Respondent/Recordkeeper:

Learning about the law or the form.	11 min.
Preparing the form ...	11 min.
Copying, assembling, and sending the form to the IRS.	14 min.

Frequency of Response: Other (One-Time).

Estimated Total Reporting/Recordkeeping Burden: 3,000 hours.

Clearance Officer: Garrick Shear, Internal Revenue Service, Room 5244, 1111 Constitution Avenue, NW, Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt, (202) 395-7860, Office of Management and Budget, Room 10202, New

Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports, Management Officer.

[FR Doc. 00-17686 Filed 7-12-00; 8:45 am]

BILLING CODE 4830-01-P

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds—Terminations: Allstate Insurance Company, Continental Western Insurance Company, Dairyland Insurance Company, Economy Fire & Casualty Company, First Excess and Reinsurance Corporation, First Financial Insurance Company, National Reinsurance Corporation, Navigators Insurance Company, Northbrook Property and Casualty Insurance Company, Security National Insurance Company, TIG Insurance Company of Michigan, TIG Premier Insurance Company, Tri-State Insurance Company of Minnesota, Trinity Universal Insurance Company of Kansas, Inc., Risk Capital Reinsurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 26 to the Treasury Department Circular 570; 1999 Revision, published July 1, 1999, at 64 FR 35864.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874-6775.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Certificate of Authority issued by the Treasury to the above named Companies, under the United States Code, Title 31, Sections 9304-9308, to qualify as an acceptable surety on Federal bonds was terminated effective June 30, 2000.

The Companies were last listed as acceptable sureties on Federal bonds at 64 FR starting on page 35864, July 1, 1999.

With respect to any bonds currently in force with above listed companies, bond-approving officers may let such bonds run to expiration and need not secure new bonds. However, no new bonds should be accepted from these companies. In addition, bonds that are continuous in nature should not be renewed.

The Circular may be viewed and downloaded through the Internet at <http://www.fms.treas.gov/c570/index.html>. A hard copy may be purchased from the Government

Printing Office (GPO), Subscription Service, Washington, DC, telephone (202) 512-1800. When ordering the Circular from GPO, use the following stock number: 048000-00527-6.

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6A04, Hyattsville, MD 20782.

Dated: June 30, 2000.

Michael C. Salapka,

Acting Director, Financial Accounting and Services Division, Financial Management Service.

[FR Doc. 00-17685 Filed 7-12-00; 8:45 am]

BILLING CODE 4810-35-M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds—Terminations: Credit General Insurance Company, The Millers Mutual Fire Insurance Company, ULICO Casualty Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury

ACTION: Notice,

SUMMARY: This is Supplement No. 24 to the Treasury Department Circular 570; 1999 Revision, published July 1, 1999, at 64 FR 35864.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874-6696.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Certificates of Authority issued by the Treasury to the above named Companies, under the United States Code, Title 31, Sections 9304-9308, to qualify as acceptable sureties on Federal bonds are terminated effective immediately.

The Companies were last listed as an acceptable surety on Federal bonds at 64 FR 35872, 35881 and 35891, July 1, 1999.

With respect to any bonds currently in force with above listed Company, bond-approving officers should secure new bonds with acceptable sureties in those instances where a significant amount of liability remains outstanding. In addition, bonds that are continuous in nature should be replaced.

The Circular may be viewed and downloaded through the Internet at <http://www.fms.treas.gov/c3570/index.html>. A hard copy may be purchased from the Government Printing Office (GPO), Subscription Service, Washington, DC, telephone (202) 512-1800. When ordering the Circular from GPO, use the following stock number: 048-000-00527-6.

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6A04, Hyattsville, MD 20782.

Dated: June 29, 2000.

Judith R. Tillman,

Assistant Commissioner, Financial Operations, Financial Management Service.

[FR Doc. 00-17683 Filed 7-12-00; 8:45 am]

BILLING CODE 4810-35-M

DEPARTMENT OF THE TREASURY

Fiscal Service

Surety Companies Acceptable on Federal Bonds—Terminations: Frontier Pacific Insurance Company & United Capitol Insurance Company

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 23 to the Treasury Department Circular 570; 1999 Revision, published July 1, 1999, at 64 FR 35864.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874-6850.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Certificate of Authority issued by the Treasury to the above named Companies, under the United States Code, Title 31, Sections 9304-9308, to qualify as an acceptable surety on Federal bonds is terminated effective immediately.

The Companies were last listed as an acceptable surety on Federal bonds at 64 FR 35876 and 35892, respectively, July 1, 1999.

With respect to any bonds currently in force with above listed Companies, bond-approving officers should secure new bonds with acceptable sureties in those instances where a significant amount of liability remains outstanding. In addition, bonds that are continuous in nature should be replaced.

The Circular may be viewed and downloaded through the Internet at <http://www.fms.treas.gov/c570/index.html>. A hard copy may be purchased from the Government Printing Office (GPO), Subscription Service, Washington, DC, telephone (202) 512-1800. When ordering the Circular from GPO, use the following stock number: 048-000-00527-6.

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6A04, Hyattsville, MD 20782.

Dated: June 29, 2000.

Judith R. Tillman,

Assistant Commissioner, Financial Operations, Financial Management Service.

[FR Doc. 00-17682 Filed 7-12-00; 8:45 am]

BILLING CODE 4810-35-M

DEPARTMENT OF THE TREASURY**Fiscal Service****Surety Companies Acceptable on Federal Bonds: Termination—Redland Insurance Company**

AGENCY: Financial Management Service, Fiscal Service, Department of the Treasury.

ACTION: Notice.

SUMMARY: This is Supplement No. 25 to the Treasury Department Circular 570; 1999 Revision, published July 1, 1999, at 64 FR 35864.

FOR FURTHER INFORMATION CONTACT: Surety Bond Branch at (202) 874-6779.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Certificate of Authority issued by the Treasury to

Redland Insurance Company, of Council Bluffs, Iowa, under the United States Code, Title 31, Sections 9304-9308, to qualify as an acceptable surety on Federal bonds is terminated effective immediately.

The Company was last listed as an acceptable surety on Federal bonds at 64 FR 35886, July 1, 1999.

With respect to any bonds currently in force with Redland Insurance Company, bond-approving officers should secure new bonds with acceptable sureties in those instances where a significant amount of liability remains outstanding. In addition, bonds that are continuous in nature should be replaced.

The Circular may be viewed and downloaded through the Internet at (<http://www.fms.treas.gov/c570/>

[index.html](#)). A hard copy may be purchased from the Government Printing Office (GPO), Subscription Service, Washington, DC, telephone (202) 512-1800. When ordering the Circular from GPO, use the following stock number: 048-00527-6.

Questions concerning this notice may be directed to the U.S. Department of the Treasury, Financial Management Service, Financial Accounting and Services Division, Surety Bond Branch, 3700 East-West Highway, Room 6A04, Hyattsville, MD 20782.

Dated: June 30, 2000.

Judith R. Tillman,

Assistant Commissioner, Financial Operations, Financial Management Service.
[FR Doc. 00-17684 Filed 7-12-00; 8:45 am]

BILLING CODE 4810-35-M

Corrections

Federal Register
Vol. 65, No. 135
Thursday, July 13, 2000

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF COMMERCE
Bureau of Export Administration

15 CFR Part 774
[Docket No. 990625176-0029-02]
RIN 0694-AB86

Revisions and Clarifications to the
Export Administration Regulations;
Commerce Control List

Correction
In rule document 00-13252 beginning on page 34073 in the issue of Friday, May 26, 2000, make the following correction:

PART 774 [CORRECTED]

- 1. On page 34075, in Supplement No. 1 to Part 774, in the third column, in "note 1.", in the second line, "desired" should read "designed".
- 2. On page 34076, in the same supplement, in the second column, in paragraph b.2.f.3., "+0.3" should read "±0.3".
- 3. On the same page, in the same supplement, in the same column, in paragraph b.3.a.3., "+10" should read "±10".

[FR Doc. C0-13252 Filed 7-12-00; 8:45 am]
BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

14 CFR Part 39
[Docket No. 2000-NM-208-AD; Amendment 39-11801; AD 2000-13-02]
RIN 2120-AA64

Airworthiness Directives; Empresa Brasileira de Aeronautica S.A. (EMBRAER) Model EMB-135 and EMB-145 Series Airplanes

Correction
In rule document 00-16110 beginning on page 39541 in the issue of Tuesday, June 27, 2000, make the following correction:

§39.13 [Corrected]

On page 39543, in the first column, in paragraph (b), the lines between "Assisted Start:" and "APU bleed start:" are corrected to read as follows:

Crossbleed Start:
N2 (operating engine). ABOVE 80%
Crossbleed AUTO OR OPEN
Engine Bleed (operating engine). OPEN
Start/Stop Selector START, THEN RUN
Engine Indication MONITOR
Check ITT and N2 rising. Observe limits.
Check ignition and fuel flow indication at 10% N2.
APU bleed start:
* * * * *

[FR Doc. C0-16110 Filed 7-12-00; 8:45 am]
BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

14 CFR Part 71
[Airspace Docket No. 00-ACE-7]
Amendment to Class E Airspace; Hampton, IA

Correction
In rule document 00-12821, in the issue of Friday, June 16, 2000, on page 37833, in the third column, the phrase "ACE AI E5 Hampton, IA [Revised]" should read "ACE IA E5 Hampton, IA [Revised]".
[FR Doc. C0-12821 Filed 7-12-00; 8:45 am]
BILLING CODE 1505-01-D

DEPARTMENT OF TRANSPORTATION
Federal Aviation Administration

14 CFR Part 71
[Airspace Docket No. 00-ASO-24]

Proposed Establishment of Class D Airspace; Oak Grove, NC

Correction
In proposed rule document 00-15944 beginning on page 39111 in the issue of Friday, June 23, 2000 make the following correction:
On page 39111, in the first column, under the heading DATES: , "June 24, 2000" should read "July 24, 2000".

[FR Doc. C0-15944 Filed 7-12-00; 8:45 am]
BILLING CODE 1505-01-D



Federal Register

**Thursday,
July 13, 2000**

Part II

Federal Housing Finance Board

12 CFR Part 917, et al.

**Capital Requirements for Federal Home
Loan Banks; Proposed Rule**

FEDERAL HOUSING FINANCE BOARD**12 CFR Parts 917, 925, 930, 931, 932, 933, 956, and 960****[No. 2000-23]****RIN 3069-AB01****Capital Requirements for Federal Home Loan Banks****AGENCY:** Federal Housing Finance Board.**ACTION:** Proposed rule.

SUMMARY: The Federal Housing Finance Board (Finance Board) proposes to amend its regulations to implement a new capital structure for the Federal Home Loan Banks (Banks), as is required by the Gramm-Leach-Bliley Act. The proposed rule would establish risk-based, leverage, and operations capital requirements for the Banks. It also addresses the different classes of stock that a Bank may issue, the rights and preferences that may be associated with each class of stock, and the capital plans that each Bank must submit for Finance Board approval.

DATES: The Finance Board will accept written comments on the proposed rule that are received on or before October 11, 2000.

ADDRESSES: Send comments to: Elaine L. Baker, Secretary to the Board, at the Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006. Comments will be available for inspection at this address.

FOR FURTHER INFORMATION CONTACT: James L. Bothwell, Director and Chief Economist, (202) 408-2821; Scott L. Smith, Deputy Director, (202) 408-2991; Ellen Hancock, Senior Financial Analyst, (202) 408-2906; or Christina Muradian, Senior Financial Analyst, (202) 408-2584; or Julie Paller, Senior Financial Analyst, (202) 408-2842, Office of Policy, Research and Analysis; or Deborah F. Silberman, General Counsel, (202) 408-2570; Neil R. Crowley, Deputy General Counsel, (202) 408-2990; or Thomas E. Joseph, Attorney-Advisor, (202) 408-2512, Office of General Counsel, Federal Housing Finance Board, 1777 F Street, N.W., Washington, D.C. 20006.

SUPPLEMENTARY INFORMATION:**I. Statutory and Regulatory Background***A. The Bank System*

The twelve Banks are instrumentalities of the United States organized under the authority of the Federal Home Loan Bank Act (Bank Act). 12 U.S.C. 1423, 1432(a), *as amended*. The Banks are a "government

sponsored enterprise" (GSE), *i.e.*, a federally chartered but privately owned institution created by Congress to serve a public purpose. The purpose of the Bank System is to support the financing of housing and community lending. *See* 12 U.S.C. 1422a(a)(3)(B)(ii), 1430(i), (j)(10) (1994). As with other GSEs, Congress has granted the Banks certain benefits, including an exemption from registration of their securities under federal securities laws, an exemption from state and local corporate taxation, and an ability to sell debt obligations (at the discretion of the Secretary of the Treasury) to the United States Treasury, that enable them to borrow in the capital markets on favorable terms. Typically, the Banks are able to borrow at a spread that is over the rates on U.S. Treasury securities of comparable maturity but which is less than the rates available to comparably situated private corporate borrowers. The Banks pass along that funding advantage to their members—and ultimately to consumers—by providing advances (secured loans) and other financial services at rates that their members generally could not obtain on their own.

The Banks also are cooperatives, meaning that only their members may own the capital stock and share in the profits of the Banks and only their members, and certain eligible associates (such as state housing finance agencies), may borrow from or use the other products and services provided by the Banks. 12 U.S.C. 1426, 1430(a), 1430b, *as amended*. Each Bank is managed by a board of directors, a majority of whom are elected by its members and the remainder of whom are appointed by the Finance Board. 12 U.S.C. 1427, *as amended*. An institution that is eligible (typically, an insured depository institution) may become a member of a Bank if it satisfies certain statutory criteria and purchases a specified amount of the Bank's capital stock. 12 U.S.C. 1424, 1426 (1994). Together with the Office of Finance, the twelve Banks comprise the Bank System, which operates under the supervision of the Finance Board, an independent agency in the executive branch of the U.S. government. The primary duty of the Finance Board is to ensure that the Banks operate in a financially safe and sound manner; consistent with that duty the Finance Board is required to supervise the Banks, ensure that they carry out their housing finance mission, and ensure that they remain adequately capitalized and able to raise funds in the capital markets. 12 U.S.C. 1422a(a)(3)(A), (B) (1994).

B. Federal Home Loan Capital Structure

Since its enactment in 1932, the Bank Act has provided for a "subscription" structure for the capital of the Banks. Under that structure, the amount of capital stock each Bank issued was determined as a percentage of either the total mortgage assets of each member of the Bank or the dollar amount of advances outstanding to each member, whichever was greater. The subscription capital structure was deficient in certain respects, most notably in that the amount of capital each Bank was required to hold bore no relationship to the risks posed by its activities. Moreover, the subscription capital structure caused the Banks to become substantially overcapitalized in relation to the risks they face. The amount of excess capital contributed to an increase in the amount of arbitrage investments made by the Banks, *i.e.*, investments in assets such as money market instruments or mortgage-backed securities that do not advance the housing finance and community lending mission of the Banks. The substantial amount of the non-mission investments held by the Banks collectively, though diminishing in recent years as a percentage of their assets, has been the subject of much criticism from the Administration and the Congress, and was one issue that the Congress intended to address by reforming the capital structure and other aspects of the Bank System. The Congress recognized that if it were to eliminate mandatory membership for federal savings associations, and thus remove the only permanent capital from the Bank System, it also would have to create a new capital structure that would include capital elements with more permanence than one based solely on 6-month redeemable stock.

C. The Gramm-Leach-Bliley Act

On November 12, 1999, the President signed the Gramm-Leach-Bliley Act, Pub. Law No. 106-102, 133 Stat. 1338 (Nov. 12, 1999) (GLB Act), which, among other things, substantially amended the provisions of the Bank Act that relate to the capital structure of the Banks. 12 U.S.C. 1426, *as amended*. As a result of those amendments, the existing subscription capital structure will be replaced over a period of several years by a more modern capital structure, with risk-based and leverage capital requirements that are similar to those applicable to depository institutions and to the other housing GSEs. The GLB Act provides for a transition period to the new capital structure of up to approximately five

years from the date of enactment, during which time the prior capital provisions are to remain in effect. The GLB Act requires the Finance Board to promulgate uniform capital regulations for the Banks no later than November 12, 2000. Under the new structure, each Bank will be required to maintain amounts of total capital and permanent capital that are sufficient to comply with the minimum leverage and risk-based capital requirements, respectively, established by the GLB Act.

The GLB Act requires each Bank to maintain a ratio of total capital to total assets of at least 4 percent. Total capital is defined to include a Bank's permanent capital (defined below), plus the amounts paid-in by members for Class A stock (which is redeemable on 6 months written notice), any general loss allowance (if consistent with generally accepted accounting principles (GAAP) and not established for specific assets), and other amounts from sources determined by the Finance Board as available to absorb losses. Permanent capital is defined as the amounts paid-in by members for the Class B stock (which is redeemable on 5 years written notice), plus the amount of a Bank's retained earnings, as determined in accordance with GAAP. In addition to requiring total capital of 4 percent, the GLB Act requires the Banks to maintain a leverage ratio of 5 percent. In calculating the leverage ratio, the amount paid-in for Class B stock and the amount of retained earnings are multiplied by 1.5, while other capital items are counted at face value. The risk-based capital provision requires each Bank to maintain permanent capital in an amount sufficient to meet the credit and market risks to which the Bank is subject, with the market risk being based on a stress test established by the Finance Board that tests for changes in certain specified market variables.

The GLB Act further requires the capital regulations to address a number of other matters, such as the classes of stock that a Bank may issue, the rights, terms, and preferences that may be established for each class, the issuance, transfer, and redemption of Bank stock, and the liquidation of claims against a withdrawing member. The rules must permit each Bank to issue Class A or Class B stock, or both, with the board of directors of each Bank to determine the rights, terms, and preferences for each class. Both Class A and Class B stock may be issued only to and held only by members of the Bank, and the regulations are to provide the manner in which the stock may be sold,

transferred, redeemed, or repurchased. The rules also must address the manner in which a Bank is to liquidate any claims against its members.

The GLB Act separately establishes a number of other capital-related requirements, which pertain to matters such as the termination of an institution's Bank membership, the ability of a Bank to redeem excess stock held by a member (*i.e.*, stock that is in excess of the amount each member is required to hold), restrictions on the ability of a Bank to redeem stock when its capital is impaired, restrictions on readmission to membership after withdrawing, and the ownership of the retained earnings by the Class B stockholders.

Within 270 days after the publication of the final capital rule, the board of directors of each Bank must submit for Finance Board approval a capital plan that the board determines is best-suited for the Bank and its members. Any amendments to the plan also must be approved in advance by the Finance Board. The law does not specify a period of time within which the Finance Board must approve the plans, which allows for the possibility that a Bank may be required to revise its plan before obtaining Finance Board approval. The GLB Act requires the plan to include certain provisions, requires that it be consistent with the regulations adopted by the Finance Board, and that when implemented it must provide the Bank with sufficient capital to meet both the leverage and risk-based capital requirements. Each plan also must include certain provisions specified by the GLB Act. Those provisions relate to the minimum investment required of each member in order for the Bank to meet its regulatory capital requirements, the effective date of the plan and the length of its transition period (which may be up to 3 years from the effective date of the plan), the classes of stock to be offered by the Bank and the rights, terms, and preferences associated with each class, the transferability of the Bank stock, the disposition of Bank stock held by institutions that withdraw from membership, and review of the plan by an independent accountant and a credit ratings agency. Those provisions are only the minimum contents required by the GLB Act; the Finance Board may require that other provisions be included in each plan, and the Banks as well may include other provisions in their plans, provided they are consistent with the Bank Act and the regulations of the Finance Board.

D. Federal Home Loan Bank Stock

Section 6 of the Bank Act, as in effect prior to the GLB Act, authorized the Banks to issue stock, specified the characteristics of the stock, and addressed the manner in which the stock may be issued, transferred, and redeemed. 12 U.S.C. 1426 (1994). Since the establishment of the Bank System in 1932, each of the Banks has been authorized to issue a single class of stock, which could be issued and redeemed only at its statutory par value of \$100 per share. An institution becoming a Bank member was required to subscribe for a certain minimum amount of the Bank's stock, for which it was required to pay in full and in cash at the time of its application.¹

The amount of the initial stock subscription required for membership was the greater of \$500, 1.0 percent of the member's mortgage assets, or 0.3 percent of the member's total assets.² 12 U.S.C. 1426(b), 1430(e) (1994). If a member were to borrow from its Bank, the amount of Bank stock it was required to own could not be less than 5.0 percent of the amount of Bank advances outstanding to the member. Each Bank was required to adjust the minimum stock investment required of each member, as of December 31st of each year, so that each member would own at least the required minimum amount of Bank stock, based on a percentage of either its assets or advances, whichever amount was higher. Each Bank had the discretion to retire any "excess" stock held by a member, *i.e.*, stock in excess of the

¹ A member also was allowed to purchase the stock in installments, under which it would pay one-quarter of the full amount at the time of application, and the remainder in three installments over the following 12 months. 12 U.S.C. 1426(c) (1994).

² The Bank Act referred to a member's "aggregate unpaid loan principal", which the Finance Board has defined to include a variety of mortgage assets, such as home mortgage loans, combination loans, and mortgage pass-through securities. 12 U.S.C. 1426(b)(1) (1994); 65 Fed. Reg. 8253 (Feb. 18, 2000), to be codified at 12 CFR 925.1. For purposes of applying the 1.0 percent of mortgage assets test, the Bank Act also established a statutory presumption that each member had at least 30 percent of its assets in mortgage related instruments. 12 U.S.C. 1430(e)(3) (1994). The effect of the presumption was that commercial banks (which typically have a lower percentage of their assets in mortgage related instruments than do savings associations) were required to maintain a minimum investment equal to the greater of 1.0 percent of mortgage assets, 0.3 percent of total assets, or 5.0 percent of outstanding advances. Separately, a member that was not a "qualified thrift lender" (QTL), *i.e.*, an institution with less than 65 percent of its assets in certain mortgage related instruments, was subject to a higher "percentage of advances" requirement, which would vary inversely with its QTL ratio.

minimum required for that member, upon the application of the member.

Once issued, the stock of a Bank could be transferred only between the member and the Bank or, with the approval of the Finance Board, from one member to another member or to an institution in the process of becoming a member. The Bank Act also required that all stock issued by a Bank share in dividends equally and without preference. The Bank Act also allowed any member, other than a federal savings and loan association, to withdraw from membership by providing six months written notice to the Finance Board. At the end of the six-month notice period, and provided that all indebtedness owed by the withdrawing member to the Bank had been liquidated, a Bank could redeem the stock of the withdrawing member, paying cash to the member equal to the par value of the stock. Any such withdrawing member could not rejoin the Bank system for 10 years, with only limited exceptions.

The Bank stock currently outstanding carries only limited voting rights. The members of each Bank have the right to elect a majority of its directors, typically eight of fourteen directorships, but do not vote on any other matters. The number of votes each member may cast in an election of directors is tied to the amount of Bank stock it is "required to hold" under the subscription capital provisions. Section 7 of the Bank Act provides that the number of votes each member may cast is equal to the number of shares of Bank stock "required [by Section 6 of the Bank Act] to be held by [each] member at the end of the calendar year next preceding the election" of directors. 12 U.S.C. 1427(b) (1994). As noted above, at the end of each year each member was required to hold Bank stock equal to the greater of \$500, 1.0 percent of its mortgage assets, 0.3 percent of its total assets, or 5.0 percent of its outstanding advances. For voting purposes, however, Section 7 limits the number of votes that any member may cast at the average number of shares of Bank stock "required to be held" by the members located in the same state at the end of the prior calendar year. Thus, for any members that hold stock in excess of the average for their state, those excess shares are divested of their voting rights.³ As

amended by the GLB Act, all of Section 6 of the Bank Act has been revised and no longer requires a member to hold a particular amount of Bank stock as of the end of the calendar year. Similarly, the Bank Act no longer establishes a required investment for each member. Instead, Section 6 of the Bank Act now authorizes each Bank to determine the amount and nature of any investment each member must maintain in the capital stock of the Bank, and requires each Bank to address the voting rights for each class of stock in its capital structure plan, subject to the approval of the Finance Board.

E. The Financial Management and Mission Achievement Proposal

In 1999 the Finance Board proposed to adopt a risk-based capital requirement as part of its "Financial Management and Mission Achievement" (FMMA) rulemaking. 64 FR 52163 (Sept. 27, 1999). The capital provisions of the FMMA would have established a "minimum total capital requirement" and a "minimum total risk-based capital requirement" for each Bank. Under the total risk-based capital requirement a Bank would have been required to maintain "total risk-based capital" in an amount sufficient to meet the sum of its credit risk, market risk, and operations risk capital requirements, each of which would have been established by the proposed rule. The credit risk aspect of the FMMA would have addressed the credit risks to which each Bank is exposed with respect to both its on- and off-balance sheet items, using data from Nationally Recognized Statistical Rating Organizations (NRSRO) to estimate the credit losses likely to be associated with particular classes of items during periods of extreme credit stress. The FMMA would have established the market risk capital requirement based on the market value of a Bank's portfolio at risk from movements in market prices, such as interest rates, foreign exchange rates, commodity prices, or equities prices, that might occur during periods of extreme market stress. The proposal would have allowed for the use of a Bank's internal market risk model, which was to have been approved by the Finance Board. The FMMA would have required each Bank to maintain capital in an amount equal to 30 percent of the sum of its credit risk capital and market risk capital

requirements in order to support the operations risks to which the Bank is exposed. The FMMA also would have required the Banks to maintain both a System-wide and individual Bank credit ratings, at levels specified by the proposed rule, and would have required each Bank to maintain "contingency liquidity" in an amount sufficient to enable the Bank to meet its obligations if it were unable to borrow in the capital markets for seven consecutive days. The proposal included provisions limiting the amount of unsecured credit that a Bank could have outstanding to any single counterparty (or to affiliated counterparties) and would have addressed the extent to which the Banks may use hedging instruments. The Finance Board withdrew the FMMA proposal following the enactment of the GLB Act. Board Resolution No. 99-56 (Nov. 15, 1999); 64 FR 66115 (Nov. 24, 1999).

With the enactment of the GLB Act, certain aspects of the proposed FMMA capital rule, such as those pertaining to the types of capital required for the leverage and risk-based capital requirements, no longer would be consistent with Section 6 of the Bank Act, as amended. Other aspects of the capital rules proposed as a part of FMMA, however, remain generally consistent with the amended statute, particularly as it relates to the capital required to be held against credit risk and market risk. The GLB Act requires the Finance Board to adopt a risk-based capital regulation that requires the Banks to maintain sufficient permanent capital to meet the credit risks to which they are subject, but does not otherwise provide how the credit risk is to be measured. Similarly, the GLB Act provides that the market risk element of the risk-based capital requirement must be based on a stress test developed by the Finance Board that "rigorously tests for changes in market variables, including changes in interest rates, rate volatility, and changes in the shape of the yield curve." The GLB Act does not further specify the provisions of the stress test, other than to require that the Finance Board give "due consideration" to any risk-based capital rules promulgated by the Office of Federal Housing Enterprises Oversight (OFHEO) with respect to Fannie Mae and Freddie Mac. Moreover, the GLB Act does not preclude the Finance Board from incorporating other elements into the risk-based capital rules, such as a requirement to hold some amount of capital to cover the operations risks to which the Banks are subject. In considering the requirements of the GLB

³ The Bank Act provides generally that each Bank is to have a board of fourteen directors, eight of whom are elected by the members and six of whom are appointed by the Finance Board. 12 U.S.C. 1427(a) (1994). The elected directorships for each Bank are allocated among the states in each Bank district, based on the amount of stock held by members in the respective states, subject to certain

"grandfather" provisions that reserve a specified number of directorships to particular states (based on relative stock ownership in 1960) and certain discretionary authority conferred on the Finance Board to establish a limited number of additional seats in certain Bank districts.

Act for the credit and market risk elements of the capital rules, the Finance Board has determined that in many respects the underlying methodology of the credit and market risk provisions of the capital rules that were proposed as part of the FMMA are consistent with the requirements of the GLB Act. Accordingly, the proposed rule builds on those provisions, as well as on the provisions of the FMMA relating to operating risk.

II. The Proposed Rule

A. Issuance of Bank Stock.

In General. The GLB Act provides that the capital regulations are to permit each Bank to issue "any one or more" of Class A or Class B stock. Class A stock is to be redeemable at par on six months written notice to the Bank; Class B stock is to be redeemable at par on five years written notice to the Bank. The board of directors of each Bank is to determine the "rights, terms, and preferences" for each class of stock, consistent with Section 6 of the Bank Act, with the regulations of the Finance Board, and with market requirements. The regulations are required to prescribe the manner in which Bank stock may be "sold, transferred, redeemed, or repurchased." The regulations also are required to restrict the issuance and ownership of Bank stock to the members of the Bank, to prohibit the issuance of other classes of stock, and to provide for the liquidation of claims and the redemption of stock upon an institution's withdrawal from membership in its Bank.

Apart from authorizing the issuance of two classes of Bank stock, the GLB Act eliminated certain key characteristics of the single class of Bank stock that had been established under prior law. For example, the Bank Act no longer mandates a statutory par value for all Bank stock of \$100 per share and no longer requires all Bank stock to be issued at par value.⁴ As a result, the Bank Act now authorizes a Bank to establish the par value for its Class A and Class B stock (which may differ), and permits the issuance of stock at a price other than par value. The proposed rule includes provisions that implement those changes in the law, as described below.

Classes of Stock. In authorizing the new capital structure for the Banks, the GLB Act provides that the regulations

promulgated by the Finance Board "shall * * * permit each Federal home loan bank to issue * * * any 1 or more of * * * Class A stock * * * and * * * Class B stock." 12 U.S.C. 1426(a)(4)(A), *as amended*. The GLB Act also provides that the capital structure plan for each Bank "shall afford each member * * * the option of maintaining its required investment in the bank through the purchase of any combination of classes of stock authorized by the board of directors of the bank and approved by the Finance Board." *Id.*, 1426(c)(4)(A), *as amended*. Although the GLB Act gives the members the option to decide how to allocate their required investment if a Bank issues both Class A and Class B stock, that option applies only to whatever "classes of stock [are] authorized by the board of directors of the bank" and must be read in light of the other provisions that permit each Bank to issue "any 1 or more" classes of stock. The directive that the regulations must allow a Bank to issue "any 1 or more" class of stock clearly contemplates that a Bank may issue only a single class of stock. Provided that a Bank's board of directors were to determine that a single class structure would be in the best interest of the Bank and its members, such a stock structure would be legally permissible. Accordingly, the proposed rule would permit each Bank to issue either Class A stock or Class B stock, or to issue both Class A and Class B stock. Whatever classes the board of directors of a Bank authorizes, the capital plan must demonstrate that the classes of stock to be issued will result in the Bank having sufficient amounts of permanent capital (*i.e.*, the amounts paid-in for the Class B stock, plus retained earnings) to meet the regulatory risk-based capital requirement and sufficient amounts of total capital (*i.e.*, permanent capital plus the amounts paid-in for Class A stock, certain loss allowances, and other items capable of absorbing losses) to meet the regulatory total capital requirement. For example, if a Bank were to increase its retained earnings to an amount that would provide sufficient permanent capital to comply with the regulatory risk-based capital requirement it may not need to issue any Class B stock. Alternatively, if a Bank were to have only a minimal amount of retained earnings it may need to issue only Class B stock in order to have sufficient permanent capital to meet the regulatory risk-based capital requirement.

The proposed rule would define the essential characteristics of both Class A and Class B stock. As required by the GLB Act, Class A stock would be

redeemable in cash at its par value on six-months written notice to the Bank. The Finance Board is proposing to require that the Class A stock have a par value of \$100 per share and that it be issued at par value. Because the current capital stock of the Banks has a par value of \$100 per share and is issued and redeemed at par, the Finance Board believes that establishing the same characteristics for the Class A stock would facilitate the transition to the new capital structure. The proposed rule also would require each Bank to specify in its capital plan a stated dividend for the Class A stock, which would have a priority over the payment of any dividends paid on Class B stock. The Finance Board anticipates that the stated dividend would be commensurate with the risks of holding an instrument that is puttable to the issuer on six months notice. By definition, the Class B stock entails a greater risk to the member because its investment is committed to the Bank for at least five years. The Finance Board believes (and has been so advised by a financial consultant retained by the Banks) that members will demand some form of control over the affairs of the Bank in return for putting their capital at risk for five years. In that event, the members holding Class B stock likely would control the board of directors of the Bank, and thus would be in a position to determine the dividend to be paid on the Class A stock. The Finance Board has included the requirement that the Class A stock pay a stated dividend as a means of ensuring that the Class B stockholders would not be able to reduce or eliminate the dividend for the Class A stock, should they control the board of directors.

Certain of the essential characteristics of Class B stock would differ from those established for the Class A stock. As with the Class A stock (and as required by the GLB Act) the proposed rule would provide that the Class B stock must be redeemable in cash and at par value on five-years written notice to the Bank. The Class B stock would differ from the Class A stock with regard to its par value and its issuance price, which could be different from its par value. Allowing the Banks to set an issuance price above the par value of the Class B stock should result in a greater degree of permanence for the Class B stock that would be more in the nature of common stock. The proposed rule would not require a Bank to issue the Class B stock above par value, but simply would allow a Bank that option. A Bank could issue Class B at par if it wished to do so. The proposed rule also would

⁴ 12 U.S.C. 1426(a) (1994). The minimum amount of Bank stock that each member was required to purchase had to be issued at par value. Any subsequent issuance could be at a price in excess of par value, but not less than par value. As a matter of practice, the stock of the Banks has been issued at par value.

provide that a fundamental characteristic of the Class B stock is that it would confer on the member an ownership interest in the retained earnings of the Bank upon acquisition of the stock. The GLB Act provides that the holders of the Class B stock shall own the retained earnings of each Bank, which is consistent with the attributes of permanent equity capital in a corporate setting.

Subclasses of Stock. The GLB Act requires the capital regulations to provide that a Bank may not issue stock other than as authorized by Section 6 of the Bank Act, and that the stock is to have “such rights, terms, and preferences * * * as the board of directors of that Bank may approve.” Separately, the GLB Act requires the capital plan for each Bank to establish the “terms, rights, and preferences, including minimum investment, dividends, voting, and liquidation preferences for each class of stock issued by the bank.” 12 U.S.C. 1426(a)(4)(A), (c)(4)(B), *as amended*. The Finance Board construes this language as authorizing a Bank to establish rights, terms, and preferences for Class A stock that differ from those established for the Class B stock. The Finance Board also believes that the authority to establish different rights, terms, or preferences for the stock should apply within a particular class of stock as well as between the two different classes. For example, the repeal of the requirement that all stock must be issued at par would allow a Bank to issue two types of Class B stock—one type that was issued at par and another that was issued above par. Although both types of stock would possess the minimum characteristics required for Class B stock, *i.e.*, they would be redeemable on five years written notice to the Bank, they would have been issued on materially different terms. The same rationale would apply if a Bank were to issue one type of Class B stock for which the dividend is to be determined based on the performance of a specific category of Bank assets and other Class B stock for which the dividend would be determined on the general profitability of the Bank. Because the board of directors of a Bank clearly has the authority to establish different rights, terms, and preferences for the Bank stock, the Finance Board believes it would be appropriate to allow a Bank to designate stock of the same class that possesses different rights as separate subclasses of that class.

Issuance of Capital Stock. The proposed rule would allow each Bank to determine whether to issue either Class A or Class B stock, or both Class A and

Class B stock, and whether to issue any subclasses of stock. In accordance with the GLB Act, the proposed rule also would provide that a Bank may issue its capital stock only to its members, and may not issue any other types or classes of capital stock. The proposal would require a Bank to act as its own transfer agent, and to issue its capital stock only in book-entry form, which is consistent with the current practice at each of the Banks, and is intended to ensure that the stock is held only by members. The Finance Board is not aware of any business necessity that would require the Banks to issue stock certificates, especially given the limited universe of potential stockholders, and believes that certificates would only increase the possibility that third parties might acquire the stock. The Finance Board requests comments on whether there are any sound reasons why the Banks should be permitted to issue stock certificates to their members, and if so what safeguards would be appropriate.

In order to allow each Bank to determine the method of distribution that is best suited to its business requirements and to the needs of its members, the Finance Board is not proposing to prescribe the manner in which the Banks must conduct the initial issuance of the Class A and Class B stock. Instead, the proposed rule would require each Bank to determine the manner in which to issue its stock, and would require only that the method of distribution be fair and equitable to all eligible purchasers. The proposal would expressly allow the Banks to conduct the initial issuance through an exchange or conversion, but would not mandate either approach. Whatever method a Bank adopts for the initial stock issuance must be included in the Bank’s capital plan, as set forth in § 933.2. Additionally, because a fundamental characteristic of Class B stock is that it confers on the member an ownership interest in the retained earnings of the Bank, the Finance Board is proposing to allow a Bank to distribute its then-existing unrestricted retained earnings as shares of Class B capital stock.

The Finance Board is further proposing to establish concentration limits that would preclude any one member, or group of affiliated members, from controlling the Bank. Thus, the proposed rule would provide that a Bank shall not issue stock to a member or group of affiliated members if it were to result in such member or group of affiliated members owning more than 40 percent of any class or subclass of its outstanding capital stock. Other provisions of the rule would bar a Bank

from approving a transfer of stock that would result in a member or group of affiliated members owning more than 40 percent of any class or subclass of its stock. The proposed rule also would allow a Bank to include in its capital plan an ownership cap lower than 40 percent.

The investment by one Bank in the assets of another Bank, such as Acquired Member Assets, has been increasing in recent years. As these “joint assets” increase, capital issues under the new structure will exist. One such issue would be whether two or more Banks jointly managing assets through a participation agreement could jointly issue stock. Another issue would be whether two or more Banks jointly managing assets could pool their capital stock in order to meet the regulatory capital requirements. The Finance Board specifically requests comments on whether the Banks should be allowed to issue stock jointly or to pool stock to meet regulatory capital requirements for assets that are being jointly managed by two or more Banks.

B. Voting rights. Section 7 of the Bank Act addresses, among other things, the manner in which the members of each Bank elect directors and the manner in which the Finance Board allocates directorships among the states in each Bank district. The GLB Act did not expressly amend Section 7 as it relates to those issues, but it did include certain amendments to Section 6 that conflict with those provisions of Section 7. In the proposed rule, the Finance Board has attempted to strike a balance between the conflicting provisions of Sections 6 and 7, respectively, by giving full effect to the more recent amendments to Section 6, while preserving as much as possible the provisions of Section 7. The approach taken in the proposed rule represents one means of reconciling the competing provisions of Section 6 and Section 7. The Finance Board recognizes that there may be other approaches to balancing the requirements of these provisions and specifically requests public comment on how else the provisions might be harmonized, and how the proposed rule may affect the cooperative structure of the Bank System. The Finance Board also would like to know whether there are any other restrictions on voting rights or allocation of directorships that should be incorporated into the rule as mandatory requirements, or whether there are other restrictions or requirements that the Finance Board should encourage the Banks to include as part of their capital plans.

Since 1932, the Banks have been authorized to issue only one class of stock. Ownership of Bank stock has conferred on a member the right to participate in the election of directors. In 1961, Congress amended Section 7 of the Bank Act to provide that the number of votes each member may cast in an election of directors, and the manner in which the elected directorships are to be allocated among the states, would be determined on the basis of the subscription capital provisions of Section 6. Specifically, Section 7 was amended to provide that "each such member may cast * * * a number of votes equal to the number of shares of stock in [the Bank] required by this Act to be held by such member at the end of the calendar year next preceding the election".⁵ At that time, Congress also amended Section 7 to require that the allocation of elected directorships, like the method for determining the number of votes, be determined based on the proportionate amounts of Bank stock "required to be held" by the members in each state as of the end of the preceding calendar year, subject to a "grandfather" provision that reflected the allocation of directorships as of December 31, 1960. See 12 U.S.C. 1427 (a)–(c) (1994).

The language in Section 7 regarding the amount of Bank stock "required to be held" by the members as of the preceding December 31st refers to the subscription capital provisions of Section 6, as in effect prior to the GLB Act. As described previously, the subscription capital provisions required each member to purchase an amount of Bank stock based on a statutory formula (*i.e.*, the greater of \$500, 1.0 percent of mortgage assets, 0.3 percent of total assets, or 5.0 percent of advances) that was to be applied to each member as of December 31st of each year. By incorporating into Section 7 a principal component of Section 6—*i.e.*, the amount of Bank stock "required to be held" by each member as of the end of each year—the Congress in 1961 effectively linked the process of electing Bank directors to the subscription capital structure. In the GLB Act the Congress removed the subscription capital provisions from Section 6, but made no conforming amendments to

Section 7. As a result, Section 7 of the Bank Act continues to require that the allocation of directorships and the determination of member votes be based solely on the subscription capital provisions, which will no longer exist when the new capital plans take effect. The Congress has provided no guidance on how, if at all, it intended the references to the subscription capital provisions within Section 7 to be applied in conjunction with the new risk-based capital provisions of Section 6.

The most apparent conflict between Section 7 and Section 6 (as amended) pertains to the number of votes each member may cast in an election of directors. Though Section 7 provides that the number of votes each member may cast shall equal the number of shares of Bank stock that the member is required to own, Section 6 expressly authorizes each Bank to establish voting preferences for its capital stock. As amended, Section 6 would authorize a Bank to assign voting rights exclusively to either its Class A or Class B stock, or to the Class A and Class B stock equally, or to both Class A and Class B but with a disproportionate weighting. The Finance Board believes that it is not possible to reconcile these provisions, as a Bank cannot establish a system of voting preferences (which, by definition, results in disparate voting rights for each class) while at the same time adhering to a requirement that all shares of its stock are to have uniform voting rights (subject only to the cap on members with large stockholdings).⁶ In order to give effect to the GLB Act capital amendments that have authorized each Bank to establish voting preferences, the Finance Board is of the opinion that the provisions of Section 7(b) of the Bank Act that establish a "one share, one vote" structure must be considered to have been impliedly repealed by Section 6(c)(4)(B), as amended by the GLB Act.

In a similar fashion, there are conflicts between provisions of Section 7(b), (c), and (e), regarding the designation of directorships among the states, and Section 6, as amended by the GLB Act. The former provisions are premised on the assumption that the Banks are to be capitalized in accordance with a statutory formula, whereas the latter provisions require the Banks to be capitalized in relation to their risks. As described previously, Section 7 continues to require the Finance Board

to designate the elected directorships of each Bank among the states in the approximate ratio of the Bank stock required to be held by the members in each state to the total stock outstanding, as of the end of the calendar year. The Finance Board cannot determine those ratios in the manner required by the literal language of Section 7, however, because under the new capital structure the members will no longer be required to maintain an investment in Bank stock in accordance with the statutory formula and as of December 31st of each year. The Finance Board has considered whether it would be feasible to calculate the Section 7 ratios for the allocation of directorships on the basis of Section 6, as it has been amended, but believes that doing so likely would create a host of uncertainties that are not addressed by the Bank Act and which the Finance Board would be required to resolve.

As amended by the GLB Act, Section 6 does refer to a "minimum investment" that each member must maintain in the stock of the Bank, but it does not specify what that term means, other than indicating that it may be based on a percentage of a member's assets or a percentage of its advances, or any other provision approved by the Finance Board. The Finance Board could define the term, but there likely are several ways in which to do so, none of which would be compelled by statute. However the term is to be defined, it would have to be correlated in some fashion to the risks to which the Bank is exposed, *i.e.*, it should not result in a Bank having too little or too much capital in relation to its risks. Thus, a bare formulaic definition of the term (as formerly included in the subscription capital provisions) likely would not be appropriate because it would have no relation to the risks to which the Banks are exposed.

As one possibility, the Finance Board could define "minimum investment" to mean an amount of Bank stock required to be held as a condition of membership in the Bank. That approach, however, would be complicated by the issuance of the two classes of Bank stock authorized by the GLB Act. The existence of two classes of stock means that for every state within a Bank district each member located in that state would hold a certain percentage of the Bank's Class A stock and a certain percentage of the Bank's Class B stock. Because the GLB Act gives each member the option of determining which class of stock to buy, it is likely that if a Bank issues both Class A and Class B stock there will be some members that purchase only one class of Bank stock and other members that purchase both

⁵ Act of September 8, 1961, Pub. Law No. 87–211; see, 12 U.S.C. 1427(b) (1994). Although each share of Bank stock carried one vote, the Bank Act also limited the number of votes any one member could cast to the average number of shares of Bank stock "required to be held" by each member in that state as of the end of the preceding calendar year. That provision had the effect of partially disenfranchising any members that owned Bank stock in excess of the average stockholdings within that state.

⁶ As a technical matter, members with large amounts of Bank stock cannot vote all of their shares of stock due to the cap based on the average holdings within each state. For those shares that can be voted, however, all votes count equally.

classes of stock but in varying combinations. As a result, for each state in a Bank district it is unlikely that the percentage of Class A stock held by the members located in that state will be identical to the percentage of Class B stock held by the members in that state. Indeed, it appears probable that the relative percentages of Class A and Class B stock held by the members in a particular state will differ, and may well differ substantially. Thus, it would be possible, and perhaps probable, that the Class A stock of a Bank may be concentrated in certain states while the Class B stock would be concentrated in other states within the Bank district. In that event, the Finance Board should be able to determine the ratio of Class A stock held by members in a given state, and separately should be able to determine the ratio of Class B stock held by the members in that state. It is not at all clear, however, how the Finance Board could apply those ratios to allocate the elected directorships in the manner required by Section 7, especially if there are material differences among the ratios for the various states in the Bank district. The possibility of having two different ratios would be further complicated by the provisions of the GLB Act that allow a Bank to set a lower minimum investment for the B stock than for the Class A stock. Thus, even if the Finance Board could readily calculate the ratios for the Class A and Class B stock, respectively, for each state, the ratio for the Class B stock most likely would have to be adjusted in some fashion.

As an alternative to viewing the term "minimum investment" as an investment required as a condition of membership, it could be defined in terms of the amount of Bank stock required to support the credit, market, and operations risks created for the Bank as a result of entering into business transactions (such as making advances, acquiring mortgage assets, or issuing letters of credit) with a member. Because all Bank assets entail some degree of risk, a member could be required to purchase Class A and Class B stock in whatever amounts are necessary to provide the total capital and permanent capital required to cover the risks associated with the assets created by its business transaction with the Bank. If the Finance Board were to define "minimum investment" on the basis of the risk placed on the balance sheet, such an approach would result in most members investing in both Class A and Class B stock. The relative amounts of each class of stock held by a member under such an approach would vary

with the degree of risk associated with the underlying assets. Thus, one would expect that a member placing somewhat more risky assets on the balance sheet of the Bank would be required to purchase a correspondingly greater amount of Class B stock than a member creating the same amount of a less risky asset. Because the leverage requirement applies independently of risk, however, an equal amount of assets with different risk characteristics should require the same amount of Class A stock for leverage purposes. Thus, defining "minimum investment" in this manner also would be likely to result in the ratio of Class A stock held by the members in a particular state differing from the ratio of Class B stock held by the members in that state, which would present the same difficulties in calculating the individual state ratio described previously. Moreover, it is likely that the term "minimum investment" could not be defined solely on the basis of a member's transactions with the Bank because not all members will at all times be engaged in a business transaction with the Bank. For that reason, it is likely that a definition of "minimum investment" would have to incorporate both membership and risk aspects. If so, the Finance Board then would be faced with using as many as four different stock ratios for each state if it were to determine the allocation of directorships in accordance with the literal language of Section 7.

Apart from those definitional concerns, the Finance Board has a more general concern that requiring the allocation of elected directorships among the states, regardless of how it is done, could impair the ability of the Banks to sell Class B stock in amounts sufficient to comply with their risk-based capital requirements. If that were to occur, the adherence to the state-based allocation formula clearly would frustrate the intent of Congress in establishing a risk-based capital structure for the Banks. In requiring the Banks to have sufficient permanent capital to meet their risk-based capital requirements, the GLB Act has effectively mandated that the Banks, through sale or conversion, issue a significant amount of Class B stock.⁷ In

⁷ Although a Bank may include its retained earnings as permanent capital, no Bank has sufficient retained earnings to comply with the risk based capital requirements at present or is likely to have sufficient retained earnings in the near future. Since the enactment of FIRREA in 1989, the Banks have maintained only nominal amounts of retained earnings. Moreover, in the six months since the enactment of the GLB Act, some Banks have paid out significant portions of their retained earnings to their members. As of March 31, 2000, the retained

tension with this requirement is another provision of the GLB Act, which requires that each Bank's capital plan allow each member the option of determining what combination of classes of authorized Bank stock to purchase. In effect, the GLB Act requires the Banks to issue Class B stock but does not compel the members to purchase the Class B stock. The GLB Act does provide that each Bank is to establish the terms, rights, and preferences for each class of stock that are "consistent with Finance Board regulations and market requirements." That provision recognizes that if the purchase of Class B stock is to be voluntary, then the Banks must be authorized to establish terms for the Class B stock, such as voting and dividend preferences, that provide economic incentives for the members to purchase the Class B stock.

The paramount intent of Congress in revising the capital structure for the Banks was to ensure that the risks to which each Bank are exposed are supported by permanent capital, *i.e.*, Class B stock and retained earnings. Because Class B stock is the only practical source of permanent capital for the immediate future, the intent of the Congress cannot be implemented unless the Banks are able to sell Class B stock. To the extent that other provisions of the Bank Act might impair the ability of the Banks to do so, the application of those provisions would frustrate the intent of Congress in creating the new risk-based permanent capital structure. The Finance Board believes that requiring the allocation of the elected directorships of each Bank exclusively on a state-based formula would make the Class B stock a less attractive economic option for the members because there would be no assurance that the Class B stock would be distributed in the same proportion that the directorships would be allocated among the states.

Because of the difficulties in using a "minimum investment" as a proxy for the amount of stock "required to be held" as of each December 31st, and the likelihood that a state-based allocation of directorships would make the sale of Class B stock more difficult, the Finance Board has preliminarily determined that it cannot apply the provisions of Section 7 regarding the allocation of directorships without frustrating the intent of Congress to create a workable risk-based permanent capital structure

earnings of the Bank System were equal to 0.11 percent of the total assets of the Banks, and the amounts at the individual Banks ranged from 0.03 percent to 0.20 percent of total assets.

for the Banks. The Finance Board believes that there is no practical way to give simultaneous effect to one provision of law that would require the preservation of the subscription capital structure for the purpose of allocating directorships and voting rights and another provision of law that would repeal the subscription capital structure in its entirety. The Finance Board is proposing to resolve that conflict by giving precedence to the provisions of Section 6 of the Bank Act, as amended by the GLB Act, over those provisions of Section 7(b), (c), and (e) relating to voting and the allocation of directorships.⁸ The Finance Board does not believe that any other provisions of Section 7 are inconsistent with Section 6, as amended. Thus, the other provisions of Section 7, such as those regarding the size of the board of directors (including both elected and appointed directors), the requirements applicable to individual directors, the terms of office, term limits, vacancies, compensation, duties, and indemnification, would not be affected by the application of Section 6, as amended.

In cases of conflicting statutory provisions, it is an ordinary rule of statutory construction that later-enacted provisions take precedence over older provisions, to the extent that the older provision is inconsistent with the later-enacted provision. See *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm'n*, 626, F.2d 1020, 1022 (D.C. Cir. 1980); *Estate of Flanigan v. Commissioner of Internal Revenue*, 743 F.2d 1526, 1532 (11th Cir. 1984). The Finance Board believes, as described above, that the provisions of Section 6 must take precedence over the

provisions of Section 7 that relate to the allocation of directorships and voting. The U.S. Supreme Court has made clear, however, that it is also a "cardinal rule" of statutory construction that judicial findings of such implied repeals of statutory provisions are not favored. *Morton v. Mancari*, 417 U.S. 535, 549 (1974); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). The Court has explained that effect should be given to both provisions wherever possible and that absent a "clear and manifest" intention on the part of Congress to repeal a statutory provision, the only permissible justification for a repeal by implication is when the earlier and later statutes are "irreconcilable." *Morton*, 417 U.S. at 550–51; see *Georgia v. Pennsylvania RR Co.*, 324 U.S. 439, 456–57; *FAIC Securities v. United States*, 768 F.2d 352, 362 (D.C. Cir. 1985); *United Ass'n of Journeymen and Apprentices v. Thornburgh*, 768 F. Supp. 375, 379–80 (D.D.C. 1991).

In determining whether an "irreconcilable" conflict exists between statutory provisions, a court will first look to the plain language of the statutes. See *Flanigan*, 743 F.2d at 1532 (finding that two provisions of the Internal Revenue Code were, on their face, plainly irreconcilable). Only when the language of two provisions leaves the court in doubt as to whether they represent truly irreconcilable intentions will a court resort to any legislative history that may be pertinent to the issue. See *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981) (wherein the court resorted to the legislative history of the newer act in finding that the provisions in question were not irreconcilable).

An administrative agency charged with the implementation of a particular statute may implement an administrative resolution of two conflicting provisions in that statute through a proper APA notice-and-comment rulemaking. *Citizens to Save Spencer County v. Environmental Protection Agency*, 600 F.2d 844, 875–78 (D.C. Cir. 1979). In undertaking such a rulemaking, an agency should determine, based on the plain language of the provisions and, if necessary, on the legislative history of the statutes, that the provisions are irreconcilable. *Id.* at 863–68. The agency should then consider the statute as a whole and the purposes of the provisions in question in order to fashion a solution that avoids unnecessary hardship or surprise to affected parties and remains within the general bounds of the statute in question. *Id.* at 870–71. The Finance Board believes that the provisions of Sections 6 and 7 of the Bank Act

described above are in conflict and is proposing through this rulemaking to give precedence to the capital provisions of Section 6. The legislative history of the GLB Act does not address the interrelationship between Section 6 and Section 7, though the language of the statute and the legislative history do suggest strongly that the creation of a sound system of permanent capital was of paramount concern to the Congress in amending Section 6. The proposed rule has been structured to give effect to Section 7 to the greatest degree possible, and would not preclude a Bank from establishing a state-based structure if it believed that approach would be consistent with capitalizing the Bank in the manner required by the GLB Act.

The proposed rule would require that the capital plan for each Bank specify the manner in which the members are to elect directors and the other corporate matters, if any, on which the members will be entitled to vote. The capital plan also must describe the voting preferences, if any, to be assigned to any particular class or subclass of stock, and whether the Bank will permit cumulative voting by its members and, if so, the matters on which members may vote cumulatively.

If a Bank were to issue any Class B stock, the proposed rule would require that the Bank assign some voting rights to the Class B stock. The proposed rule would not specify what voting rights should be assigned to the Class B stock, and thus would allow each Bank to determine whether the Class B stock would have exclusive voting power or shared voting power. If a Bank were to issue Class B stock, the proposed rule would allow the Bank, in its discretion, also to assign some voting rights to the Class A stock, and would allow some voting rights to be assigned to the members generally, *i.e.*, without regard to the amount or class of Bank stock that each member owns. Within each class or subclass of stock, however, the proposed rule would require that all shares have equal voting rights, although a Bank could give preferences to one or more classes. Thus, all Class B stock would vote equally, although a Bank could authorize the Class B members to elect a majority of the elected directors by giving Class B a preference over the Class A stock. As suggested to the Finance Board by an independent consultant retained by the Banks to study the GLB Act capital issues, a Bank may find that such preferences are necessary in order to sell the Class B stock because it bears more of the risks than does the Class A stock.

As a means of preventing undue concentration of voting power within a

⁸ Puerto Rico presents a unique situation of a prior Finance Board establishment of a directorship, which has been made permanent by statute. In 1962, Congress amended Section 7(e) to authorize the Finance Board to establish an additional elected directorship for the Bank in which the Commonwealth of Puerto Rico was located, which directorship was required to be designated to Puerto Rico. The Finance Board exercised that authority, creating an additional elected directorship for the New York Bank, which it designated as representing the members located in Puerto Rico. Although the designation of that seat to Puerto Rico is inconsistent with the risk-based capital amendments to Section 6, for the same reasons that the other state-based designations are inconsistent with Section 6, the preservation of the additional directorship can be reconciled with Section 6, as amended. Accordingly, the New York Bank would continue to have an additional elected directorship pursuant to Section 7(e), and the proposed rule would allow the Bank to accommodate the representation of members located in Puerto Rico as part of its capital plan. As provided in Section 7(e), if the Finance Board ever were to relocate the Commonwealth of Puerto Rico to another Bank district, the additional elected directorship created by Section 7(e) would cease to exist.

small number of members, the proposed rule would cap the number of votes any member (including affiliated members) may cast in an election at 20 percent of the votes eligible to be cast in that election. The Finance Board recognizes that in some Bank districts a member with less than 20 percent of the vote may be able to control the Bank and therefore is proposing to allow any Bank to establish a lower percentage as part of its capital plan.

As noted above, in order to ensure that the new capital structure is workable and the Banks are able to sell the Class B stock, the proposed rule would state expressly that the elected directorships for a Bank need not be allocated among the states on the basis of the amount of stock required to be held under the now-repealed subscription capital requirements, and that the number of votes for each member also need not be based on the amount of stock each member was required to hold as of the end of the prior year. Notwithstanding that provision the proposed rule would not preclude a Bank from allocating voting rights among its members on a state-by-state basis, provided such an allocation were approved as part of the Bank's capital plan. A Bank also could adopt any other reasonable method of electing directors, such as authorizing each class of stock to elect a specified number of directors, or allocating the directors among the members based on the asset size of the members. The proposed rule also would require that each Bank include in its capital plan, to the extent feasible, a provision for the representation of small members that own Class B stock, particularly members that are community financial institutions (CFI), as that term is defined by the GLB Act.

Although the proposed rule includes provisions addressing concentration of stock ownership, limits on voting rights, and representation of CFIs on the boards of directors, the Finance Board is especially interested in receiving comments on these issues and whether there may be other ways to address each of them. The approach taken in the proposed rule regarding voting would allow each Bank to determine the manner in which the members are to elect directors, which recognizes that the board of each Bank may be best suited to determining how to balance the interests of its members against the need to raise the capital required by the GLB Act. Notwithstanding the approach embodied in the proposed rule, the Finance Board requests public comments on whether there might be a need to include some limitations in the

rule such that it does not have any untoward consequences for the cooperative structure of the Bank System.

On the issue of board composition, the Finance Board would like to receive comments on whether the rule should include a provision requiring certain types of members, such as CFIs, to be represented on the boards of the Banks. As proposed, the rule would require the Banks to ensure that small members, specifically including CFIs, that own Class B stock be represented on the board, to the extent it is feasible to do so. The Finance Board would like to know whether this type of requirement should be made mandatory on the Banks, such that some number of the elected directorships should be assigned permanently to the CFIs within that district. The Finance Board also would like to receive comments on whether the rule should mandate some form of state-based representation on the boards of the Banks. With the removal of barriers to interstate banking, it is less clear what purpose is served by retaining a state-based board of directors, especially when there is no requirement that the members within a particular state hold any Class B stock. The Finance Board requests that any comments advocating a requirement for state-based representation address the details of how that should be accomplished, especially in light of the varying number of states in each Bank district, which range from two to eight, and the cooperative structure of the Bank System. The Finance Board also would like to know whether it would be advantageous to increase the size of the boards of directors to accommodate the representation of small members, which the Finance Board can do in the five Bank districts that include five or more states, and if so, what actions might be appropriate in the other seven Bank districts, for which the Finance Board cannot increase the number of directors on the boards.

One issue on which the Finance Board would like to receive comment is whether the rule should allow a Bank to include advisory directors on its board, *i.e.*, directors who are not elected by the members and who do not vote on board matters, but who may participate in the deliberations of the full board of directors. Advisory directors are neither expressly authorized nor expressly prohibited by the Bank Act, but the Finance Board believes that it could authorize such directors, provided that the management of the Bank (*i.e.*, the ability to vote) remained vested exclusively in the elected and appointed directors. Although an advisory director

could not vote on matters before the board of the Bank, the Finance Board believes that there may be some value to the Bank in having such individuals on the board, as they could present the views of members who might not otherwise have a voice at the meetings of the boards of directors. For example, if the members were to elect directors predominantly from certain states or from certain sized institutions, the board could appoint advisory directors from states or classes of members that were not otherwise represented. The proposed rule does not include any provisions regarding advisory directors, but the Finance Board would appreciate comments on whether such directorships, or other advisory panels, might be appropriate to address in the final rule.

The proposed rule would bar any member or affiliated members from owning more than 40 percent of any class of Bank stock and would bar any member or affiliated members from casting more than 20 percent of the eligible votes in any election. Although the proposed rule would allow each Bank to establish lower limits as part of its capital plan, the Finance Board requests comments on whether the percentages used in the proposal are appropriate or whether the Finance Board should adopt some other percentages as a means of preserving the cooperative structure of the Bank System.

With regard to voting rights, the proposed rule would require that the Class B stockholders be assigned some voting rights, but would leave to each individual Bank the responsibility to decide exactly what voting rights the Class B stock shall be assigned. The rule expressly allows a Bank to assign voting rights as well to the Class A stockholders and further allows a Bank to assign voting rights on the basis of membership, *i.e.*, without regard to what class or how much stock a particular member owns. The Finance Board would like to receive comments on whether those matters that are at present left to the discretion of the Banks should be included in the rule as a mandatory requirement, *i.e.*, whether the Banks should be required to assign some portion of the voting rights on a one-member one-vote basis, or should otherwise require that the members generally be allowed to elect some number of directors. Similarly, the Finance Board requests comments on whether some number of directorships or some proportion of the vote should be assigned by regulation to the Class A stockholders.

With regard to all such issues, the Finance Board requests that commenters elaborate on how any alternative voting arrangements recommended by the commenters would work in conjunction with Section 6 and how they would facilitate, or at least not impair, the ability of the Banks to raise the permanent and total capital required by the GLB Act. If the Finance Board ultimately adopts a final rule addressing the voting rights and directorship structure generally as proposed, the final rule also would include conforming amendments to certain provisions of the current election rules, 12 CFR Part 915. Those rules address matters such as the allocation of directorships, the annual capital stock report, the determination of member votes, and the election process. If the final rule authorizes each Bank to determine the manner of electing directors, several of the existing regulations in Part 915 would have to be rescinded or revised, to the extent that they are based on the subscription capital provisions incorporated in Section 7. Assuming that the final rule were to address voting rights and the allocation of directorships in the manner proposed, the Finance Board requests comment on what conforming amendments to the existing elections regulations would be appropriate.

C. Dividends. Under the proposed rule, any member, including those withdrawing from the Bank System, that owns Class A or Class B stock, or both, would be entitled to receive dividends declared on its stock for as long as it owned the stock. The Class A stock would be required to pay a stated dividend, and the capital plan would specify the basis on which the stated dividend would be calculated. Any Bank wishing to change the basis on which the stated Class A dividend is calculated would be required to amend its capital plan and submit the amendment to the Finance Board for approval. Payment of the stated dividend on the Class A stock would have priority over the payment of dividends on Class B stock. By providing Class A stockholders a dividend priority, the Finance Board intends to preclude the possible manipulation of the Class A dividend by and for the benefit of Class B shareholders, who are likely to have greater influence on the Bank's dividend policies than Class A stockholders. After a Bank pays its stated Class A dividend, the board of directors of a Bank may augment the stated dividend. This additional payment may be paid, at the discretion of the Bank's board of

directors, before, concurrently with, or after payment of dividends on paid-in Class B stock. Along with specifying the basis on which the stated dividend would be calculated, a Bank's board of directors would have to determine, prior to issuance of the stock, whether such dividends are to be cumulative or non-cumulative.

Under the proposed rule, the Bank's board of directors could authorize the payment of a dividend to Class B stockholders and would determine the amount of the dividend to be paid. The board of directors would also be able to establish different dividend rates or preferences for different subclasses of Class B stock. A dividend established for a different subclass could, for example, track the performance of specific Bank assets, such as Acquired Member Assets or advances. Any dividend that tracks the performance of a Bank asset, however, must be proportionately appropriate for the level of risk and profitability associated with the underlying asset. For example, the lower the risk and profitability of an asset, the lower the dividend payment should be.

The payment of any Class B dividends would only be permitted after the payment of the stated Class A dividend. Any dividends to Class B stockholders must be payable from GAAP net earnings of the Bank plus the GAAP retained earnings of the Bank (after the payment of Class A dividends). GAAP net earnings are the net earnings of the Bank after the payment of the Resolution Funding Corporation (RefCorp) and Affordable Housing Program obligations. Any dividends on Class B stock would be non-cumulative. Cumulative dividends on Class B stock would not be necessary because the board of directors would set the dividend rate anew each year and could, therefore, effectively treat dividends as cumulative, but only if there were sufficient earnings to do so.

D. Preferences on Liquidation, Merger, or Consolidation. Under the proposed rule, in the event of a liquidation, merger, or other consolidation of a Bank, Class A stockholders would be entitled to receive the par value of their stock, plus any accumulated dividends. Class A stockholders would be paid before the Bank (or its successor) could redeem any Class B stock or pay dividends on the outstanding Class B stock that had been issued by the Bank that had been liquidated, merged, or consolidated. The preference given to Class A stockholders in such cases is consistent with the priority given to the payment of the stated dividend to Class

A stockholders and with the role of Class B stock as bearing the greater risk.

E. Transfer of Capital Stock. As required by the GLB Act, the proposed rule would allow a member to transfer capital stock only to another member of the Bank or to an institution that is in the process of becoming a member. The Finance Board considers the transfer of stock to an institution in the process of becoming a member as an opportunity to minimize the likelihood of a Bank becoming overcapitalized. Any such transfer of stock would be at a price agreed to by the parties, and could be below, at, or above the par value of the stock.

Additionally, the proposed rule would prohibit a Bank from allowing the transfer of Bank stock to a member or group of affiliated members if, after the transfer, the member or group of affiliated members would own more than 40 percent of any class or subclass of capital stock. The proposed rule also would allow a Bank, through its capital plan, to establish an ownership cap lower than 40 percent. The ownership cap is intended to preclude the possibility that a single member or group of affiliated members could control a Bank. If a merger, acquisition, or other consolidation of two or more members of a Bank were to result in the surviving member holding more than 40 percent of any class of stock, or any lower cap set by the Bank, the Bank and member(s) would be required to agree to a plan for the member to divest any stock in excess of the ownership cap in an orderly manner. The Finance Board requests comments on how else the concentration limits might be applied in the case of a merger of members, as well as on how to apply such limits if a member were to exceed the limits as a result of actions taken by a third party, such as the withdrawal of a large member that causes the percentages of all other members to increase.

F. Membership Investment in Capital Stock. The GLB Act requires each member to maintain an investment in its Bank. Under the proposed rule, a Bank may require an institution to invest in Class A stock as a condition to becoming and remaining a member of the Bank, or a Bank may establish a membership fee to be assessed in lieu of mandatory stock investment. As noted below, after a Bank reaches its operating capital ratios it could no longer continue to require any additional membership investments, though it would be able to continue to assess annual membership fees. If a Bank were to require a membership investment in Class A stock, the Bank also must provide the member the option of

investing in a lesser proportional amount of Class B stock, which amount would be as determined by the Bank. For example, a lesser proportional amount of Class B stock could be calculated by multiplying the amount of Class A stock otherwise required for membership by a Bank-determined percentage.

If a Bank were at or above its operating total capital ratio and its operating risk-based capital ratio, the proposed rule would provide that the Bank could not require a member to purchase capital stock, but it still could require a member to pay an annual membership fee in lieu of the mandatory stock purchase. Because the amounts paid as membership fees do not constitute total capital or permanent capital under the GLB Act, the proposed rule would not preclude a Bank from assessing an annual membership fee after it has reached or exceeded its operating capital ratios. Both of these provisions have been included in the proposed rule in an effort to avoid a Bank becoming over-capitalized. The Finance Board believes that allowing a Bank to accumulate excessive amounts of capital, *i.e.*, amounts of capital beyond what is required to support the risks inherent in the business of the Bank, plus the marginal amount of additional capital carried as a result of the Bank's operating total capital and risk-based capital ratios, would lead to increased arbitrage investments, which the Congress clearly intended to address as part of the GLB Act capital restructuring. The Finance Board would allow the Banks to operate at higher capital ratios than are required by the GLB Act and this regulation, *i.e.*, higher percentages of total and permanent capital, which the Finance Board does not believe would lead to increased arbitrage investments. Also, by providing the Bank with various options to offer its members, the Finance Board believes members would have the flexibility necessary to accommodate the membership investment requirement that is required by the GLB Act.

G. Activity-Based Stock Purchase Requirement. The proposed rule provides that a Bank may require a member to purchase either or both Class A or Class B stock as a condition to entering into a specific business transaction with the Bank. Such an activity-based stock purchase requirement would not be inconsistent with other provisions of the GLB Act, which provide generally that a member shall have the option of purchasing either Class A or Class B stock. Any business transaction between a Bank

and a member, such as an advance, is a voluntary transaction initiated by the member that results in an asset being placed on the books of the Bank. Under the risk-based capital provisions of the GLB Act and the proposed rule, every on-balance sheet asset and off-balance sheet item of a Bank must be supported by some amount of permanent capital to cover the credit, market, and operations risks associated with the asset or item. Ultimately, whatever amount of permanent capital is required by each Bank to meet its regulatory risk-based capital ratio and its operating risk-based capital ratio must be provided by the members; if a Bank lacks sufficient capital to engage in a particular transaction, it cannot enter into the transaction. If the provision of the GLB Act allowing each member the option of purchasing either Class A or Class B stock were read to allow each member to decline to purchase any Class B stock, the Banks would be unable to engage in any transactions with their members beyond the amount that could be supported by their retained earnings, the only other source of permanent capital. There is nothing in the GLB Act or its legislative history that suggests that the provision allowing members the option of purchasing Class A or Class B stock was intended to override the other provisions of the GLB Act that require every asset and off-balance sheet item to be supported, at least in part, by some amount of permanent capital. As noted above, the provisions of this proposed rule regarding each member to maintain some investment in the Bank preserves for the members the option of maintaining that investment in either Class A or Class B stock. To ensure that the Banks have sufficient permanent and total capital to cover the risks of their business, the proposed rule would authorize a Bank to require a member, as a condition to doing business with the Bank, to purchase whatever amount of Class A and Class B stock is necessary for the Bank to comply with the regulatory capital requirements (and operating capital ratios) that would be associated with the Bank asset (or off-balance sheet item) to be generated by the transaction with the member. If a member would prefer not to purchase any Class B stock, it would not be required to do so, but the Bank would not be required to make an advance or enter into any other transaction with a member that declined to provide the capital needed for the business it wished to conduct with the Bank.

The activity-based stock purchase requirement also should provide the Banks with some additional flexibility

in managing their capital accounts, such that the levels of capital correspond more closely to the risks generated by the business of the Bank. The proposed rule would impose certain limitations on activity-based stock purchases. First, the amount of Class B stock that a member may be required to purchase in order to engage in a certain transaction must be based on the risk characteristics of the asset being acquired by the Bank. Second, a Bank could not require a member entering into a transaction to purchase Class B stock if the amount of the purchase would cause the Bank to exceed its operating total capital ratio and operating risk-based capital ratio, as established in the Bank's capital plan. Although a Bank could not impose an activity-based stock purchase requirement if doing so would cause it to exceed its operating capital ratios, the proposed rule would allow a Bank to enter into a written agreement with a member under which the member would commit to purchase a specific number of shares of Class A or Class B stock at a specified price, but with the purchase to be completed and all payments made at a future date to be determined by the Bank. Any such arrangement would have to be included in the Bank's approved capital plan. Under such an arrangement, if a Bank were to fall below its operating capital ratios it could require the members to honor their commitment to provide the capital that otherwise would have been required at the time they entered into the commitments. These provisions are intended to prevent the Banks from building excessive amounts of capital, which the Finance Board believes would lead to arbitrage investments.

Additionally, the proposed rule would bar a Bank from prohibiting a member that had purchased capital stock in compliance with an activity-based purchase requirement from selling the stock to another member. The members would remain subject to the other provisions of the rule, under which no member may redeem any capital stock if doing so would cause the Bank to fail to comply with any regulatory capital requirement.

H. Concentration limits. Under the proposed rule, no member, or group of affiliated members, of a Bank would be permitted to own more than 40 percent of any class or subclass of the outstanding capital stock of the Bank. A Bank would be able, through its capital plan, to establish an ownership cap lower than 40 percent. If at a given time, a member, or group of affiliated members, of a Bank were to acquire stock such that they owned more than 40 percent of any class or subclass of

stock (or any lower amount as established by the Bank) the Bank and member (including any affiliated members) would be required to agree to a plan under which the member would divest sufficient shares of such stock as necessary to comply with the limit. The Finance Board requests comment on the need to include concentration limits in the rule and what percentage limits might be most appropriate to ensure that the Bank cannot be dominated by a small number of members.

I. Redemption and Purchase of Capital Stock. As required by the GLB Act, a member may redeem its Class A stock with six-months written notice to the Bank. Class B stock may be redeemed with five-years written notice to the Bank. At the end of the notice periods, a member would be entitled to receive the par value of the stock in cash. The proposed rule would bar a member from having pending at any one time more than one notice of redemption for any class of Bank stock. For example, a member may have pending a notice to redeem 50 shares of Class A stock, as well as a notice to redeem 50 shares of Class B stock. A member, however, could not have two separate notices to redeem only Class B (or only Class A) stock. A Bank would be permitted to impose a fee, as specified in its capital plan, on a member that cancels a pending notice of redemption. The imposition of a fee would be at the discretion of a Bank, as specified in its capital plan. The Finance Board is proposing the option of establishing a fee in order to minimize a Bank's cost associated with canceling a notice of redemption.

J. Capital Impairment. Under the proposed rule, the Bank would not be permitted to redeem or purchase any capital stock without prior written approval from the Finance Board if the Bank were not in compliance with any of its regulatory capital requirements. The Bank would also not be permitted to redeem or purchase any capital stock without prior written approval from the Finance Board if such a redemption or purchase of stock would cause the Bank to fail to comply with any of its regulatory capital requirements. These provisions reflect the requirement of the GLB Act that the Bank shall maintain both total and permanent capital that is sufficient to meet its regulatory capital requirements.

K. Part 932—Federal Home Loan Bank Capital Requirements.

Overview. As discussed previously, the Banks' current capital requirements have been determined according to a statutory formula, which has used either the assets held by a member or the

amount of the member's borrowings from a Bank to determine the amount of Bank stock that the member must hold. 12 U.S.C. 1426(b)(1), (b)(2), and (b)(4); 1430(c), (e)(1), and (e)(3) (1994). The capital provisions of the GLB Act replace this approach with a modern risk-based capital system for the Banks and mandate a capital structure that is more in line with the risk-based capital standards developed under the Basle Accord and with the practices of other bank regulatory agencies.⁹ Under the GLB Act amendments, the Banks would be allowed greater flexibility to set their own risk tolerances, subject to the requirement that they hold sufficient capital to support the risks they choose to accept. The Finance Board is proposing to implement the capital provisions of the GLB Act by adopting a modern approach to overseeing the Banks, which would require the Banks to implement regulatory capital requirements as part of a comprehensive risk management system. In developing the proposed regulations, the Finance Board has reviewed the Basle Accord, the regulations of other banking regulators, the OFHEO proposed capital regulations,¹⁰ and other papers drafted by the BCBS and other bodies.

The capital requirements of proposed Part 932 also would replace the risk management provisions of the Finance Board's Financial Management Policy (FMP) under which the Banks currently operate. The FMP imposes specific restrictions and limitations on the Banks' investment practices and includes a leverage limit to regulate the risk management practices of the Banks. Finance Board Res. No. 96–45 (July 3, 1996), *as amended* by Finance Board Res. No. 96–90 (Dec. 6, 1996), Finance Board Res. No. 97–05 (Jan. 14, 1997), Finance Board Res. No. 97–86 (Dec. 17,

1997) and 65 FR 36305 (June 7, 2000). Although the FMP has served the purpose of ensuring the safety and soundness of the Bank System, it lacks sufficient flexibility to enable the Banks to fulfill their mission to the maximum extent possible.

The Basle Accord forms the basis for risk-based capital standards for banks in the world's industrialized countries. Its approach principally involves a standardized system of risk weights, under which the book value of an on-balance sheet asset is assigned a particular risk weight based on the relative level of credit risk associated with that category of asset. The same method is used with respect to off-balance sheet items, which are converted to credit equivalent amounts and assigned to the appropriate risk weight category. The risk weight categories range from zero percent, for items such as cash and U.S. Treasury obligations, to 100 percent, which includes claims on private obligors. The Basle Accord credit risk capital regime is based on an 8 percent benchmark, *i.e.*, an institution must maintain total capital in an amount equal to 8 percent of the book value of any asset that is in the 100 percent risk weight category.

The Finance Board, and other commentators, believe that the Basle Accord has a number of shortcomings. For example, the risk weight categories are so broad that instruments with markedly different credit risks may be subject to the same risk weighting. The Basle Accord also does not take into consideration how differences in the maturities between two instruments within the same category would affect their relative credit risk, nor does it distinguish between immediate exposure and possible future credit exposures, or between the credit risks associated with a diversified portfolio compared to those associated with a concentrated portfolio.

The January 1996 amendment to the Basle Accord (the Amendment) remedies some of these shortcomings, especially with respect to debt instruments held in the trading portfolios of large banks.¹¹ The Amendment offers large banks the

⁹ The risk-based capital standards of the other federal bank regulatory agencies are based on the document entitled "International Convergence of Capital Measurement and Capital Standards" (July 1988) (the Basle Accord). The Basle Accord was agreed to by the Basle Committee on Banking Supervision (BCBS) which comprises representatives of the central banks and supervisory authorities of the Group of Ten countries (Belgium, Canada, France, Germany Italy, Japan, Netherlands, Sweden, Switzerland, United Kingdom, United States and Luxembourg). The BCBS meets at the Bank for International Settlements, Basle, Switzerland.

¹⁰ On April 13, 1999, OFHEO published a notice of proposed rule-making with respect to the required risk-based capital standards. See 64 FR 18083 (Apr. 13, 1999). The original deadline for comments on this proposal was August 11, 1999, but that deadline was extended. The comment period ultimately closed on March 10, 2000. See 64 FR 56274 (Oct. 19, 1999). On March 13, 2000, OFHEO solicited reply comments in response to the comments received on the proposed rule. See 65 FR 13251 (Mar. 13, 2000). The deadline for these reply comments was April 14, 2000.

¹¹ The Amendment, entitled "Amendment to the Capital Accord to Incorporate Market Risks," sets specific risk-based capital standards for instruments held in trading portfolios of commercial banks. For debt instruments, the specific risk is defined by the Amendment as credit and event risk. In addition, the Amendment incorporates a measure of the market risk due to interest rates, foreign exchange rates, equity prices and commodity prices for all instruments held in trading portfolio (trading book); and foreign exchange and commodity risks for instruments held in non-trading portfolio (banking book).

alternative either to use internal credit risk models to calculate value at risk due to credit risk on debt instruments held in its trading portfolio, or, if the bank lacks satisfactory internal models, to use standardized credit risk capital percentage requirements specified in the Amendment.

In order to address some shortcomings of the Basle Accord with respect to the non-trading portfolio, *i.e.*, the banking book, the BCBS published in June 1999 a consultative paper entitled "A New Capital Adequacy Framework" (the Framework), which proposed a system to better correlate regulatory solvency with the economic-capital needs of a bank and with the risks and returns of a bank's lending activities.¹² The Framework would calibrate a bank's risk-based capital requirements more closely with its underlying credit risks, and would recognize the improvements in risk measurement and control that have occurred in recent years. The Framework would also allow for the use of internal credit ratings and credit risk models to better assess a bank's capital requirement in relation to its risk profile.

General Capital Requirements. Section 6(a)(1) of the Bank Act, 12 U.S.C. 1426(a), *as amended*, requires that each Bank maintain a minimum ratio of total capital to total assets and that each Bank maintain permanent capital in an amount that is sufficient, as determined in accordance with the regulations of the Finance Board, to cover the credit risk and market risk to which a Bank is subject. 12 U.S.C. 1426(a)(1), (3), *as amended*.

The GLB Act defines "permanent capital" as the amounts paid for a Bank's Class B stock, plus the Bank's retained earnings (as determined in accordance with GAAP). 12 U.S.C. 1426(a)(5)(A), *as amended*. The term "total capital" includes permanent capital, the amounts paid for Class A stock, any general allowance for losses that are not held against specific assets (determined in accordance with GAAP and Finance Board regulations), and any other amounts available to absorb losses that the Finance Board determines by regulation to be appropriate to be included in total capital. 12 U.S.C. 1426(a)(5)(B), *as amended*.

The definitions for "permanent capital" and "total capital" proposed in § 930.1 conform with the statutory definitions. Proposed § 930.1 also defines the term "general allowance for

losses" to require that such allowances be consistent with GAAP and not include any amounts held against specific assets of the Bank. The restrictions would be the same as the statutory restrictions placed on loan loss reserves.

Capital requirement transition provisions. The proposed rule would require that by a date not later than three years from the effective date of the its capital plan, each Bank shall have sufficient total capital to meet the total capital requirement in proposed § 932.2 and sufficient permanent capital to meet the risk-based capital requirement in proposed § 932.3. Before the new total capital and risk-based capital requirements could be implemented, however, each Bank must first obtain Finance Board approval for its internal risk model or its cash flow model, which would be used to calculate the market risk component of its risk-based capital requirement, and for the risk assessment procedures and controls that would be used to manage the Bank's credit, market, and operations risks.

The capital rule would not supercede the risk management provisions of the FMP until after the Finance Board has approved the models and procedures, discussed above, for each Bank and the Bank has met its regulatory capital requirements. Thus, each Bank would continue to be governed by the Hedging Transaction Guidelines and the Interest Rate Risk guidelines of the FMP until those conditions are met. *See* FMP Sections V and VII. The provisions of the FMP that limit the purchase of mortgage-backed securities (MBS), collateralized mortgage obligations (CMOs), real estate mortgage investment conduits (REMICs), and eligible asset-backed securities to 300 percent of capital, Section II.C.2, also would remain in effect until the Bank had met the proposed regulatory capital requirements.

The proposed rule also would mandate that the minimum stock purchase and stock retention requirements of the Bank Act in effect immediately prior to the GLB amendments would remain in effect until the Bank has issued capital stock in accordance with its approved capital plan. (See discussion of proposed Part 933.) This provision is consistent with the GLB Act requirement that the pre-GLB Act stock purchase and stock retention requirements shall continue in effect until the capital plan of a Bank has been approved and implemented. 12 U.S.C. 1426(a)(6), *as amended*. Under the proposed rule, the new capital structure for each Bank would take effect (subject to any transition

provision) once a Bank has issued its Class A or Class B capital stock. Any other Finance Board regulations that may affect stock purchase or retention would also apply.¹³

Total capital requirement. The GLB Act requires each Bank to maintain a ratio of total capital to total assets of no less than four percent. 12 U.S.C. 1426(a)(2), *as amended*. The statute also requires each Bank to maintain a leverage ratio of total capital to total assets of five percent, where in calculating this ratio, the amounts paid in for the class B stock and the amounts of retained earnings are multiplied by 1.5 and all other items of total capital are included at face value. *Id.* Section 932.2 of the proposed rule would implement these statutory provisions.

Risk-based capital requirement. The GLB Act requires each Bank to maintain permanent capital in an amount that is sufficient, as determined in accordance with the regulations of the Finance Board, to cover the credit risk and market risk to which a Bank is subject. 12 U.S.C. 1426(a)(1), (3), *as amended*. Section 932.3 of the proposed rule would require each Bank to maintain sufficient permanent capital to meet the combined credit, market, and operations risks to which it is subject, as determined under proposed § 932.4, § 932.5, and § 932.6, respectively.

Although the GLB Act does not address operations risk, the Finance Board is proposing to adopt an operations risk component to the risk-based capital requirements in order to assure that the Banks "operate in a financially safe and sound manner" and "remain adequately capitalized." 12 U.S.C. 1422a(a)(3)(A), (B), *as amended*. The Finance Board believes that the risk of loss from business operations exists with regard to the Banks and that it is necessary to require the Banks to maintain capital against that risk. Under the new credit and market risk capital provisions in the GLB Act, the amount

¹³ The Finance Board recently approved a final rule that, among other things, established an asset-based leverage limit under which the aggregate amount of assets of any Bank shall not exceed 21 times the total of paid-in capital stock, retained earnings and reserves (or a capital to assets ratio of at least 4.76 percent). The rule also extended and made permanent the additional leverage authority originally permitted to the Banks for Year 2000 liquidity, *i.e.*, a Bank may have asset-based leverage of up to 25 to 1 (or a capital to assets ratio of at least 4.0 percent) if that Bank's ratio of non-mortgage assets does not exceed 11 percent of the Bank's total assets minus deposits and capital. *See* 65 FR 36290, 36299 (June 7, 2000). Non-mortgage assets equal total assets after deduction of core mission activity assets, as defined in proposed § 940.3, and assets described in sections II.B.8 though II.B.11 of the FMP. *See* 65 FR 25676, 25688 (May 3, 2000). This 25 to 1 limit is in line with the requirements of the GLB Act.

¹² *New Basle Committee Proposals Have Positive Bank Credit Implications*, Moody's Credit Perspectives, June 21, 1999, at 1, 18.

of capital held by the Banks will be closely aligned to the expected losses associated with those risks, and is not meant to cover the unexpected losses that may result from human error, fraud, unenforceability of legal contracts, or deficiencies in internal controls or information systems or other operations risks. Without an operations risk requirement, the proposed rule would be deficient and the Banks could be exposed to losses arising from these operational failures. Thus, the Finance Board considers the operations risk requirement necessary to ensuring the continued safe and sound operation of the Bank system.

Credit Risk Capital Requirement. The GLB Act mandates that each Bank maintain sufficient permanent capital, as determined in accordance with Finance Board regulations, to meet the credit risk to which the Bank is subject. 12 U.S.C. § 6(a)(3)(A)(i), *as amended*. The GLB Act, however, does not specify the elements that make up credit risk or the charges that must be applied to cover such risk, leaving to the Finance Board the responsibility to define the elements of credit risk.

Proposed § 932.4 would implement the credit risk requirements of the GLB Act. In developing these requirements, the Finance Board has reviewed the Basle Accord, the regulations of other banking regulators, OFHEO's proposed capital regulations, and other information prepared by the BCBS and other relevant bodies. As already discussed, the Finance Board has revised the credit risk provisions contained in the proposed FMMA both to meet the GLB requirements and to further enhance the accuracy of the provisions.

The credit risk component of the risk-based capital requirement proposed by the Finance Board would encompass the credit risks associated with both on-balance sheet assets and off-balance sheet items of each Bank. The objective of this credit risk capital standard is to provide a regulatory framework that would: (i) Assess capital charges based on the extent of the underlying credit exposure; (ii) address on- and off-balance sheet exposures consistently; (iii) be responsive to changes to the portfolios of the Banks, as well as in the markets; and (iv) reflect improvements in risk measurement and control systems, as they develop and become available for use by the Banks.

Finance Board determination of specific credit risk percentage requirements. The credit risk capital requirement would be equal to the sum of a Bank's credit risk capital charges for all on-balance sheet assets and off-

balance sheet items. For an on-balance sheet asset, the credit risk capital charge would equal the book value of the asset multiplied by the "credit risk percentage requirement" assigned to the asset. For off-balance sheet items, the credit risk capital charge would be the "credit equivalent amount" of the item, multiplied by the credit risk percentage requirement assigned to the item.

The proposed rule would include credit risk percentage requirements for various categories of on-balance sheet assets and the credit equivalent amount of off-balance sheet items based on the type of asset or item, its credit rating and, if appropriate, its remaining maturity. The Finance Board has used data from NRSROs and other relevant sources to calculate estimates of credit losses associated with the particular categories. The estimates of credit risk percentage requirements represent the expected credit losses for the particular categories of instruments during periods of credit stress, based on historical data that reflect the longer-term nature of credit cycles, and span multiple credit cycles. The credit losses are estimated after identifying time periods with the highest losses stemming from downgrades and defaults. The loss in market value from a downgrade is estimated for each maturity category of the investment using credit spreads from 1992 to the present that were available to the Finance Board. For defaults, assumptions for loss severity are based on exposure type and maturity as indicated by available data. Periodic updates to the initial credit risk percentage requirements will be implemented by the Finance Board as amendments to the credit risk capital requirement.

In the proposed FMMA, the credit risk percentage requirements did not consider the term structure of credit risk. This limitation mirrored the initial failure of the Basle Accord to consider the term structure of credit risk, such that an overnight exposure on a particular instrument would receive the same capital charge as a two- or a ten-year exposure on another instrument from the same issuer. Recently, however, the BCBS as well as other financial regulators have begun to address this failure. Under the Amendment, the term structure of credit risk can be fully recognized for trading portfolios of large banks with satisfactory internal models, and is partially recognized for others through a standardized table. In addition, the recently proposed Framework addresses this problem by according limited recognition to the term structure of credit risk. The Farm Credit

Administration similarly accords limited recognition to the term structure of credit risk in its risk-based capital requirements for the farm credit banks. In the proposed rule, the Finance Board would give recognition to the term structure of credit risk.

While consideration of term structure is not necessary for all credit risk categories, the Finance Board incorporated term structure in the percentage requirements for advances and "rated assets or items other than advances or residential mortgage assets." The Finance Board also has incorporated specific credit risk percentage requirements for residential mortgage assets, which include MBS, by investment grade. As a result, four tables are included in proposed § 932.4(d)(2)(i): Table 1.1—Requirement for Advances; Table 1.2—Requirement for Residential Mortgage Assets; Table 1.3—Requirement for Rated Assets or Items Other Than Advances or Residential Mortgage Assets; and Table 1.4—Requirement for Unrated Assets. These tables set forth the percentages to be applied to the book value of on-balance sheet assets, or the credit equivalent amounts of off-balance sheet items, in determining a Bank's credit risk capital requirement. The Finance Board seeks comment on its proposed recognition of asset maturity in its calculation of credit risk percentage requirement for certain types of assets or items. The Finance Board also generally requests comment on any aspect of the tables included in the proposed rule.

Table 1.1. The proposed FMMA assigned advances to a triple-A credit risk category based on factors such as the historical credit loss record for Bank advances (no credit losses have been incurred on the advance portfolio), the conservative lending and collateral management policies of each Bank (all classes of collateral are discounted based on risk), the blanket lien arrangements that some Banks employ with certain members over all of the assets of that member, the statutory priority lien, which gives the Banks priority over other secured creditors (so long as those secured interests are not perfected), and a statutory stock purchase requirement that required a member to maintain an investment in the Bank at least equal to 5 percent of its outstanding advances. 12 U.S.C. 1430(e) (1994).

In developing the FMMA, the Finance Board considered treating advances in the same manner as cash or as securities that are backed by the full faith and credit of the U.S. government, both of which are assigned zero credit risk. Two credit rating agencies, however, have

expressed their opinion to the Finance Board that such treatment would not be appropriate for advances, *i.e.*, that advances should not be treated as equivalent to assets that have no credit risk. The two rating agencies recommended that advances be treated as triple-A rated assets. They noted, in particular, that legislative authority for the Banks to accept new types of collateral from certain members as one reason why advances should not be rated higher than triple-A. Based on the historical experience of zero credit losses for advances over the past 60 years, however, compared to the experience with triple-A rated corporate securities, some of which have had rating downgrades that have led to eventual credit losses, it would appear that advances are a better credit than are triple-A rated corporate securities. Accordingly, the proposed rule would treat advances as having somewhat greater credit risk than securities that are backed by the full faith and credit of the U.S. government, but somewhat less than triple-A rated corporate securities. The proposed rule, in Table 1.1, provides unique credit risk percentage requirements for advances by their maturity.

The determination of credit risk percentage requirements or credit losses for advances under stress conditions would require estimates of the default rate and the loss severity rate under such stress conditions. Because the Banks have incurred no credit losses on their advances, the Finance Board has assumed, for purposes of establishing a default rate for advances, that advances would exhibit the same default patterns as the highest investment grade corporate bonds in Moody's Default Risk Service database, and that advances would have a recovery rate of 90 percent (*i.e.*, a loss severity rate of 10 percent). A recovery rate of 90 percent is consistent with the conservative lending and collateral management policies and the historical credit loss record of the Banks with respect to advances. Thus, the credit risk percentage requirements in Table 1.1 for advances are based on the maximum default rates for the highest investment grade exposures from Moody's Default Risk Service database and a recovery of 90 percent.¹⁴ The Finance Board seeks comment on the methodology used for setting the credit risk percentage

requirements for advances and whether a more satisfactory analytical framework exists that could be used to determine more appropriate credit risk percentage requirements for advances.

Table 1.2 and Table 1.3. Table 1.2 includes the credit risk percentage requirements for residential mortgage assets, which category includes both mortgages and MBS, while Table 1.3 sets forth credit risk percentage requirements for rated assets or items other than advances or residential mortgage assets. The credit risk percentage requirements in Table 1.3 were developed for instruments without embedded options. As explained in more detail following the discussion of Table 1.3, residential mortgage assets have prepayment options, and, therefore, require a separate set of credit risk percentage requirements.

The proposed credit risk percentage requirements in Table 1.3 for credit exposures of rated assets or items other than advances and residential mortgages are calculated by examining data from Moody's which includes the rating and default history for rated assets over the time period 1970–1999. In calculating the values in Table 1.3, the worst time period for credit losses is found for each rating category, where credit losses are estimated as the sum of defaults, assuming a 100 percent loss severity, and losses in market value from rating downgrades during a specified period or credit risk horizon.¹⁵ See "Historical Default Rates of Corporate Bond Issuers, 1920–1998," Moody's Investor Service, January 1999.

A maximum of a two year credit risk horizon has been used for calculating the default and downgrade probabilities, because this is the expected period of time, based on experience, needed to resolve asset-quality problems at troubled commercial banks. Furthermore, both the default and downgrade probabilities increase as the horizon is increased from six months to two years. For credit exposures longer than two years, the default and downgrade probabilities remain constant at the two year maximum horizon. The loss in market value from a downgrade is estimated from calculations of market values of corporate bonds at initial credit ratings and market values subsequent to the

downgrade. These losses tend to increase with the maturity of the asset.

The probability of a rating downgrade (of one or more categories), and the probability of default, are taken from the worst historical period as defined above. These probabilities, and available credit spread data, are used to estimate the possible loss in value from defaults and downgrades in future stressful environments. Assets with longer maturities will generally have higher credit risk percentage requirements to reflect higher credit risk associated with longer maturities. Even though the default and downgrade probabilities are constant for maturities above two years, the downgrades will have a greater impact on the market value of longer lived assets.

Based on data obtained from Moody's, the worst default frequency over a two-year horizon for triple-A rated corporate debt is 0.0. In fact, no triple-A rated security has ever defaulted while it was rated triple-A. Given a sufficiently long period of time, however, even triple-A rated corporate credits may default following rating downgrades.¹⁶ In fact, some triple-A rated credits have been downgraded within a year after receiving the triple-A rating. In addition, the market credit spreads for triple-A rated securities can widen without any change in credit ratings.¹⁷ Credit deterioration and spread widening can lead to losses in market value for triple-A rated securities within a relatively short time after such securities are assigned a triple-A rating. Because such risks exist and the holding periods associated with long-term held-to-maturity securities are relatively long, the proposal adopts a conservative approach and requires capital to be maintained for triple-A rated credit exposures.

For Bank assets that are downgraded to below investment grade after being acquired by the Bank, the proposed rule would assign increasingly higher credit risk percentage requirements. The percentage requirements would range from 5.0 percent to 20.0 percent for assets or items that are downgraded to the highest rating below investment grade. For assets or items that are downgraded to the second highest rating below investment grade, the percentages would range from 22.0 percent to 37.0 percent. The proposed rule would assign a percentage requirement of 100 percent for all other assets or items that

¹⁴ The credit risk percentage requirement for advances with maturities above 10 years has been capped at the maximum credit risk percentage requirement for the highest investment grade residential mortgage exposures as historical loss rates for advances have been below the loss rates for residential mortgages.

¹⁵ Based on Moody's data from 1977–98, historical defaulted-bond prices display a great deal of volatility and are zero at two standard deviations below the mean. Unless more data is examined and a positive recovery rate under credit stress conditions can be established with confidence, the Finance Board would adopt a recovery rate of zero for estimation of credit losses that are to be used for credit risk capital requirements.

¹⁶ According to Moody's data from 1970 to 1998, over a 4-year default horizon, the worst historical probability of default for assets initially rated triple-A is 1.21 percent.

¹⁷ This applies equally to triple-A rated securities issued by GSEs.

are downgraded below investment grade. Table 1.3 includes U.S. government securities that are backed by the full faith and credit of the U.S. government. These securities, which would include Government National Mortgage Association (GNMA) MBS, are assigned to the zero percentage category regardless of their maturity, because they are deemed not to present any credit risk to the Bank.

Credit risk capital requirements in Table 1.3 were developed for instruments without embedded prepayment options.¹⁸ Instruments with prepayment options, such as residential mortgage assets, would require a separate set of capital charges. Therefore, credit risk percentage requirements for residential mortgage related exposures are presented in Table 1.2.¹⁹ Due to prepayment features, the expected or weighted average maturity for 30-year, fixed-rate mortgages is significantly less than 30 years. Therefore, the credit risk percentage requirements in Table 1.3 would be too high for residential mortgage exposures. In addition, the pattern or timing of defaults between corporate bonds and residential mortgages significantly differ. The default rates for corporate bonds generally increase with the time horizon, whereas, mortgage defaults tend to be concentrated between years three and eight. See "Moody's Approach to Rating Residential Mortgage Pass-Through Securities," Moody's Investor Service, November 1996 (hereinafter Moody's). Based on Moody's analysis of the lifetime default curve for 30-year residential mortgages, the default rate becomes very small after 14 years and is zero after 22 years. Due to the build up of borrower equity in residential assets, the loss severity rates generally decline after the first few years of a residential mortgage's life. The Fitch IBCA Residential Mortgage-Backed

Securities model utilizes a 14 year credit loss horizon. See "Fitch IBCA Residential Mortgage-Backed Securities Criteria" Fitch IBCA, December 1998 (hereinafter Fitch IBCA). Somewhat similar default and loss patterns are found in Duff & Phelps model. See "The Rating of Residential Mortgage-Backed Securities" Duff & Phelps Credit Rating Co.

As required by the Federal Housing Enterprises Financial Safety and Soundness Act of 1992 (1992 Housing Enterprises Act), OFHEO has identified a "benchmark loss experience" for fixed rate mortgages (defined as conventional, 30-year, fixed-rate loans secured by first liens) on single-family properties (defined as single unit, owner occupied, detached properties) that were originated from 1979 to 1993 by the secondary market housing enterprises. OFHEO proposed to base its benchmark credit loss estimates on a 10 year credit loss horizon See 61 FR 29616. (June 11, 1996).

In the proposed rule, residential mortgage assets, including MBS, held by Banks that are not rated directly for credit quality by rating agencies (NRSROs) must be rated for credit quality internally by Banks based on NRSRO criteria for rated MBS. The determination of credit risk percentage requirements or credit losses for residential mortgages under stress conditions would require estimates of the lifetime default rate corresponding to each rating category and the loss severity rate under stress conditions. In grading the relative credit risk of MBS, rating agencies employ the same symbol system as used for corporate bonds and counterparty obligations. As stated by Moody's, "The overall expected loss for a security of any rating should be the same, whether applied to an unsecured corporate instrument, a senior class of an MBS transaction (where losses would be of small magnitude), or a subordinate tranche." Moody's at 2. To determine the appropriate thresholds on the distribution of mortgage default rates to be associated with each rating level, Fitch IBCA calibrated the lifetime mortgage default rate curve to the default rate curves for corporate bonds. Fitch IBCA at 4. This means that the corporate bond default rate data could provide a means of determining default rates comparable to mortgage default rates at each credit rating level. Based on the above analysis and conversations with rating agencies, it appears that a credit loss horizon of 15 years would be sufficient to capture the credit risk from residential mortgages. Therefore, the maximum default rate for a 15 year horizon from Moody's Default Risk

Service is utilized for calculation of credit risk percentage requirements for residential mortgage assets with prepayment features.

The loss severity rates for residential mortgages can be significantly different from the loss severity rates for corporate exposures. Private label mortgage issues rated single-B have had loss severity rates of 100 percent even though the private label market has yet to cope with a period of serious stress or a prolonged recession. In addition, the actual loss rates for some of the single-B rated issues have been 100 percent. Conversations with credit rating agencies indicate that the loss severity rates for mortgages are associated with credit ratings. Mortgage issues rated triple-A would be expected to have relatively small losses even under a severe recession, and loss severity rates increase with a decline in credit rating. Thus, a loss severity rate of 100 percent is assumed for residential mortgage assets rated single-B or below. Loss severity rates for investment grade mortgage assets are derived by calibrating them to the pattern of loss rates for long corporate bonds.

Credit risk percentage requirements in Table 1.2 for residential mortgage assets are based on 15-year maximum default rate from Moody's Default Risk Service database and the rating specific loss severity rate. Unless separate credit risk percentage requirements are determined by the Finance Board for other classes of mortgages, such as multifamily and commercial properties, the percentages in Table 1.3 would apply to such rated credit exposures. The Finance Board seeks comment on the methodology used for setting credit risk percentage requirements, as well as alternative approaches for setting such percentages, that are linked to specific credit ratings from NRSROs.

Table 1.4. To the extent possible, credit risk percentage requirements are derived from actual loss experience during periods of financial stress. For several asset categories, however, there is no relevant loss experience from which to calculate the credit risk percentage. The credit risk percentage requirements for certain unrated assets are set forth in Table 1.4, and are the same as previously proposed in the FMMA. Cash would be assigned to the zero percent category, as it is deemed not to present any credit risk to the Bank. All of a Bank's tangible assets, "Premises, Plant and Equipment," as well as any unrated targeted debt or equity investments made by the Banks

¹⁸ The proposed credit risk percentage requirements in Table 1.3 are based on the credit risk from typical bonds that carry normal coupons. Zero or low coupon exposures would require credit risk percentage requirements higher than those being proposed. The Banks' holdings of such exposures and other complex credit-related instruments would be monitored and assigned appropriate credit risk percentage requirements on a case-by-case basis.

¹⁹ Conceptually, the data in Table 1.2 should be based on historical mortgage default data. Because sufficient data on historical mortgage default rates was not available, however, the percentages in the table are derived from corporate bond default rates and mortgage loss recovery rates, adjusted to approximate mortgage default rates. The Finance Board believes that the use of corporate bond data is less than ideal and intends to seek better sources of historical mortgage default data for purposes of the final rule. The Finance Board requests comment on any other methods of obtaining accurate data on historical mortgage loan defaults.

pursuant to proposed § 940.3(a)(5),²⁰ would be assigned an 8.0 percent requirement. The targeted investments included in this category would be certain non-securitized debt or equity investments that advance certain specific public welfare goals. The 8 percent credit risk percentage requirement for these categories is consistent with the Basle Accord (with regard to tangible assets) and with the capital requirements applicable to national banks (with regard to public welfare investments).

Bank determination of specific credit risk percentage requirements. The proposed rule would require each Bank to determine the credit risk capital requirement for each asset and item, first by identifying its type, its credit rating, and, its remaining maturity (as appropriate), then by identifying its appropriate risk category and applying the applicable credit risk percentage for that risk category under Tables 1.1 through 1.4. The proposal includes guidance for the Banks on how to determine the credit rating for a particular asset or item.

The proposed rule would require the Banks to apply certain criteria when determining the credit rating to be used in finding the applicable credit risk percentage requirement from Tables 1.2 and 1.3. If an asset or item is directly rated by an NRSRO, the Banks must use that rating. If an asset or item is not rated directly by an NRSRO, but its issuer or guarantor is rated or the asset or item is backed by collateral that is rated, then a Bank may use the highest rating given to the issuer, guarantor, or collateral, to the extent that the issuer, guarantor, or collateral supports the asset or item held by the Bank. If the asset or item is not fully backed by a rated issuer, guarantor, or collateral, then only the portion to which such rated support applies may receive the highest rating noted above, and the portion of the asset or item that is not supported must be assigned to the category that would be appropriate for such an asset on a stand-alone basis. For example, if up to 25 percent of a triple-B asset with a maturity of less than one year is guaranteed by a triple-A-rated entity, then 25 percent of the value of the asset may be assigned to the highest investment grade category with maturity equal to or less than one year, which would carry a credit risk percentage requirement from Table 1.3 of 0.15 percent, and the remaining 75 percent of the value of the asset will be assigned to the fourth highest investment grade category with a maturity equal to or less

than one year, which would carry a credit risk percentage requirement of 1.30 percent.

The proposal further provides that the Banks must disregard modifiers attached to a particular credit rating. Thus, an asset with an A+ rating and an asset with an A-rating would both be placed in the A category, or third highest investment grade, for credit risk-based capital charge purposes. NRSROs generally assign rating modifiers such as "1", "2" and "3" or "+" and "-" along with letter grades. Such modifiers are provided to further distinguish among credit risks that are assigned identical letter grades. Consequently, historical samples containing default activity for each modified letter grade are smaller than what they would be if modifiers were ignored. The smaller sample size makes it more difficult to calculate credit risk percentage requirements corresponding to modified ratings with some degree of statistical precision and confidence. Therefore, the Finance Board is proposing to disregard rating modifiers. This is consistent with the treatment specified for investment grade credit exposures under the Amendment and the Framework.

The proposal also provides that where a particular asset or item has been rated multiple times by the same NRSRO, the Bank must use the most recent rating from that NRSRO, and that if an asset or item has received ratings from multiple NRSROs, the Bank must use the lowest of those ratings. If an asset is not rated by an NRSRO and does not fall within one of the categories in Tables 1.1 or 1.4 (which do not need to be rated), the proposal would require a Bank to determine its own credit rating for the asset or item or relevant portion thereof using credit rating standards available from an NRSRO or other similar standards.

As a general matter, collateral may be used to enhance the creditworthiness of a particular asset or item, which can result in a lower credit risk percentage requirement for the particular asset or item. The BCBS has recognized that the Basle Accord did not provide sufficient incentive for banks to reduce their credit risk by taking an interest in collateral other than marketable securities, and recently has proposed to extend the scope of collateral recognition to all financial assets—not just marketable securities. The Finance Board proposal would allow a Bank to look through to the collateral supporting a given asset or instrument for credit risk capital purposes if certain conditions are met. In order to recognize such collateral for capital purposes, the collateral must be held by the Bank

(which could include being held by a third party custodian or by the member), must be legally available to absorb losses (*i.e.*, the Bank must have a legal right to liquidate the collateral and have a superior priority to all other parties with competing claims to the asset), must have a readily determinable value at which it can be liquidated, and must be held in conformance with the Bank's member product policy. See 12 CFR § 917.4. This would include arrangements under which a third-party custodian holds collateral from a Bank's counterparty and may not return the collateral to the counterparty without the express permission of the Bank. In using collateral to reduce the credit risk percentage requirement, a bank must make appropriate allowance for discounts, such as haircuts or overcollateralization, to reflect the price risk underlying the collateral.

Credit equivalent amounts for off-balance sheet items. Off-balance sheet items may expose a Bank to credit risks similar to those associated with on-balance sheet assets. The Finance Board is proposing to apply the credit risk capital framework consistently to all on- and off-balance sheet instruments. The proposed rule would require the Banks to convert all off-balance sheet credit exposures into equivalent on-balance-sheet credit exposures or credit equivalent amounts, determine the type of the item, and then apply the appropriate credit risk percentage requirement from the tables to estimate the instrument's credit risk capital charge. The Finance Board would allow the Banks to use Finance Board approved internal models to convert some or all off-balance sheet credit exposures into on-balance-sheet credit equivalents. For Banks that lack appropriate internal models, the Finance Board is proposing to adopt the Basle Accord treatment for such instruments as used by the other federal bank regulatory agencies to convert an off-balance sheet credit exposure into an equivalent on-balance-sheet exposure.

Under the Basle Accord, as incorporated by the federal bank regulatory agencies, off-balance sheet instruments, other than derivative contracts, that are substitutes for loans, *e.g.*, standby letters of credit serving as financial guarantees for loans and securities, have the same credit risk as an on-balance sheet direct loan. For some off-balance sheet instruments, the full face value, or notional amount, is not exposed to credit risk. This means that a dollar of off-balance sheet exposure may be equivalent to less than a dollar of on-balance sheet exposure. Table 2 in proposed § 932.4(e)(1), which

²⁰ See 65 FR 25676, 25688 (May 3, 2000).

includes the same categories as are used by the federal bank regulatory agencies and those proposed under the Framework, presents credit exposure conversion factors that are to be used to calculate the credit equivalent amount of an off-balance sheet instrument other than a derivative contract. The conversion factors are given in percentage form so that a conversion factor of 50 results in the face value of the off-balance sheet instrument being multiplied by 0.50 to calculate the credit equivalent amount.

Under the Basle Accord, a 100 percent conversion factor is assigned to an off-balance sheet instrument where the instrument is a direct credit substitute and the credit risk is equivalent to that of an on-balance sheet exposure to the same counterparty. A 50-percent conversion factor is assigned to an off-balance sheet instrument where there is a significant credit risk but mitigating circumstances exist which suggest less than full credit risk. A 20-percent conversion factor is assigned to an off-balance sheet instrument where there is a small credit risk, but it is not one that can be ignored. The proposed rule would assign a credit conversion factor of zero percent for other commitments that are unconditionally cancelable by the Bank without prior notice, or that effectively provide for automatic cancellation, due to deterioration in a borrower's creditworthiness. The proposed rule also would allow the Banks to use Finance Board approved internal models to calculate credit conversion factors instead of those specified in Table 2.

Under the proposed FMMA, a standby letter of credit (SLOC) would have been assigned a 100 percent conversion. Because a SLOC issued by a Bank is rarely drawn down, and if drawn down it converts to an advance, the Finance Board believes that it would be more appropriate to assign a Bank SLOC a 50-percent conversion factor, and has done so in the proposed rule. The Finance Board intends to undertake further research on the magnitude and appropriateness of the credit conversion factors set forth in proposed Table 2 and may make revisions in the final rule based on this research. The Finance Board requests comment on the credit conversion factors generally, and what issues might be appropriate to address as part of the anticipated research on this issue.

Credit equivalent amounts for derivative contracts. The proposed rule provides that for market driven instruments such as over-the-counter derivative contracts, *i.e.*, swaps, forwards, and options, subject to

counterparty default, the credit risk percentage requirement will be based on both current and potential future credit exposures (PFEs). The credit equivalent amount for a derivative contract is equal to the sum of the current credit exposure (sometimes referred to as the replacement cost) of the contract and the PFE (sometimes referred to as the potential future replacement cost) of the contract.

The proposed rule provides that the current credit exposure is equal to the maximum of the mark-to-market value of the contract, if that value is positive. A current credit exposure of zero is applied for contracts with a zero or negative mark-to-market value because such contracts do not create any current credit exposure for a Bank.

The proposed rule provides that the PFE of a contract shall be determined by using an internal market risk model approved by the Finance Board or, in the case of Banks that lack appropriate internal models to calculate PFE, using the Basle Accord's standardized approach set forth in Table 3 of the proposed rule.²¹ Under this approach, the PFE of a contract, including a contract with a negative mark-to-market value, is estimated by multiplying the notional amount of the contract by a credit conversion factor for the underlying market risk, as specified in proposed Table 3 of proposed § 932.4(f)(3)(i). The credit conversion factors are given in percentage terms such that a conversion factor of 7 would require the notional amount of a derivative contract to be multiplied by 0.07 to calculate the PFE for the contract.

Under the proposed rule, forwards, swaps, purchased options and similar derivative contracts that are not included in the Interest Rate, Foreign Exchange and Gold, Equity, or Precious Metals except Gold categories must be treated as Other Commodities for purposes of applying proposed Table 3. If a Bank determines to use proposed Table 3 for credit derivative contracts, the credit conversion factors applicable to Interest Rate Contracts under proposed Table 3 would apply.²²

²¹ See BCBS, *Basle Capital Accord: Treatment of Potential Credit Exposure for Off-Balance Sheet Items* (Apr. 1995). The BCBS ran Monte Carlo simulations on numerous contracts before determining the conversion factors included in Table 3.

²² The BCBS has yet to determine conversion factors for credit derivatives. Given that fluctuations in investment grade credit spreads are generally of a smaller magnitude than shifts in the level of interest rates, it appears that the potential future changes in the market value of credit-linked contracts should not generally exceed potential shifts in the market value of interest rate linked

Within each category of market risks, a Bank would not be allowed to arbitrage between capital requirements based on proposed Table 3 and internal models.²³ If a Bank were to use an internal model for a particular type of derivative contract, the Bank would be required to use the same model for all other similar types of contracts. The Bank, however, could use an internal model for one type of derivative contract and proposed Table 3 for another type of derivative contract. Adjustments to the credit conversion factors provided in Table 3 are specified in the proposed rule for contracts with multiple payment dates or that automatically reset to zero following a payment.

The proposed rule does not include any specific means to account for portfolio diversification effects. Consequently, the proposal would require the same regulatory capital charge for two portfolios that are of the same credit quality, even where the credit risk of one is significantly more concentrated than that of the other. As noted by the BCBS, however, this limitation may be effectively addressed in a portfolio-based internal credit risk model framework. Portfolio credit risk modeling is a long-term project for the BCBS; ultimately, it is anticipated that sophisticated banking institutions would employ a comprehensive portfolio risk modeling approach under which regulatory capital requirements would be based entirely on internal models. Similarly, the Finance Board will encourage the Banks to develop internal credit risk models. Building such an internal model should not be a formidable task for the Banks, given that their portfolios largely consist of credit exposures that may be rated and almost all their counterparties are financial institutions. The remaining unrated exposures are insignificant and may be dealt with outside a credit risk model. The Finance Board requests comment on whether the rule should take into account the diversification of a Bank's portfolio, and if so, how that should be done.

The proposed rule sets forth specific requirements for calculation of credit equivalent amounts for multiple derivative contracts subject to a

contracts. The Finance Board plans to examine any credit derivative contracts that the Banks may enter into and require larger conversion factors for credit derivatives, if necessary.

²³ A Bank that uses an internal model for simple interest rate contracts may utilize Table 3 for interest rate contracts with embedded options, stand-alone interest rate options or other complex/structured contracts. The reverse would not be allowed as a Bank that is capable of internally calculating PFE for complex/structured contracts must use such internal model for simple contracts.

qualifying bilateral netting contract, as defined in the proposed rule. The provisions in the proposal are consistent with the requirements set forth in the risk-based capital guidelines of the federal bank regulatory agencies.

Zero credit risk charge for assets and items. The proposed rule would allow on-balance sheet assets that are hedged with credit derivatives to be assigned a zero credit risk capital charge under three specified scenarios. Even if the credit risk capital requirement for the on-balance sheet asset were decreased through the use of a credit derivative, the applicable credit risk capital required for the derivative contract still would be applied.

Within an internal credit risk model in which credit risks are marked-to-market, recognition of offsets, or credit hedges, whether perfect or imperfect, can be readily accommodated. Large commercial banks have accomplished this as part of their credit risk and value at risk models for trading portfolios. Under the proposed rule, only some of the offsets would be recognized. If the offset is perfect, *i.e.*, the two positions are of identical remaining maturity and relate to exactly the same instrument, it is straightforward to reduce the credit risk capital charge for the on-balance sheet asset to zero. For example, if a Bank purchases a triple-B rated corporate bond with a maturity of five years and at the same time enters into a five-year credit default option contract based on the same bond, the credit risk capital charge for the underlying asset will be zero. The net credit risk capital charge for the pair will equal the credit risk capital charge for the credit exposure on the derivative contract.

If the on-balance sheet asset and the asset referenced in a credit derivative are identical, but the remaining maturities for the asset and the credit derivative are different, the capital relief in the proposed rule would depend on a maturity comparison between the two. For example, if the same triple-B rated five-year corporate bond was hedged with a credit derivative referenced to the same five-year corporate bond with a remaining maturity of two years or longer, there would be no credit risk associated with the underlying asset given the Finance Board's proposed default horizon of two years. Therefore, such a hedge would be fully recognized and the credit risk capital charge on the underlying asset would be zero. If the credit derivative maturity were less than two years, however, no capital relief would be granted because the credit derivative would not off-set the exposure associated with the asset for the complete term of the proposed

default horizon. In all cases, there will be a credit risk capital charge for the credit exposure on the derivative contract.

If the remaining maturities of the on-balance sheet asset and a credit derivative are the same, but the on-balance sheet asset is different from the asset referenced in the credit derivative, capital relief for the on-balance asset may or may not be granted. It is proposed that the credit risk capital charge for the on-balance sheet asset be reduced to zero only if the asset referenced in the credit derivative and the on-balance sheet asset have been issued by the same obligor, the asset referenced in the credit derivative ranks *pari passu* or more junior to the on-balance sheet asset, and cross-default clauses are in effect.

Where the on-balance sheet asset and the asset referenced in the credit derivative have been issued by different obligors, the proposed rule does not provide any capital relief for the underlying asset. For example, a Bank may invest in a triple-B rated bond issued by corporate entity X, but hedge the credit risk with a derivative based on triple-B rated bond issued by corporate entity Y, and where X and Y belong to the same industry. The Finance Board recognizes that such a hedge may provide significant credit protection to the Bank as there may be a high degree of default correlation between X and Y, and that capital relief for such hedges can be accommodated under an internal portfolio credit risk model. Thus, the Finance Board requests comments on whether to allow affected Banks to petition the Finance Board for capital relief on a case-by-case basis, provided the petition is accompanied by adequate data and analysis. The Finance Board also more generally requests comment on how it should account for credit derivatives in calculating credit risk capital charges.

The proposed rule also would allow foreign exchange rate contracts with an original maturity of 14 calendar days or less to be assigned a zero credit risk capital charge. Gold contracts would not be considered exchange rate contracts. Derivative contracts that are traded on regulated exchanges that require daily collection of variation margin for the contract also would be assigned a zero credit risk capital charge.

The credit risk capital charge calculations required by the proposed rule, unless otherwise directed by the Finance Board, must be performed based on a Bank's on-balance sheet assets and off-balance sheet items as of the close of business on the last business day of the month for which the

credit risk capital requirement is being calculated. Where applicable, calculations of credit risk capital charges must use the most current NRSRO credit risk ratings available as of the last business day of the month for which the credit risk capital requirement is being calculated.

Market Risk Capital Requirement. The GLB Act requires each Bank to maintain sufficient permanent capital, as determined in accordance with Finance Board regulations, to cover the market risk to which the Bank is subject. 12 U.S.C. 1426(a)(3)(A)(ii), *as amended*. It further specifies that each Bank's market risk be determined:

based on a stress test established by the Finance Board that rigorously tests for changes in market variables, including changes in interest rates, rate volatility, and changes in the shape of the yield curve.

Id. Beyond requiring that the stress test include the effects of changes in the interest rates, rate volatility and changes in the shape of the yield curve, neither the elements of market risk nor specific elements of the stress test are further defined in the statute, leaving the Finance Board with a degree of discretion to determine the terms and elements of the market risk stress test.

The GLB Act also directs the Finance Board, in developing the market risk stress test, to "take due consideration" of any risk-based capital test established by OFHEO for Fannie Mae and Freddie Mac, with such modifications as are appropriate to reflect differences in operations between the Banks and Fannie Mae and Freddie Mac. 12 U.S.C. 1426(a)(3)(B), *as amended*. This provision requires the Finance Board to take "due consideration" of the OFHEO capital rule only as it may relate to market risk. It does not require consideration of other aspects of the OFHEO rule, such as those relating to credit risk, nor does it mandate deference to OFHEO in any respect. The Finance Board has included the proposed OFHEO market risk test among the factors it has considered in developing the proposed market risk provisions of its capital rules. The Finance Board has modeled a hypothetical \$100 billion asset Bank with a portfolio composition similar to the portfolio composition of Freddie Mac and Fannie Mae. The results of this simulation show that the Finance Board's risk-based capital requirement is consistent with what OFHEO has proposed to require for Freddie Mac and Fannie Mae. Given this consideration, the Finance Board believes that it has complied with its legal obligations under the GLB Act. Further, although

OFHEO has not yet adopted a risk-based capital test, the Finance Board intends to consider the substance of the final rule once it is adopted by OFHEO.

Market risk may be defined as the risk that the market value, or estimated fair value if market value is not available, of a Bank's portfolio will decline as a result of changes in interest rates, foreign exchange rates, equity prices and commodity prices. The Banks engage in activities that carry complex on-and off-balance sheet market risks. For example, outstanding consolidated obligations (COs), for which the Banks are jointly and severally liable, include bonds having embedded options, callable and index amortizing bonds, bonds denominated in foreign currencies, and bonds linked to equity prices. To hedge the market risk on such instruments, the Banks typically enter into off-balance sheet derivative contracts that convert the bonds to simple fixed-rate or floating rate bonds or convert the exposure to U.S. dollars. The Banks also make advances on a simple fixed-or floating-rate basis, as well as callable, putable/convertible and amortizing advances. The Banks also have invested in agency bonds with callable and structured features, mortgage and mortgage-backed instruments with embedded options, and collateralized mortgage obligations.

Given that the Banks undertake transactions that carry market risks similar to the risks incurred by large banks or securities dealers, the Finance Board believes that the capital regime needed to address market risks should be similar to the market risk capital requirements established or recommended by the BCBS and other financial institution regulatory agencies, but broader in scope. The Finance Board further believes that the general approach to market risk developed by the BCBS, as modified in this proposed rule, is consistent with the statutory requirements of the GLB Act.

As previously discussed, the BCBS has led the drive to institute a risk-based capital system for general market risk. Following the BCBS's lead, the federal bank regulatory agencies (Office of the Comptroller of the Currency (OCC), Federal Reserve Board (FRB), and Federal Deposit Insurance Corporation (FDIC)) issued a joint final rule in September 1996 to incorporate a measure for market risk, effective as of January 1, 1998 (Joint Rule). 61 FR 47358 (Sept. 6, 1996). Institutions whose trading activity (defined in the Joint Rule as total assets plus total liabilities in the trading portfolio) equals 10 percent or more of their total assets, or whose trading activity equals \$1

billion or more, must use an internal model (with standardized parameters as set in the Joint Rule) to calculate the capital they must hold to support their exposure to general market risk. Positions covered by the rule include: (i) All positions in an institution's trading account; and (ii) foreign exchange and commodity positions, whether or not in the trading account.

Overall, the Joint Rule implements market risk-based capital requirements that are based on actual risks undertaken by large banks. This is the only market risk capital framework that has been both agreed to internationally and implemented in a number of countries. Under the Joint Rule, large banks in the United States generally have adopted a simulation-based approach that is capable of capturing market risks from holding a wide range of simple, exotic and structured instruments, with or without options, including mortgages or other similar types of instruments.

Financial institutions regulated by the Office of Thrift Supervision (OTS) and by the Farm Credit Administration (FCA) currently are subject to credit risk capital requirements that contain no market risk capital components (consistent with the small bank regulatory capital framework). *See* 12 CFR 567.5 (OTS), 615.5205, 615.5210 (FCA). OFHEO, however, has published a Notice of Proposed Rulemaking including its regulatory model for calculating risk-based capital for Fannie Mae and Freddie Mac, which model does account for both interest rate risk and credit risk. *See* 64 FR 18083 (Apr. 3, 1999). The OFHEO interest rate risk based capital rule is mandated by the 1992 Housing Enterprises Act, which requires that capital requirements account for market risks. Under the proposed OFHEO test, the market risk capital requirement would be determined by a stress test, which examines the effects of two specified interest rate shocks. *See* 12 U.S.C. 4611(a)(2). The 1992 Housing Enterprises Act establishes parameters that OFHEO must meet in developing the model used to implement its stress test such that many aspects of OFHEO's stress test are dictated by legislation. This legislative approach is in contrast to the greater flexibility afforded the Finance Board in developing its stress test under the GLB Act. While the 1992 Housing Enterprises Act reflected the state of the art in risk measurement at the time it was drafted, the Finance Board's proposed regulation seeks to incorporate improvements in risk measurement that have been made since then. Furthermore, the statutory

constraints imposed on OFHEO have rendered it difficult for OFHEO to develop and implement its capital requirements in a timely manner. The Finance Board believes that its proposed approach would reach the same goal as OFHEO's proposal—that of providing sound capital requirements based on the economic risks undertaken by the regulated entities—albeit with inevitable differences in the underlying methodology. Nonetheless, the Finance Board also notes that its proposed market risk rule would provide Banks with the opportunity to develop a cash flow model, similar to that proposed by OFHEO, as long as the cash flow model is consistent with the requirements of the GLB Act and the Finance Board's proposed requirements governing internal market risk models, and is approved by the Finance Board.

Currently, the FMP limits the Banks' interest rate risk based on a methodology that uses interest rate shocks similar to those proposed but never adopted by the four federal bank regulatory agencies (the OCC, the FRB, the FDIC, and the OTS). Specifically, the FMP requires the Banks to maintain the duration of their equity to within ± 5 years and to maintain the duration of their equity to ± 7 years under an assumed change in interest rates of ± 200 basis points. *See* FMP Section VII.

In the view of the Finance Board, the methodology underlying the FMP is not sufficiently flexible to capture the Banks' market risks as they currently exist, or as they are likely to evolve given the recent proposal to expand their investment authority. *See* 65 FR 25676 (May 3, 2000). Additionally, the risk management approach of the FMP is not consistent with a risk-based capital structure, nor would it allow the Finance Board to establish a market risk capital requirement based on a stress test that "rigorously tests for changes in market variables" and captures the risks to which a Bank is subject, as required by the GLB Act. Accordingly, the proposed rule sets forth an approach to measuring market risk that is based on the value at risk (VAR) framework adopted by the BCBS and other financial institution regulators. This approach can be implemented with commercially available models, is practical, and is sufficiently rigorous to comply with the requirements of the GLB Act. In particular, the proposed rule would require each Bank's internal market risk model to capture the effects of various shifts in the interest rate yield curve beyond parallel shocks, and to account for other financial and market shocks that could be experienced by the Banks given historic experience.

Components of the market risk capital requirement. The proposed market risk capital requirement is the sum of two separate components. One component is the amount by which the current market value of a Bank's total capital is less than 95 percent of the book value of the Bank's total capital. The current market value of a Bank's total capital would be estimated by using the Bank's internal risk model to calculate the market value of the Bank's on-balance sheet assets, liabilities and off-balance sheet items. In essence, these values would be the base line values for the Bank's portfolio prior to running any stress tests required by the proposed rule. The "book value" of total capital would equal the Bank's total capital where all on-balance assets, liabilities and off-balance sheet items are accounted for under GAAP. The second component of the proposed market risk requirement would be the market value of the Bank's portfolio at risk, as estimated by the Bank's approved internal risk model. This value would equal the maximum loss in the market value of a Bank's portfolio under various stress scenarios, where the Bank's portfolio would be comprised of all its on-balance sheet assets and liabilities, and all off-balance sheet items.

The 95 percent test. The Finance Board believes that significant impairment in a Bank's market value of capital, to the extent that it is not reflected in the book value of capital, must be taken into account in developing an adequate market risk capital requirement. To address this issue, the Finance Board proposes to increase the market risk capital requirement by the amount, if any, that a Bank's market value of total capital is less than 95 percent of its book value of its total capital. Thus, given the proposed test, if the current value of a Bank's total capital were significantly diminished by adverse market changes, a Bank's ability to take on risk would be restrained even if the impact of such adverse market events were not reflected in the book value of a Bank's total capital.

Generally, the proposed rule requires a Bank to measure and report its capital adequacy based upon the book value of total or permanent capital, calculated in accordance with GAAP. Because the Banks have large portfolios of long-term on- and off-balance sheet positions that are held-to-maturity, however, a Bank's financial strength, expressed by its market value, can decline significantly without that decline being reflected in

the Bank's book value of capital.²⁴ This is because under GAAP, held-to-maturity positions would generally be valued at historic cost. Without the proposed 95 percent market value test, a Bank could incur a significant loss in financial strength due to adverse market changes, but not alter its market risk profile in response to that loss. The Finance Board is proposing this 95 percent test as a safeguard measure and believes that it will have little effect on Bank operations because most Banks have a market value of capital above 95 percent of book value. The charge associated with the 95 percent test would only limit a Bank's risk taking activities if its market value of capital were to fall below the 95 percent benchmark, and the Bank had otherwise fully leveraged its permanent capital.

Measurement of market value at risk under a Bank's internal market risk model. The proposed rule requires each Bank to estimate the current market value of its portfolio and measure the market value of the portfolio at risk using an internal VAR model, subject to the parameters in the proposed rule. Each Bank's internal model must calculate the value of a Bank's portfolio at risk during periods of market stress, given the interest rate, foreign exchange rate, equity price, and commodity price risks undertaken by the Bank, including risks of related options positions.

The Finance Board notes that even where foreign exchange, equity or commodity price exposures are hedged, the market valuations may differ from valuations for hedging instruments because of different assumptions concerning the underlying discount curves, volatilities and correlations. Prices in the two markets may not be the same and may fail to move in perfect correlation over time. Therefore, some measure of market risk would generally remain. Under the proposed rule, however, a Bank is not required to determine the market value of its portfolio at risk from its exposure to interest rate, foreign exchange rate, equity price, and commodity price risk if those risks are not material. For example, such risks may be effectively eliminated through matching hedges such as "mirror swaps" arranged in conjunction with the issuance of consolidated obligations denominated in foreign currencies or linked to equity or commodity prices, which typically reduce a Bank's market risk exposure to foreign exchange, equity or commodity price risk to an immaterial amount.

²⁴ The held-to-maturity items in a Bank's portfolio would typically include 15 and 30 year fixed-rate mortgage loans and fixed-rate pass-through MBS.

The proposed rule would require the Banks to calculate the market value of their portfolios at risk associated with these risks except, as discussed below, in the narrow circumstances where such risks may be immaterial. The proposed rule would allow the value at risk measure to incorporate empirical correlations within and among foreign exchange rates, equity prices, and commodity prices, subject to a Finance Board determination that the model's system for measuring such correlations is sound. The Finance Board is requesting comment on whether the final rule should require the Banks to account for basis risk by incorporating the correlations across risk categories in the market risk model.

The Finance Board believes that it is appropriate to exempt a Bank's exposure to certain hedged risks from the market value at risk calculation. The Finance Board emphasizes that this proposed exception is a narrow one, and the Banks would be expected consistently to estimate a market value at risk measurement for instruments linked to foreign exchange rates, equity prices, and commodity prices unless the hedging of those risks in each instrument results in those risks being immaterial. Given the Banks' portfolios, however, the Finance Board does not expect that the Banks' overall exposure to interest rate risk could ever be considered immaterial.²⁵ If the proposed "immateriality" exception is adopted, the Finance Board intends to direct its staff to monitor the Banks' implementation of the exception to assure that it is applied strictly in accordance with its underlying purpose.

As proposed, the rule would allow each Bank to develop an internal market risk model that uses any generally accepted measurement technique, such as variance-covariance models, historical simulations, or Monte Carlo simulations, provided that the measurement technique covers the Bank's material risks. In this respect, the proposed rule specifically provides that the Bank's internal market risk model must measure the risks arising from the non-linear price characteristics of options and the sensitivity of the market value of options to changes in the volatility of the option's underlying rates or prices. Thus, for example, while

²⁵ Currently, the Banks are required by the FMP to hedge risk associated with foreign exchange rates, equity prices, and commodity prices with matching derivative contracts. As a result market risks associated with foreign exchange rates, equity prices, and commodity prices are currently small relative to interest rate risk. Therefore, the bulk of the proposed market risk capital requirement will reflect interest rate and related options risks.

a variance-covariance methodology may be sufficient for estimating the market value at risk associated with instruments that contain no optionality, it would be essential to use a simulation technique for instruments with options characteristics.

The proposed rule also provides that a Bank's internal market risk model must use interest rate and market price scenarios of the Bank's choosing for estimating the market value of the Bank's portfolio at risk, subject to certain minimum requirements. These requirements are that the internal risk model must incorporate: (i) Monthly estimates of the market value of the Bank's portfolio at risk so that the probability of a loss greater than that estimated shall be no more than one percent; and (ii) scenarios that reflect changes in interest rates, interest rate volatility and the shape of the yield curve equivalent to those that have been observed over 120-business day periods of market stress. The proposed rule specifies that for interest rates, the relevant historical observation period would start at the end of the month prior to the month for which the market risk capital requirement is being calculated and go back to the beginning of 1978. This time frame represents a modern period with a relatively liquid debt market that also includes periods of market stress. The rule would also allow the market value at risk measure to incorporate empirical correlations among interest rates, subject to a Finance Board determination that the model's system for measuring such correlations is sound. These required scenarios assure that the stress tests performed using the Bank's models will be rigorous and fulfill the statutory requirements of the GLB Act.

The proposed rule provides that if a Bank participates in COs denominated in a currency other than U.S. Dollars or linked to equity or commodity prices, the Bank's internal market risk model must be used to calculate the market value of its portfolio at risk due to these market risks such that the probability of a loss greater than that estimated must not exceed one percent and must include scenarios that reflect changes in rates and market prices that have been observed over 120-business day periods of market stress. For foreign exchange, equity and commodity prices, the relevant historic observation period can be chosen by the Banks, but such period must be acceptable to the Finance Board. The chosen time periods generally must reflect periods of stress, which given the risk exposures of a Bank, could have resulted in a strong negative impact on the Bank's financial

position. Although the Finance Board believes foreign exchange rates, equity prices, and commodity prices pose a relatively small amount of market risk to the Banks at this time, this requirement reflects the conservative approach adopted by the Finance Board with respect to the Banks' safety and soundness.

The proposed rule also makes clear that Banks are required to hedge risk arising from consolidated obligations that are denominated in foreign currencies or otherwise linked to foreign exchange, equity or commodity prices, and to enter into a replacement contract if there is a default by a counterparty on an existing hedging contract. Besides strengthening safety and soundness, the proposed requirement formalizes the long standing practice at the Banks under which the Banks do not assume unhedged foreign exchange, equity or commodity positions and is consistent with the requirement in proposed § 956.3(b). See 65 FR 25676, 25692 (May 3, 2000).

Independent validation of Bank internal market risk model. The proposed rule provides that each Bank annually shall conduct an independent validation of its internal market risk model within the Bank or obtain independent validation by an outside party qualified to make such determinations on an annual basis. The Finance Board would be able, however, to require such reviews to occur more frequently. In order for validations conducted within the Bank to be considered independent, the validation would have to be carried out by personnel not reporting to persons responsible for conducting or overseeing business transactions for the Bank. As contemplated by the Finance Board, the required validation could include periodic comparisons, such as on a quarterly basis or annual basis, of model-generated mark-to-market values with values obtained from dealers/markets or of model-generated market value at risk measurements obtained from an independent third-party source. An integral part of this process, however, is the necessity to validate key assumptions and associated parameters underlying the Bank's market risk models. For example, the Finance Board would expect a Bank to determine periodically the impact on its market value at risk measurements from shifts in key parameters such as correlations or regime shifts in volatility parameters. The results of such validations would be reviewed by the Bank's board of directors and provided to the Finance Board.

Under the proposed rule, each Bank must obtain approval from the Finance Board of its internal market risk model, including subsequent material adjustments to the model made by the Bank, prior to the model's initial use or to implementing the subsequent adjustments. A Bank would be required to make any adjustments to its model that may be directed by the Finance Board. In addition, the calculations required by the proposed rule, unless otherwise directed by the Finance Board, must be performed based on the Bank's portfolio as of the close of business on the last business day of the month for which the market risk capital requirement is being calculated.

Basis risk. Banks are exposed to basis risk, which is the risk that rates or prices of different instruments on the two sides of the balance sheet (after taking associated off-balance instruments into account) do not change in perfect correlation over time. The BCBS has emphasized the importance of basis risk as part of a comprehensive process for the management of interest rate risk.²⁶ While certain modeling techniques may capture the effects of basis risk on a Bank's portfolio, the proposed rule does not require a Bank's model to capture basis risk. At this time, the Finance Board is requesting comment on how best to treat basis risk in the final rule.

Operations Risk Capital Requirement. Operations risk is the risk of an unexpected loss to a Bank resulting from human error, fraud, unenforceability of legal contracts, or deficiencies in internal controls or information systems. There is currently no generally accepted methodology for measuring the magnitude of operations risk. Therefore, the proposed rule adopts the same statutory requirement imposed on Fannie Mae and Freddie Mac, 12 U.S.C. 4611(c)(2), but will allow the Banks the option of demonstrating to the Finance Board that a lower requirement should apply.

As proposed, § 932.6 provides that each Bank's operations risk capital requirement shall equal 30 percent of the sum of the Bank's credit risk capital requirement and market risk capital requirement. The proposed provision, however, allows a Bank to substitute an alternative methodology for calculating the operations risk capital requirement if such methodology is approved by the Finance Board. In addition, a Bank may obtain insurance to cover it for operations risk and, with Finance Board approval, proportionately reduce the

²⁶ See *Principles for the Management of Interest Rate Risk* (Jan. 1997).

operations risk capital requirement. Any insurance obtained must be from an insurer that has at least the second highest investment grade credit rating by an NSRSO. As proposed, however, the rule specifies that in no case may a Bank's operations risk requirement be reduced to less than 10 percent of the sum of the Bank's credit risk capital requirement and market risk capital requirement.

Reporting Requirements. Proposed § 932.7 provides that each Bank shall report to the Finance Board by the 15th day of each month its minimum total risk-based capital requirement, by component amounts (credit risk capital, market risk capital, and operations risk capital), and its actual total capital amount and permanent capital calculated as of the last day of the preceding month, or more frequently as may be required by the Finance Board.

L. Minimum Liquidity Requirements. Liquidity risk is the risk that a Bank would be unable to meet its obligations as they come due or to meet the credit needs of its members and associates in a timely and cost-efficient manner. See 65 FR 25267, 25274 (May 1, 2000), *to be codified* at 12 CFR 917.1. In general, the liquidity needs of the Banks may be classified as: (1) Operational liquidity; and (2) contingency liquidity. Operational liquidity addresses day-to-day or ongoing liquidity needs under normal circumstances, and may be either anticipated or unanticipated. Contingency liquidity addresses liquidity needs under abnormal or unusual circumstances in which a Bank's access to the capital markets is temporarily impeded. Under such unusual circumstances, a Bank may still need funds to meet all of its obligations that are due or to meet some of the credit needs of its members and eligible nonmember borrowers.

Currently, the Banks operate under two general liquidity requirements. Both are easily met by the Banks. Neither, however, is structured to meet the Banks' liquidity needs should their access to the capital markets be limited for any reason. The first requirement is statutory and requires the Banks to maintain an amount equal to total deposits invested in obligations of the United States, deposits in banks or trusts, or advances to members that mature in 5 years or less. 12 U.S.C. 1431(g). The second liquidity requirement is in the FMP. It requires each Bank to maintain a daily average liquidity level each month in an amount not less than 20 percent of the sum of the Bank's daily average demand and overnight deposits and other overnight borrowings during the month, plus 10

percent of the sum of the Bank's daily average term deposits, COs, and other borrowings that mature within one year. See FMP section III.C.

The proposed rule specifies a contingency liquidity requirement, but does not specify an operational liquidity requirement.²⁷ The Finance Board requests comment on whether the rule should address the issue of operational liquidity, and if so, how it should do so. The proposed rule provides that the Banks not only must meet the statutory liquidity requirements, 12 U.S.C. 1431(g), but also must hold contingency liquidity in an amount sufficient to enable the Bank to cover its liquidity risk, assuming a period of not less than five business days of inability to borrow in the capital markets. Contingency liquidity may be provided, for example, by Banks: (1) Selling liquid assets; (2) pledging government, agency and mortgage-backed securities as collateral for repurchase agreements; and (3) borrowing in the federal funds market. Consequently, contingency liquidity is defined in proposed § 930.1 as: (1) Marketable assets with a maturity of one year or less; (2) self-liquidating assets with a maturity of seven days or less; (3) assets that are generally accepted as collateral in the repurchase agreement market; and (4) irrevocable lines of credit from financial institutions rated not lower than the second highest credit rating by a NRSRO. The proposed rule specifically states that an asset that has been pledged under a repurchase agreement cannot be used to satisfy the contingency liquidity requirement, because such an asset will not be available to provide liquidity should a contingency arise.

The proposed five business day contingency liquidity requirement would help to ensure that the Banks maintain sufficient liquidity to meet their funding needs should their access to the capital markets be temporarily limited by occurrences such as: (1) A power outage at the Bank System's Office of Finance (OF); (2) a natural disaster; or (3) a real or perceived credit problem. This requirement was determined from calculations using daily data on CO redemptions during 1998. The Finance Board found that the 99th percentile of the five-business day CO redemption distribution resulted in liquidity requirements that ranged from

about 5 percent to 17 percent of each Bank's total assets.

Other regulators recognize the importance of adequate levels of liquidity but, for the most part, have not always imposed liquidity requirements with the degree of specificity contained in the proposed rule. Specifically, depository institution regulators have not implemented any numeric ratios or other quantitative requirements with respect to liquidity. For example, each institution regulated by the Farm Credit Administration is required to maintain a minimum liquidity reserve. 12 CFR 615.5134. This liquidity reserve requirement ensures that Farm Credit System banks have a pool of liquid investments to fund their operations for approximately 15 days should their access to the capital markets become impeded. The importance of liquidity is also reflected in the fact that it is one of the six components of the Uniform Financial Institutions Rating System (UFIRS) that was adopted by the Federal Financial Institutions Examination Council (FFIEC) on November 13, 1979 and revised as of January 1, 1997. The UFIRS has been used as an internal supervisory tool for evaluating the soundness of financial institutions and for identifying those institutions requiring special attention or concern. OFHEO has not published any regulation concerning liquidity requirements for Fannie Mae and Freddie Mac.

Liquidity problems may arise from concerns about the creditworthiness of the Banks or from events that may temporarily disrupt the Banks' access to the credit markets. Real or perceived concerns about creditworthiness of the Bank System could lead to a widening of the spreads to U.S. Treasury securities at which the Bank System COs are issued. Depending on the size of the increase in credit spreads, such an event could substantially impair the Banks' ability to carry out their mission. Two such episodes affecting other GSEs took place in the 1980s. In both cases, the interest rate spread narrowed back to normal levels only after the GSE in question received assistance from the federal government.²⁸ In the first instance, the spread to comparable U.S. Treasury securities for a Farm Credit System issue increased approximately 80 basis points within a 6 month period during 1985 as the Farm Credit System ran into financial difficulty and started posting losses. Fannie Mae underwent a

²⁷ Recently adopted 12 CFR § 917.3(b)(3)(iii) requires that each Bank's risk management policy indicate the Bank's sources of liquidity, including specific types of investments to be held for liquidity purposes, and the methodology to be used for determining the Bank's operational liquidity needs. See 65 FR 25267, 25275 (May 1, 2000).

²⁸ See Federal Reserve Bank of Richmond, *Instruments of the Money Market* 153 (1993).

similar episode in which its debt spread widened substantially.

The likelihood that such an event could take place with respect to the Banks is remote and, in any case, the proposed contingency requirement is not meant to address such an event. The five business day contingency liquidity requirement could, however, provide policy makers with some time to address the underlying problem. Further, should a crisis arise affecting liquidity at all financial institutions, assistance would be needed from the Federal Reserve System, the U.S. Treasury, or the Congress.

The proposed requirement is meant to address principally events that may temporarily disrupt a Bank's access to credit markets. It may be viewed as conservative when examined in the context of events which could impair the normal operations of the OF. The likelihood that there would be no access to the capital markets for as long as five business days is extremely remote, given OF contingency plans to be back in operation within the same business day following a disaster. The OF contingency plans include back-up power sources and two back-up facilities, plus procedures to back-up their databases at both their main location as well as the primary alternative site. A back-up data tape from OF's main location is sent and stored off-site on a daily basis.

Rating agencies also consider adequate liquidity an important component in a financial institution's rating. Liquid investments held by the Banks are stated by Moody's as one of the reasons behind the triple-A rating for the Banks.²⁹ Thus, the Finance Board believes that the proposed liquidity requirement is important to maintaining a sound credit rating for the Banks and assuring continued safe and sound operation of the Bank System and access to the capital markets.

M. Limits on Unsecured Extensions of Credit. The proposed rule also would establish maximum capital exposure limits for unsecured extensions of credit by a Bank to a single counterparty or to affiliated counterparties. As proposed, the rule also establishes reporting requirements for total unsecured credit exposures and total secured and unsecured credit exposures to single counterparties and affiliated counterparties that exceed certain thresholds.

Concentrations of unsecured credit by a Bank with a limited number of

counterparties or group of affiliated counterparties raise safety and soundness concerns. Unlike Bank advances, which must be secured, unsecured credit extensions are more likely to result in limited recoveries in the event of default. Thus, significant credit exposures to a few counterparties increase the probability that a Bank may experience a catastrophic loss in the event of default by one of the counterparties. In contrast, holding small credit exposures in a large number of counterparties reduces the probability of a catastrophic loss to a Bank.

Safety and soundness concerns also arise where a Bank's credit extensions are concentrated in a single counterparty whose debt, in turn, is concentrated in one or a few lenders. The fact that the counterparty's debt is concentrated may suggest that other lenders have declined to lend to the counterparty because of concerns about the counterparty's ability to repay a loan. The Bank's concentration of credit in such a counterparty may indicate that the Bank's extensions of credit are at risk.

In addition, where a Bank's extensions of credit to a single counterparty are in jeopardy of nonpayment, the Bank may be reluctant to take appropriate actions to reduce losses, such as declaring a default, or selling the loans, which could depress the value of the Bank's remaining loans to the counterparty. Further, a Bank may even be tempted to lend additional funds to the counterparty to keep the counterparty in business, in order to protect its existing significant credit exposure to the counterparty.

Affiliated counterparties generally share aspects of common ownership, control or management. Thus, if one member of a group of affiliates defaults, the likelihood is high that other members of the affiliated group also are under financial stress. A Bank's unsecured credit exposures to a group of affiliated counterparties thus should be aggregated in considering the Bank's unsecured credit exposure to any one counterparty in the affiliated group.

Concentrations of credit by multiple Banks in a few counterparties also may raise safety and soundness concerns at the Bank System level. Several Banks in recent years have had unsecured credit exposures to affiliated counterparties that exceeded 20 percent of each Bank's capital. These credit exposures were to counterparties ranked at the second highest investment grade. A few counterparties have spread their exposure among several Banks. Such credit concentrations may result in large aggregate credit exposures for the Bank

System, raising concerns regarding the liquidity of such debt in the event of adverse information regarding a counterparty.

The risk-based capital requirement in the proposed rule does not take into account the increase in credit risk associated with concentrations of credit exposures. Therefore, the Finance Board believes that it is necessary, for safety and soundness reasons, to impose separate limits on unsecured credit exposures of a Bank to single counterparties and to affiliated counterparties. This is consistent with the regulatory approaches of other financial institution regulators. *See, e.g.,* 12 U.S.C. 84; 12 CFR Part 32 (the lending limit for a national bank is generally 15 percent of its capital and surplus).

Currently, the FMP limits Bank unsecured credit exposures to a single counterparty based on the credit rating of the counterparty. *See* FMP section VI. Under the FMP, the lower the credit rating of the counterparty, the lower the maximum permissible credit exposure limit, because the probability of default increases as the counterparty's rating decreases. The FMP does not impose limits on unsecured exposure to affiliated counterparties, but does require the Banks to monitor such lending and impose limits if necessary. As of December 31, 1998, five Banks had adopted explicit unsecured credit exposure limits to affiliated counterparties. Consistent with the general approach of the FMP, § 932.9(a)(1) of the proposed rule provides that unsecured credit exposure by a Bank to a single counterparty that arises from authorized Bank investments or hedging transactions shall be limited to the maximum capital exposure percent limit applicable to such counterparty, as set forth in Table 4 of the proposed rule, multiplied by the lesser of: (i) The Bank's total capital; or (ii) the counterparty's Tier 1 capital, or total capital if information on Tier 1 capital is not available.³⁰ The maximum capital exposure percent limits applicable to specific counterparties in Table 4 range from a high of 15 percent for counterparties with the highest investment grade rating, to a low of one percent for counterparties with a below

³⁰ For the purposes of the proposed requirements related to limits on and reporting of credit concentrations, the term "total capital" when used in reference to capital held by a Bank's counterparty (or an affiliate of such counterparty) would have the same meaning as in regulations issued by the counterparty's (or the affiliate's) principal regulator and not as defined in proposed § 930.1. The proposed rule makes clear in the affected sections when the meaning of "total capital" differs from that in proposed § 930.1.

²⁹ Moody's Investor Service, Global Credit Research, *Moody's Credit Opinions—Financial Institutions*, (June 1999).

investment grade rating. These limits are consistent with those established internally by large lenders. Section 932.9(a)(3)(iii) of the proposed rule provides that where a counterparty has received different credit ratings for its transactions with short-term and long-term maturities: (i) the higher credit rating shall apply for purposes of determining the allowable maximum capital exposure limit under Table 4 applicable to the total amount of unsecured credit extended by the Bank to such counterparty; and (ii) the lower credit rating shall apply for purposes of determining the allowable maximum capital exposure limit under Table 4 applicable to the amount of unsecured credit extended by the Bank to such counterparty for the transactions with maturities governed by that rating. For example, if a counterparty has received a lower rating on its long-term debt than its short-term debt, the Bank will be more severely limited in the amount of the counterparty's long-term debt that it can hold. If the Bank wishes to hold any more of this counterparty's debt, it will be limited to holding the higher rated short term debt, up to a total amount of credit exposure governed by proposed § 932.9(a)(3)(iii)(A).

The proposed rule also provides that if a counterparty is placed on a credit watch for a potential downgrade by an NRSRO, the Bank would determine the maximum capital exposure under Table 4 by first assuming that an NRSRO had already downgraded the rating to the next lower grade and then choosing the exposure limit that corresponds to that next lower rating. Section 932.9(b) of the proposed rule provides that the total amount of unsecured extensions of credit by a Bank to all affiliated counterparties may not exceed: (i) The maximum capital exposure limit applicable under Table 4 based on the highest credit rating of the affiliated counterparties; (ii) multiplied by the lesser of: (A) The Bank's total capital; or (B) the combined Tier 1 capital, or total capital if information on Tier 1 capital is not available, of all of the affiliated counterparties.

Reporting requirement for total unsecured credit concentrations. Currently, there is no Finance Board requirement establishing a centralized mechanism for maintaining and measuring specific data on the aggregate unsecured credit concentration exposure at the Bank System level. As discussed above, Bank unsecured credit concentrations raise safety and soundness concerns at the Bank System level, as well as at the individual Bank level.

Accordingly, the proposed rule requires each Bank to report monthly to the Finance Board the amount of the Bank's total unsecured extensions of credit to any single counterparty or group of affiliated counterparties that exceeds 5 percent of: (i) The Bank's total capital; or (ii) the counterparty's Tier 1 capital (or total capital if information on Tier 1 capital is not available), or in the case of affiliated counterparties, the combined Tier 1 capital (or total capital if information on Tier 1 capital is not available) of all of the affiliated counterparties. The Finance Board will be considering limits on aggregate unsecured credit concentration exposures at the Bank System level for the final rule. The Finance Board specifically requests comments on whether such limits should be imposed and what the size and form of such limits should be.

Reporting requirement for total secured and unsecured credit concentrations. Bank concentrations of secured credit, primarily advances, to a single counterparty or group of affiliated counterparties also may present safety and soundness concerns for individual Banks and the Bank System. Other financial institution regulators impose loans-to-one-borrower limits for secured as well as unsecured extensions of credit, with exceptions for loans secured by high-quality collateral. *See, e.g.,* 12 U.S.C. 84; 12 CFR Part 32. There may be reasons to exclude concentrations of advances from such limits, given the extent of their overcollateralization, their statutory superlien protection and core mission activity status.

Accordingly, the proposed rule requires each Bank to report monthly to the Finance Board the amount of the Bank's total secured and unsecured credit exposures to any single counterparty or group of affiliated counterparties that exceeds 5 percent of the Bank's total assets. Because secured credit is supported by collateral, not capital, in the first instance, the Finance Board believes that exposures as a percent of assets rather than of capital is a more appropriate measure of the size of the exposure.

The Finance Board will be considering limits on total secured and unsecured credit concentration exposures applicable to the Banks or the Bank System for the final rule. The Finance Board specifically requests comments on whether such limits should be imposed and what the size and form of such limits should be.

N. Part 933—Capital Plans.

Approval of Plans. The GLB Act requires the board of directors of each Bank to submit to the Finance Board a

capital plan within 270 days after the date of publication of the final capital rule. Each capital plan must establish the details for the new capital structure, which must provide sufficient capital for the Bank to comply with its regulatory total capital and regulatory risk-based capital requirements. The proposed rule would allow the Finance Board to approve a reasonable extension of the 270-day period upon a demonstration of good cause as to why the Bank does not expect to meet the statutory deadline. The Finance Board would determine what constitutes "good cause" on a case-by-case basis. As required by the GLB Act, a Bank must receive approval from the Finance Board prior to implementing its capital plan, or any amendment to the plan. As part of that approval process, the Finance Board would reserve the right to determine the effective date for each capital plan.

If a Bank, for any reason, were to fail to submit a capital plan to the Finance Board within the 270-day period, including any Finance Board approved extension, the proposed rule would authorize the Finance Board to establish a capital plan for that Bank, and the Finance Board also would have the discretion to take any enforcement action against the Bank, its directors, or its executive officers authorized by Section 2B(a)(5) of the Bank Act, or to merge the Bank in accordance with Section 26 of the Bank Act into another Bank that has submitted an acceptable capital plan.

Contents of Plan. The GLB Act sets forth requirements regarding the contents of each Bank's capital plan. The proposed rule would follow the statutory requirements and require that each Bank's capital plan address, at a minimum, the classes of capital stock, capital stock issuance, membership investment or fee structure, transfer of capital stock, termination of membership, independent review of the capital plan, and implementation of the plan. In addressing the classes of stock, the Finance Board is proposing that the capital plan shall, at a minimum, describe each class or subclass of capital stock to be issued to the members; establish the terms, rights, and preferences for each class and subclass of capital stock to be issued; establish the voting rights and preferences; and provide the basis on which the stated Class A dividends are to be calculated and whether such dividends are to be cumulative. In general, the Finance Board believes the inclusion of each of these items in the Banks' capital plans is necessary for the Bank to transition

smoothly to the new capital structure mandated by the GLB Act.

The proposed rule also would require each Bank to include in its capital plan a description of the manner in which the Bank intends to solicit its members for voluntary purchases of its capital stock. By requiring that the Banks address the issue of solicitations of voluntary purchases in its capital plan, the Finance Board would have the opportunity to ensure that the methods used are fair and equitable. The proposed rule also would require each Bank's capital structure plan to specify "operating capital ratios," *i.e.*, an "operating total capital ratio" and an "operating risk-based capital ratio," each of which would be set at a higher percentage than the regulatory total capital and the regulatory risk-based capital requirements, respectively, as established by the Finance Board. Because it is necessary that each Bank manage its risk portfolio such that it complies with its regulatory capital requirements, the Finance Board believes each Bank must establish target ratios at which to operate that are sufficiently higher than the minimum regulatory capital requirements. Doing so would allow each Bank to manage its capital accounts in a manner that affords a capital "cushion" within which to conduct its operations while ensuring its compliance with the regulatory capital requirements.

The GLB Act requires that each Bank's capital plan specify the minimum investment required of the members. The proposed rule requires that each Bank's capital plan allow for the fulfillment of this requirement through either the purchase of Class A stock or the payment of an annual membership fee, as set forth in § 931.7. The Finance Board is proposing that a Bank's capital plan must allow a member to substitute the purchase of Class B stock for its membership investment of Class A stock. The capital plans also would be required to specify the methodology used by the Bank to determine the level of the membership investment or the annual membership fee. The Finance Board is proposing to allow the Banks to offer the option of a membership fee in order to provide additional flexibility to both the Banks and its members. By providing an option, the Banks would have more flexibility in controlling their capital accounts while meeting the needs of their members.

If, to fulfill its membership investment requirement, a member were to elect to invest in the capital stock of the Bank, the Finance Board is proposing that the member be provided

the option of investing in Class B stock, if authorized by the Bank, at a proportionately lesser amount than would be required if the member purchased Class A stock. The terms of Class A and Class B stock, as specified in the Bank's capital plan, will dictate an appropriate rate of substitution of Class B stock for Class A stock to fulfill the membership investment requirement. For example, one term imposed by the GLB Act is to weight Class B stock at 1.5 times of Class A stock for purposes of determining compliance with the five percent leverage requirement, which, taken alone, suggests that one share of Class B stock should substitute for more than one share of Class A stock. In proposing that this provision be included in the Banks' capital plans, the Finance Board is providing the Banks the opportunity to offer members different membership investment options.

Additionally, the proposed rule requires that each Bank's capital plans specify that the board of directors of the Bank review and adjust the membership investment periodically to ensure that the Bank complies with the regulatory capital requirements and, further, requires members to comply promptly with any adjusted membership investment.

The Finance Board is also proposing that a Bank's capital plan may specify a fee to be imposed on a member that cancels a notice of withdrawal or a notice of redemption. The decision to impose a fee structure would be at a Bank's discretion, but the methodology used to calculate such fees would need to be specified in the capital plan. The conditions under which a Bank may impose a fee also must be specified in its capital plan to ensure the fair and equitable imposition of fees among members. The Finance Board is proposing the option of establishing a fee in order to minimize the Bank's costs associated with canceling a notice of withdrawal or redemption.

As required in the GLB Act, the capital plan must establish the criteria for the issuance, redemption, retirement, or purchase of Bank stock by the Bank, and for the transfer of Bank stock between members of the Bank. The capital plan must also specify that the stock of the Bank may only be issued to or held by the members of the Bank, and that no entities other than the Bank may trade the stock of the Bank.

Under the proposed rule, as required in the GLB Act, the plan must address the manner in which the Bank will provide for the disposition of its capital stock that is held by institutions that terminate their membership, and the

manner in which the Bank will liquidate claims against its members, including claims resulting from prepayment of advances prior to their stated maturity. Also as required in the GLB Act, the plan must include a report from an independent certified public accountant regarding the extent to which the implementation of the plan would affect the redeemable stock issued by the Bank and a report from an NRSRO regarding the extent to which the implementation of the plan would affect the credit rating of the Bank. The plan must also demonstrate that the Bank has made a good faith determination that the Bank will be able to implement the plan as submitted and that the Bank will be in compliance with its regulatory total capital requirement and regulatory risk-based capital requirement.

Implementation of Plan. The Finance Board is proposing that each Bank's capital plan must specify the manner in which the members of the Bank may convert or exchange their existing Bank capital stock into either, or both, Class A and Class B capital stock. The plans should address how the conversion or exchange will take place and the likely outcome in terms of total Class A and Class B stock, as demonstrated by prior commitments of members, surveys, or other quantifiable means. The proposed rule also requires that the capital plan specify what will happen to existing Bank stock owned by a member that does not affirmatively elect to convert or exchange its existing Bank stock into either Class A or Class B stock or some combination of both.

As required by the GLB Act, each Bank's plan must include a transition provision that specifies the date on which the plan is to take effect, as well as the date, not to exceed three years from the effective date of the plan, on which the Bank must be in full compliance with its regulatory total capital requirement and regulatory risk-based capital requirement. The GLB Act further requires that the capital plan for each Bank may include a provision allowing any institution that was a member of the Bank on November 12, 1999, a period of up to three years from the effective date of the plan in which to comply with the membership investment requirements of the capital structure plan. Any institution that was approved for membership after November 12, 1999, will be required to comply with the membership investment requirements as soon as the Bank's capital structure plan becomes effective. The Finance Board also requests comment on whether it would be appropriate for the final rule to allow

institutions becoming members after November 12, 1999 to be provided with a similar transition period.

O. Part 925 Membership Amendments.

The proposed rule would revise several provisions of the Finance Board's membership regulations to reflect changes made by the GLB Act. The existing membership regulations include provisions regarding the amount of Bank stock an institution must purchase upon becoming a member. Because that issue would be addressed by the capital regulations and the capital plan for each Bank, the proposed rule would remove all stock purchase requirements from the membership regulations.

The proposed rule also would revise the existing provisions that pertain to the effect of a merger or other consolidation of a member into another member of the same Bank, a member of another Bank, or a nonmember. Generally speaking, the Bank membership of an institution terminates when its charter is cancelled in connection with its merger or consolidation into another institution. The proposed rule would retain that concept, but would consolidate the substance of the two sections that deal separately with the consolidation into another member and into a nonmember, respectively. The proposed rule also would remove from the membership regulation provisions that address the treatment of the member's Bank stock, dividends, and advances, each of which is to be covered by other provisions of the regulations. For example, § 950.19 of the advances regulations provides that upon an institution's termination of membership, the Bank shall determine an orderly schedule for the liquidation of any indebtedness owed by the member to the Bank, and may allow the debt to run until its maturity. The Finance Board believes that the general requirement in § 950.19 for an orderly liquidation of indebtedness is sufficient and is proposing to remove the existing references to such liquidation from the provisions dealing with consolidation of members as being duplicative.

The proposed rule also would implement the provisions of the GLB Act that address the withdrawal of a member from a Bank. Section 6(d) of the Bank Act, 12 U.S.C. 1426(d), *as amended*, provides that any member may withdraw from its Bank by providing written notice of its intent to do so, provided that on the date of the withdrawal there is in effect a certification from the Finance Board (RefCorp certification) that the withdrawal will not cause the Bank

System to fail to meet its obligations to contribute to the debt service for the obligations issued by RefCorp, in accordance with Section 21B(f)(2)(C) of the Bank Act, 12 U.S.C. 1441b(f)(2)(C), *as amended*. The GLB Act further provides that the receipt of the notice by the Bank commences the applicable stock redemption periods for the stock owned by that member, *i.e.*, the 6-month and 5-year notice periods for Class A and Class B stock, respectively, and allows the member to receive the par value of its stock in cash at the end of the redemption period. During the notice period, the member may continue to receive dividends on its stock.

The proposed rule would require a member to specify in its notice of withdrawal the date on which it intends its termination of membership to become effective, which date may be no later than the date on which the last of its stock redemption periods end. If the notice does not indicate a withdrawal date, the proposed rule would provide that the withdrawal is deemed to take effect on the date that the last applicable stock redemption period ends. Because the Bank Act no longer links the withdrawal from membership to the redemption of stock, the proposed rule would allow an institution to terminate its membership in a Bank as early as upon the Bank's receipt of the member's notice of withdrawal, if the member so chose. The effect of an immediate withdrawal would be that an institution would cease to be eligible to obtain any further services from the Bank and would be at risk that the Bank would call due any advances outstanding to the member. Such an institution, however, could not redeem its Bank stock until the end of the applicable stock redemption period, notwithstanding its earlier termination of membership, but would be entitled to continue to receive dividends on its Bank stock for as long as it were to hold the stock. The proposed rule would allow a member to cancel a notice of withdrawal at any time before its effective date, by providing a written cancellation notice to the Bank. The proposed rule also would permit a Bank to impose a fee, which would be specified in its capital plan, on any member that withdraws a notice of termination.

As amended by the GLB Act, the obligation of the Banks to contribute to the annual RefCorp debt service was changed from a fixed dollar amount of \$300 million per year to a percentage amount, 20 percent of the net earnings of each Bank. In effect, the RefCorp certification requires the Finance Board to certify that the withdrawal of a

member would not cause the Bank System to fail to pay 20 percent of its annual earnings (on an aggregate basis) to discharge its RefCorp obligation. Because the GLB Act has changed the method of calculating the RefCorp obligation to a percentage formula, there are no circumstances in which the Bank System could ever fail to meet its RefCorp obligations, *i.e.*, if the obligation is to pay 20 percent of annual net earnings, and the net earnings for a given year were to be zero or negative, the obligation for that year would be zero. Moreover, if one or more Banks were to have zero or negative earnings, and zero contributions, for a particular year, the RefCorp obligation, as amended by the GLB Act, would be extended for some additional number of years, based on a present value calculation. The Finance Board anticipates addressing this matter by issuing a certification that the withdrawal of any member will not cause the Bank System to fail to meet its RefCorp obligation. That certification would remain in effect, thus allowing members to withdraw from membership without requesting individual certifications, until rescinded by the Finance Board.

The GLB Act also provides grounds on which the Bank may terminate the membership of an institution, such as in the case of violating the Bank Act or Finance Board regulations, or insolvency. The proposed rule would provide that the stock redemption periods commence on the date that a Bank removes an institution from membership, during which time the institution could continue to receive dividends on its stock, but not any other membership benefits.

If a member withdraws from membership, the proposed rule would require the Bank to determine an orderly manner for liquidating all indebtedness owed to the Bank and for unwinding other transactions with the member, and would provide that the Bank's lien on any stock held by the member would remain in effect until the debts are paid, the effect of which could be to delay the redemption of stock until the member has satisfied its indebtedness to the Bank. Once an institution terminates its membership, it may not again become a member of any Bank for five years, as required by the GLB Act amendments.

P. Part 956—Hedging Provisions and Part 960 Off Balance Sheet Items.

Use of hedging Instruments—§ 956.6: Section 956.6 of the proposed rule addresses the Banks' use of hedging instruments, such as interest rate swaps, options, and futures contracts. Hedging

instruments are derivative contracts or securities used to offset the risks associated with asset-liability management by financial institutions and others, typically relating to interest rate risk. Proposed § 956.6(a) would require that derivatives instruments that do not qualify as hedging instruments pursuant to GAAP may be used only if a non-speculative use is documented by the Bank. Because GAAP prescribes extensive rules for hedging transactions that are required to be followed by most market participants, the Finance Board finds it prudent that the Banks also should be subject to these same requirements. The Banks, however, enter into derivatives contracts with members in order to assist those members with their asset-liability management. In addition, certain derivatives that currently are used by the Banks for hedging purposes, would not meet the requirements of FAS 133.³¹ The Finance Board recognizes that allowing the Banks to serve as intermediaries in derivatives contracts with members is a benefit that is valued by members, and that the Banks may benefit from the ability to use certain instruments to hedge actual balance sheet risks, even if the hedge transactions would not meet the requirements of FAS 133. Therefore, the Finance Board is proposing to permit such transactions, provided that the Bank documents that the use of the hedging instruments is non-speculative.

Section 956.6(b) of the proposed rule would govern the documentation that each Bank must have and maintain during the life of each hedge. Proposed § 956.6(c)(1) would require that transactions with a single counterparty be governed by a single master agreement when practicable. Proposed § 956.6(c)(2) would govern Bank agreements with counterparties for over-the-counter derivative contracts by requiring each agreement to include: (i) A requirement that market value determinations and subsequent adjustments of collateral be made on at least a monthly basis; (ii) a statement that failure of a counterparty to meet a collateral call will result in an early

termination event; (iii) a description of early termination pricing and methodology; and (iv) a requirement that the Bank's consent be obtained prior to the transfer of an agreement or contract by a counterparty.

All of these requirements currently exist in the FMP. The requirements are intended to ensure that the Banks monitor and manage their exposure to counterparties and that the agreements in place with counterparties provide adequate legal protection to the Banks. Because the risk-based capital requirements contained in the proposed rule do not directly alter or replace the need to address these issues, the Finance Board finds it appropriate to continue to impose these requirements on Bank hedging transactions.

Under the FMP, the Banks are limited to using a specific list of hedging instruments. The use of the listed hedging instruments by the Banks is permitted provided it is for the purpose of assisting the Bank in achieving its interest rate or basis risk management objectives. Like the FMP's Investment Guidelines, the Hedge Transaction Guidelines of the FMP contain detailed requirements that will no longer be necessary. The unsecured credit concentration limits set forth in proposed § 932.9 and the credit risk-based capital requirements set forth in proposed § 932.4 would eliminate the need for provisions addressing unsecured credit exposure and collateralization in the FMP. In addition, because the Finance Board is removing the restrictions on certain types of investments, it would be inconsistent to continue to restrict swaps with characteristics similar to those investments.

Q. Part 960—Off-Balance Sheet Items.

Proposed § 960.2(a) would authorize the Banks to enter into the following types of off-balance sheet transactions, subject to any requirements or restrictions set forth by the Finance Board: standby letters of credit; derivative contracts; forward asset purchases and sales; and commitments to make advances or other loans. This authorization essentially would codify the types of off-balance transactions that already have been authorized by the Finance Board. The Finance Board specifically requests comment on whether there are additional types of off-balance sheet transactions that it should consider authorizing.

Proposed § 960.2(b) prohibits the Banks from making speculative use of derivative contracts by requiring that derivative instruments that do not qualify as hedging instruments pursuant to GAAP may be used only if a non-

speculative use is documented by the Bank. As previously discussed in the general context of hedging instruments, speculating with derivatives contracts is inappropriate for the Banks, as it would do nothing to further their mission, while posing risks to their safety and soundness.

III. Paperwork Reduction Act

The Finance Board has submitted to the Office of Management and Budget (OMB) an analysis of the collection of information contained in §§ 931.7 through 931.9 and 933.2 of the proposed rule, described more fully in part II of the **SUPPLEMENTARY INFORMATION**. The Banks will use the information collection to determine whether Bank members satisfy the statutory and regulatory capital stock requirements. The Banks will use the information collection to implement its new capital structure and limit member ownership of Bank stock. See 12 U.S.C. 1426; 12 CFR parts 931 and 933. Responses are mandatory and are required to obtain or retain a benefit. See 12 U.S.C. 1426.

Likely respondents and/or record keepers will be Banks and Bank members. Potential respondents are not required to respond to the collection of information unless the regulation collecting the information displays a currently valid control number assigned by OMB. See 44 U.S.C. 3512(a).

The estimated annual reporting and recordkeeping hour burden is:

- a. Number of respondents—7,512
- b. Total annual responses—52,500
- Percentage of these responses collected electronically—0%
- c. Total annual hours requested—900,648

The estimated annual reporting and recordkeeping cost burden is:

- a. Total annualized capital/startup costs—0
- b. Total annual costs (O&M)—0
- c. Total annualized cost requested—\$46,717,758.48

The Finance Board will accept written comments concerning the accuracy of the burden estimates and suggestions for reducing the burden at the address listed above.

The Finance Board has submitted the collection of information to OMB for review. Comments regarding the proposed collection of information may be submitted in writing to the Office of Information and Regulatory Affairs of OMB, Attention: Desk Officer for Federal Housing Finance Board, Washington, D.C. 20503 by September 11, 2000.

³¹ Financial Accounting Standards No. 133, "Accounting for Derivative Instruments and Hedging Activities" (FAS 133), which provides a comprehensive framework of accounting and reporting standards for derivatives. It requires that all derivatives must be carried on the balance sheet at fair value. The only exception is for derivatives that qualify as hedges in accordance with FAS 133. Certain derivatives used by the Banks would not meet the requirements for hedge accounting. For example, macro or portfolio hedging would not be allowed hedge accounting treatment under FAS 133 because a specific identification of the hedged item, which must be a specific asset or liability or a pool of similar assets or liabilities is required.

IV. Regulatory Flexibility Act

The proposed rule would apply only to the Finance Board and to the Federal Home Loan Banks, which do not come within the meaning of small entities as defined in the Regulatory Flexibility Act (RFA). See 5 U.S.C. 601(6). Thus, in accordance with section 605(b) of the RFA, 5 U.S.C. 605(b), the Finance Board hereby certifies that the proposed rule, if promulgated as a final rule, will not have a significant impact on a substantial number of small entities.

List of Subjects

12 CFR Part 917

Community development, Credit, Federal home loan banks, Housing, Reporting and recordkeeping requirements.

12 CFR Part 925

Credit, Federal home loan banks, Reporting and recordkeeping requirements.

12 CFR Parts 930, 931, 932 and 933

Capital, Credit, Federal home loan banks, Investments, Reporting and recordkeeping requirements.

12 CFR Part 956

Community development, Credit, Federal home loan banks, Housing, Investments, Reporting and recordkeeping requirements.

12 CFR Part 960

Credit, Federal home loan banks, Investments.

Accordingly, the Federal Housing Finance Board proposes to amend title 12, chapter IX of the Code of Federal Regulations, as follows:

PART 917—POWERS AND RESPONSIBILITIES OF BANK BOARDS OF DIRECTORS AND SENIOR MANAGEMENT

1. The authority citation for part 917 continues to read as follows:

Authority: 12 U.S.C. 1422a(a)(3), 1422b(a)(1), 1427, 1432(a), 1436(a), 1440.

§ 917.9 [Removed]

§ 917.10 [Redesignate as § 917.9]

2. In part 917, remove § 917.9 and redesignate § 917.10 as § 917.9.

PART 925—MEMBERS OF THE BANKS

3. The authority citation for part 925 continues to read as follows:

Authority: 12 U.S.C. 1422, 1422a, 1422b, 1423, 1424, 1426, 1430, 1442.

Part 925 [Remove Subpart D]

4. Remove subpart D from part 925.

§§ 925.24 and 925.28 [Removed]

5. Remove §§ 925.24 and 925.28.

§§ 925.25 through 925.27 [Redesignated as §§ 925.19 through 925.21]

6. Redesignate §§ 925.25 through 925.27 as §§ 925.19 through 925.21.

§§ 925.29 through 925.32 [Redesignated as §§ 925.22 through 925.25]

7. Redesignate §§ 925.29 through 925.32 as §§ 925.22 through 925.25.

Subparts E through J [Redesignate as subparts D through I]

8. Redesignate subparts E through J as subparts D through I.

9. Amend newly designated § 925.19 by revising the heading and paragraphs (a), (b) and (d), and by removing paragraph (e), to read as follows:

§ 925.19 Consolidations involving members.

(a) *Consolidation of members.* (1) Upon the consolidation of two or more institutions that are members of the same Bank into one institution operating under the charter of one of the consolidating institutions, the membership of the surviving institution shall continue and the membership of the disappearing institutions shall terminate on the cancellation of their charter. Upon the consolidation of two or more institutions each of which is a member of a different Bank, into one institution operating under the charter of one of the consolidating institutions, the membership of the surviving institution shall continue and the membership of each disappearing institution shall terminate upon cancellation of its charter, provided, however, that if more than 80 percent of the assets of the consolidated institution are derived from the assets of a disappearing institution, then the consolidated institution shall continue to be a member of the Bank of which the disappearing institution was a member prior to the consolidation and the membership of the other institutions shall terminate upon the effective date of the consolidation.

(2) Upon the consolidation of a member into an institution that is not a member of a Bank, where the consolidated institution operates under the charter of the nonmember institution, the membership of the disappearing institution shall terminate upon the cancellation of its charter.

(b) *Notification of decision to seek membership.* When a consolidated institution resulting from a consolidation described in paragraph (a)(2) of this section has its principal place of business in a state in the same Bank district as the disappearing

institution, the consolidated institution shall have 60 calendar days after the cancellation of the charter of the disappearing institution to notify the disappearing institution's Bank that it intends to apply for membership in such Bank.

* * * * *

(d) *Treatment of outstanding indebtedness.* (1) *Prior to membership approval.* If the membership of an institution has been terminated pursuant to paragraph (a)(2) of this section, the Bank need not require the institution (or its successor) to liquidate any outstanding indebtedness owed to the Bank, as otherwise may be required pursuant to § 950.19, during:

(i) The initial 60-day notification period;

(ii) The 60 calendar day period following receipt of a notification that the consolidated institution intends to apply for membership; and

(iii) The period of time during which the Bank processes the application for membership.

(2) *Failure to apply for or be approved for membership.* If the consolidated institution does not apply for membership within the required period of time, or if its application for membership is denied, then the liquidation of any outstanding indebtedness owed to the disappearing institution's Bank shall be carried out in accordance with § 950.19.

* * * * *

10. Revise newly designated § 925.20 to read as follows:

§ 925.20 Withdrawal from membership.

(a) *Notice of withdrawal.* Any institution may terminate its membership by providing to the Bank written notice of its intent to withdraw from membership. A member that has so notified its Bank shall be entitled to have continued access to the benefits of membership until the effective date of its withdrawal. A withdrawing member may cancel its notice of withdrawal at any time prior to its effective date by providing a written cancellation notice to the Bank. A Bank may impose a fee, to be specified in its capital plan, on a member that cancels its notice of withdrawal.

(b) *Termination of membership.* The notice of withdrawal shall indicate the date on which the membership is to terminate, which may be no later than the date on which the last of the applicable stock redemption periods ends. If the notice fails to specify an effective date for the withdrawal, the Bank shall deem the withdrawal to take effect on the date the last of the

applicable stock redemption periods ends.

(c) *Stock redemption periods.* The receipt by a Bank of a notice of withdrawal shall commence the applicable 6-month and 5-year stock redemption periods for all Bank stock held by that member, unless the member previously has provided a notice of stock redemption. In the case of an institution the membership of which has been terminated as a result of a merger or other consolidation into a nonmember or into a member of another Bank, the applicable stock redemption periods shall be deemed to commence on the date on which the member's charter is cancelled, unless the member previously has provided a notice of stock redemption.

(d) *Certification.* No institution may withdraw from membership unless, on the date that the membership is to terminate, there is in effect a certification from the Finance Board that the withdrawal of a member will not cause the Bank System to fail to satisfy its obligations under 12 U.S.C. 1441b(f)(2)(C) to contribute toward the interest payments owed on obligations issued by the Resolution Funding Corporation.

11. Revise newly designated § 925.21 to read as follows:

§ 925.21 Removal from membership.

(a) *Grounds for removal.* The board of directors of a Bank may terminate the membership of any institution that fails to comply with any requirement of the Bank Act, any regulation adopted by the Finance Board, or any requirement of the Bank's capital plan, or that becomes insolvent or otherwise subject to the appointment of a conservator, receiver, or other legal custodian under federal or state law.

(b) *Stock redemption.* The applicable 6-month and 5-year stock redemption periods shall commence on the date that the Bank removes an institution from membership, unless the institution previously has provided a notice of stock redemption to the Bank.

(c) *Membership rights.* An institution whose membership is terminated involuntarily under this section shall have no right to obtain any of the benefits of membership after the effective date of its removal.

12. Revise newly designated § 925.22 to read as follows:

§ 925.22 Liquidation of indebtedness.

(a) *In general.* If an institution withdraws from membership or its membership is otherwise terminated, the Bank shall determine an orderly manner for liquidating all indebtedness

owed by that member to the Bank, as well as all other items, including letters of credit, derivatives, or deposits. After all such obligations relating to the member have been extinguished, the Bank shall return to the member all collateral pledged by the member to the Bank to secure its obligations to the Bank.

(b) *Lien on Bank stock.* If a withdrawing member is indebted or otherwise obligated to a Bank, the Bank shall not redeem any Bank stock held by the member until after the indebtedness and other obligations to the Bank have been extinguished.

13. Revise newly designated § 925.23 to read as follows:

§ 925.23 Readmission to membership.

(a) *In general.* An institution that has withdrawn from membership, or otherwise has terminated its membership, may not be readmitted to membership in any Bank for a period of 5 years from the date on which its membership terminated.

(b) *Exceptions.* An institution that transfers membership between two Banks without interruption shall not be deemed to have withdrawn from Bank membership. Any institution that withdrew from Bank membership prior to December 31, 1997, and for which the 5-year period has not expired, may apply for membership in a Bank at any time, subject to the approval of the Finance Board and the requirements of 12 CFR part 925.

14. In subchapter E, add new parts 930, 931, 932 and 933 to read as follows:

PART 930—DEFINITIONS APPLYING TO RISK MANAGEMENT AND CAPITAL REGULATIONS

Sec.

930.1 Definitions.

Authority: 12 U.S.C. 1422a(a)(3), 1422b(a), 1426, 1440, 1443, 1446.

§ 930.1 Definitions.

As used in this subchapter:

Affiliated counterparty means a counterparty that is an affiliate of another counterparty, as the term "affiliate" is defined in 12 U.S.C. 371c(b).

Capital plan means the approved capital structure plan that each Bank is required to develop and submit to the Finance Board for approval pursuant to 12 CFR 933.1.

Class A stock means capital stock issued by a Bank, including subclasses, that has the characteristics specified by § 931.1(a) of this subchapter.

Class B stock means capital stock issued by a Bank, including subclasses,

that has the characteristics specified by § 931.1(b) of this subchapter.

Contingency liquidity has the meaning set forth in § 917.1 of this chapter.

Credit derivative contract means a derivative contract that transfers credit risk.

Credit risk has the meaning set forth in § 917.1 of this chapter.

Derivative contract means generally a financial contract the value of which is derived from the values of one or more underlying assets, reference rates, or indices of asset values, or credit-related events. Derivative contracts include interest rate, foreign exchange rate, equity, precious metals, commodity, and credit contracts, and any other instruments that pose similar risks.

Exchange rate contracts include cross-currency interest-rate swaps, forward foreign exchange rate contracts, currency options purchased, and any similar instruments that give rise to similar risks.

Financial Management Policy means the Financial Management Policy For The Federal Home Loan Bank System approved by the Finance Board pursuant to Finance Board Resolution No. 96-45 (July 3, 1996), as amended by Finance Board Resolution No. 96-90 (Dec. 6, 1996), Finance Board Resolution No. 97-05 (Jan. 14, 1997), and Finance Board Res. No. 97-86 (Dec. 17, 1997).

GAAP means generally accepted accounting principles.

General allowance for losses means an allowance established by a Bank in accordance with GAAP for losses, but which does not include any amounts held against specific assets of the Bank.

Government Sponsored Enterprise, or GSE, means a United States Government-sponsored agency originally established or chartered to serve public purposes specified by the United States Congress, but whose obligations are not obligations of the United States and are not guaranteed by the United States.

Interest rate contracts include: Single currency interest-rate swaps; basis swaps; forward rate agreements; interest-rate options; and any similar instrument that gives rise to similar risks, including when-issued securities.

Investment grade means:

(1) A credit quality rating in one of the four highest credit rating categories by an NRSRO and not below the fourth highest rating category by any NRSRO; or

(2) If there is no credit quality rating by an NRSRO, a determination by a Bank that the issuer, asset or instrument is the credit equivalent of investment grade using credit rating standards

available from an NRSRO or other similar standards.

Market risk has the meaning set forth in § 917.1 of this chapter.

Marketable means, with respect to an asset, that the asset can be sold with reasonable promptness at a price that corresponds reasonably to its fair value.

Market value at risk is calculated as the maximum loss in the market value of a portfolio under various stress scenarios.

NRSRO means a credit rating organization regarded as a Nationally Recognized Statistical Rating Organization by the Securities and Exchange Commission.

Operating risk-based capital ratio means the ratio of permanent capital to total assets at which the Bank intends to operate.

Operating total capital ratio means the ratio of total capital to total assets at which the Bank intends to operate.

Operations risk has the meaning set forth in § 917.1 of this chapter.

Permanent capital of a Bank means the amount paid-in for Class B stock plus its retained earnings.

Regulatory risk-based capital requirement means the amount of permanent capital that a Bank is required to maintain in accordance with § 932.3 of this chapter.

Regulatory total capital requirement means the amount of total capital that a Bank is required to maintain in accordance with § 932.2 of this chapter.

Repurchase agreement means an agreement between a seller and a buyer whereby the seller agrees to repurchase a security or similar securities at an agreed upon price, with or without a stated time for repurchase.

Retained earnings means the retained earnings, as determined in accordance with GAAP.

Total assets means the total assets of a Bank, as determined in accordance with GAAP.

Total capital of a Bank means the sum of permanent capital, the amounts paid-in for Class A stock, the amount of any general allowance for losses, and the amount of other instruments identified in a Bank's capital plan that the Finance Board has determined to be available to absorb losses incurred by such Bank.

Unrealized net losses on available-for-sale securities means the unrealized net losses on available-for-sale securities, as determined in accordance with GAAP.

Walkaway clause means a provision in a bilateral netting contract that permits a nondefaulting counterparty to make a lower payment than it would make otherwise under the bilateral netting contract, or no payment at all, to a defaulter or the estate of a defaulter,

even if the defaulter or the estate of the defaulter is a net creditor under the bilateral netting contract.

PART 931—FEDERAL HOME LOAN BANK CAPITAL STOCK

Sec.

- 931.1 Classes of capital stock.
- 931.2 Issuance of capital stock.
- 931.3 Voting rights.
- 931.4 Dividends.
- 931.5 Preferences on liquidation, merger, or consolidation.
- 931.6 Transfer of capital stock.
- 931.7 Membership investment in capital stock.
- 931.8 Activity-based stock purchase requirement.
- 931.9 Concentration limits.
- 931.10 Redemption and purchase of capital stock.
- 931.11 Capital impairment.

Authority: 12 U.S.C. 1422a(a)(3), 1422b(a), 1426, 1440, 1443, 1446.

§ 931.1 Classes of capital stock.

The authorized capital stock of a Bank shall consist of the following instruments:

- (a) Class A stock, which shall:
 - (1) Have a par value of \$100 per share;
 - (2) Be issued and redeemed only at its par value;
 - (3) Be redeemable in cash only on six-months written notice to the Bank; and
 - (4) Pay a stated dividend that has a priority over the payment of dividends on the Class B stock.
- (b) Class B stock, which:
 - (1) Shall have a par value that is to be determined by the Bank and is to be included in the capital plan;
 - (2) May be issued at its par value or at a price other than its par value, as determined by the Bank;
 - (3) Shall be redeemable in cash and at par value only on five-years written notice to the Bank;
 - (4) Shall be subordinated to the stated dividend payable on the Class A stock; and
 - (5) Shall confer an ownership interest in the retained earnings and paid-in surplus of the Bank upon acquisition of the stock by a member; and
- (c) Any one or more subclasses of Class A or Class B stock, each of which may have different rights, terms, conditions, or preferences, but each subclass also shall have all of the characteristics of its respective class, as specified in paragraph (a) or (b) of this section.

(c) Any one or more subclasses of Class A or Class B stock, each of which may have different rights, terms, conditions, or preferences, but each subclass also shall have all of the characteristics of its respective class, as specified in paragraph (a) or (b) of this section.

§ 931.2 Issuance of capital stock.

(a) *In general.* A Bank may issue any one or more classes or subclasses of capital stock authorized by § 931.1 and shall not issue any other class of capital stock. A Bank shall issue its stock only

to its members and only in book-entry form, and the Bank shall act as its own transfer agent. All issuances of capital stock shall be in accordance with the provisions of an approved capital plan.

(b) *Initial issuance.* In connection with the initial issuance of Class A or Class B stock (or any subclass of either), a Bank may issue such stock in exchange for its existing stock, through a conversion of its existing stock, or through any other fair and equitable method of distribution to the eligible purchasers, and may distribute its then-existing unrestricted retained earnings as shares of Class B capital stock.

(c) *Membership and activity-based issuance.* A Bank may issue capital stock as a requirement of membership only in accordance with § 931.7, and may issue capital stock as a requirement for conducting business with the Bank only in accordance with § 931.8.

(d) *Limitation on issuance.* A Bank shall not issue stock to a member or group of affiliated members if the issuance would result in such member or group of affiliated members owning more than 40 percent of any class (including its subclasses) of the outstanding capital stock of the Bank, or such lesser percentage established in its capital plan pursuant to § 931.9.

§ 931.3 Voting rights.

(a) *In general.* (1) The capital plan of each Bank shall specify the manner in which the members of the Bank are to elect directors, shall specify the other corporate matters, if any, on which the members of the Bank may vote, shall describe the voting preferences, if any, to be given to any particular class or subclass of capital stock, and shall indicate whether any class or subclass of capital stock may be voted cumulatively and, if so, the matters on which such cumulative voting would be permitted.

(2) A Bank that has issued any Class B stock shall assign voting rights to the Class B stock and, in its discretion, also may assign voting rights to its outstanding Class A stock or may assign voting rights to all members generally without regard to the class or number of shares of stock held by the members.

(3) Within each class or subclass of capital stock to which the capital plan has assigned voting rights, each share of stock shall have equal voting rights, but a Bank may give voting preferences to one or more classes or subclasses of capital stock and may permit any class or subclass of capital stock to vote separately from the other classes and subclasses of capital stock.

(4) No member or group of affiliated members of a Bank shall be permitted to

cast more than 20 percent of the votes eligible to be cast in any election by any class or subclass of capital stock on any matter on which the stockholders may vote. A Bank may establish a lower percentage limit in its capital plan.

(b) *Election of directors.* (1) The number of elected directors for each Bank shall be as provided by section 7 of the Act (12 U.S.C. 1427), except that the provisions of section 7 that require the elected directorships to be designated as representing the members located in each of the states within the Bank district and those provisions that require the number of votes each member may cast in an election to be determined based on the number of shares of Bank stock held by the member (or by the average number of shares held by all members in that state) as of the most recent year end shall not apply.

(2) With regard to the election of directors, the capital plan may allocate the voting rights among the members on any reasonable basis, such as on the basis of the class (or subclass) of capital stock outstanding, the asset size of the members, or the states in which the members are located. The capital plan shall, to the extent feasible, provide for the representation on the board of directors of smaller members that own Class B stock, especially members that are community financial institutions.

§ 931.4 Dividends.

(a) *In general.* A member, including a withdrawing member, shall be entitled to receive any dividends that a Bank declares on its capital stock for as long as the member owns the stock.

(b) *Class A stock.* The capital plan of a Bank shall establish the basis on which the stated dividends on the Class A stock are to be calculated, and shall provide whether such dividends are to be cumulative or non-cumulative. Thereafter, the Bank shall pay dividends on the Class A stock in accordance with that method and shall pay such dividends before paying any dividends on the Class B stock of the Bank. After payment of the stated Class A dividend, the board of directors of the Bank, in its discretion, may augment the stated dividend, which may be paid before, concurrently with, or after payment of dividends on the Class B stock.

(c) *Class B stock.* The board of directors of a Bank may authorize the payment of a dividend on the Class B stock, and shall determine the amount of such dividend. The board of directors may establish different dividend rates or preferences for different subclasses of the Class B stock, and may establish a dividend for one or more subclasses of

the Class B stock that tracks the economic performance of certain Bank assets, such as Acquired Member Assets. Any dividend that tracks the performance of specific Bank assets shall be proportionately appropriate for the level of risk and profitability associated with the underlying assets. Any dividends on the Class B stock shall be payable only from the net earnings or retained earnings of the Bank, determined in accordance with GAAP, shall be paid only after the payment of the stated dividend on the Class A stock, and shall be non-cumulative.

§ 931.5 Preferences on liquidation, merger, or consolidation.

In the event of a liquidation, merger, or other consolidation of a Bank, the holders of the Class A stock shall be entitled to receive the par value of their stock, plus any accumulated dividends, before the Bank or its successor may redeem, or pay any dividends on, the outstanding Class B stock that had been issued by the Bank that has been liquidated, merged, or consolidated.

§ 931.6 Transfer of capital stock.

(a) A member of a Bank may transfer the capital stock of the Bank only to another member of the Bank or to an institution that is in the process of becoming a member of the Bank. Any such stock transfers shall be at a price agreed to by the parties.

(b) No Bank shall permit the transfer of any class (including subclasses) of its capital stock to a member, or group of affiliated members, to the extent that such transfer would result in that member or group of members owning more than 40 percent of such class or subclass of the capital stock of the Bank, or such lesser percentage established in its capital plan pursuant to § 931.9. In the event of a transfer of Bank stock that occurs as a result of a merger, acquisition, or other consolidation of two or more members of a Bank that results in the surviving member holding more than 40 percent of any class or subclass of Bank stock, the Bank and the member shall agree to a plan for the member to divest any stock pursuant to § 931.9.

§ 931.7 Membership investment in capital stock.

A Bank may require each member to invest in the Class A stock of the Bank as a condition to becoming and remaining a member of the Bank. If a Bank establishes such a mandatory membership investment, it shall allow each member the option of satisfying the requirement by investing a lesser

proportional amount in Class B stock, as determined by the Bank. If a Bank is at or above its operating total capital ratio and its operating risk-based capital ratio, it shall not require members to purchase capital stock. A Bank also may establish an annual membership fee to be assessed in lieu of a mandatory stock investment for its members.

(The Office of Management and Budget has approved the information collection contained in this section and assigned control number 3069– with an expiration date of .)

§ 931.8 Activity-based stock purchase requirement.

(a) *In general.* As a condition for entering into a particular business transaction with a member, a Bank may require the member to purchase an amount of Class A or Class B stock.

(b) *Alternative arrangements.* A Bank may enter into a written contractual agreement with a member under which the member commits to purchase a specific number of shares of a particular class or classes of Bank stock at a specified price, with the purchase to be completed and all payments made at a future date to be determined by the Bank, and such agreement may be used to satisfy the activity-based stock purchase requirement in paragraph (a) of this section, if the use of such alternative arrangements is approved as part of the Bank's capital plan.

(c) *Limitations.* The amount of Class B stock that a Bank may require a member to purchase under paragraph (a) of this section shall be based on the risk characteristics associated with the type and duration of asset to be acquired by the Bank as a result of the particular transaction with that member. A Bank shall not require a member to purchase any Class B capital stock either under paragraph (a) or paragraph (b) of this section to the extent that the amount of stock to be purchased would cause the Bank to exceed its operating total capital ratio and operating risk-based capital ratio.

(d) *Retention of stock.* A Bank shall not prohibit a member that has purchased capital stock in accordance with this section from selling the stock to another member, subject to the limitations of § 931.11.

(The Office of Management and Budget has approved the information collection contained in this section and assigned control number 3069– with an expiration date of .)

§ 931.9 Concentration limits.

No member, or group of affiliated members, of a Bank shall own more than 40 percent of any class (including,

in the aggregate, all subclasses of a class) of the outstanding capital stock of the Bank, or such lower limit established in the capital plan. If at a given time, a member, or group of affiliated members, of a Bank acquires stock such that they own more than 40 percent of any class (including, in the aggregate, all subclasses of any class) of the outstanding capital stock of the Bank, or such lower limit established in the capital plan, the Bank and member (or members) shall agree to a plan under which the member (or members) will divest sufficient shares of such stock as necessary to comply with this section.

(The Office of Management and Budget has approved the information collection contained in this section and assigned control number 3069— with an expiration date of .)

§ 931.10 Redemption and purchase of capital stock.

(a) *Redemption.* A member may redeem capital stock of the Bank by providing the requisite written notice to the Bank of its intent to redeem the stock. For Class A stock, a member shall provide 6 months written notice, and for Class B stock a member shall provide 5 years written notice. At the expiration of the applicable notice period, the member shall be entitled to receive from the Bank the par value of the stock in cash. A member shall not have pending at any one time more than one notice of redemption for any class of Bank stock. A Bank may impose a fee, as specified in its capital plan, on a member that cancels a pending notice of redemption.

(b) *Purchase.* A Bank shall not be obligated to redeem its capital stock other than in accordance with paragraph (a) of this section, but a Bank, in its discretion, may purchase its outstanding Class A or Class B capital stock at any time at a negotiated price.

§ 931.11 Capital impairment.

A Bank may not redeem or purchase any capital stock without the prior written approval of the Finance Board if the Bank is not in compliance with any regulatory capital requirement or would fall out of compliance with any regulatory capital requirement as a result of the redemption or purchase.

PART 932—FEDERAL HOME LOAN BANK CAPITAL REQUIREMENTS

Sec.

932.1 Capital provisions transition requirements.

932.2 Total capital requirement.

932.3 Risk-based capital requirement.

932.4 Credit risk capital requirement.

932.5 Market risk capital requirement.

932.6 Operations risk capital requirement.

932.7 Reporting requirements.

932.8 Minimum liquidity requirements.

932.9 Limits on unsecured extensions of credit to one counterparty or affiliated counterparties; reporting requirements for total extensions of credit to one counterparty or affiliated counterparties.

Authority: 12 U.S.C. 1422a(a)(3), 1422b(a), 1426, 1440, 1443, 1446.

§ 932.1 Capital provisions transition requirements.

(a) *General transition provision.* Not later than three years after the effective date of its capital plan, each Bank shall:

(1) Have sufficient total capital to comply with the requirement of § 932.2 and

(2) Have sufficient permanent capital to comply with the requirement of § 932.3.

(b) *Risk management.* Before its new capital structure may take effect, each Bank shall obtain the approval of the Finance Board for the internal market risk model or a cash flow model used to calculate the market risk component of its risk-based capital requirement, and for the risk assessment procedures and controls (whether established as part of its risk management policy or otherwise) to be used to manage its credit, market, and operations risks.

(c) *Financial Management Policy.* After obtaining the approvals required by paragraph (b) and as of the end of the transition period specified in its capital plan, a Bank shall be governed exclusively by the capital requirements of § 932.2 or § 932.3. Until such date, the risk management requirements of the Financial Management Policy shall continue to apply to that Bank.

(d) *Issuance of capital stock.* Until a Bank has issued capital stock in accordance with its approved capital plan, it shall continue to be governed by the minimum stock purchase and stock retention requirements of the Act, as in effect on November 11, 1999. Upon the initial issuance of stock in accordance with its capital plan, the minimum stock purchase and stock retention requirements of the Act as in effect on November 11, 1999, will cease to apply to that Bank and the purchase and retention of capital stock by its members shall be governed by the approved capital plan and other applicable regulations.

§ 932.2 Total capital requirement.

(a) Each Bank shall maintain at all times total capital in an amount equal to at least 4.0 percent of the Bank's total assets.

(b) Each Bank also shall maintain at all times a leverage ratio of total capital to total assets of at least 5.0 percent of the Bank's total assets, where the ratio is computed by multiplying the Bank's

permanent capital by 1.5 and all other components of total capital are included at face value.

(c) For reasons of safety and soundness, the Finance Board may require an individual Bank to have and maintain more total capital than mandated by paragraph (a) of this section.

§ 932.3 Risk-based capital requirement.

(a) *In general.* Each Bank shall maintain at all times permanent capital in an amount at least equal to the sum of its credit risk capital requirement, its market risk capital requirement, and its operations risk capital requirement, calculated in accordance with §§ 932.4, 932.5 and 932.6, respectively.

(b) *Exception.* For reasons of safety and soundness, the Finance Board may require an individual Bank to have a greater amount of permanent capital than required by paragraph (a) of this section.

§ 932.4 Credit risk capital requirement.

(a) *General requirement.* A Bank's credit risk capital requirement shall be equal to the sum of the Bank's credit risk capital charges for all on-balance sheet assets and off-balance sheet items.

(b) *Credit risk capital charge for on-balance sheet assets.* Except as provided in paragraph (h)(1) of this section, a Bank's credit risk capital charge for a specific on-balance sheet asset shall be equal to the book value of the asset multiplied by the specific credit risk percentage requirement assigned to that asset pursuant to paragraph (d)(2) of this section.

(c) *Credit risk capital charge for off-balance sheet items.* Except as provided in paragraph (h)(2) of this section, a Bank's credit risk capital charge for a specific off-balance sheet item shall be equal to the credit equivalent amount of such item, as determined pursuant to paragraphs (e), (f), or (g) of this section, as applicable, multiplied by the specific credit risk percentage requirement assigned to that item pursuant to paragraph (d)(2) of this section.

(d) *Determination of specific credit risk percentage requirements.* (1) *Finance Board determination of specific credit risk percentage requirements.* The Finance Board shall determine, and update periodically, the specific credit risk percentage requirements set forth in Tables 1.1 through 1.4 of this part applicable to a Bank's on-balance sheet assets and credit equivalent amounts of its off-balance sheet items.

(2) *Bank determination of specific credit risk percentage requirements.* (i) Each Bank shall determine the credit risk percentage requirement applicable

to the book value of each on-balance sheet asset and the on-balance sheet equivalent value of each off-balance sheet item by identifying the category set forth in Table 1.1, Table 1.2, Table 1.3 or Table 1.4 of this part to which the asset or item belongs based upon, as applicable, the type of asset or item, its

demonstrated credit rating (as determined in accordance with paragraphs (d)(2)(ii) and (d)(2)(iii) of this section), and its remaining maturity. The applicable credit risk percentage requirement for a specific on-balance sheet asset or off-balance sheet item shall be used to calculate the

credit risk capital charge for such asset or item in accordance with paragraphs (b) or (c) of this section respectively. The relevant categories and credit risk percentage requirements are provided in the following Tables 1.1 through 1.4 of this part:

TABLE 1.1.—REQUIREMENT FOR ADVANCES

Type of Advances	Percentage applicable to on-balance sheet equivalent value
Advances with:	
Remaining maturity ≤ 4 years	0.07
Remaining maturity > 4 years to 7 years	0.20
Remaining maturity > 7 years to 10 years	0.40
Remaining maturity > 10 years	0.45

TABLE 1.2.—REQUIREMENT FOR RESIDENTIAL MORTGAGE ASSETS

Type of residential mortgage asset	Percentage applicable to on-balance sheet equivalent value
Highest Investment Grade	0.45
Second Highest Investment Grade	0.55
Third Highest Investment Grade	0.90
Fourth Highest Investment Grade	3.40
If Downgraded to Below Investment Grade After Acquisition By Bank:	
Highest Below Investment Grade	35.00
Second Highest Below Investment Grade	100.00
All Other Below Investment Grade	100.00

TABLE 1.3.—REQUIREMENT FOR RATED ASSETS OR ITEMS OTHER THAN ADVANCES OR RESIDENTIAL MORTGAGE ASSETS

	Percentage applicable to on-balance sheet equivalent value				
	≤year	>1 yr to 3 yrs	>3 yrs to 7yrs	>7 yrs to 10 yrs	>10 yrs
U.S. Government Securities	0.00	0.00	0.00	0.00	0.00
Highest Investment Grade	0.15	0.44	0.88	1.45	2.05
Second Highest Investment Grade	0.15	0.47	1.00	1.50	2.35
Third Highest Investment Grade	0.20	1.80	2.50	3.30	4.30
Fourth Highest Investment Grade	1.30	2.90	4.20	5.20	6.80
If Downgraded Below Investment Grade After Acquisition by Bank:					
Highest Below Investment Grade	5.00	15.00	17.00	18.00	20.00
Second Highest Below Investment Grade	22.00	35.00	37.00	37.00	37.00
All Other	100.00	100.00	100.00	100.00	100.00

TABLE 1.4.—REQUIREMENT FOR UNRATED ASSETS

Type of unrated asset	Percentage applicable to on-balance sheet equivalent value
Cash	0.00
Premises, Plant, and Equipment	8.00
Investments Under § 940.3(a)(5) of this chapter	8.00

(ii) When determining the credit rating used to identify the applicable

credit risk percentage requirement from

Tables 1.2 and 1.3 of this part, each Bank shall apply the following criteria:

(A) For assets or items that are rated directly by an NRSRO, the credit rating shall be the NRSRO's credit rating for the asset or item as determined in accordance with paragraph (d)(2)(iii) of this section.

(B) For an asset or item, or relevant portion of an asset or item, that is not rated directly by an NRSRO, but for which an NRSRO rating has been assigned to any corresponding obligor counterparty, third party guarantor, or collateral backing the asset or item, the credit rating that shall apply to the asset or item, or portion of the asset or item, so guaranteed or collateralized, shall be the credit rating corresponding to such obligor counterparty, third party guarantor, or underlying collateral, as determined in accordance with paragraphs (d)(2)(iii) of this section. If there are multiple obligor counterparties, third party guarantors, or collateral instruments backing an asset or item not rated directly by an NRSRO, or any specific portion thereof, then the credit rating that shall apply to that asset or item, or specific portion thereof, shall be the highest credit rating among such obligor counterparties, third party guarantors, or collateral instruments, as determined in accordance with paragraph (d)(2)(iii) of this section. Assets or items shall be deemed to be backed by collateral for purposes of this paragraph if the collateral is:

(1) Actually held by the Bank or an independent, third-party custodian, or by the Bank's member if permitted under the Bank's collateral agreement with such party;

(2) Legally available to absorb losses;

(3) Of a readily determinable value at which it can be liquidated by the Bank;

(4) Held in accordance with the provisions of the Bank's member products policy established pursuant to § 917.4 of this chapter; and

(5) Subject to an appropriate discount reflecting the price risk underlying the collateral.

(C) For residential mortgage assets and other assets or items, or relevant portion of an asset or item, that do not meet the requirements of paragraphs (d)(2)(ii)(A) or (d)(2)(ii)(B) of this section, and are not identified in Tables 1.1 or Table 1.4 of this part, the Bank shall determine its own credit rating for such assets or items, or relevant portion thereof, using credit rating standards available from an NRSRO or other

similar standards. This credit rating, as determined by the Bank, shall be used to identify the correct credit risk percentage requirement under Table 1.2 of this part for residential mortgage assets, or under Table 1.3 of this part for all other assets or items.

(iii) In determining the credit ratings under paragraph (d)(2)(ii)(A) and (d)(2)(ii)(B) of this section, a Bank shall apply the following criteria:

(A) Where a credit rating has a modifier (e.g., A+ or A-) the credit rating is deemed to be the credit rating without the modifier (e.g., A+ or A- = A);

(B) Where a specific asset or item has received more than one credit rating from a given NRSRO, the most recent credit rating shall be used;

(C) Where a specific asset or item has received credit ratings from more than one NRSRO, the lowest credit rating shall be used.

(e) *Calculation of credit equivalent amount for off-balance sheet items other than derivative contracts.* (1) *General requirement.* The credit equivalent amount for an off-balance sheet item other than a derivative contract shall be determined by a Finance Board approved model or shall be equal to the face amount of the instrument multiplied by the credit conversion factor assigned to such risk category of instruments, subject to the exceptions in paragraph (e)(2) of this section, provided in the following Table 2 of this part:

TABLE 2.—CREDIT CONVERSION FACTORS FOR OFF-BALANCE SHEET ITEMS OTHER THAN DERIVATIVE CONTRACTS

Instrument	Credit conversion factor (in percent)
Asset sales with recourse where the credit risk remains with the Bank	100
Sale and repurchase agreements	
Forward asset purchases	
Commitments to make advance, or other loans	
Standby letters of credit	50
Other commitments with original maturity of over one year	
Other commitments with original maturity of one year or less	20

(2) *Exceptions.* The credit conversion factor shall be zero for Other Commitments With Original Maturity of Over One Year and Other Commitments With Original Maturity of One Year or Less, for which credit conversion factors of 50 percent or 20 percent would otherwise apply, that are unconditionally cancelable, or that effectively provide for automatic cancellation, due to the deterioration in a borrower's creditworthiness, at any time by the Bank without prior notice.

(f) *Calculation of credit equivalent amount for single derivative contracts.*

(1) *General requirement.* The credit equivalent amount for a derivative contract that is not subject to a qualifying bilateral netting contract shall be the sum of the current credit exposure and the potential future credit exposure of the derivative contract, where the current credit exposure is determined in accordance with paragraph (f)(2) of this section and the potential future credit exposure is determined in accordance with paragraph (f)(3) of this section.

(2) *Current credit exposure.* If the mark-to-market value of the contract is positive, the current credit exposure shall equal that mark-to-market value. If the mark-to-market value of the contract is zero or negative, the current credit exposure shall be zero.

(3) *Potential future credit exposure.* (i) The potential future credit exposure for a single derivative contract, including a derivative contract with a negative mark-to-market value, shall be calculated using an internal model approved by the Finance Board or, in the alternative, by multiplying the notional amount of the derivative contract by one of the assigned credit conversion factors, modified as may be required by paragraph (f)(3)(ii) of this section, for the appropriate category as provided in the following Table 3 of this part:

TABLE 3.—CREDIT CONVERSION FACTORS FOR POTENTIAL FUTURE CREDIT EXPOSURE DERIVATIVE CONTRACTS
[in percent]

Residual maturity	Interest rate	Foreign exchange and gold	Equity	Precious metals except gold	Other commodities
One year or less	0	1	6	7	10
Over 1 year to five years	.5	5	8	7	12
Over five years	1.5	7.5	10	8	15

(ii) In applying the credit conversion factors in Table 3 of this part the following modifications shall be made:

(A) For derivative contracts with multiple exchanges of principal, the conversion factors are multiplied by the number of remaining payments in the derivative contract; and

(B) For derivative contracts that automatically reset to zero value following a payment, the residual maturity equals the time until the next payment; however, interest rate contracts with remaining maturities of greater than one year shall be subject to a minimum conversion factor of 0.5 percent.

(iii) If a Bank uses an internal model to determine the potential future credit exposure for a particular type of derivative contract, the Bank shall use the same model for all other similar types of contracts. However, the Bank may use an internal model for one type of derivative contract and Table 3 of this part for another type of derivative contract.

(iv) Forwards, swaps, purchased options and similar derivative contracts not included in the Interest Rate, Foreign Exchange and Gold, Equity, or Precious Metals Except Gold categories shall be treated as Other Commodities contracts when determining potential future credit exposures using Table 3 of this part.

(v) If a Bank uses Table 3 of this part to determine the potential future credit exposures for credit derivatives contracts, the credit conversion factors provided in Table 3 for Interest Rate contracts shall also apply to the credit derivative contracts.

(g) *Calculation of credit equivalent amount for multiple derivative contracts subject to a qualifying bilateral netting contract.* (1) *Netting calculation.* The credit equivalent amount for multiple derivative contracts executed with a single counterparty and subject to a qualifying bilateral netting contract described in paragraph (g)(2) of this section, shall be calculated by adding the net current credit exposure and the adjusted sum of the potential future credit exposure for all derivative

contracts subject to the qualifying bilateral netting contract, where:

(i) The net current credit exposure equals:

(A) The net sum of all positive and negative mark-to-market values of the individual derivative contracts subject to a qualifying bilateral netting contract, if the net sum of the mark-to-market values is positive; or

(B) Zero, if the net sum of the mark-to-market values is zero or negative; and

(ii) The adjusted sum of the potential future credit exposure (A_{net}) is calculated as follows:

$$A_{\text{net}} = 0.4 \times A_{\text{gross}} + (0.6 \times \text{NGR} \times A_{\text{gross}}),$$

where:

(A) A_{gross} is the gross potential future credit exposure, *i.e.*, the sum of the potential future credit exposure, calculated in accordance with paragraph (f)(3) of this section, for each individual derivative contract subject to the qualifying bilateral netting contract;

(B) NGR is the net to gross ratio, *i.e.*, the ratio of the net current credit exposure to the gross current credit exposure; and

(C) The gross current credit exposure equals the sum of the positive current credit exposures of all individual derivative contracts subject to the qualifying bilateral netting contract.

(2) *Qualifying bilateral netting contract.* A bilateral netting contract shall be considered a qualifying bilateral netting contract if the following conditions are met:

(i) The netting contract is in writing;

(ii) The netting contract is not subject to a walkaway clause;

(iii) The netting contract provides that the Bank would have a single legal claim or obligation either to receive or to pay only the net amount of the sum of the positive and negative mark-to-market values on the individual derivative contracts covered by the netting contract in the event that a counterparty, or a counterparty to whom the netting contract has been assigned, fails to perform due to default, insolvency, bankruptcy, or other similar circumstance;

(iv) The Bank obtains a written and reasoned legal opinion that represents, with a high degree of certainty, that in the event of a legal challenge, including one resulting from default, insolvency, bankruptcy, or similar circumstances, the relevant court and administrative authorities would find the Bank's exposure to be the net amount under:

(A) The law of the jurisdiction by which the counterparty is chartered or the equivalent location in the case of non-corporate entities, and if a branch of the counterparty is involved, then also under the law of the jurisdiction in which the branch is located;

(B) The law of the jurisdiction that governs the individual derivative contracts covered by the netting contract; and

(C) The law of the jurisdiction that governs the netting contract;

(v) The Bank establishes and maintains procedures to monitor possible changes in relevant law and to ensure that the netting contract continues to satisfy the requirements of this section; and

(vi) The Bank maintains in its files documentation adequate to support the netting of a derivative contract.

(h) *Exceptions.* (1) *Specific credit risk capital charge for on-balance sheet assets hedged with credit derivatives.* The credit risk capital charge for an on-balance sheet asset shall be zero if a credit derivative is used to hedge the credit risk on that asset, provided that:

(i) Either:

(A) The credit derivative and the on-balance sheet asset are of identical remaining maturity, and the asset being referenced in the credit derivative is identical to the underlying asset;

(B) If the on-balance sheet asset and the asset referenced in the credit derivative are identical, but the remaining maturities of the on-balance sheet asset and the credit derivative are different, the remaining maturity of the credit derivative is two years or more; or

(C) If the remaining maturities of the on-balance sheet asset and the credit derivative are identical, but the on-balance sheet asset is different from the asset referenced in the credit derivative,

the asset referenced in the credit derivative and the on-balance sheet asset have been issued by the same obligor, the asset referenced in the credit derivative ranks *pari passu* to or more junior than the on-balance sheet asset, and cross-default clauses apply; and

(ii) The credit risk capital charge for the credit derivative contract calculated pursuant to paragraph (c) of this section is still applied.

(2) *Specific credit risk capital charge for certain derivative contracts.* The credit risk capital charge for the following derivative contracts shall be zero:

(i) An exchange rate contract with an original maturity of 14 calendar days or less (gold contracts do not qualify for this exception); and

(ii) A derivative contract that is traded on an exchange requiring the daily payment of any variations in the market value of the contract.

(i) *Date of calculations.* Unless otherwise directed by the Finance Board, a Bank must perform all calculations required by this section using the assets and off-balance sheet items held by the Bank, and, if applicable, the values or credit ratings of such assets or items, as of the close of business of the last business day of the month for which the credit risk capital charge is being calculated.

§ 932.5 Market risk capital requirement.

(a) *General requirement.* (1) A Bank's market risk capital requirement shall equal the sum of:

(i) The market value of the Bank's portfolio at risk from movements in interest rates, foreign exchange rates, commodity prices, and equity prices that could occur during periods of market stress, where the market value of the Bank's portfolio at risk is determined using an internal market risk model that fulfills the requirements of paragraph (b) of this section and that has been approved by the Finance Board; and

(ii) The amount, if any, by which the Bank's current market value of total capital is less than 95 percent of the Bank's book value of total capital, where:

(A) The current market value of the total capital is calculated by the Bank after determining the current market value of its assets, liabilities and off-balance sheet items using the internal market risk model, or cash flow model, approved by the Finance Board under paragraph (d) of this section; and

(B) The book value of the Bank's total capital is calculated in accordance with GAAP.

(2) A Bank may substitute a cash-flow model to derive a market risk capital requirement comparable to that calculated using an internal risk model under paragraph (a)(1) of this section, provided that:

(i) The Bank obtains Finance Board approval of the cash-flow model and of the assumptions to be applied to the model; and

(ii) The Bank demonstrates to the Finance Board that the cash flow model considers the same factors and a comparable degree of stress as required for an internal market risk model and as set forth in paragraph (b) of this section, taking into account the difference in model structure.

(b) *Measurement of market value at risk under a Bank's internal market risk model.* (1) Each Bank shall use an internal market risk model that estimates the market value of the Bank's on-balance sheet assets and liabilities and off-balance sheet items, including related options, and measures the market value of the Bank's portfolio at risk of its on-balance sheet assets and liabilities and of off-balance sheet items, including related options, from all sources of the Bank's market risks, except that a Bank's model need only incorporate those risks that are material.

(2) The Bank's internal market risk model may use any generally accepted measurement technique, such as variance-covariance models, historical simulations, or Monte Carlo simulations, for estimating the market value of the Bank's portfolio at risk, provided that any measurement technique used must cover the Bank's material risks.

(3) The measures of the market value of the Bank's portfolio at risk shall include the risks arising from the non-linear price characteristics of options and the sensitivity of the market value of options to changes in the volatility of the options' underlying rates or prices.

(4) The Bank's internal market risk model shall use interest rate and market price scenarios for estimating the market value of the Bank's portfolio at risk, but at a minimum:

(i) The Bank's internal market risk model must provide an estimate of the market value of the Bank's portfolio at risk such that the probability of a loss greater than that estimated shall be no more than one percent;

(ii) The Bank's internal market risk model must incorporate scenarios that reflect changes in interest rates, interest rate volatility, and shape of the yield curve, and changes in market prices, equivalent to those that have been observed over 120-business day periods of market stress. For interest rates, the

relevant historical observation period is to start from the end of the previous month and to go back to the beginning of 1978; and

(iii) The measure of the market value of the Bank's portfolio at risk may incorporate empirical correlations among interest rates, subject to a Finance Board determination that the model's system for measuring such correlations is sound.

(5) For any consolidated obligations denominated in a currency other than U.S. Dollars or linked to equity or commodity prices, the Bank must meet the following requirements:

(i) The relevant foreign exchange, equity price or commodity price risks associated with the consolidated obligations must be hedged in accordance with § 956.6:

(ii) In addition to fulfilling the criteria of paragraph (b)(4) of this section, the Bank's internal market risk model must calculate an estimate of the market value of the Bank's portfolio at risk due to the material foreign exchange, equity price or commodity price risk, such that, at a minimum:

(A) The probability of a loss greater than that estimated must not exceed one percent;

(B) The scenarios reflect changes in foreign exchange, equity, or commodity market prices that have been observed over 120-business day periods of market stress, as determined using historical data that is from an appropriate period and satisfactory to the Finance Board; and

(C) The measure of the market value of the Bank's portfolio at risk may incorporate empirical correlations within or among foreign exchange rates, equity prices, or commodity prices, subject to a Finance Board determination that the model's system for measuring such correlations is sound; and

(iii) If there is a default on the part of a counterparty to a derivative or hedging contract linked to foreign exchange, equities or commodities, the Bank must enter into a replacement contract in a timely manner and as soon as market conditions permit.

(c) *Independent validation of Bank internal market risk model or cash flow model.* (1) Each Bank shall conduct an independent validation of its internal market risk model or cash flow model within the Bank that is carried out by personnel not reporting to the business line responsible for conducting business transactions for the Bank. Alternatively, the Bank may obtain independent validation by an outside party qualified to make such determinations. Validations will be done on an annual

basis, or more frequently as required by the Finance Board.

(2) The results of such independent validations shall be reviewed by the Bank's board of directors and provided promptly to the Finance Board.

(d) *Finance Board approval of Bank internal market risk model or cash flow model.* Each Bank shall obtain approval from the Finance Board of its internal market risk model or its cash flow model, including subsequent material adjustments to the model made by the Bank prior to its use. A Bank shall make all adjustments to its model that may be directed by the Finance Board.

(e) *Date of calculations.* Unless otherwise directed by the Finance Board, a Bank must perform any calculations or estimates required under this section using the on-balance sheet assets and liabilities and off-balance sheet items held by the Bank, and if applicable, the values of any such holdings, as of the close of business of the last business day of the month for which the market risk capital requirement is being calculated.

§ 932.6 Operations risk capital requirement.

(a) *General requirement.* Except as allowed in accordance with paragraph (b) of this section, a Bank's operations risk capital requirement shall at all times equal 30 percent of the sum of the Bank's credit risk capital requirement and market risk capital requirement.

(b) *Alternative requirements.* With the approval of the Finance Board, a Bank may have an operations risk capital requirement equal to less than 30 percent but no less than 10 percent of the sum of the Bank's credit risk capital requirement and market risk capital requirement if:

(1) The Bank provides an alternative methodology for assessing and quantifying an operations risk capital requirement; or

(2) The Bank obtains insurance to cover operations risk from an insurer rated at least the second highest investment grade credit rating by an NRSRO.

§ 932.7 Reporting requirements.

Each Bank shall report to the Finance Board by the 15th day of each month its risk-based capital requirement by component amounts, and its actual total capital amount and permanent capital amount, calculated as of the close of business of the last business day of the preceding month, or more frequently, as may be required by the Finance Board.

§ 932.8 Minimum liquidity requirements.

In addition to meeting the deposit liquidity requirements contained in

§ 965.3 of this chapter, each Bank shall hold contingency liquidity in an amount sufficient to enable the Bank to meet its liquidity needs, which shall, at a minimum, cover five business days of inability to access the consolidated obligation debt markets. An asset that has been pledged under a repurchase agreement cannot be used to satisfy minimum liquidity requirements.

§ 932.9 Limits on unsecured extensions of credit to one counterparty or affiliated counterparties; reporting requirements for total extensions of credit to one counterparty or affiliated counterparties.

(a) *Unsecured extensions of credit to single counterparty.* (1) *General requirement.* Unsecured extensions of credit by a Bank to a single counterparty that arise from the Bank's on- and off-balance sheet transactions shall not exceed the product of the maximum capital exposure limit applicable to such counterparty, as set forth in paragraph (a)(2) and Table 4 of this part, multiplied by the lesser of:

(i) The Bank's total capital; or

(ii) The counterparty's Tier 1 capital, or total capital (as defined by the counterparty's principal regulator) if Tier 1 capital is not available.

(2) *Bank determination applicable maximum exposure limits.* The applicable maximum capital exposure limits for specific counterparties are assigned to each counterparty based upon the credit rating of the counterparty, as determined in accordance with paragraph (a)(3) of this section, and are provided in the following Table 4 of this part:

TABLE 4.—MAXIMUM LIMITS ON UNSECURED EXTENSIONS OF CREDIT TO A SINGLE COUNTERPARTY BY COUNTERPARTY CREDIT RATING CATEGORY

Credit rating of counterparty category	Maximum capital exposure limit (in percent)
Highest Investment Grade	15
Second Highest Investment Grade	12
Third Highest Investment Grade	6
Fourth Highest Investment Grade	1.5
Below Investment Grade or Other	1

(3) *Bank determination of applicable credit ratings.* In determining the applicable credit rating category under Table 4 of this part, the following criteria shall be applied:

(i) If a counterparty has received more than one rating from a given NRSRO,

the most recent credit rating shall be used;

(ii) If a counterparty has received credit ratings from more than one NRSRO, the lowest credit rating shall be used;

(iii) If a counterparty has received different credit ratings for its transactions with short-term and long-term maturities:

(A) The higher credit rating shall apply for purposes of determining the allowable maximum capital exposure limit applicable to the total amount of unsecured credit extended by the Bank to such counterparty; and

(B) The lower credit rating shall apply for purposes of determining the allowable maximum capital exposure limit applicable to the amount of unsecured credit extended by the Bank to such counterparty for the transactions with maturities governed by that rating.

(iv) If a counterparty is placed on a credit watch for a potential downgrade by an NRSRO, the credit rating from that NRSRO at the next lower grade shall be used; and

(v) If a counterparty is not rated by a NRSRO, the Bank shall determine the applicable credit rating by using credit rating standards available from an NRSRO or other similar standards.

(b) *Unsecured extensions of credit to affiliated counterparties.* The total amount of unsecured extensions of credit by a Bank to all affiliated counterparties shall not exceed the product of the maximum capital exposure limit provided under Table 4 of this part based upon the highest credit rating of the affiliated counterparties, as determined in accordance with paragraph (a)(3) of this section, multiplied by the lesser of:

(1) The Bank's total capital; or

(2) The combined Tier 1 capital, or total capital (as defined by each affiliated counterparty's principal regulator) if Tier 1 capital is not available, of all of the affiliated counterparties.

(c) *Reporting requirements.* (1) *Total unsecured extensions of credit.* Each Bank shall report monthly to the Finance Board the amount of the Bank's total unsecured extensions of credit arising from on- and off-balance sheet transactions to any single counterparty or group of affiliated counterparties that exceeds 5 percent of:

(i) The Bank's total capital; or

(ii) The counterparty's, or affiliated counterparties' combined, Tier 1 capital, or total capital (as defined by each counterparty's principal regulator) if Tier 1 capital is not available.

(2) *Total secured and unsecured extensions of credit.* Each Bank shall

report monthly to the Finance Board the amount of the Bank's total secured and unsecured extensions of credit arising from on- or off-balance sheet transactions to any single counterparty or group of affiliated counterparties that exceeds 5 percent of the Bank's total assets.

PART 933—BANK CAPITAL STRUCTURE PLANS

Sec.

933.1 Submission of plan.

933.2 Contents of plan.

933.3 Implementation of plan.

Authority: 12 U.S.C. 1422a(a)(3), 1422b(a), 1426, 1440, 1443, 1446.

§ 933.1 Submission of Plan.

(a) *In general.* Within 270 days after the date of publication of the final capital rule, the board of directors of each Bank shall submit to the Finance Board a capital plan that would establish a new capital structure for the Bank and that would provide sufficient capital for the Bank to comply with its regulatory total capital requirement and regulatory risk-based capital requirement. The Finance Board, upon a demonstration of good cause, may approve a reasonable extension of the 270-day period for submission of the plan. A Bank may not implement its capital plan, or any amendment to the plan, until after the Finance Board has approved the plan or amendment, and the Finance Board shall determine the effective date for each capital plan.

(b) *Failure to submit a capital plan.* If a Bank fails to submit a capital plan to the Finance Board within the 270 day period, including any approved extension, the Finance Board may establish a capital plan for that Bank, take any enforcement action against the Bank, its directors, or its executive officers section 2B(a)(5) of the Act (12 U.S.C. 1422b(a)(5)), or merge the Bank in accordance with section 26 of the Act (12 U.S.C. 1446) into another Bank that has submitted an acceptable capital plan.

§ 933.2 Contents of Plan.

The capital plan for each Bank shall include, at a minimum, the following provisions:

(a) *Classes of capital stock.* The capital plan shall:

(1) Indicate each class or subclass of capital stock that the Bank will offer to its members;

(2) Indicate the terms, rights, and preferences for each class and subclass of capital stock to be issued by the Bank;

(3) Provide that the payment for Class B stock confers on the member an ownership interest in the retained

earnings and paid-in surplus of the Bank;

(4) Specify the manner in which the members of the Bank are to elect directors, specify the other corporate matters, if any, on which the members of the Bank may vote, describe the voting preferences, if any, to be given to any particular class or subclass of capital stock, and indicate whether any class or subclass of capital stock may be voted cumulatively and, if so, the matters on which such cumulative voting would be permitted; and

(5) Establish the basis on which the stated dividends on the Class A stock are to be calculated, and provide whether such dividends are to be cumulative or non-cumulative.

(b) *Capital stock issuance.* The capital plan shall:

(1) Describe the manner in which the Bank intends to solicit its members for voluntary purchases of its capital stock; and

(2) Specify the operating total capital ratio and the operating risk-based capital ratio at which the Bank intends to operate, which shall be greater than the regulatory total capital requirement and regulatory risk-based capital requirement, respectively.

(c) *Membership investment or fee structure.* The capital plan shall:

(1) Require, as a condition of membership, that a member either maintain a specified investment in the Class A stock of the Bank or pay to the Bank an annual membership fee, and describe the method used by the Bank to calculate such investment or fee;

(2) Allow each member that is required to invest in the capital stock of the Bank the option of investing in Class B stock, if authorized by the Bank, rather than in the Class A stock, in some lesser amount as determined by the Bank, subject to § 931.7 of this subchapter;

(3) Require the board of directors of the Bank to review and adjust the membership investment periodically to ensure that the Bank complies with the regulatory total capital requirement and the regulatory risk-based capital requirement;

(4) Require members to comply promptly with any adjusted membership investment; and

(5) Specify a fee, if any, on a member that cancels a notice of withdrawal or a notice of redemption and describe the method used by the Bank to calculate such fees.

(d) *Transfer of Bank stock.* The capital plan shall:

(1) Establish the criteria for the issuance, redemption, retirement, or purchase of Bank stock by the Bank, and

for the transfer of Bank stock between members of the Bank;

(2) Provide that the stock of the Bank may only be issued to or held by the members of the Bank, and that no entities other than the Bank or its members may trade the stock of the Bank; and

(3) Specify the maximum percentage of a class or subclass of stock a Bank may transfer to a member, or group of affiliated members, not to exceed 40 percent of any class or subclass of stock.

(e) *Termination of membership.* The capital plan shall address the manner in which the Bank will provide for the disposition of its capital stock that is held by institutions that terminate their membership, and the manner in which the Bank will liquidate claims against its members, including claims resulting from prepayment of advances prior to their stated maturity.

(f) *Independent review of plan.* The capital plan shall include the report from an independent certified public accountant regarding the extent to which the implementation of the plan would affect the redeemable stock issued by the Bank and the report from an NRSRO regarding the extent to which the implementation of the plan would affect the credit rating of the Bank.

(g) *Implementation.* The capital plan shall demonstrate that the Bank has made a good faith determination that the Bank will be able to implement the plan as submitted and that the Bank will be in compliance with its regulatory total capital requirement and its regulatory risk-based capital requirement after the plan is implemented.

(The Office of Management and Budget has approved the information collection contained in this section and assigned control number 3069— with an expiration date of .)

§ 933.3 Implementation of Plan.

(a) *In general.* Each Bank's capital plan shall:

(1) Provide for the manner in which the Bank shall issue Class A or Class B stock (or any subclass of either), which may be through an exchange for its existing stock, a conversion of its existing stock, or any other fair and equitable method of distribution to eligible purchasers;

(2) Provide what shall happen to the existing Bank stock owned by a member that does not affirmatively elect to convert or exchange its existing Bank stock into either Class A or Class B stock, or some combination thereof; and

(3) Include a transition provision that specifies the date on which the plan is to take effect, and that specifies the date,

not to exceed three years from the effective date of the plan, on which the Bank shall be in full compliance with its regulatory total capital requirement and regulatory risk-based capital requirement.

(b) *Member transition.* The capital plan for each Bank may include a provision allowing any institution that was a member of the Bank on November 12, 1999, a period of up to three years from the effective date of the plan in which to comply with the membership investment requirements of the capital plan.

PART 956—FEDERAL HOME LOAN BANK INVESTMENTS

15. The authority citation for part 956 continues to read as follows:

Authority: 12 U.S.C. 1422a(a)(3), 1422b(a), 1431, 1436.

16. Add a new § 956.6, to read as follows:

§ 956.4 Use of hedging instruments.

(a) *Applicability of GAAP.* Derivative instruments that do not qualify as hedging instruments pursuant to GAAP may be used only if a non-speculative use is documented by the Bank.

(b) *Documentation requirements.* (1) Transactions with a single counterparty shall be governed by a single master agreement when practicable.

(2) A Bank's agreement with the counterparty for over-the-counter derivative contracts shall include:

(i) A requirement that market value determinations and subsequent adjustments of collateral be made at least on a monthly basis;

(ii) A statement that failure of a counterparty to meet a collateral call will result in an early termination event;

(iii) A description of early termination pricing and methodology, with the methodology reflecting a reasonable estimate of the market value of the over-the-counter derivative contract at termination (Standard International Swaps and Derivatives Association, Inc. language relative to early termination pricing and methodology may be used to satisfy this requirement); and

(iv) A requirement that the Bank's consent be obtained prior to the transfer of an agreement or contract by a counterparty.

17. In subchapter G, add a new part 960 to read as follows:

PART 960—OFF-BALANCE SHEET ITEMS

Sec.

960.1 Definitions.

960.2 Authorized off-balance sheet items.

Authority: 12 U.S.C. 1422a(a)(3), 1422b(a), 1429, 1430, 1430b, 1431.

§ 960.1 Definitions.

As used in this part:

Derivative contracts has the meaning set forth in § 930.1 of this chapter.

Repurchase agreement has the meaning set forth in § 930.1 of this chapter.

§ 960.2 Authorized off-balance sheet items.

(a) *Authorization.* A Bank may enter into the following types of off-balance sheet transactions:

(1) Standby letters of credit, pursuant to the requirements of 12 CFR part 961;

(2) Derivative contracts;

(3) Forward asset purchases and sales; and

(4) Commitments to make advances or other loans.

(b) *Speculative use prohibited.* Derivative instruments that do not qualify as hedging instruments pursuant to GAAP may be used only if a non-speculative use is documented by the Bank.

Dated: May 22, 2000.

By the Board of Directors of the Federal Housing Finance Board.

Bruce A. Morrison,
Chairman.

[FR Doc. 00-17153 Filed 7-12-00; 8:45 am]

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Federal Register

**Thursday,
July 13, 2000**

Part III

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

**Endangered and Threatened Wildlife and
Plants; Proposal To Reclassify and
Remove the Gray Wolf From the List of
Endangered and Threatened Wildlife in
Portions of the Conterminous United
States; Proposal To Establish Three
Special Regulations for Threatened Gray
Wolves; Proposed Rule**

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 17**

RIN 1018-AF20

Endangered and Threatened Wildlife and Plants; Proposal To Reclassify and Remove the Gray Wolf From the List of Endangered and Threatened Wildlife in Portions of the Conterminous United States; Proposal To Establish Three Special Regulations for Threatened Gray Wolves**AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Proposed rule.

SUMMARY: The U.S. Fish and Wildlife Service (Service or we) proposes to change the classification of the gray wolf (*Canis lupus*) under the Endangered Species Act of 1973, as amended (Act). Increases in gray wolf numbers, expansion of the species' occupied range, and progress toward achieving the reclassification and delisting criteria of several approved gray wolf recovery plans show that the species' current classification is no longer appropriate throughout most of its range. This proposal, if finalized, will establish four distinct population segments (DPSs) for the gray wolf in the United States and Mexico. Gray wolves in the Western Great Lakes DPS, the Western DPS, and the Northeastern DPS will be reclassified from endangered to threatened, except where already classified as an experimental population or as threatened. Gray wolves in the Southwestern (Mexican) DPS will retain their endangered status. All three existing gray wolf experimental population designations will be retained and are not affected by this proposal. Gray wolves will be removed from the protections of the Act in all other areas of the 48 conterminous states. We are proposing a new special regulation under section 4(d) of the Act for the threatened Western DPS to increase our ability to respond to wolf-human conflicts outside the two experimental population areas in the northern United States Rockies. We are proposing a second special regulation under section 4(d) that would apply to the Northeastern DPS to reduce wolf-human conflicts and land-use restrictions. A third section 4(d) special regulation would expand the current Minnesota wolf depredation program into Wisconsin, Michigan, North Dakota, and South Dakota. The classification, under the Act, of captive gray wolves would be

determined by the location from which they, or their ancestors, were removed from the wild. We would revise our existing recovery plans, as appropriate to accommodate changes necessitated by this proposal, if finalized. This proposal does not affect the protection currently afforded by the Act to the red wolf (*C. rufus*), a separate species that is listed as endangered in the southeastern United States.

DATES: We must receive comments from interested parties by November 13, 2000 so they can be considered in our final decision. Requests for formal public hearings must be received by August 28, 2000. We will hold informal public informational meetings at numerous locations across the country during the comment period. The locations and dates of the informational meetings will be widely publicized in advance in the press; the locations and dates can also be obtained by using the phone, facsimile, electronic mail, and World Wide Web contact information given below.

ADDRESSES: Send all comments and other materials concerning this notice to Content Analysis Enterprise Team, Wolf Comments, 200 East Broadway, PO Box 7669, Room 301, Missoula, Montana 59807. Comments only (no questions or requests for information) may be submitted by electronic mail to GRAYWOLFComments@FWS.GOV or by facsimile to 406-329-3021; the subject line must say wolf comments. Questions or requests for additional information should follow the instructions in the following section.

We will make the comments and materials we receive available for public inspection, by appointment, during normal business hours at Regional Offices and the Washington Office of the U.S. Fish Wildlife Service following the close of the comment period. Use the contact information in the next paragraph to obtain the addresses of those locations.

FOR FURTHER INFORMATION CONTACT: Direct all questions or requests for additional information to the Fish and Wildlife Service using the Gray Wolf Phone Line—612-713-7337, facsimile—612-713-5292, the general gray wolf electronic mail address—GRAYWOLFMAIL@FWS.GOV, or write to: GRAY WOLF QUESTIONS, Fish and Wildlife Service, Federal Building, 1 Federal Drive, Ft. Snelling, MN 55111-4056. Additional information is also available on our World Wide Web site at <http://midwest.fws.gov/wolf>.

SUPPLEMENTARY INFORMATION:

Background*Purpose and Definitions of the Act*

The purpose of the Act is to identify species that meet the Act's definitions of endangered and threatened species, to add those species to the Federal lists of Endangered and Threatened Wildlife and Plants (50 CFR 17.11 and 17.12, respectively), and to implement conservation measures to improve their status to the point at which they no longer need the protections of the Act. When protection is no longer needed, we take steps to remove (delist) the species from the Federal lists. If a species is listed as endangered, we may reclassify it to threatened status as an intermediate step before eventual delisting; however, reclassification to threatened status is not required in order to delist.

Section 3 of the Act provides the following definitions that are relevant to this proposal:

Endangered species—any species which is in danger of extinction throughout all or a significant portion of its range;

Threatened species—any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range; and

Species—includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. (See additional discussion in *Distinct Population Segments under Our Vertebrate Population Policy*, below.)

Organization and Contents of This Proposed Rule

This proposal begins with a discussion of the biology of the gray wolf, followed by a description of related issues that we considered during the development of this proposal. These issues include gray wolf taxonomy, experimental population designations, our Vertebrate Population Policy, and wolf-dog hybrids. We describe previous Federal actions taken for the gray wolf, including the development of recovery plans, and recovery progress in various parts of the country.

A detailed discussion is presented for the five listing factors as required by the Act. These factors are (1) the present or threatened destruction, modification, or curtailment of its habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or manmade factors affecting its continued

existence. We analyze these factors for the proposed reclassification of certain populations in response to the current status of the species, which encompasses present and future threats and conservation efforts. We designate Distinct Population Segments (DPSs) and we also discuss wolves in captivity and their role in wolf recovery.

We identify alternative actions that we considered but did not propose and explain the reasons for selecting the proposed actions. Separate sections will explain the three special regulations that are proposed and how these special regulations will promote the conservation of the gray wolf in different parts of the country. We also explain the conservation measures that would be provided to the species if this proposal is finalized.

We request comments and additional information on these proposed changes. The text of the regulatory changes that we are proposing for the gray wolf are found at the end of this rule.

Biology and Ecology of Gray Wolves

Gray wolves are the largest wild members of the Canidae, or dog family, with adults ranging from 18 to 80 kilograms (kg) (40 to 175 pounds (lb)) depending upon sex and subspecies (Mech 1974). The average weight of male wolves in Wisconsin is 35 kilograms (77 lb) and ranges from 26 to 46 kg (57 to 102 lb), while females average 28 kg (62 lb) and range from 21 to 34 kg (46 to 75 lb) (Wisconsin Department of Natural Resources (WI DNR) 1999a). In the northern U.S. Rocky Mountains, adult male gray wolves average just over 45 kg (100 lb), while the females weigh slightly less. The fur color is frequently grizzled gray, but it can vary from pure white to coal black. Wolves tend to resemble coyotes (*Canis latrans*) or domestic German shepherd or husky dogs (*C. domesticus*) but can be distinguished from them by their longer legs, larger feet, wider head and snout, and straight tail.

Wolves are predators of large animals. Wild prey species in North America include white-tailed deer (*Odocoileus virginianus*) and mule deer (*O. hemionus*), moose (*Alces alces*), elk (*Cervus canadensis*), woodland caribou (*Rangifer caribou*) and barren ground caribou (*R. arcticus*), bison (*Bison bison*), muskox (*Ovibos moschatus*), bighorn sheep (*Ovis canadensis*) and Dall sheep (*O. dalli*), mountain goat (*Oreamnos americanus*), beaver (*Castor canadensis*), and snowshoe hare (*Lepus americanus*), with small mammals, birds and large invertebrates sometimes being taken (Mech 1974, Stebler 1944, WI DNR 1999a). Domestic animals

verified as being taken by wolves in Minnesota during the last 20 years include horses, cattle, sheep, goats, pigs, geese, ducks, turkeys, chickens, dogs, and cats (Paul 1999). Since 1987, wolves in the northern Rocky Mountains of Montana, Idaho, and Wyoming have killed a horse, cattle, sheep, and dogs.

Wolves are social animals, normally living in packs of 2 to 10 members. Packs are primarily family groups consisting of a breeding pair, their pups from the current year, offspring from the previous year, and occasionally an unrelated wolf. Packs occupy, and defend from other packs and individual wolves, a territory of 50 to 550 square kilometers (sq km) (20 to 214 square miles (sq mi)). In the northern U.S. Rocky Mountains territories tend to be larger, typically from 520 to 1040 sq km (200 to 400 sq mi). Normally, only the top-ranking male and female in each pack breed and produce pups. Litters are born from early April into May; they can range from 1 to 11 pups, but generally contain 4 to 6 pups (Michigan Department of Natural Resources (MI DNR) 1997, U.S. Fish and Wildlife Service 1992a). Yearling wolves frequently disperse from their natal packs, although some remain with their pack. Dispersers may become nomadic and cover large areas as lone animals, or they may locate suitable unoccupied habitat and a member of the opposite sex and begin their own territorial pack. Dispersal movements of over 800 km (500 mi) have been documented (Fritts 1983).

The gray wolf historically occurred across most of North America, Europe, and Asia. In North America, gray wolves formerly occurred from the northern reaches of Alaska, Canada, and Greenland to the central mountains and the high interior plateau of southern Mexico. The only areas of the contiguous United States that apparently lacked gray wolves since the last glacial events are much of California and the Gulf and Atlantic coastal plain south of Virginia. In addition, wolves were generally absent from the extremely arid deserts and the mountaintops of the western United States (Goldman 1944, Hall 1959, Mech 1974).

The influx of European settlers and their cultures into North America brought superstitions and fears of wolves. Their attitudes, coupled with perceived and real conflicts between wolves and human activities along the frontier, led to widespread persecution of wolves. Poisons, trapping, and shooting—spurred by Federal, State, and local government bounties—resulted in extirpation of this once

widespread species from more than 95 percent of its range in the 48 conterminous States. At the time of the passage of the Act, likely only several hundred wolves occurred in northeastern Minnesota and on Isle Royale, Michigan, and possibly a few scattered wolves in the Upper Peninsula of Michigan, Montana, and the American Southwest.

Researchers have learned a great deal about gray wolf biology, especially regarding the species' adaptability and its use of non-wilderness habitats. Public appreciation of the role of predators in our ecosystems has increased, and the recovery of the species is now generally supported by the public. Most importantly, within the last decade the prospects for gray wolf recovery in several areas of their former historical United States range have greatly increased. In the western Great Lakes area, wolves have dramatically increased their numbers and occupied range. In addition, gray wolf reintroduction programs in the northern U.S. Rocky Mountains have shown great success.

The gray wolf (*Canis lupus*) is one of two North American wolf species currently protected by the Act. The other is the red wolf (*C. rufus*), a separate species that is listed as endangered throughout its range in the southeastern United States and extending west into central Texas. The red wolf is the subject of a separate recovery program. This proposal does not pertain to the current or future listing status or protection of the red wolf.

Summary of Related Issues Considered

Taxonomy of Gray Wolves in the Eastern United States

Both the 1978 and 1992 versions of the Recovery Plan for the Eastern Timber Wolf were developed to recover the gray wolf subspecies *Canis lupus lycaon*, commonly known as the eastern timber wolf, that was believed to be the gray wolf subspecies historically occurring throughout the northeastern quarter of the United States east of the Great Plains (Goldman 1944, Hall and Kelson 1959, Mech 1974). Since the publication of those recovery plans, various studies have been conducted on the subspecific taxonomy of the gray wolf with conflicting results (Nowak 1995, Wayne *et al.* 1995).

We recognize that gray wolf taxonomy at the subspecies level is subject to conflicting opinions and continuing modification. For this reason, we will not base our gray wolf recovery efforts on any particular portrayal of gray wolf

subspeciation. Instead, we have identified geographic areas where wolf recovery is occurring or is feasible, and we will focus recovery efforts on those geographic entities, regardless of the subspecific affiliation of current or historical gray wolves in those areas. We recognize the benefits to the species of focusing recovery efforts across a large expanse of the species' range in order to recover and retain as much of the remaining genetic variation as is feasible. This approach will promote the recovery of the gray wolf throughout representative areas of their historical range in the conterminous 48 States.

Distinct Population Segments Under Our Vertebrate Population Policy

The Act's definition of the term "species" includes "any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." On February 7, 1996, we, in conjunction with the National Marine Fisheries Service, adopted a policy governing the recognition of distinct population segments (DPSs) for purposes of listing, reclassifying, and delisting vertebrate species under the Act (61 FR 4722). This policy, sometimes referred to as the "Vertebrate Population Policy" guides the Services in recognizing DPSs that satisfy the definition of species under the Act. To be recognized as a DPS, a group of vertebrate animals must satisfy tests of discreteness and significance, as well as qualify for the status (that is, threatened or endangered) assigned to it.

To be considered discrete, a group of vertebrate animals must be delimited by physical, physiological, ecological, or behavioral barriers or by an international governmental boundary that coincides with differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms. A population does not have to be completely isolated from other populations of the parent taxon in order to be considered discrete.

The significance of a potential DPS is assessed in light of its importance to the taxon to which it belongs. Evidence of significance includes, but is not limited to, the use of an unusual or unique ecological setting; a marked difference in genetic characteristics; or the occupancy of an area that, if devoid of the species, would result in a significant gap in the range of the taxon.

If a group of vertebrate animals is determined to be both discrete and significant, its status can then be judged as would that of any species; that is, if it satisfies the Act's definition of "endangered" or "threatened", it can be accorded the appropriate protective

legal status under the Act as a DPS. Although the policy does not allow State or other intra-national governmental boundaries to be used in determining the discreteness of a potential DPS, a State boundary may be used as a boundary of convenience when it incidentally separates two DPSs that are judged to be discrete on other grounds.

Refer to **Designation of Distinct Population Segments**, below, for further discussion and analysis of how our Vertebrate Population Policy applies in this proposed rule.

Currently Designated Nonessential Experimental Populations of Gray Wolves

Section 10(j) of the Act gives the Secretary of the Interior the authority to designate populations of listed species that are reintroduced outside their current range, but within their probable historical range, as "experimental populations" for the purposes of promoting the recovery of those species by establishing additional wild populations. Such a designation increases our flexibility in managing reintroduced populations, because experimental populations are treated as threatened species under the Act. Threatened status, in comparison to endangered status, allows somewhat more liberal issuance of take permits for conservation and educational purposes, imposes fewer permit requirements on recovery activities by cooperating States, and allows the promulgation of special regulations to further promote the conservation of the species.

Furthermore, the Secretary is authorized to designate experimental populations as "nonessential" if they are determined to be not essential to the continued existence of the species. For the purposes of section 7(a)(2) of the Act (Interagency Cooperation), nonessential experimental populations, except where they occur within areas of the National Wildlife Refuge System or the National Park System, are treated as species proposed to be listed as threatened or endangered species, rather than as listed species. Proposed species lack the protection of the Act, although we encourage the inclusion of protective measures when Federal agencies conference with us pursuant to section 7(a)(4) of the Act or consult with us pursuant to section 7(a)(2), or private individuals apply for a 10(a)(1)(B) permit.

The Secretary has designated three nonessential experimental population areas for the gray wolf, and wolves have subsequently been reintroduced into these areas, establishing three

nonessential experimental populations. These nonessential experimental population areas are the Yellowstone Experimental Population Area, the Central Idaho Experimental Population Area, and the Mexican Wolf Experimental Population Area.

The Yellowstone Experimental Population Area consists of that portion of Idaho east of Interstate Highway 15; that portion of Montana that is east of Interstate Highway 15 and south of the Missouri River from Great Falls, Montana, to the eastern Montana border; and all of Wyoming (59 FR 60252; November 22, 1994).

The Central Idaho Experimental Population Area consists of that portion of Idaho that is south of Interstate Highway 90 and west of Interstate 15; and that portion of Montana south of Interstate 90, west of Interstate 15, and south of Highway 12 west of Missoula (59 FR 60266; November 22, 1994).

The special regulations for these two experimental populations allow flexible management of wolves, including authorization for private citizens to take wolves in the act of attacking livestock on private land. These rules also provide a permit process that similarly allows the taking, under certain circumstances, of wolves in the act of attacking livestock grazing on public land. In addition, they allow opportunistic noninjurious harassment of wolves by livestock raisers on private and public grazing lands, and designated government employees may perform lethal and non-lethal control efforts to remove problem wolves under specified circumstances.

A December 12, 1997, ruling by the United States District Court for Wyoming declared these nonessential experimental population rules to be in violation of the Act because they reduce the protection for any naturally occurring (that is, non-reintroduced) wolves that may disperse into those areas from northwestern Montana or Canada. The District Court declared the nonessential experimental designation to be unlawful and ordered that the reintroduced wolves be removed. However, the Court stayed the order pending an appeal. The United States appealed the District Court's ruling, and on January 13, 2000, the Tenth Circuit Court of Appeals upheld the wolf reintroduction rule. Consequently, wolves in central Idaho and the Greater Yellowstone area are protected and managed as nonessential experimental populations.

On January 12, 1998, we established a similar third nonessential experimental population area to reintroduce the Mexican gray wolf into

its historical habitat in the southwestern States. The Mexican Gray Wolf Nonessential Experimental Population Area consists of that portion of Arizona lying south of Interstate Highway 40 and north of Interstate Highway 10; that portion of New Mexico lying south of Interstate Highway 40 and north of Interstate Highway 10 in the west and north of the Texas-New Mexico border in the east; and that part of Texas lying north of U.S. Highway 62/180 (63 FR 1752).

This proposed rule will not affect any of the existing three nonessential experimental populations for gray wolves in Wyoming and portions of Idaho, Montana, Arizona, New Mexico, and Texas, nor will it affect the existing special regulations that apply to those three nonessential experimental populations.

Distinct Population Segments and Experimental Populations

The Act does not provide a definition for the term "population." However, the Act uses the term "population" in two different concepts—distinct population segments and experimental populations. These two concepts were added to the original Act at different times and are used in different contexts. The term "distinct population segment" is part of the statutory definition of a "species" and is significant for listing, delisting, and reclassification purposes, under section 4 of the Act. Our Vertebrate Population Policy (61 FR 4722; February 7, 1996) defines a DPS as one or more groups of members of a species or subspecies within a portion of that species' or subspecies' geographic distribution that meets established criteria regarding discreteness, significance, and conservation status. Congress included the DPS concept in the Act, recognizing that a listing, reclassification, or delisting action may, in some circumstances, be more appropriately applied over something less than the entire area in which a species or subspecies is found in order to protect and recover organisms in a more timely and cost-effective manner.

In contrast, Congress added the experimental population concept to give the Secretary another tool to aid in the conservation of species, subspecies, or DPSs that have already been listed under the Act. The Act authorizes the Secretary to establish an experimental population if he determines that a release under such a designation will further the conservation of a listed species. Under the Act's definition of "species," an experimental population can be introduced to aid in the recovery of whatever biological unit is the subject

of the listing, that is, a species, subspecies, or DPS. The term "population" as used in the experimental population program is necessarily a flexible concept, depending upon the organism involved and its biological requirements for successfully breeding, reproducing, and establishing itself in the reintroduction area.

For purposes of gray wolf reintroduction by means of experimental populations in central Idaho and Yellowstone National Park, we needed to examine the biological characteristics of the species to determine if the reintroduced wolves would be geographically separate from other gray wolf populations. We defined a wolf population to be two breeding pairs, each successfully raising two or more young for two consecutive years in a recovery area (U.S. Fish and Wildlife Service 1994a). This wolf population definition was used to evaluate all wolves in the northern U.S. Rocky Mountains to determine if, and where, gray wolf populations might exist. Gray wolves in northwestern Montana qualified as a wolf population under this definition; that existing wolf population was further examined to determine if it was geographically separated from the potential experimental population areas. We determined that the northwestern Montana wolf population was geographically separate, so we designated the two experimental population areas and began gray wolf reintroductions to establish the two experimental populations.

Refer to Designation of Distinct Population Segments, below, for further discussion and analysis of how our Vertebrate Population Policy has been applied in this proposed rule.

Gray Wolf-Dog Hybrids

The many gray wolf-dog hybrids in North America have no value to gray wolf recovery programs, and are not provided the protections of the Act. Wolf-dog hybrids, when they escape from captivity or are intentionally released into the wild, can interfere with gray wolf recovery programs in several ways. They are familiar with humans, so they commonly are attracted to the vicinity of farms and residences, leading to unwarranted fears that they are wild wolves hunting in pastures and yards. They generally have poor hunting skills; thus, they may resort to preying on domestic animals, while the blame for their depredations is commonly and mistakenly placed on wild wolves. These behaviors are reported in the media and can erode public support for

wolf recovery efforts. In addition, feral wolf-dog hybrids may mate with dispersing wild wolves, resulting in the introduction of dog genes into wild wolf populations. For these reasons, this proposed regulation would not extend the protections of the Act to gray wolf-dog hybrids, regardless of the geographic location of the capture of their pure wolf ancestors.

In other threatened or endangered species recovery programs, hybrids and hybridization could perhaps play an important role. Our decision to not extend the protections of the Act to gray wolf-dog hybrids should not be taken as an indication of our position on the potential importance of hybrids and hybridization to recovery programs for other species. Determining the importance and treatment under the Act of hybrids requires a species-by-species evaluation.

Previous Federal Action

The eastern timber wolf (*Canus lupus lycaon*) was listed as endangered in Minnesota and Michigan, and the northern Rocky Mountain wolf (*C. l. irremotus*) was listed as endangered in Montana and Wyoming in the first list of species that were protected under the 1973 Act, published in May 1974 (USDI 1974). A third gray wolf subspecies, the Mexican wolf (*C. l. baileyi*), was listed as endangered on April 28, 1976, (41 FR 17740) with its known range given as "Mexico, USA (Arizona, New Mexico, Texas)." On June 14, 1976, (41 FR 24064) the subspecies *C. l. monstrabilis* was listed as endangered (under the misleading common name "Gray wolf"), and its range was described as "Texas, New Mexico, Mexico."

To eliminate problems with listing separate subspecies of the gray wolf and identifying relatively narrow geographic areas in which those subspecies are protected, on March 9, 1978, we published a rulemaking (43 FR 9607) relisting the gray wolf at the species level (*Canus lupus*) as endangered throughout the conterminous 48 States and Mexico, except for Minnesota, where the gray wolf was reclassified to threatened (refer to Map 1 located at the end of the Alternative Selected for Proposal section). In addition, critical habitat was designated in that rulemaking. In 50 CFR 17.95(a), we designated Isle Royale National Park, Michigan, and Minnesota wolf management zones 1, 2, and 3 (delineated in 50 CFR 17.40(d)(1)) as critical habitat. We also promulgated special regulations under section 4(d) of the Act for operating a wolf management program in Minnesota at that time. The depredation control

portion of the special regulation was later modified (50 FR 50793; December 12, 1985).

On November 22, 1994, we designated areas in Idaho, Montana, and Wyoming as nonessential experimental populations in order to initiate gray wolf reintroduction projects in central Idaho and the Greater Yellowstone Area (59 FR 60252, 59 FR 60266). On January 12, 1998, a nonessential experimental population was established for the Mexican gray wolf in portions of Arizona, New Mexico, and Texas (63 FR 1752). These experimental population designations also contain special regulations that govern take of wolves within these geographic areas (codified at 50 CFR 17.84(i) and (k)). (Refer to *Currently Designated Nonessential Experimental Populations of Gray Wolves*, above, for more details.) We have received several petitions during the past decade requesting consideration to delist the gray wolf in all or part of the 48 conterminous States. We subsequently published findings that these petitions did not present substantial information that delisting gray wolves in all or part of the conterminous 48 States may be warranted (54 FR 16380, April 24, 1989; 55 CFR 48656, November 30, 1990; 63 FR 55839, October 19, 1998).

Gray Wolf Recovery Plans

Section 4(f) of the Act directs us to develop and implement recovery plans for listed species. In some cases, we appoint recovery teams of experts to assist in the writing of recovery plans and oversight of subsequent recovery efforts.

We initiated recovery programs for the originally listed subspecies of gray wolves by appointing recovery teams and developing and implementing recovery plans. Recovery plans describe criteria that are used to assess a species' progress toward recovery, contain specific prioritized actions believed necessary to achieve the recovery criteria and objectives, and identify the most appropriate parties to implement the recovery actions.

Recovery plans may contain two separate sets of criteria that are intended to trigger our consideration of the need to either reclassify (from endangered to threatened) or to delist a species due to improvements in its status. Criteria are based upon factors that can be measured or otherwise evaluated to document improvements in a species' biological status. Examples of the type of criteria typically used are numbers of individuals, numbers and distribution of subgroups or populations of the species, rates of productivity of

individuals and/or populations, protection of habitat, and reduction or elimination of threats to the species and its habitat.

The first gray wolf recovery plan was written for the eastern timber wolf, and it was approved on May 2, 1978 (U.S. Fish and Wildlife Service 1978). This recovery plan was later revised and was approved on January 31, 1992 (U.S. Fish and Wildlife Service 1992a). The 1978 Recovery Plan for the Eastern Timber Wolf (Eastern Plan) and its revision were intended to recover the eastern timber wolf, *Canus lupus lycaon*, believed at that time to be the only gray wolf subspecies that historically inhabited the United States east of the Great Plains. Thus, the Eastern Plan covers a geographic triangle extending from Minnesota to Maine and into northeastern Florida. The recovery plan for the eastern timber wolf is based on the best available information on taxonomy at the time of publication. Since the publication of those recovery plans, various studies have produced conflicting results (See *Taxonomy of Gray Wolves in the Eastern United States*).

The Northern Rocky Mountain Wolf Recovery Plan (Rocky Mountain Plan) was approved in 1980 and revised in 1987 (U.S. Fish and Wildlife Service 1980, 1987). The Rocky Mountain Plan states in its introduction that it should be understood to refer to "gray wolves in the northern Rocky Mountains of the contiguous 48 States, rather than to a specific subspecies." The Rocky Mountain Plan covers Idaho, most of Montana and Wyoming, and approximately the eastern one-third of the States of Washington and Oregon.

The Mexican Wolf Recovery Plan was approved in 1982 (U.S. Fish and Wildlife Service 1982). Based on a review of Southwestern (Mexican) subspecies of the gray wolf by Bogan and Mehlhop (1983), the plan combines the historical ranges of *Canus lupus baileyi*, *C. l. monstabilis*, and the presumed extinct *C. l. mogollonensis* (which historically occurred in parts of New Mexico and Arizona) to define the portions of Arizona, New Mexico, Texas, and Mexico where recovery of the Mexican wolf would be appropriate.

Recovery Progress of the Eastern Gray Wolf

The 1992 revised Eastern Plan has two delisting criteria. The first criterion requires that the survival of the wolf in Minnesota must be assured. We believe that this first delisting criterion identifies a need for reasonable assurances that future State and Tribal wolf management practices and

protection will maintain a viable recovered population of gray wolves within the borders of Minnesota for the foreseeable future. While there is no specific numerical recovery criterion for the Minnesota wolf population, the Eastern Plan identified State subgoals for use by land managers and planners. The Eastern Plan's subgoal for Minnesota is 1251 to 1400 wolves.

The second delisting criterion in the Eastern Plan requires that at least one viable wolf population be reestablished within the historical range of the eastern timber wolf outside of Minnesota and Isle Royale. The Eastern Plan provides two options for reestablishing this second viable wolf population. If it is located more than 100 miles from the Minnesota wolf population, it would be considered "isolated," and the frequency of movement of individuals and genetic material from one population to the other would likely be very low. Such an isolated population, in order to be self-sustaining, would have to consist of at least 200 wolves for at least 5 years (based upon late winter counts) to be considered viable. Alternatively, if the second population is located within 100 miles of a self-sustaining wolf population (for example, the Minnesota wolf population), a reestablished population having a minimum of 100 wolves for at least 5 years would be considered viable. Such a smaller population would be considered to be viable, because its proximity would allow frequent immigration of Minnesota wolves to supplement it numerically and genetically.

The Eastern Plan does not specify where in the eastern United States the second population should be reestablished. Therefore, the second population could be located anywhere within the triangular Minnesota-Maine-Florida land area covered by the Eastern plan, except on Isle Royale and within Minnesota.

The 1992 Eastern Plan recommends reclassifying in Wisconsin and Michigan separately, recognizing that progress towards recovery may occur at differing rates. The Plan specifies that wolves in Wisconsin could be reclassified to threatened if the population within the State remained at or above 80 (late winter counts) for 3 consecutive years. The Plan does not contain a reclassification criterion for Michigan wolves. Instead, it states that if Wisconsin wolves reached their reclassification criterion, consideration should also be given to reclassifying Michigan wolves. However, with the subsequent increase in Michigan wolf numbers, it has frequently, but

unofficially, been assumed that the "80 wolves for 3 years" criterion would be applied to Michigan. In other words, each State could be considered for reclassification if either the Wisconsin or Michigan wolf population reached 80 individuals or more for 3 successive years. The Eastern Timber Wolf Recovery Team used these criteria in its recent recommendation that the gray wolf in the western Great Lakes States be reclassified to threatened as soon as possible (Rolf Peterson, Eastern Timber Wolf Recovery Team, *in litt.* 1997, 1998, 1999a, 1999b).

The Eastern Timber Wolf Recovery Team recently clarified the delisting criterion, which treats wolves in Wisconsin-Michigan as a single population. The Recovery Team clarified that the numerical delisting criterion for the Wisconsin-Michigan population will be achieved when 6 successive late winter wolf surveys document that the population equaled or exceeded 100 wolves for 5 consecutive years (Rolf Peterson, *in litt.* 1998). Because the Wisconsin-Michigan wolf population was first known to have exceeded 100 wolves in the late winter 1993–94 survey, the numerical delisting criterion was satisfied in early 1999, based upon late winter 1998–99 data (Wydeven *et al.* 1999).

The Eastern Plan has no goals or criteria for the gray wolf population on the 546-sq km (210-sq mi) Isle Royale, Michigan. This small and isolated wolf population is not expected to make a significant contribution to gray wolf recovery, although long-term research on this wolf population has added a great deal to our knowledge of the species.

Over the last 2 years, the Eastern Timber Wolf Recovery Team has consistently recommended that we designate a DPS in the western Great Lakes area and proceed with reclassification of wolves in that DPS to threatened as soon as possible. The Eastern Team recommended that the DPS include a wide buffer around the existing populations of wolves in Minnesota, Wisconsin, and Michigan. Buffers generally are described as lands that may not be regularly occupied by wolves but which may be temporarily used by dispersing wolves. Thus, they suggested the DPS also include the States of North Dakota, South Dakota, Iowa, Illinois, Indiana, and Ohio (Peterson *in litt.* 1997, 1998, 1999a, 1999b).

Minnesota

During the pre-1965 period of wolf bounties and legal public trapping, wolves persisted in the more remote

northeastern areas of Minnesota. Estimates of population levels of Minnesota wolves prior to listing under the Act in 1974 include 450 to 700 in 1950–53 (Fuller *et al.* 1992, Stenlund 1955), 350 to 700 in 1963 (Cahalane 1964), 750 in 1970 (Leirfallom 1970), 736 to 950 in 1971–72 (Fuller *et al.* 1992), and 500 to 1,000 in 1973 (Mech and Rausch 1975). While these estimates were based upon varying methodologies and are not directly comparable, they all agree in estimating the wolf population in Minnesota, the only significant population in the Lower 48 States during those time-periods, at 1,000 or fewer animals preceding their listing under the Act.

Various population estimates in Minnesota have indicated a steady increase in numbers after the eastern timber wolf was listed as endangered under the Act. A population of 1,000 to 1,200 was estimated by L. David Mech for 1976 (U.S. Fish and Wildlife Service 1978), and 1,235 wolves in 138 packs were estimated for the winter of 1978–79 (Berg and Kuehn 1982).

In 1988–89 the Minnesota Department of Natural Resources (MN DNR) repeated the 1978–79 survey, and also used a second method to estimate wolf numbers in the State. The resulting independent estimates were 1,500 and 1,750 wolves in at least 233 packs (Fuller *et al.* 1992).

During the winter of 1997–98, a statewide wolf population and distribution survey was repeated by MN DNR, using methods similar to those of the two previous surveys. That survey concluded that approximately 2,445 wolves existed in about 385 packs in Minnesota during that winter period. This figure indicates the continued growth of the Minnesota wolf population at 4 to 5 percent annually. The Minnesota wolf population has shown this annual rate of increase since 1970 (Berg and Benson, *in press*, Fuller *et al.* 1992).

Simultaneous with the increase in wolf numbers in Minnesota has been a parallel expansion of the area in which wolves are routinely found. During 1948–53 the major wolf range was estimated to be about 31,080 sq km (11,954 sq mi) (Stenlund 1955). A 1970 questionnaire survey resulted in an estimated wolf range of 38,400 sq km (14,769 sq mi) (calculated by Fuller *et al.* 1992 from Leirfallom 1970). Fuller *et al.* (1992), using data from Berg and Kuehn (1982), estimated that Minnesota primary wolf range included 36,500 sq km (14,038 sq mi) during winter 1978–79. By 1982–83, pairs or breeding packs of wolves were estimated to occupy an area of 57,050 sq km (22,000 sq mi) in

northern Minnesota (Mech *et al.* 1988). That study also identified an additional 40,500 sq km (15,577 sq mi) of peripheral range, where habitat appeared suitable but no wolves or only lone wolves existed. The 1988–89 study produced an estimate of 60,200 sq km (23,165 sq mi) as the contiguous wolf range at that time in Minnesota (Fuller *et al.* 1992), an increase of 65 percent over the primary range calculated for 1978–79. The 1997–98 study concluded that the contiguous wolf range had expanded to 88,325 sq km (33,971 sq mi), a 47 percent increase in 9 years (Berg and Benson, *in press*). The wolf population in Minnesota has recovered to the point that its contiguous range covered approximately 40 percent of the State during 1997–98.

Wisconsin

Wolves were considered to have been extirpated from Wisconsin by 1960. No formal attempts were made to monitor the State's wolf population from 1960 until 1979. From 1960 through 1975 individual wolves and an occasional wolf pair were reported. However, no evidence exists of any wolf reproduction occurring in Wisconsin, and the wolves that were reported may have been dispersing animals from Minnesota.

Wolf population monitoring by the Wisconsin Department of Natural Resources (WI DNR) began in 1979 and estimated a statewide population of 25 wolves at that time. This population remained relatively stable for several years, then declined slightly to approximately 15 to 19 wolves in the mid-1980s.

In the late 1980s, the Wisconsin wolf population began an increase that continues today. WI DNR intensively monitors its wolf population, using a combination of aerial and ground radiotelemetry, snow tracking, and wolf sign surveys (Wydeven *et al.* 1995, 1999). During the winter of 1998–99, 20 wolf packs had members carrying active radio transmitters much of the season. Minimum wolf population estimates (late-winter counts) for 1994 through 1999 are 57, 83, 99, 148, 178, and 197 animals, comprising 14, 18, 28, 32, 47, and 54 packs respectively (WI DNR 1999a; Wydeven *et al.* 1999). Wolves in Wisconsin have surpassed the reclassification criteria identified in the Eastern Plan.

In 1995 wolves were documented in Jackson County, Wisconsin, an area well to the south of the northern Wisconsin area occupied by other Wisconsin wolf packs. During the winter of 1998–99, there were believed to be 24–27 wolves

in 8 packs in the Jackson County area (Wydeven *et al.* 1999).

Based on wolf monitoring activities during the winter of 1997–98, a minimum of 10 wolves were believed on Tribal reservations in Wisconsin. Nine to 11 wolves, not including pups that may have been born in 1998, comprised 3 packs on the Bad River Reservation. By the fall of 1998, one pack no longer occupied the reservation, and the wolf population declined to five animals. One, and possibly as many as three, wolves occur on the Lac du Flambeau Reservation. Wolves will likely reoccupy areas of the Lac Courte Oreilles and Menominee Reservations in the next few years (Adrian Wydeven, WI DNR, *in litt.* 1998).

Michigan

Michigan wolves were extirpated as a reproducing population long before they were listed as endangered in 1974. Prior to 1991, and excluding Isle Royale, the last known breeding population of wild Michigan wolves occurred in the mid-1950s. As wolves began to occupy northern Wisconsin, the Michigan Department of Natural Resources (MI DNR) began noting single wolves at various locations in the Upper Peninsula of Michigan. In the late 1980s, a wolf pair was verified in the central Upper Peninsula and produced pups in 1991. Since that time, wolf packs have spread throughout the Upper Peninsula, with immigration occurring from both Wisconsin on the west and Ontario on the east. They now are found in every county of the Upper Peninsula. The MI DNR annually monitors the wolf population and estimates that 57, 80, 116, 112, 140, and 174 wolves occurred in the Upper Peninsula based on late winter counts from 1994 through 1999, respectively (MI DNR 1997, 1999a). The Upper Peninsula Michigan wolf population has exceeded the unofficial criteria for reclassification from endangered to threatened status.

During the winter of 1997–98 one wolf pack composed of four animals lived on lands of the Keewenaw Bay Indian Community. No other wolves are known to be primarily using Tribal lands in Michigan (James Hammill, MI DNR, *in litt.* 1998).

The wolf population of Isle Royale National Park, Michigan, is not considered to be an important factor in the recovery or long-term survival of wolves in the western Great Lakes States. This population is small, varying from 12 to 25 animals over the last 15 years, and is almost completely isolated from other wolf populations (Peterson *et al.* 1998, pers. comm. 1999). For these reasons, the Eastern Plan does not

include these wolves in its recovery criteria and recommends only the continuation of research and complete protection for these wolves (U.S. Fish and Wildlife Service 1992a).

Northeastern United States

Wolves were extirpated from the northeastern United States by 1900. Few credible observations of wolves were reported in the Northeast during most of this century. However, in 1993 a single female wolf was killed in western Maine, and in 1996 a second wolf or wolf-like canid was trapped and killed in central Maine. These records and a growing number of observations (and signs) of large, unidentified canids in Maine during recent years led to speculation that wolves may be dispersing into the northeastern United States from nearby occupied habitat in Canada. No actual specimens have been collected to document their presence. Many of the characteristics of the unidentified canids are consistent with an animal intermediate between the eastern coyote and the gray wolf and they may be hybrids of these two species. Private conservation organizations, the Maine Department of Inland Fisheries and Wildlife, the New York Department of Environmental Conservation, and the Service are continuing to seek evidence of the presence of wild wolves in northern New York and New England.

A recent Geographic Information System analysis evaluated the potential for wolf dispersal from southern Quebec and Ontario into the northeastern United States. The study also estimated the amount of suitable wolf habitat present in northern New York and other New England States, and evaluated the likelihood of natural wolf colonization from existing occupied wolf range in Canada. That study found that sufficient suitable wolf habitat is available in the Adirondack Park region of New York and in Maine and northern New Hampshire. However, the New York habitat is relatively isolated, and the authors concluded that natural recolonization is unlikely to occur there. Furthermore, while there are relatively narrow potential dispersal corridors connecting wolf habitat in Maine and New Hampshire with existing wolf populations north of Quebec City, there are significant barriers to dispersal, including the St. Lawrence River, adjacent highways, and dense human developments that may preclude the movement of a sufficient number of wolves from Canada into Maine (Harrison and Chapin 1997).

Recovery Progress of the Rocky Mountain Gray Wolf

In 1974, an interagency wolf recovery team was formed and completed the Northern Rocky Mountain Wolf Recovery Plan in 1980 (U.S. Fish and Wildlife Service 1980). The Rocky Mountain Plan focuses wolf recovery efforts on the large contiguous blocks of public land from western Wyoming through Montana to the Canadian border.

The Rocky Mountain Recovery Plan (U.S. Fish and Wildlife Service 1987) identifies a criterion of 10 breeding pairs of wolves for 3 consecutive years in each of the 3 recovery areas—(1) northwestern Montana (Glacier National Park; the Great Bear, Bob Marshall, and Lincoln Scapegoat Wilderness Areas; and adjacent public lands), (2) central Idaho (Selway-Bitterroot, Gospel Hump, Frank Church River of No Return, and Sawtooth Wilderness Areas; and adjacent, mostly Federal, lands), and (3) the Yellowstone National Park area (including the Absaroka-Beartooth, North Absaroka, Washakie, and Teton Wilderness Areas; and adjacent public lands). The Plan states that if one of these recovery areas maintains a population of 10 breeding pairs for 3 successive years, wolves in that recovery area can be reclassified to threatened status. If 2 recovery areas maintain 10 breeding pairs (totaling about 200 adult wolves) for 3 successive years, gray wolves across the coverage area of the Rocky Mountain Plan can be reclassified to threatened status. It also states that if all 3 recovery areas maintain 10 breeding pairs for 3 successive years, the Northern Rocky Mountain wolf population can be considered as fully recovered and can be delisted. The wolf population would be about 300 adult wolves upon attainment of full recovery. The Plan also recommends that wolves be reintroduced into the Yellowstone National Park area as an experimental population. Additionally, if natural recovery has not resulted in at least two packs becoming established in central Idaho within 5 years, the Rocky Mountain Plan states that other measures, including reintroduction, would be considered to recover wolves in that area. The goals identified in the Rocky Mountain Plan are intended to ensure a well distributed and viable population in the Rocky Mountains, goals that could be met in a variety of ways while still adhering to the “biological intent” of the recovery plan.

Gray wolf populations were eliminated from Montana, Idaho, and Wyoming, as well as adjacent

southwestern Canada by the 1930s (Young 1944). After human-caused mortality of wolves in southwestern Canada was regulated in the 1960s, populations expanded southward (Carbyn 1983). Dispersing individuals occasionally reached the northern Rocky Mountains of the United States (Ream and Mattson 1982, Nowak 1983), but lacked legal protection until 1974 when they were listed as endangered.

In 1982 a wolf pack from Canada began to occupy Glacier National Park along the Montana-Canadian border. In 1986 the first litter of pups documented in over 50 years was born in the Park. In recognition of the ongoing natural recovery of wolves arising from these Canadian dispersers, the Rocky Mountain Plan was revised in 1987 (U.S. Fish and Wildlife Service 1987). The revised Rocky Mountain Plan recommends that recovery be focused in areas with large blocks of public land, abundant native ungulates, and minimal livestock. Three recovery areas were identified—northwestern Montana, central Idaho, and the Greater Yellowstone Area. Promotion of natural recovery was advocated for Montana and Idaho (unless no breeding pairs formed in Idaho within 5 years), but recovery in the Yellowstone area was believed to require a reintroduction program.

By 1989, we formed an interagency wolf working group, composed of Federal, State, and Tribal agency personnel. The group conducted four basic recovery tasks, in addition to the standard enforcement functions associated with any take of listed species. These tasks were—(1) monitor wolf distribution and numbers, (2) control wolves that attacked livestock by either moving or killing them, (3) research wolves' relationships to ungulate prey, livestock, and people, and (4) provide accurate information to the public through reports and mass media so that people could develop their opinions about wolves and wolf management from an informed perspective.

In 1995 and 1996, we reintroduced wolves from southwestern Canada to remote public lands in central Idaho and Yellowstone National Park (Bangs and Fritts 1996, Fritts *et al.* 1997). We designated these wolves as nonessential experimental populations to increase management flexibility and address local and State concerns (59 FR 60252 and 60266; November 22, 1994). Wolves in northwestern Montana remain listed as endangered, the most protective category under the Act; they are not included within the nonessential experimental population areas. (Refer to

Currently Designated Nonessential Experimental Populations of Gray Wolves, above, for additional details.)

The reintroduction of wolves to Yellowstone National Park and central Idaho in 1995 and 1996 greatly expanded the numbers and distribution of wolves in the northern Rocky Mountains of the United States. Because of the reintroduction, wolves soon became established throughout central Idaho and the Greater Yellowstone Area. In 1995, an estimated 8 packs of about 105 individual wolves produced pups in the northern Rocky Mountains. By 1996, 161 wolves with 15 packs were producing pups. In 1997, 233 wolves with 23 packs were producing pups. In 1998, the wolf population exceeded 300 wolves, with 23 packs producing pups. In 1999, the third successive year that over 20 wolf packs successfully produced pups in the Northern U.S. Rocky Mountains, approximately 400 wolves in about 30 packs occurred in Montana, Idaho, and Wyoming. This achieves the reclassification goal within the Rocky Mountain Plan, which was to have a minimum of 10 breeding packs in at least 2 recovery areas (about 200 adult wolves) for 3 years. While the rate of wolf population expansion may slow, we have every reason to believe wolves will continue to form packs and expand both their distribution and numbers rapidly.

Achieving the Rocky Mountain Plan's delisting goal of 10 breeding packs in each of the 3 recovery areas (about 300 adult wolves) for a minimum of 3 successive years is expected to be achieved by 2002 or 2003. At that point, gray wolves within the geographic area covered by the Rocky Mountain Plan would be proposed to be delisted.

Northwestern Montana

Reproduction first occurred in northwestern Montana in 1986. The natural ability of wolves to find and quickly recolonize empty habitat and the interagency recovery program combined to effectively promote an increase in wolf numbers. By 1993 the number of wolves had grown approximately 22 percent annually to about 88 wolves in 7 packs (Fritts *et al.* 1995). However, since 1993 the number of breeding groups and number of wolves has stabilized, varying from 6 to 8 packs and from 65 to 90 wolves. The reasons for this are unknown, but are being investigated. The decline in documented wolf numbers may be due to two factors, the first of which produced only the appearance of a decline, while the second represents a real decline (1) monitoring was less intensive during the last several years,

so some packs may have gone undetected during those years; and (2) a dramatic reduction of white-tailed deer numbers throughout northwestern Montana (Caroline Sime, Montana Dep. Fish, Wildlife and Parks, pers. comm. 1998) due to the severe winter of 1996–97, which we believe was responsible for the record high level of livestock depredations and correspondingly high level of wolf control in northwestern Montana during summer 1997. Our 1998 estimate was a minimum of 65 wolves in 6 reproducing packs. In 1999, 7 packs appear to have produced pups, and the northwestern Montana population has increased to about 80 wolves.

Wolf conflicts with livestock have increased with the increasing wolf population and with fluctuations in prey populations. For example, in 1997, following a severe winter that reduced white-tailed deer populations, wolf conflicts with livestock increased dramatically. That year accounted for nearly 50 percent of all the livestock wolf depredations that were confirmed and lethal wolf control actions that were taken in northwestern Montana from 1987 to 1999 (Bangs *et al.* 1998). Wolf numbers should increase as prey numbers rebound; the need for wolf control measures is expected to subside at the same time.

Central Idaho

In January 1995, 15 young adult wolves captured in Alberta, Canada, were released in central Idaho (Bangs and Fritts 1996, Fritts *et al.* 1997). During January 1996, an additional 20 wolves from British Columbia were released. In 1998 the population consisted of a minimum of 122 wolves, including 10 packs that produced pups (Bangs *et al.* 1998), and in 1999 it has grown to about 170 wolves including 12 reproducing packs.

Yellowstone National Park

In January 1995, 14 wolves from Alberta, representing three family groups, were placed in 3 pens in Yellowstone National Park (Bangs and Fritts 1996, Fritts *et al.* 1997, Phillips and Smith 1996). The groups were released in late March. Two of the three groups produced young in late April. In January 1996, this procedure was repeated with 17 wolves from British Columbia, representing 4 family groups, being released in early April. Two of those groups produced pups in late April. Furthermore, as the result of a September 1996 wolf control action in northwestern Montana, 10 5-month-old pups were transported to a pen in the Park. These pups and 3 adults from the

Greater Yellowstone Area, which were originally reintroduced from Canada, were released in spring 1997. By autumn of 1998 the Greater Yellowstone Area population consisted of 116 wolves, including 7 packs that produced 10 litters of pups. The 1999 population consists of about 170 wolves comprising 11 reproducing packs.

Dispersal of Western Gray Wolves

By winter 1998–99, significant numbers of pups (9 in 1995, 25 in 1996, and 99 in 1997) born to reintroduced wolves were becoming sexually mature and were beginning to disperse from their natal packs. Because dispersing wolves may travel extensively and often settle in areas without resident packs, we expect that these wolves will initiate significant expansion in the number and distribution of wolf packs in the northern Rocky Mountains. Dispersal will increase management costs and controversy, because many of these wolves will not be radiocollared and will attempt to colonize areas of private land used for livestock production. Wolves that disperse southward in central Idaho and the Greater Yellowstone Area will increasingly encounter the full range of domestic livestock, including sheep, which are more susceptible to predation and multiple-mortality incidents than are other domestic livestock (Bangs *et al.* 1995, Fritts *et al.* 1992).

We predicted that these three populations eventually would expand and begin to overlap, resulting in one meta-population of gray wolves in the northern U.S. Rocky Mountains. In 1994 we believed that the most likely direction for wolf dispersal and population growth would be from northwestern Montana southward into the experimental areas. Wolves most commonly disperse toward other wolves even when separated by great distances, and we speculated that the presence of reintroduced wolves in the central Idaho and Yellowstone experimental areas would increase the likelihood for wolf dispersal into those areas from northwestern Montana. At that time, we believed that wolves in the northwestern Montana recovery area would be the first to reach 10 breeding pairs. We now believe that the severe winter of 1996–97 temporarily depressed the number of wolves in northwestern Montana and limited the number of dispersal-aged wolves in that area (U.S. Fish and Wildlife Service 1994a, Bangs *et al.* 1998).

In contrast, the wolves reintroduced into central Idaho and Yellowstone have increased their numbers greatly, and nearly two-thirds of those wolves are

young, dispersal-aged animals that may move from those areas over the next 2 years. We believe that wolves that are offspring of the reintroduced animals will increasingly disperse into northwestern Montana and elsewhere. In 1997 a reintroduced male wolf from Idaho dispersed into northwestern Montana and joined a pack there. To date, this is the only wolf known to leave and settle outside an experimental area, but we anticipate many other similar occurrences in the near future.

We also anticipate additional movement of wolves from the northern U.S. Rockies and Canada into western Washington and Oregon and into the Cascade Range. For example, one radiocollared wolf from northwestern Montana was recently found dead from unknown causes in eastern Washington, and a radiocollared young female wolf from central Idaho dispersed into eastern Oregon in early 1999. She was recaptured and returned to the Central Idaho Recovery Area where she would have a better opportunity to find a mate. Furthermore, there are suitable habitat and prey conditions in areas to which wolves may be able to disperse from current populations. Interest in reintroducing gray wolves into Olympic National Park, Washington, prompted the recent completion of a congressionally mandated feasibility study of such a project; additional studies are underway. A similar feasibility study conducted by us concludes that Colorado contains abundant suitable wolf habitat (primarily on public lands administered by the USDA Forest Service) and that a viable wolf population is biologically feasible in the State. While habitat that could support wolves certainly exists in these areas, at this time we have no plans to initiate wolf recovery efforts for any areas in the western United States outside of those identified in Montana, Idaho, and Wyoming.

Recovery Progress of the Southwestern (Mexican) Gray Wolf

The objectives of the Mexican Wolf Recovery Plan (U.S. Fish and Wildlife Service 1982) are to maintain a captive breeding program and to reestablish a population of at least 100 Mexican wolves within its historical range. The plan contains no numerical criteria for revising the endangered status of the Mexican wolf. We consider the current recovery plan objective for the wild population to be an essential first step toward the eventual recovery of the Mexican wolf. A revised recovery plan for the Mexican wolf will contain numerical criteria for reclassifying to a threatened status and for delisting.

Because recovery of the Mexican wolf is in its very early stages, we are proposing no changes to the legal status of the Mexican gray wolf at this time.

Through managed breeding, the captive population of Southwestern (Mexican) gray wolves had increased to 182 animals prior to the 1999 breeding season. Forty zoos and wildlife sanctuaries throughout the United States and Mexico cooperate in the maintenance and breeding of the captive wolves. An 18,000-sq km (7000-sq mi) area (the Blue Range Wolf Recovery Area) has been designated for the re-establishment of a wild population of at least 100 wolves. This area includes all of the Apache and Gila National Forests in eastern Arizona and western New Mexico.

Re-establishment of a wild population began with the release of 13 captive-reared Mexican gray wolves in eastern Arizona in 1998, and an additional 21 wolves in 1999. Nineteen Mexican wolves were free-ranging in the wild as of January, 2000. Additional releases are planned over the next 2 to 3 years to reach the goal of a wild population of 100 wolves. This reintroduced population of wolves, like those in central Idaho and the Greater Yellowstone Area, has been designated nonessential experimental (63 FR 1752–1772, January 12, 1998) and can be legally killed by ranchers if the wolves are attacking livestock on private land. Other provisions of the special regulation designating the population as nonessential experimental give agency managers flexibility to address wolf-human conflicts. Defenders of Wildlife, a private conservation organization, compensates ranchers whose livestock are killed by these wolves.

Summary of Factors Affecting the Species

Section 4 of the Endangered Species Act and regulations (50 CFR Part 424) promulgated to implement the listing provisions of the Act, set forth the procedures for listing, reclassifying, and delisting species. Species may be listed as threatened or endangered if one or more of the five factors described in section 4(a)(1) of the Act threatens the continued existence of the species. A species may be delisted, according to 50 CFR 424.11(d), if the best scientific and commercial data available substantiate that the species is neither endangered nor threatened because (1) of extinction, (2) of recovery, or (3) the original data for classification of the species were in error. This analysis must be based upon the same five categories of threats specified in section 4(a)(1).

In a subsequent section of this proposal we identify four DPSs that we believe deserve separate treatment under the Act (refer to Designation of Distinct Population Segments). These DPSs are the Western Gray Wolf DPS, the Western Great Lakes Gray Wolf DPS, the Northeastern Gray Wolf DPS, and the Southwestern (Mexican) Gray Wolf DPS. Therefore, for consistency and clarity in discussing each threat, the following analysis of the five categories of threats contains separate discussions for wolves within those geographic areas that we believe should be designated as DPSs.

For species that are already listed as threatened or endangered, this analysis of threats is primarily an evaluation of the threats that could potentially affect the species in the future if the delisting or downlisting proposal is finalized and the Act's protections are removed or reduced. Our evaluation of the future threats to the gray wolf in the Western Great Lakes DPS—especially those threats that would occur after removal from the protections of the Act—is partially based upon the wolf management plans and assurances of the States and Tribes in that area. If the gray wolf were to be federally delisted, State and tribal management plans will be the major determinants of wolf habitat and prey availability, will set and enforce limits on human utilization and other forms of taking, and will determine the overall regulatory framework for conservation or exploitation of gray wolves.

If the gray wolf is reclassified to threatened status, many aspects of State and Tribal management plans cannot yet be implemented because of the overriding prohibitions of the Act. However, State and Tribal plans, to the extent that they have been developed, can serve as significant indicators of public attitudes and agency goals which, in turn, are evidence of the probability of continued progress toward full recovery under the Act. Such indicators of attitudes and goals are especially important in assessing the future of a species that was officially persecuted by government agencies as recently as 35 years ago and still is reviled by some members of the public to this day. Therefore, below we provide some details on the components of the wolf management plans that currently exist and analyze their impact on the future of the gray wolf.

After a thorough review of all available information and an evaluation of the following five factors specified in section 4(a)(1) of the Act, we have determined that the Act's protections for the gray wolf should be reduced or eliminated across the conterminous States except for portions of several

southwestern States and Mexico. Significant gray wolf recovery has occurred, and continues, across a significant portion of the species' historical range as a result of the reduction of threats as described below.

A. The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range

General. Gray wolves have become symbols of wilderness in the minds of many people. Wolves are popularly thought to inhabit only remote portions of pristine forests or mountainous areas, where human developments and other activities have produced negligible change to the natural landscape. Their extirpation outside of areas such as the heavily forested portions of northeastern Minnesota, Alaska, and Canada reinforced this popular belief. However, wolves survived in those areas not because those were the only places with the necessary habitat, but because only in those remote areas were they sufficiently free of the human persecution that elsewhere killed wolves faster than the species could reproduce.

Wolf research, as well as the expansion of the wolf range over the last 2 decades, has shown that wolves can successfully occupy a wide range of habitats, and are not dependent on wilderness areas for their survival. In the past, gray wolf populations occupied nearly every type of habitat north of mid-Mexico that contained large ungulate prey species, including bison, elk, white-tailed deer, mule deer, moose, and caribou. An inadequate prey density and a high level of human persecution apparently are the only factors which limit wolf distribution (Mech 1995).

Western Great Lakes Gray Wolves. In the western Great Lakes States, wolves in the densely forested northeastern corner of Minnesota have expanded into the more agricultural portions of central and northwestern Minnesota, northern and central Wisconsin, and most of the Upper Peninsula of Michigan. Habitat currently being used by wolves spans the range from the mixed hardwood-coniferous forest wilderness area of northern Minnesota; through sparsely settled, but similar habitats in Michigan's Upper Peninsula and northern Wisconsin; into more intensively cultivated and livestock-producing portions of central and northwestern Minnesota and central Wisconsin; and even approaching the northern fringes of the St. Paul suburbs. (In April 1993 a radiotracked wolf from Wisconsin spent several weeks near the Washington County, Minnesota town of Hugo, without generating any reported

sightings. Hugo is less than 20 miles from the center of downtown St. Paul.) Wolves are also dispersing from Minnesota into the agricultural landscape of eastern North and South Dakota in increasing numbers (Licht and Fritts 1994).

Based upon computer modeling, Wisconsin and the Upper Peninsula of Michigan contain large tracts of potential wolf habitat, estimated at 15,052 sq km (5812 sq mi) and 29,348 sq km (11,331 sq mi), respectively (Mladenoff *et al.* 1995; WI DNR 1999). In Wisconsin most of this suitable habitat is on public lands, with most of these public lands being National, State, and county forest lands.

Wisconsin DNR biologists conducted a population viability analysis (PVA) for their wolf population using the computer simulation model VORTEX. The purpose of a PVA is to estimate extinction probabilities by modeling long-term species' population changes that result from multiple interacting factors. The resulting extinction probabilities provide insight into the effects that management alternatives, environmental fluctuation, and biological factors will likely have on rare species' populations over many years.

Under most of the scenarios that were modeled by WI DNR the results of the PVA indicated that a wolf population of 300 to 500 animals would have a low probability of extinction over a 100-year timeframe. However, the modeling indicated that the population might decline to a level that State-relisting might be necessary (fewer than 80 wolves for 3 years). "State-relisting probabilities" ranged from 10 to 40 percent for those scenarios which looked at a combination of moderate environmental variability and a 5 percent probability of catastrophic events. Extinction probabilities were only one percent for those same scenarios (WI DNR 1999a).

The Wisconsin wolf population has increased at an average annual rate of over 30 percent over the last 6 years and was at least 197 wolves in early 1999 (Wydeven *et al.* 1999). The Michigan wolf population (excluding Isle Royale) has increased at an average annual rate of about 34 percent over the last 6 years and was at least 174 wolves in early 1999 (MI DNR 1999a). Wolf survey methods in both States focus on wolf packs and may miss some lone individuals.

Final and State wolf management plans for Michigan and Wisconsin, respectively, have identified habitat protection as one of their top priorities

for maintaining a viable wolf population. Both of these State wolf management plans emphasize the need to manage human access to wolf areas by avoiding increasing road densities, protecting habitat corridors between larger tracts of wolf habitat, avoiding disturbance and habitat degradation in the immediate vicinity of den and rendezvous sites, and maintaining adequate prey species for wolves by suitable habitat and prey harvest regulations.

Both the final Michigan Plan and the Wisconsin Plan establish wolf population goals that exceed the viable population threshold identified in the Federal Recovery plan for isolated wolf populations, that is, a population of 200 or more wolves for 5 consecutive years (U.S. Fish and Wildlife Service 1992a). Each State adopted this approach to ensure the continued existence of a viable wolf population within its borders regardless of the condition or existence of wolf populations in adjacent States or Canada. The Michigan Plan contains a long-term minimum goal of 200 wolves (excluding Isle Royale wolves) and identifies 800 wolves as the estimated carrying capacity of suitable areas on the Upper Peninsula (MI DNR 1997).

The final Wisconsin wolf plan identifies a management goal of 350 wolves, well above the 200 wolves specified in the Federal Recovery Plan for a viable isolated wolf population. After the Wisconsin wolf population is at 250 for 3 consecutive years (excluding wolves on Indian Reservations) the species will be removed from the State's threatened and endangered species list (WI DNR 1999a).

Three comparable surveys of wolf numbers and range in Minnesota have been carried out in recent decades. The first survey estimated a State wolf population of 1235 in 1979 (Berg and Kuehn 1982). In 1989, 1500 to 1750 wolves were estimated in the State (Fuller *et al.* 1992). This represents an average annual increase of about three percent. The 1998 survey (Berg and Benson, *in press*) estimated that the State's wolf population was 2445 animals, indicating an average annual growth rate of 4 to 5 percent during the intervening 9 years. While estimates of the wolf population that are made at about 10-year intervals do not provide any insight into annual fluctuations in wolf numbers that might be due to winter conditions, prey availability and vulnerability, legal depredation control, and illegal killing, these three population estimates clearly indicate that the Minnesota wolf population has continued to increase. (Refer to

Recovery Progress of Gray Wolves in the Eastern United States, above, for additional details on the increase in numbers and range of Minnesota wolves.)

The Minnesota DNR prepared its Wolf Management Plan (MN Plan)(MN DNR 1999) and an accompanying legislative bill in early 1999 and submitted them to the Minnesota Legislature. The Legislature must approve the plan and bill to provide implementation of the regulatory authority. However, the Legislature failed to approve the MN Plan in the 1999 session. In early 2000 the MN DNR released a second bill that would result in somewhat different wolf management and protection than would the 1999 bill. As of mid-February the Minnesota Legislature had not yet considered the 2000 Minnesota wolf management bill.

The complete text of the Wisconsin, Michigan, and Minnesota wolf management plans and bills can be found on our Web site. Our summaries of those plans are also available there. See **FOR FURTHER INFORMATION**, above, for the Uniform Resource Locator (URL) of our World Wide Web site.

We expect wolf populations to continue to be conserved on most, and probably all, Indian Reservations in the western Great Lakes area, and those practices will augment wolf population goals listed above for the State DNRs. While we are unable to perform a comprehensive analysis of the likely future management and protection afforded to wolves on Native American reservations, we believe their traditional respect for the wolf, and its importance in Native American culture, will secure the species' future existence on most land under Native American control.

The wolf retains great cultural significance and traditional value to many Tribes and their members (Eli Hunt, Leech Lake Tribal Council, *in litt.* 1998, Mike Schrage, Fond du Lac Resource Management Division, *in litt.* 1998a). Some Native Americans view wolves as competitors for deer and moose, while others are interested in the harvest of the wolf as a furbearer (Schrage, *in litt.* 1998a). Many Tribes intend to manage their natural resources, wolves among them, in a sustainable manner in order that they be available to their descendants. However, traditional natural resource harvest practices often include only a minimum amount of regulation by the Tribal government (Hunt *in litt.* 1998).

In the creation story of the Ojibwa, Ma'ingan, the wolf, is a brother to the Original Man. The two traveled together throughout the world naming everything they encountered. Afterward,

the Creator had them take separate paths, but told them that they would share the same fates, and that both would be feared, respected, and misunderstood by others who arrived later. Thus, the Ojibwa people link their survival to that of Ma'ingan, and will fully support the protection of the wolf to ensure its health and abundance in the future (Schlender, Great Lakes Indian Fish and Wildlife Commission, *in litt.* 1998).

In order to retain and strengthen these cultural connections some Tribes are choosing to reject the unnecessary killing of wolves on reservations and on ceded lands, even if wolves were to be delisted. For example, the Tribal Council of the Leech Lake Band of Minnesota Chippewa recently has adopted a resolution that describes the sport and recreational harvest of gray wolves as an inappropriate use of the animal. The resolution supports the limited harvest of wolves to be used for traditional or spiritual purposes by enrolled Tribal members. This limited harvest would only be allowed by the Tribe if it does not negatively affect the wolf population. We will assist the Council with obtaining wolf pelts and parts that become available from other sources, such as depredation control activities, based on their request. The Leech Lake Reservation is home to an estimated 75 to 100 gray wolves, the largest population of wolves on an Indian reservation in the 48 conterminous States (Hunt *in litt.* 1998).

The Red Lake Band of Chippewa Indians (Minnesota) has indicated that it is likely to develop a wolf management plan that will probably be very similar in scope and content to the plan developed by the MN DNR. The Band's position on wolf management is "wolf preservation through effective management," and the Band is confident that wolves will continue to thrive on their lands (Lawrence Bedeau, Red Lake Band of Chippewa Indians, *in litt.* 1998).

The Keweenaw Bay Indian Community (Michigan) has at least one wolf pack of four animals on its lands. They will continue to list the gray wolf as a protected animal under the Tribal Code even if federally delisted, with hunting and trapping prohibited (Mike Donofrio, Biological Services, Keweenaw Bay Indian Community, pers. comm. 1998). Other Tribes, such as the Fond du Lac Band of Lake Superior Chippewa, have requested a slower pace to any wolf delisting process to allow more time for the preparation of Tribal wolf management plans. The Fond du Lac Band has passed a resolution opposing Federal

delisting and to any other measure that would permit trapping, hunting, or poisoning of the gray wolf (Schrage *in litt.* 1998b).

The Great Lakes Indian Fish and Wildlife Commission has stated its intent to work closely with the States to cooperatively manage wolves in the ceded territories in the Upper Midwest, and will not develop a separate wolf management plan. The Commission intends to work with us to ensure that State plans will adequately protect the wolf (Schlender, *in litt.* 1998).

The lands of national forests, and the prey species found in their various habitats, are important to wolf conservation and recovery in the western Great Lakes States. There are six national forests in that area that have resident wolves. Their wolf populations range from 3 on the Nicolet National Forest in northeastern Wisconsin to an estimated 300–400 on the Superior National Forest in northeastern Minnesota. The land base of the Chequamegon National Forest currently is used by nearly half of the wolves in Wisconsin. All of these national forests are operated in conformance with standards and guidelines in their management plans that follow the recommendations of the 1992 Recovery Plan for the Eastern Timber Wolf (U.S. Fish and Wildlife Service 1992a). Reclassification to threatened status is not expected to change these standards and guidelines; in fact, the gray wolf is expected to remain classified as a sensitive species by the Regional Forester for U.S. Forest Service Region 9 at least for 5 years even if federally delisted (Steve Mighton, U.S. Forest Service, pers. comm. 1998). This continuation of current national forest management practices will be a major factor in ensuring the long-term viability of gray wolf populations in Minnesota, Wisconsin, and Michigan.

Gray wolves regularly use four units of the National Park System in the western Great Lakes States and may occasionally use three or four other units. Although the National Park Service (NPS) has participated in the development of some of the wolf management plans in this area, NPS is not bound by those plans. Instead, the NPS Organic Act and the NPS Management Policy on Wildlife give the agency a separate responsibility to conserve natural and cultural resources and the wildlife present within the Parks. National Park Service management policies require that native species be protected against harvest, removal, destruction, harassment, or harm through human action, so management emphasis will continue to

minimize the human impacts on wolf populations. Thus, because of their responsibility to preserve all wildlife, units of the National Park System can be more protective of wildlife than are State plans and regulations. In the case of the gray wolf, the NPS Organic Act and NPS policies will continue to provide protection to the wolf even after Federal delisting has occurred.

Voyageurs National Park, along Minnesota's northern border, has a land base of nearly 350,000 sq km (134,000 sq mi). Preliminary data from the first 6 months of a 3-year wolf study indicate that 40 to 55 wolves in 7 to 11 packs currently have at least a portion of their territory within the Park. Management and protection of wolves within the Park is not expected to change significantly if they are reclassified to threatened or even if delisted. Voyageurs National Park has identified winter Wildlife Protection Areas; some of these areas are lake embayments which are closed to winter visitation to minimize human disturbance to wildlife, including wolves and bald eagles. Temporary closures around wolf denning and rendezvous sites will be enacted to reduce human disturbance. Sport harvest of wolves within the Park will be prohibited, regardless of what may be allowed beyond Park boundaries in future years. If there is a need to control depredating wolves (unlikely due to the current absence of agricultural activities adjacent to the Park) the Park will work with the State to conduct control activities outside the Park to resolve the problem (Barbara West, Voyageurs National Park, *in litt.* 1999).

The wolf population in Isle Royale National Park is described above (see Recovery Progress of Gray Wolves in the Eastern United States). The NPS has indicated that it will continue to closely monitor and study these wolves, but at this time it does not plan to take any special measures to ensure their continued existence, regardless of their status under the Act. This wolf population is very small and isolated from the remainder of the western Great Lakes population; it is not considered to be significant to the recovery or long-term viability of the gray wolf (U.S. Fish and Wildlife Service 1992a).

Two other units of the National Park System—Pictured Rocks National Lakeshore and St. Croix National Scenic Riverway—are regularly used by wolf packs. Pictured Rocks National Lakeshore is a narrow strip of land along Michigan's Lake Superior Shoreline; it contains wolves during the non-winter months when deer populations are high. The Lakeshore

intends to protect denning and rendezvous sites at least as strictly as the MI DNR Plan recommends (Brian Kenner, Pictured Rocks National Lakeshore, *in litt.* 1998). The St. Croix National Scenic Riverway, in Wisconsin and Minnesota, is also a linear ownership, and it makes up portions of the territories of 3 to 5 packs of 10 to 40 wolves. The Riverway is likely to limit public access to denning and rendezvous sites, and to follow other management and protective practices outlined in the respective State wolf management plans when they are finalized (Robin Maercklein, St. Croix National Scenic Riverway, *in litt.* 1998).

In the western Great Lakes area we currently manage six units within the National Wildlife Refuge System with wolf populations. Primary among these are Agassiz National Wildlife Refuge (NWR) and Tamarac NWR in Minnesota, as well as Seney NWR in the Upper Peninsula of Michigan. Agassiz NWR has had as many as 20 wolves in 2 or 3 packs in recent years, but mange and illegal shootings have reduced them to 5 wolves in a single pack and a separate single wolf in 1999. Tamarac NWR has 2 resident packs in 1999, and both of them produced pups. Possibly 10 to 15 adult wolves use that refuge. Seney NWR currently has 3 packs, with a total of 10 wolves. Rice Lake NWR, in Minnesota, had 1 or 2 packs using the refuge in 1999. Late in the winter of 1998–99 a pair of gray wolves were located on Necedah NWR. Sherburne NWR, also in Minnesota, has 2 to 4 individual wolves, but lacks established wolf packs.

Gray wolves occurring on national wildlife refuges in the western Great Lakes States will be monitored, and refuge habitat management actions will maintain the current prey base for them while they are listed as threatened, and for a minimum of 5 years following any future delisting. Trapping or hunting by government trappers in response to depredation complaints will not be authorized on these refuges.

The extra protection afforded to resident and transient wolves, their den and rendezvous sites, and their prey by 6 national forests, 2 national parks, and numerous national wildlife refuges in the western Great Lakes area will further ensure the continuing recovery of wolves in the three States.

In summary, we believe that, if reclassified to threatened, the gray wolf will not become endangered in the western Great Lakes area in the foreseeable future due to habitat or range destruction or degradation, or related factors that may affect gray wolf numbers. Recovery efforts over the past

decade, the final or draft State and Tribal wolf management plans and practices, as well as those of Federal land management agencies in the western Great Lakes area, will provide adequate protection for wolf populations, maintain their prey base, preserve denning sites and dispersal corridors, and are likely to keep wolf populations well above the numerical recovery criteria established in the Federal recovery plan.

Northeastern Gray Wolves.

Researchers have recently evaluated the potential for wolf restoration in the Northeastern U.S., and found that both habitat quality and prey densities are favorable for gray wolf recovery (Harrison and Chapman 1997). The moose population in Maine is particularly robust, and within the past few decades moose have expanded their range throughout New Hampshire and into Vermont. Additionally, a small number of moose now occur in northern New York. White-tailed deer and beaver populations are generally considered healthy throughout the region.

Therefore, we believe that habitat and prey base conditions are favorable for wolf restoration in the Northeastern U.S.

Western Gray Wolves. The Recovery Plan recommended that wolf recovery efforts in the northern U.S. Rocky Mountains be focused on areas that contained large blocks of public land, abundant wild ungulates, and minimal livestock to reduce potential conflicts between people and wolves. Three primary recovery areas were identified: northwestern Montana, central Idaho, and the Greater Yellowstone Area (U.S. Fish and Wildlife Service 1987). Northwestern Montana (more than 50,000 sq km (19,200 sq mi); the area North of Interstate 90 and West of Interstate 15) is a mixture of public land, primarily administrated by the USDA Forest Service, and private land. The economy and local culture is diverse and not as agriculturally based as other parts of Montana (Bangs *et al.* 1995). The Greater Yellowstone Area and central Idaho areas, 64,000 sq km (24,600 sq mi) and 53,900 sq km (20,700 sq mi) respectively, are primarily composed of public lands (U.S. Fish and Wildlife Service 1994a). These areas of potential wolf habitat are secure and there are no foreseeable habitat-related threats that would prevent them from supporting a wolf population that exceeds recovery levels.

Wild ungulate populations in these three areas are composed mainly of elk, white-tailed deer, mule deer, moose, and (only in the Greater Yellowstone Area) bison. The States of Montana, Idaho, and Wyoming have managed resident ungulate populations for

decades and maintain them at densities that would support a recovered wolf population. There is no foreseeable condition that would cause a decline in ungulate populations significant enough to affect a recovered wolf population. While 100,000 to 250,000 wild ungulates are estimated in each State, domestic ungulates, primarily cattle and sheep, are typically at least twice as numerous even on public lands (U.S. Fish and Wildlife Service 1994a). The only areas large enough to support wolf packs, but lacking livestock grazing, are Yellowstone National Park and some adjacent USDA Forest Service Wilderness and parts of wilderness areas in central Idaho and northwestern Montana. Consequently, many wolf pack territories have included areas used by livestock, primarily cattle. While there is no livestock grazing in Glacier National Park, every wolf pack in northwestern Montana has interacted with some livestock, primarily cattle. To date, conflict between wolves and livestock has resulted in the annual removal of less than six percent of the wolf population (Bangs *et al.* 1995). This level of removal by itself is not generally believed to cause declines in wolf populations.

In summary, we do not believe that habitat loss or deterioration, or a decline in the abundance of wild prey, will occur at levels that will affect wolf recovery and long-term population viability in the Western DPS.

Southwestern (Mexican) Gray Wolves. Sufficient suitable habitat exists in the Southwestern United States to support current recovery plan objectives for the Southwestern (Mexican) gray wolf. These habitats occur primarily on national forests and Native American reservations. Current and reasonably foreseeable management practices on these areas are expected to support ungulate populations at levels that will sustain wolf populations which meet or exceed recovery plan objectives. Habitat destruction or modification is not currently considered a threat or deterrent for restoration of Southwestern (Mexican) gray wolves.

B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes.

General. Since their listing under the Act, there have been no gray wolves legally killed or removed from the wild for either commercial or recreational purposes. We acknowledge that there may have been wolves illegally killed for commercial use of the pelts and other parts, but illegal commercial trafficking in wolf pelts or wolf parts is believed to be rare. Illegal capture of wolves for commercial breeding

purposes is also possible, but is also believed to be rare. The large fines and prison sentences provided for by the Act for criminal violations are believed to substantially discourage and minimize the illegal killing of wolves for commercial or recreational purposes.

The intentional or incidental killing, or capture and permanent confinement of endangered or threatened gray wolves for scientific purposes can only legally occur under permits issued by us (under section 10(a)(1)(A) and 10(a)(1)(B) of the Act; under an incidental take statement issued by us as part of a biological opinion evaluating the effects of an action by a Federal agency; under an incidental take statement issued by us pursuant to section 10(a)(1)(B), or by a State agency operating under a cooperative agreement with us pursuant to section 6 of the Act (50 CFR 17.21(c)(5) and 17.31(b)). Although exact figures are not available, such removals of wolves from the wild have been very limited and probably comprised an average of fewer than two animals per year since the species was first listed as endangered. These animals were either taken from the Minnesota wolf population during long-term research activities (about 15 gray wolves), were accidental takings as a result of research activities in Wisconsin (4 mortalities and 1 long-term confinement), were removed from the endangered population in Mexico (5 wolves) to be used as breeding stock for reintroduction programs in the United States, or they were previously released *Canis lupus baileyi* that were recaptured for probable permanent confinement after being judged unsuitable for the reintroduction program (2 or 3 wolves) (William Berg, MN DNR, *in litt.* 1998; Mech, *in litt.* 1998; David Parsons, U.S. Fish and Wildlife Service *in litt.* 1998; Wydeven 1998).

We believe that there have been no wolves legally removed from the wild for educational purposes in recent years. Wolves that are used for such purposes are the captive-reared offspring of wolves that were already in captivity for other reasons.

Refer to *Depredation Control Programs in the Western Great Lakes States and Depredation Control Programs in the Western DPS* under E. *Other Natural or Manmade Factors Affecting its Continued Existence*, below, for discussions of additional wolf mortalities associated with wolf depredation control programs.

Western Great Lakes Gray Wolves. If reclassified to threatened status, the taking of gray wolves for commercial, recreational, scientific, or educational

purposes would still be generally prohibited under the Act, but could be authorized by Federal permit. In addition, the taking of wolves for conservation purposes could be done without an authorizing permit, if that taking is done by an employee or agent of a State conservation agency having an approved conservation agreement under the provisions of section 6(c) of the Act. The wildlife management agencies of the States of Minnesota, Wisconsin, Michigan, North Dakota, and South Dakota each have such an approved conservation agreement, and therefore, would be able to take gray wolves for conservation purposes if they are reclassified to threatened status. The amount of such take must be reported to us annually.

A reclassification to threatened status for the Western Great Lakes DPS would not result in any decrease in protection for gray wolves in Minnesota, because they already are classified as threatened there. Therefore, we do not expect any increase in the taking of Minnesota wolves for these purposes. The extremely small current level of such take has not affected the recovery of Minnesota wolves, and is not expected to do so in the future.

Gray wolves in Wisconsin, Michigan, North Dakota, and South Dakota will be subject to a possible increase in take by employees or agents of these States. However, this take must be for conservation purposes, and is thus likely to be for research purposes. Therefore, we believe such take will be minimal and will not significantly slow wolf recovery in Wisconsin and Michigan. (Refer to *Depredation Control Programs in the Western Great Lakes States* under *E. Other Natural or Manmade Factors Affecting its Continued Existence*, below, for a discussion of the increased take expected in these four States for depredation control under the proposed section 4(d) special regulation.)

The taking of wolves by Tribes, Federal agencies, organizations, or private citizens for commercial, recreational, scientific, or educational purposes may increase slightly, because the Act allows us to issue take permits for zoological exhibition, educational purposes, and "special purposes consistent with the Act" for threatened but not for endangered wildlife. Again, the requirement that such take must promote the conservation of the threatened species means that the magnitude of the take will be small and cannot inhibit continued gray wolf recovery.

Western Gray Wolves. Since being listed as endangered and experimental, there has been no legal commercial, recreational, or educational utilization

or take of western gray wolves. In the States where wolves are proposed for reclassification to threatened status and will be covered by the proposed 4(d) special regulation, there still would not be any legal take for these purposes under the threatened classification or under the proposed special regulation.

We believe some wolf mortalities associated with the ongoing scientific studies of wolves will occur. Some of these studies involve capturing and radiocollaring of wolves. Wolf capture by trapping, helicopter netgunning, and darting has the potential to seriously injure or kill wolves. These unintentional mortalities are rare and generally average less than 2 percent of the wolves handled (U.S. Fish and Wildlife Service 1994a). During the reintroduction of wolves from Canada nearly 100 wolves were handled and 2 died. Since then there has been only 1 wolf mortality out of about 130 wolves captured as part of routine trapping and radiocollaring for monitoring purposes in Montana, Idaho, and Wyoming.

Northeastern and Southwestern (Mexican) Gray Wolves. In these DPSs, gray wolves would continue to be protected by section 9 of the Act under their threatened, endangered, or nonessential experimental population classifications. These classifications would prohibit any commercial or recreational take of gray wolves. Neither the current special regulations for the nonessential experimental population in the Southwestern (Mexican) DPS, nor the proposed special regulation for the Northeastern DPS, would allow these forms of take. Enforcement by us will continue to keep such take to minimal levels.

Take for scientific or recovery purposes, including educational purposes, will be available for both DPSs. For the Southwestern (Mexican) DPS such take can be authorized only by a permit from us. Under the proposed special regulation for the Northeastern DPS take of wolves for scientific, educational, and conservation purposes can be carried out by States under existing cooperative agreements with us under section 6 of the Act. This take authority would be extended to Tribes after they have developed a wolf conservation plan and it has been approved by us.

Thus, in all cases, gray wolf take for scientific, educational, and conservation purposes must benefit the gray wolf DPS and must promote its recovery. Therefore, any take of this nature will not negatively impact these DPSs.

C. Disease or Predation Disease

Many diseases and parasites have been reported for the gray wolf, and

several of them have had significant impacts during the recovery of the species in the conterminous States. These diseases and parasites, and perhaps others, must be considered to be significant potential threats to gray wolf populations in the future. Thus, in order to avoid a disease/parasite-related decline in the gray wolf population, their presence and impacts require diligent monitoring and appropriate follow-up for the foreseeable future.

Western Great Lakes Gray Wolves. Canine parvovirus (CPV) is a relatively new disease that infects wolves, domestic dogs, foxes, coyotes, skunks, and raccoons. Recognized in the United States in 1977 in domestic dogs, it appeared in Minnesota wolves (based upon retrospective serologic evidence) live-trapped as early as 1977 (Mech *et al.* 1986). However, Minnesota wolves may have been exposed to the virus as early as 1973 (Mech and Goyal 1995). Serologic evidence of gray wolf exposure to CPV peaked at 95 percent of a group of Minnesota wolves live-trapped in 1989 (Mech and Goyal 1993). In a captive colony of Minnesota wolves, pup and yearling mortality from CPV was 92 percent of the animals that showed indications of active CPV infections in 1983 (Mech and Fritts 1987), demonstrating the substantial impacts this disease can have on young wolves. It is believed that the population impacts of CPV occur via diarrhea-induced dehydration leading to abnormally high pup mortality (WI DNR 1999).

There is no evidence that CPV has caused a population decline or has had a significant impact on the recovery of the Minnesota gray wolf population. However, Mech and Goyal (1995) found that high CPV prevalence in the wolves of the Superior National Forest in Minnesota occurred during the same years in which wolf pup numbers were low. Because the wolf population did not decline during the study period, they concluded that CPV-caused pup mortality was compensatory, that is, it replaced deaths that would have occurred from other causes, especially starvation of pups. They theorized that CPV prevalence affects the amount of population increase, and that a wolf population will decline when 76 percent of the adult wolves consistently test positive for CPV exposure. Their data indicate CPV prevalence in adult wolves in their study area increased by an annual average of 4 percent during 1979–93, and was at least 80 percent during the last 5 years of their study (Mech and Goyal 1995). Additional

unpublished data gathered since 1995 indicate that CPV reduced wolf population growth in that area from 1979 to 1989, but not since that period (Mech *in litt.* 1999). These data provide strong justification for continuing population and disease monitoring.

The disease probably stalled wolf population growth in Wisconsin during the early and mid-1980s. During those years the Wisconsin wolf population declined or was static, and 75 percent of 32 wolves tested by the same method were positive for CPV. During the following years (1988-96) of population increase only 35 percent of the 63 wolves tested positive for CPV (WI DNR 1999). CPV exposure rates were at 50 percent in live-captured Wisconsin wolves in 1995-96 (WI DNR 1999), but there is no necropsy evidence of CPV mortalities from Wisconsin wolves (Nancy Thomas, National Wildlife Health Laboratory, *in litt.* 1998). However, the difficulty of discovering CPV-killed pups must be considered.

Canine parvovirus is considered to have been a major cause of the decline of the isolated Isle Royale, Michigan, population in the mid and late 1980s. The Isle Royale gray wolf population decreased from 23 and 24 wolves in 1983 and 1984, respectively, to 12 and 11 wolves in 1988 and 1989, respectively. The wolf population remained in the low to mid-teens through 1995. However, factors other than disease may be causing a low level of reproductive success, including a low level of genetic diversity and a prey population composed of young healthy moose that may make it difficult to secure sufficient prey for pups. There are no data showing any CPV-caused population impacts to the larger gray wolf population on the Upper Peninsula of Michigan (Peterson *et al.* 1998).

Sarcoptic mange is caused by a mite infection of the skin. The irritation caused by the feeding and burrowing mites results in scratching and then severe fur loss, which in turn can lead to mortality from exposure during severe winter weather. From 1991-96 27 percent of live-trapped Wisconsin wolves exhibited symptoms of mange. During the winter of 1992-93 58 percent showed symptoms, and a concurrent decline in the Wisconsin wolf population was attributed to mange-induced mortality (WI DNR 1999). Seven Wisconsin wolves died of mange during the years 1993 through October 15, 1998, and severe fur loss affected five other wolves that died from other causes. During that period mange was the third largest cause of death in Wisconsin wolves, behind trauma

(usually vehicle collisions) and shooting (Nancy Thomas *in litt.* 1998).

In a long-term Alberta wolf study, higher wolf densities were correlated with increased incidence of mange, and pup survival decreased as the incidence of mange increased (Brand *et al.* 1995). At least seven wild Michigan wolves died from mange during 1993-97, making it the most common disease of Michigan wolves. The Michigan Wolf Management Plan acknowledges that mange may be slowing wolf population growth and specifies that captured wolves be treated with Ivermectin to combat the mites (MI DNR 1997). MI DNR currently treats all captured wolves with Ivermectin, vaccinates them against CPV and canine distemper virus (CDV), and administers antibiotics to combat potential leptospirosis infections.

Wisconsin wolves similarly had been treated with Ivermectin and vaccinated for CPV and CDV when captured, but the practice was stopped in 1995 to allow the wolf population to experience more natural biotic conditions. Since that time, Ivermectin has been administered only to captured wolves with severe cases of mange. In the future, Ivermectin and vaccines will be used sparingly on Wisconsin wolves, but will be used to counter significant disease outbreaks (Adrian Wydeven *in litt.* 1998).

Mange has not been documented to be a significant disease problem in Minnesota. Several packs in the Ely and Park Rapids areas are known to suffer from mange, and a pack at Agassiz NWR in northwestern Minnesota was reduced from at least five wolves (the pack may have numbered six to eight in the early 1990s) to a single animal over the last few years, primarily due to mange.

Lyme disease, caused by a spirochete, is another relatively recently recognized disease, first documented in New England in 1975; it may have occurred in Wisconsin as early as 1969. It is spread by ticks, who pass along the infection to their various host species during tick feeding episodes. Host species include humans, horses, dogs, white-tailed deer, white-footed mice, eastern chipmunks, coyotes, and wolves. The prevalence of Lyme disease in Wisconsin wolves averaged 70 percent of live-trapped animals in 1988-91, but dropped to 37 percent during 1992-97. While there are no data showing wolf mortalities from Lyme disease, it may be suppressing population growth through decreased wolf pup survival. Lyme disease has not been reported from wolves beyond the Great Lakes regions (WI DNR 1999a).

Other diseases and parasites, including rabies, canine distemper, canine heartworm, blastomycosis, brucellosis, leptospirosis, bovine tuberculosis, hookworm, coccidiosis, and canine hepatitis have been documented in wild gray wolves, but their impacts on future wild wolf populations are not likely to be significant (Brand *et al.* 1995, Johnson 1995, Mech and Kurtz 1999, Thomas *in litt.* 1998, WI DNR 1999a).

In aggregate, diseases and parasites were the cause of 25 percent of the diagnosed wolf deaths from 1960-97 in Michigan (MI DNR 1997) and 19 percent of the diagnosed mortalities of radiocollared wolves in Wisconsin from 1979-98 (Wydeven 1998).

Since several of the diseases and parasites are known to be spread by wolf to wolf contact, their incidence may increase as wolf densities increase in newly colonized areas. However, because wolf densities generally are relatively stable following the first few years of colonization, wolf to wolf contacts will not likely lead to a continuing increase in disease prevalence (L. David Mech *in litt.* 1998).

Disease and parasite impacts may increase because several wolf diseases are carried and spread by dogs. This transfer of diseases and parasites from domestic dogs to wild wolves may increase as gray wolves continue to colonize non-wilderness areas (Mech *in litt.* 1998). Heartworm, CPV, and rabies are the main concerns (Thomas *in litt.* 1998).

Disease and parasite impacts are a recognized concern of the State departments of natural resources. The Michigan Gray Wolf Recovery and Management Plan states that necropsies will be conducted on all dead wolves and that all live wolves that are handled will be examined and blood, skin, and fecal samples will be taken to provide disease information. All wolves that are handled will be vaccinated for CDV and CPV and treated for parasites before release (MI DNR 1997). These steps will continue even if the gray wolf is federally reclassified to threatened.

Similarly, the Wisconsin Wolf Management Plan has a section on wolf health monitoring. It states that as long as the wolf is State-listed as a threatened or endangered species the WI DNR will conduct necropsies of dead wolves and a sample of live-captured wolves will be tested for diseases and parasites. The goal will be to capture and screen 10 percent of the State wolf population for diseases annually. Following State delisting (after the State wolf population grows to 250 animals) disease monitoring will be scaled back because

the percentage of the wolf population that is live-trapped each year will decline, but periodic necropsy and scat analyses will continue to test for disease and parasite loads. The plan also recommends that all wolves live-trapped for other studies should have their health monitored and reported to the WI DNR wildlife health specialists (WI DNR 1999a).

In summary, several diseases have had significant impacts on wolf population growth in the Great Lakes region in the past. These impacts have been both direct, resulting in mortality of individual wolves, and indirect, by reducing longevity and fecundity of individuals or entire packs or populations. Canine parvovirus stalled wolf population growth in Wisconsin in the early and mid-1980s, and it has been implicated as a contributing factor in declines in the isolated Isle Royale population. Sarcoptic mange has impacted wolf recovery in both Michigan's Upper Peninsula and in Wisconsin in this decade, and is recognized as a continuing problem. However, despite these and other diseases and parasites, the overall trend for wolf populations in the western Great Lakes States is upward. The wolf management plans of Michigan and Wisconsin include monitoring components that are expected to identify future disease and parasite problems in time to allow corrective action to be taken to avoid a significant decline in overall population viability. We do not believe disease impacts will have significant adverse effects on wolf recovery in the western Great Lakes States.

Western Gray Wolves. Wolves in the northern U.S. Rocky Mountains are exposed to a wide variety of canid diseases, which are common throughout North America. Some of these diseases and parasites have been documented to significantly affect wolf populations, usually temporarily, in other areas of North America. However, in the studies of wolves in Montana, Idaho, and Wyoming to date, disease and parasites have not appeared to be a significant factor affecting wolf population dynamics. Just like wolves in all other parts of North America, wolves in the Northern Rocky Mountains will occasionally die from a wide variety of canid diseases. However, it is doubtful that wolf populations in the northern Rocky Mountains could be significantly impacted, because wolf exposure to these diseases has been occurring for decades. The environmental impact statement (EIS) on gray wolf reintroduction identified disease impact as an issue but did not evaluate it further, because it appeared not to be

significant (U.S. Fish and Wildlife Service 1994a). Likewise, in the "Wolves for Yellowstone?" reports to Congress in 1992, Johnson (1995b and 1995c) reviewed the relationship between wolves and rabies, brucellosis, and tuberculosis and found canids were not likely to be a reservoir for those diseases.

Southwestern (Mexican) Gray Wolves. There is no evidence suggesting that disease was a significant factor in the decline of the Mexican wolf. Likewise, there is no reason to believe that disease will be a significant impediment to recovery of the Mexican wolf in the wild. Because the potential for disease and parasite transmission is much greater in captivity, especially in zoos, all captive Mexican wolves are vaccinated or treated for potential canine diseases and parasites that may exist in the captive environment.

As a result of captive disease and parasite prevention and treatment protocols, released wolves are in good health and physical condition when they enter the wild. Re-established Southwestern (Mexican) wolves will be monitored for disease or parasite-related problems.

Predation

There are no wild animals that habitually prey on gray wolves. Occasionally wolves will be killed by large prey such as deer or moose (Mech and Nelson 1989) or possibly by a competing predator such as a mountain lion, but this has only been documented on rare occasions and is not believed to be a significant mortality factor. However, humans are highly effective predators of gray wolves.

Western Great Lakes Gray Wolves. Wolves are killed by other wolves, most commonly when a dispersing wolf encounters another pack and is attacked as an intruder, or when two packs encounter each other along their common territorial boundary. This form of mortality is likely to increase as more of the available wolf habitat becomes saturated with wolf pack territories, as is already the case in northeastern Minnesota. Over the period from October 1979 through June 1998 7 (13 percent) wolves of the diagnosed mortalities of radiocollared Wisconsin wolves were a result of wolves being killed by other wolves (Wydeven 1998). However, this behavior is a normal part of the species' behavioral repertoire and should not be a cause for concern in healthy wolf populations as it normally indicates that the wolf population is at, or approaching, the carrying capacity of the area.

Humans have functioned as highly effective predators of the gray wolf as

we attempted to eliminate them from the landscape in earlier times. The United States Congress passed a wolf bounty that covered the Northwest Territories in 1817. Bounties on wolves subsequently became the norm for States across the species' range. In Michigan an 1838 wolf bounty became the ninth law passed by the First Michigan Legislature; a bounty remained in place until 1960. A Wisconsin bounty was instituted in 1865 and then repealed about the time wolves were extirpated from the State in 1957. Minnesota maintained a wolf bounty until 1965.

Subsequent to its listing as a federally endangered species, protection of the gray wolf under the Act and under State endangered species statutes prohibited the killing of wolves except under extenuating circumstances, such as in defense of human life, for scientific or conservation purposes, or under several special regulations intended to reduce wolf depredations on livestock. This reduction in human-caused mortality is the main cause of the wolf's comeback in parts of its historical range. However, it is clear that illegal killing of wolves still continues.

Illegal killing of wolves occurs for a number of reasons. Some of these killings are accidental (*e.g.*, vehicle collisions, mistaken for coyotes and shot, caught in traps set for other animals), and some of these incidents are reported to State, Tribal, and Federal authorities. However, it is likely that most illegal wolf killings are intentional and are never reported to authorities. Such killings may be done out of frustration over wolf depredations on livestock or pets, fear for the safety of pets or children, hatred of the species, opposition to wolf recovery, as a form of protest against the government, or for other reasons. The number of illegal killings is difficult to determine, because they generally occur in isolated areas and the evidence is quickly concealed.

There are two Minnesota studies that provide insight into the extent of human-caused wolf mortality before and after the species' listing. Based upon bounty data from a period that predated wolf protection under the Act by 20 years, Stenlund (1955) found an annual human-caused mortality rate of 0.41 wolves (that is, 41 out of 100 wolf mortalities were human-caused). Fuller (1989) provided 1980–86 data from a north-central Minnesota study area and found an annual human-caused mortality rate of 0.27. (Fuller's mortality rate excludes wolves killed as part of the wolf depredation control program.) However, drawing conclusions from

these two data sets is difficult due to the confounding effects of habitat quality, exposure to humans, prey density, differing time periods, and vast differences in study design. While these figures provide support for the contention that human-caused mortality decreased subsequent to the wolf's protection under the Act, it is not possible at this time to determine if human-caused mortality (apart from mortalities from depredation control) has significantly changed during the 25-year period that the gray wolf has been listed as threatened or endangered.

Interestingly, when compared to his 1985 survey, Kellert's 1999 public attitudes survey showed an increase in the number of northern Minnesota residents who reported having killed, or knowing someone who had killed, a wolf. However, members of groups that are likely to encounter wolves—farmers, hunters, and trappers—reported a decrease in the number of such incidents (Kellert 1999). Due to these apparently conflicting results, and differences in the methodology of the two surveys, it is difficult to draw any clear conclusions on this issue.

It is important to note that despite the difficulty in measuring the extent of illegal killing of wolves, their population and range in the western Great Lakes States has continued to increase. During recent decades all sources of wolf mortality, including legal (takings for research and depredation control activities) and illegal human-caused mortality, have not stopped the continuing growth of the wolf population, estimated at a 4 to 5 percent average annual increase in Minnesota, and about a 30 to 35 percent average annual increase in Wisconsin and Michigan. This indicates that total gray wolf mortality continues to be exceeded by recruitment (that is, reproduction and immigration) into these areas.

As the wolf population in Wisconsin and Michigan achieves habitat saturation or as the cultural carrying capacity is approached, the rapid growth rates are expected to slow and likely will eventually stop. We should then expect to see negative growth rates (that is, wolf population declines) in some years, due to short-term fluctuations in birth and mortality rates. However, adequate wolf monitoring programs, as identified in the Michigan, Wisconsin, and Minnesota (submitted by MN DNR in 1999 but not approved by the Legislature) wolf management plans, should be able to identify excessively high mortality rates and low birth and/or survival rates and to trigger timely corrective action when

necessary. Michigan and Wisconsin DNRs are currently monitoring their wolf populations in this manner, and we fully expect this level of monitoring will continue if those wolves are reclassified to threatened status. The goals of all three State wolf management plans are to maintain a within-state wolf population that is well above the size identified in the Federal Eastern Recovery Plan for viable isolated wolf populations.

In Wisconsin, human-caused mortalities accounted for 58 percent of the diagnosed mortalities on radiocollared wolves from October 1979 through June 1998. One-third of all the diagnosed mortalities, and 55 percent of the human-caused mortalities, were from shooting. Another 12 percent of all the diagnosed mortalities resulted from vehicle collisions. Vehicle collisions have increased as a percentage of radiocollared wolf mortalities. During the October 1979 through June 1995 period only one of 27 known mortalities was from that cause, but from July 1995 through June 1998 5 of the 26 known mortalities resulted from vehicle collisions (WI DNR 1999a, Wydevén 1998).

In the Upper Peninsula of Michigan human-caused mortalities accounted for 75 percent of the diagnosed mortalities, based upon 34 wolves recovered from 1960 to 1997. Twenty-eight percent of all the diagnosed mortalities and 38 percent of the human-caused mortalities were from shooting. In the Michigan Upper Peninsula during that period about one-third of all the known mortalities were from vehicle collisions (MI DNR 1997). During the 1998 Michigan deer hunting season three radiocollared wolves were shot and killed, resulting in one arrest and conviction; the other two cases remain under investigation (Hammill *in litt.* 1999, Michigan DNR 1999b).

A continuing increase in wolf mortalities from vehicle collisions is expected as wolves continue their colonization of areas with more human developments and a denser network of roads.

A significant portion of the intentional illegal mortalities may arise as a protest against the Federal government or from frustration due to a perception of inadequate Federal depredation control programs or inadequate State compensation for depredated livestock and dogs. The proposed action in the Western Great Lakes DPS—reclassifying Wisconsin and Michigan wolves to threatened and implementing a special regulation for lethal depredation control, with no change in the protection provided to

threatened Minnesota wolves—is expected to have both positive and negative impacts on illegal wolf mortality.

In Wisconsin and Michigan, the rapidly expanding wolf population is beginning to cause more depredation problems. For example, from 1991 through 1996 only one Wisconsin wolf was captured for depredation control. In 1997 two wolves were trapped and moved to eliminate depredation problems. In 1998 four wolves had to be captured as a result of depredation problems. For Wisconsin and Michigan, special management regulations under section 4(d) of the Act would provide increased flexibility and efficiency in dealing with these problem wolves (See Special Regulations Under Section 4(d) for Threatened Species). This may result in greater public satisfaction with the States' abilities to promptly and effectively deal with depredation incidents, and may reduce the perception that wolves are out of control and vigilante action is needed to reduce their numbers.

Wolves were extirpated in the Dakotas in the 1920s and 1930s and were rarely reported from the mid-1940s through the late 1970s. From 1981 to 1992 10 wolves were killed in the Dakotas, with 5 of them killed from 1991 to 1992. Two more were killed in North Dakota after 1992. There have been other recent reported sightings of gray wolves, including a confirmed sighting by U.S. Department of Agriculture, Animal and Plant Health Inspection Service, Wildlife Services (APHIS-Wildlife Services) personnel in 1996 near Gary, South Dakota, and a 1994 confirmation of a den with pups in extreme north central North Dakota. Several other unconfirmed sightings have been reported from extreme northeastern and southeastern South Dakota. Wolves killed in North and South Dakota are most often shot by hunters who have mistaken them for coyotes or are killed by vehicles.

Additional discussion of past and future wolf mortalities in the Western Great Lakes DPS arising from depredation control actions is found under factor D. *The inadequacy of existing regulatory mechanisms.*

Despite human-caused mortalities of wolves in the western Great Lakes States, it is clear that these populations have continued to increase in both numbers and range. As long as other mortality factors do not increase significantly, and the wolf populations receive adequate and timely monitoring to document (and counteract, if necessary) the effects of excessive human-caused mortality, we believe the

Minnesota and Wisconsin-Michigan wolf populations will not decline to non-viable levels, nor will recovery slow, in the foreseeable future due to human-caused killing or other forms of predation.

Western Gray Wolves. Since wolves have been monitored in Montana, Idaho, and Wyoming only one wolf has been confirmed to have been killed by another predator. That lone reintroduced wolf was killed by a mountain lion in 1995. Wolves in the northern Rocky Mountains inhabit the same areas as mountain lions, grizzly bears, and black bears, but conflicts rarely result in the death of either species. Wolves are occasionally killed by prey that they are attacking but those instances are rare. Since 1987, wolves in the northern Rocky Mountains have apparently died from wounds they received while attacking prey on about four occasions. This level of mortality will not significantly affect wolf recovery. Other wolves are the largest cause of natural predation among wolves. Wherever wolves occur, including Montana, Idaho, and Wyoming, some low level of mortality due to territorial conflict between wolves is common. Those incidents occur but are so infrequent that they do not cause a level of mortality that would significantly affect a wolf population that is at or above recovery levels.

Humans are the largest cause of wolf mortality and the only cause that can significantly affect wolf populations at recovery levels. The annual survival rate of immature wolves in northwestern Montana and adjacent Canada from 1984 to 1995 was 80 percent (Pletscher *et al.* 1997); 84 percent for resident wolves and 66 percent for dispersers. That study found 84 percent of immature wolf mortality to be human-caused. Fifty-eight wolves from northwestern Montana with functioning radiocollars have died since 1987, and humans caused the death of 49 (84 percent). Wolves are more likely to be radiocollared if they come into conflict with people, so the proportion of mortality caused by agency depredation control actions could be over-estimated by this study. People who illegally kill wolves may destroy the radiocollar so the proportion of illegal mortality could be under-estimated.

As was typically the case elsewhere in North America, humans were the largest cause of wolf mortality in northwestern Montana. Wolf control was the leading cause of death for wolves in northwestern Montana. Of 28 wolves from northwestern Montana that were relocated and released because of conflicts with livestock, humans caused

the death of 96 percent. Only two females lived long enough after relocation to reproduce, and both of them were killed by people within months of whelping. Injuries during capture or confinement ultimately caused the death of 7 of those 28 relocated wolves.

In central Idaho, 25 of 35 original reintroduced wolves have functioning radiocollars and continue to be monitored. In addition, new radiocollars have been placed on an additional 24 wolves. One radiocollared wolf from northwestern Montana has dispersed into central Idaho. Eleven radiocollared wolves have died. Sixty-four percent of the wolf mortalities were human-caused. Fewer wolves have died in Idaho than in either the Greater Yellowstone Area or northwestern Montana. Causes of natural mortality in Idaho were starvation and mountain lion predation.

Over three times as many radiocollared wolves have died in the Greater Yellowstone Area than in central Idaho. Humans caused 68 percent of mortalities in the Greater Yellowstone Area. Sources of natural mortalities included other wolves (4), prey (2), avalanches (1), old age (1), and unknown causes (2).

The EIS (U.S. Fish and Wildlife Service 1994a) predicted that 10 percent of the reintroduced wolves would be removed annually for depredation control with an additional 10 percent dying annually from other causes. Out of 66 original reintroduced and 69 other wolves radiocollared for monitoring purposes over the past 4 years in central Idaho and the Greater Yellowstone Area, 45 (33 percent) have died. Most (68 percent) wolf mortality was human-caused. Annual mortality has been below the 20 percent annual level that was predicted in the EIS. Reintroduced wolves had a lower proportion of human-caused mortality compared to naturally colonizing wolves because they were released in remote areas where contact and conflicts with people were less likely. Relocated depredating wolves in northwestern Montana had a higher proportion of human-caused mortality (96 percent) than either reintroduced (61 percent) or naturally colonizing wolves in northwestern Montana (71 percent excluding legal harvest in Canada). In northwestern Montana relocated depredating wolves traveled widely and often resettled in places similar to the areas that they had been removed from, typically private ranch land. Consequently they continued to come into conflict with people and livestock.

The levels of documented human-caused mortality among wolves in the northern Rocky Mountains have not, at this time, been significant enough to cause declines in wolf populations. The protection of wolves under the Act appears sufficient to promote wolf population growth. Under the provisions of the experimental population rules for the central Idaho and Yellowstone areas, wolf population growth has been high. Although special management regulations under section 4(d) of the Act would allow some expanded take of problem wolves outside the experimental population areas, such regulations would still sufficiently protect wolves from human persecution. Continued rapid growth towards recovery levels is therefore expected (See Special Regulations Under Section 4(d) for Threatened Species).

Enforcement of the Act's prohibitions on taking wolves listed as "experimental" and "endangered" has been successful to date. Twelve wolves have been illegally killed in the experimental areas, and six cases have been resolved. In northwestern Montana nine wolves were known to have been illegally killed, and four cases have been resolved. Fines have ranged from \$500 to \$10,000, with jail sentences being imposed for some violators. The legal or illegal killing documented to date has not been at a level that could affect wolf population growth to recovery levels.

Two yearling experimental wolves were legally killed (one each in Montana and Idaho) under the provisions of the experimental population special regulation by livestock producers who saw the wolves attacking livestock. They reported shooting the wolves to authorities within 24 hours as required. Both investigations confirmed compliance with the experimental rules, and no further action was taken. So far, wolves have been unintentionally killed by vehicles, coyote cyanide (M-44) devices, and traps, and during control and management actions, but investigations of these incidents concluded that prosecution was not warranted. These types of mortalities are relatively rare and will not affect wolf population growth to recovery levels.

Special management regulations under section 4(d) of the Act would allow for the legal take of wolves under more circumstances than the existing special regulation. The existing special management regulations under section 10(j) of the Act will continue to apply to the two nonessential experimental populations in the Northern U.S. Rocky

Mountains (See Special Regulations Under Section 4(d) for Threatened Species). Therefore, we do not expect wolf mortality rates to change significantly as a result.

Northeastern Gray Wolves. The proposed special management regulations under section 4(d) of the Act would give State and Tribal conservation agencies that actively undertake wolf recovery actions, such as a reintroduction effort, new regulatory flexibility to address problems caused by these wolves or their progeny (See Special Regulations Under Section 4(d) for Threatened Species). We are not proposing to authorize the incidental or intentional take of gray wolves that naturally occur in the Northeast. Special management regulations under section 4(d) of the Act will have no immediate effect on the protection afforded any naturally occurring or recolonizing gray wolves in the States of New York, Vermont, New Hampshire and Maine. However, if future wolf reintroductions occur in the Northeast, and conditions allowing incidental or intentional take pursuant to special management regulations under section 4(d) of the Act are met, it will not be possible in every instance to distinguish naturally occurring wolves from the unmarked progeny of reintroduced wolves. Therefore, in the event that one or more States or Tribes actively reintroduce wolves into the Northeast, some incidental or intentional take of naturally occurring wolves may occur in the future.

Southwestern (Mexican) Gray Wolves. As of mid-February, 2000, illegal killing has been confirmed as the cause of death of 4 of the 34 Mexican wolves that have been released to the wild. However, we do not believe that predation or illegal killing will preclude recovery of the Mexican wolf. Killing or capture and permanent confinement of gray wolves for scientific and educational purposes is discussed under Factor B, above.

D. The Inadequacy of Existing Regulatory Mechanisms.

Upon being listed under the Act the gray wolf immediately benefitted from a Federal regulatory framework that includes— prohibition of take, which is defined broadly under the Act to include killing, injuring, or attempting to kill or injure; prohibition of habitat destruction or degradation if such activities harm individuals of the species; the requirement that Federal agencies ensure their actions will not likely jeopardize the continued existence of the species, coupled with the requirement that Federal agencies implement measures to reduce the

incidental adverse effects of their actions; and the requirement that we develop and implement a recovery program for the species. In addition, the 1978 designation of critical habitat in Minnesota and Michigan (43 FR 9607) further requires Federal agencies to ensure that their actions do not result in the destruction or adverse modification of those designated areas. These protective regulations and conservation measures have substantially improved the status of the gray wolf.

Western Great Lakes Gray Wolves. A June 29, 1998, announcement by Secretary of Interior Bruce Babbitt and Service Director Jamie Rappaport Clark described, in part, our intention to propose a delisting of gray wolves in the Western Great Lakes. That intention was based, in large part, upon our belief that State wolf management plans for Minnesota, Wisconsin, and Michigan would either be completed, or would be sufficiently close to completion, so that our delisting and reclassification proposal could be based, in part, upon an analysis of the protective mechanisms and management strategies and actions to be described in those plans.

In late 1997 the Michigan wolf management plan was completed and received the necessary State approvals. By mid-1998 the Wisconsin wolf management plan was available as a public draft; it has since been revised, released as a second draft for public review and comment, and has undergone further revision. The Wisconsin Natural Resources Board approved the plan in October of 1999. Our biologists have participated on the teams that developed these two State plans, so we are familiar with their evolution and likely future direction. We believe that these plans provide sufficient information for us to analyze the future threats to the gray wolf population in Wisconsin and Michigan after Federal delisting.

The Minnesota Legislature failed to approve a State Wolf Management Plan and regulatory bill during the 1999 legislative session that would allow us to conclude that the future of the Minnesota wolf population would be assured, as is recommended by the recovery criteria for the Eastern Timber Wolf (See Other Alternatives Considered). Furthermore, as of mid-February, 2000, the Minnesota Legislature had not considered the wolf management bill produced by the Minnesota DNR in early 2000. Therefore, we are not proposing to delist wolves in the Western Great Lakes. Rather we are proposing to reclassify wolves in Wisconsin, Michigan, North Dakota, and South Dakota to threatened.

Upon adoption of an adequate State wolf management plan and regulatory bill for Minnesota, we will consider delisting wolves in the Western Great Lakes.

If this proposed regulation is finalized, wolves will continue to be protected by the provisions of the Act throughout this DPS. The regulatory changes that will take place are twofold—wolves in Wisconsin, Michigan, North Dakota, and South Dakota will be protected as a threatened species, rather than as an endangered species; and for the first time wolves in those four States will be subject to limited, but routine, lethal depredation control measures under the terms of the special regulation that we are proposing under section 4(d) of the Act.

The only direct change in protection that would result from a reclassification from endangered to threatened was discussed above, under *B. Overutilization for Commercial, recreational, scientific, or educational purposes.* The change stems from the broader authority of Service or State employees, or their designated agents, to take a threatened species without a Federal permit. Furthermore, we can issue permits to take threatened species for a somewhat wider variety of purposes than for endangered species. The impact of this increased take authority on wolf recovery is believed to be insignificant; additional discussion is found in that earlier section.

The second impact of this reclassification is indirect, and it stems from our ability to implement special regulations under section 4(d) of the Act for threatened, but not endangered, species. We are using that authority to propose a special regulation for the lethal control of depredating wolves in Wisconsin, Michigan, North Dakota, and South Dakota, in a form that is very similar to that authorized by the special regulation that has been in effect for Minnesota wolves since December 12, 1985 (50 FR 50792). The proposed special regulation will allow the killing of depredating wolves by certain government employees or agents, subject to several restrictions.

Depredation Control Programs in the Western Great Lakes States. Wolves that are injuring and/or killing domestic animals in the western Great Lakes States are currently controlled in different ways, depending upon their listing under the Act and their importance to our gray wolf recovery programs. In Minnesota depredating wolves have been lethally controlled under a special regulation, because they are listed as threatened. Section 4(d) of

the Act allows lethal take of threatened animals under a special regulation. (Details on the Minnesota depredation control program are provided later in this subsection.)

Depredating wolves in Wisconsin and Michigan, listed as endangered and therefore not eligible for a section 4(d) special regulation, currently are being trapped and released in suitable and unoccupied habitat at some distance from the depredation location. The goal of this approach is to eliminate future depredations by the individual wolf by moving it to suitable, but vacant, habitat at a location with abundant wild prey, and with minimal or no exposure to domestic animals. However, the results of this approach vary widely. In some cases the wolf will become resident at the new site and will not resume its previous habit of preying on domestic animals. In other cases the wolf attempts to return to its previous territory, continues its depredations on domestic animals at the new site, or is killed by nearby resident wolves. This approach has a greater chance of succeeding if there are several areas of suitable unoccupied habitat from which to choose for release of the wolf, so that a release location can be selected that is very remote from the wolf's previous territory.

However, the rapidly growing wolf populations in both Wisconsin and Michigan make it increasingly difficult to find suitable, but unoccupied, habitat into which a depredating wolf can be successfully released. In the most recent incident of the capture and translocation of a depredating wolf in Wisconsin, the animal left the release site and had traveled half of the distance back to its capture site before being mistaken for a coyote and shot (Wydeven *in litt.* 1999).

Due to the decreasing effectiveness of translocating depredating wolves, and the high cost of making such attempts, the States of Wisconsin and Michigan have requested the authority to carry out lethal depredation control measures, similar to what has been done by APHIS-Wildlife Services in Minnesota. As the wolf population grows in number and expands in range in those two States, those wolves will increasingly use more agricultural areas and will be exposed to additional domestic animals as potential prey. We believe that special management regulations under section 4(d) of the Act would provide increased flexibility and efficiency in managing wolves (See Special Regulations under Section 4(d) for Threatened Species.)

Based upon depredation control statistics from Minnesota, we expect the

lethal take of Wisconsin and Michigan wolves to be very small during the next few years. Data from Minnesota clearly show that an expanding wolf population's increasing exposure to domestic animals will likely lead to increased depredation incidents, and the need for additional lethal control of those wolves. From 1980 to 1984, with a late winter wolf population of about 1350 animals, an annual average of 2.2 percent of the Minnesota wolf population was killed by APHIS-Wildlife Services to reduce depredation problems. From 1985 to 1989, with a late winter wolf population of about 1600 wolves, the annual average of wolves killed for depredation control increased to 3.0 percent. Additional increases have occurred in the 1990s.

With the current Wisconsin and Michigan (Upper Peninsula) late winter wolf populations at 200 or less in each State, we estimate that about 2 percent of those wolves will be taken through lethal depredation control annually, or about 4 or 5 wolves in each State. Given the average annual population increases of 30 to 34 percent over the last 6 years in each of these States, the effect of such levels of lethal depredation control will not prevent the continued growth of the wolf population in either State, and will probably be so small that it does not noticeably slow that growth over the next few years. Wolf recovery will not be affected in either State. Reporting and monitoring requirements will ensure that the level of lethal depredation control is evaluated annually and can be curtailed if necessary. Therefore, we do not believe that lethal depredation control will be a significant threat to the future of wolves in either Michigan or Wisconsin, or that it will result in a need to reclassify those wolves as endangered in the foreseeable future.

Only one wolf has been killed for depredation control purposes in Wisconsin and Michigan. An adult wolf was killed by the WI DNR in 1999, under the provisions of a permit that we issued. This was done to end a chronic depredation problem at a private deer farm after the failure of extensive efforts to live-trap and remove the wolf (WI DNR 1999b).

For both North Dakota and South Dakota we have anticipated potential wolf depredation problems associated with mostly single, dispersing wolves from the Minnesota and Manitoba populations. To cope with these anticipated depredations we have had a "Contingency Plan for Responding to Gray Wolf Depredations of Livestock" in place for each State for several years (U.S. Fish and Wildlife Service 1992b,

1994b). In partnership with APHIS-Wildlife Services and State animal damage control agencies, the contingency plans provide for the capture and permanent transfer to American Zoo and Aquarium Association (AZA)-approved holding facilities, such as zoos, captive breeding centers, or research facilities, of all depredating or injured/sick wolves in North Dakota and South Dakota. The lethal control of depredating and injured/sick wolves is authorized by the plans only if no AZA-approved holding facilities could be identified. Verified wolf depredations occur approximately once every other year in North Dakota, with the most recent occurring in June of 1999; there have been no verified wolf depredations in South Dakota in recent decades. To date, neither state has found it necessary to implement either the non-lethal or lethal control measures authorized under the contingency plans, although confirmed wolf sightings and some incidents of wolf depredation continue to occur.

North Dakota and South Dakota are recognized as lacking significant recovery potential for the gray wolf. Therefore, lethal control of depredating wolves in these two States will not adversely affect the Western Great Lakes DPS recovery program. We believe that special management regulations under section 4(d) of the Act to allow lethal control of depredating wolves would help to promote greater public acceptance of the gray wolf recovery programs being carried out in areas where wolf recovery is feasible (See Special Regulations under Section 4(d) for Threatened Species). Furthermore, such regulations would allow Federal, State, and Tribal agencies in the Dakotas to be even more responsive to depredation incidents, thus, minimizing conflicts between wolves and livestock production. In addition, such regulations would eliminate the costs, time, and facilities needed to capture, transport, and house live gray wolves.

We expect a much higher proportion of North Dakota and South Dakota wolves to become involved in depredation than the approximately 2 or 3 percent we expected in Wisconsin and Michigan. Thus, if the Minnesota wolf population continues to expand and provide additional dispersing wolves, lethal depredation control activities in North Dakota and South Dakota may also kill on the order of four or five wolves annually in each of these two States. These mortalities will neither slow the recovery of the Minnesota and Michigan-Wisconsin wolf populations nor delay the eventual delisting of the Western Great Lakes DPS, because the

Eastern Plan does not rely on wolves in North Dakota or South Dakota to achieve any of its recovery criteria.

This proposal will not affect the current section 4(d) special regulation for wolf depredation control in Minnesota, and we expect that program will continue unchanged. During the period from 1980 through 1998 the Federal Minnesota wolf depredation control program has annually euthanized from 20 (in 1982) to 216 (1997) gray wolves. The annual average was 30 wolves killed from 1980 to 1984, 49 from 1985 to 1989, 115 from 1990 to 1994, and 152 from 1995 to 1998. Based upon estimates of the Minnesota wolf population during these periods, these numbers represent an average annual removal of approximately 2.2 percent, 3.0 percent, 6.0 percent, and 6.7 percent of the total population during those four multi-year periods, respectively. The lowest annual percentage of Minnesota wolves destroyed by APHIS-Wildlife Services was 1.5 percent in 1982; the highest percentage was 9.4 in 1997.

There is no evidence that this level of wolf removal for depredation control purposes has halted the increase in wolf numbers or range in Minnesota, although it is quite possible that the depredation control program may have slowed wolf population growth, especially since the late-1980s. Because the Minnesota wolf population has continued to grow at an average annual rate of 4 to 5 percent since 1989, we believe that it is highly likely that a viable wolf population will continue to exist in Minnesota if a lethal depredation control program of this magnitude is continued. However, monitoring of the wolf population will become increasingly important if the percentage of wolves killed for depredation control continues to increase, or if other mortality factors increase in magnitude. Annual monitoring may become necessary to enable timely corrective action, including reduction of lethal depredation control activities, if the Minnesota wolf population begins to decrease or to contract in geographic range. At this time, however, it appears that continuing the current magnitude of lethal depredation control under the existing special regulation will not significantly suppress the Minnesota wolf population.

State and Tribal Management and Protection of Wolves. The Wisconsin Wolf Management Plan recommends immediate reclassification from State-endangered to State-threatened status because the State's wolf population has already exceeded the State reclassification criterion of 80 wolves

for 3 years. The Plan further recommends the State manage for a gray wolf population of 350 wolves outside of Native American reservations, and states the species should be delisted by the State once the population reaches 250 animals outside of reservations. Upon State delisting, the species would be classified as a "protected nongame species," a designation that would continue State prohibitions on sport hunting and trapping of the species. The Wisconsin Plan includes criteria that would trigger State relisting as threatened (a decline to fewer than 250 wolves for 3 years) or endangered (a decline to fewer than 80 wolves for 1 year). State reclassification to threatened, and possibly State delisting, will occur while the wolf is still federally listed as threatened or endangered. If the wolf is both federally and State-delisted proactive wolf control by government trappers in problem areas could occur. In addition, the taking of wolves by the public in Wisconsin would be considered to keep the wolf population within the range of social tolerance if other control measures have failed to do so; however, the social tolerance level has not yet been determined. Public taking of wolves will not occur while the wolf remains federally listed as threatened or endangered. The Wisconsin plan will be reviewed annually by the Wisconsin Wolf Advisory Committee and will be reviewed by the public every 5 years.

Both the Wisconsin and Michigan Wolf Management Plans recommend managing wolf populations within each State as isolated populations that are not dependent upon frequent immigration of wolves from an adjacent State or Canada. Thus, each State will be managing for a wolf population at, or in excess of, the 200 wolves identified in the Federal Recovery Plan for the Eastern Timber Wolf as necessary for an isolated wolf population to be viable. We support this approach and believe it provides further assurance that the gray wolf will remain a viable component of the western Great Lakes ecosystem in the foreseeable future.

The Wisconsin and Michigan wolf management plans recommend similar high levels of protection for wolf den and rendezvous sites, whether on public or private land. Both State plans recommend that most land uses be prohibited at all times within 100 meters (330 feet) of active sites. Seasonal restrictions (March through July) should be enforced within 0.8 km (0.5 mi) of these sites, to prevent high-disturbance activities such as logging from disrupting pup-rearing activities.

These restrictions should remain in effect even after State delisting occurs.

While the Tribes do not yet have management plans specific to the gray wolf, several Tribes have informed us that they have no plans or intentions to allow commercial or recreational hunting or trapping of the species on their lands even if gray wolves were to be federally delisted. As previously discussed in the section *Overutilization for Commercial, Recreational, Scientific, or Educational Purposes*, Tribes are expected to continue to provide sufficient protection to gray wolves on reservation lands to preserve the species' long-term viability in the western Great Lakes area.

Based upon information received from other Federal land management agencies in the western Great Lakes area, we expect National Forests, units of the National Park System, and National Wildlife Refuges will provide additional protections to threatened gray wolves beyond the protections that will be provided by the Act and its regulations, State wolf management plans, and State protective regulations. Refer to the discussion under Factor A. *The Present or Threatened Destruction, Modification, or Curtailment of its Habitat or Range* for Details.

Northeastern Gray Wolves. Except as provided by special management regulations under section 4(d) of the Act (See Special Regulations under Section 4(d) for Threatened Species.), the current Federal regulatory framework will remain in effect largely unchanged for those wolves in the Northeast proposed to be reclassified to threatened status. The Act and implementing regulations under 50 CFR 17.31 provide nearly the same level of protection to both endangered and threatened species. The exceptions to this equal protection are twofold.

First, we can issue permits to take threatened species from the wild for a wider variety of purposes than for endangered species. The additional purposes are for educational use, zoological exhibition, and for other special purposes consistent with the Act, that is, for purposes consistent with the conservation of the species.

Second, an employee of the Service or of a State conservation agency which is operating under a conservation program pursuant to the terms of a cooperative agreement with us in accordance with section 6(c) of the Act, who is designated by his agency for such purposes, may take threatened species in the course of official duties, to carry out conservation programs for that species.

Because both of these provisions allow take of threatened species for purposes that are intended to promote the conservation of the species, the additional take that results from these provisions must be small and must be beneficial to the Northeastern DPS.

In addition, special management regulations under section 4(d) of the Act (See Special Regulations under Section 4(d) for Threatened Species) will also authorize additional take, both intentional and incidental, of gray wolves if the take is done under conditions specified in a Service-approved wolf conservation plan. (Refer to *Northeastern Gray Wolf DPS special regulations*, below, for additional discussion.) These conservation plans, and all actions carried out under their authority, must have the conservation of the gray wolf as their purpose.

We do not believe this additional management flexibility provided by a reclassification to threatened status and the proposed special regulation will adversely impact the recovery of gray wolves. On the contrary, we believe the additional flexibility will promote wolf recovery in those areas by making it easier for State, Tribal, and local agencies, as well as private organizations, to become more involved in the activities essential to wolf recovery—educational programs, wolf reintroductions, and capture and relocation of nuisance wolves.

Western Gray Wolves. Currently, wolves in these States have two different listings under the Act—(1) Those wolves within the two nonessential experimental populations (all of Wyoming and most of Idaho and Montana) are treated as threatened wolves. However, for purposes of interagency cooperation (section 7 of the Act) those wolves are treated as species proposed for listing and receive limited consideration in the planning and implementation of Federal agency actions, unless those actions occur on units of the National Park System or the National Wildlife Refuge System, in which case the wolves are treated as a threatened species and are subject to the full protections of section 7. These wolves also are subject to two special regulations that modify the normal protections of the Act for threatened species (under the nonessential experimental population designation 59 FR 60252 and 60266; November 22, 1994). (2) Those wolves outside of the nonessential experimental populations are listed as endangered and are subject to the strictest protections afforded by the Act.

The proposed special management regulations under section 4(d) of the Act

(See Special Regulations under Section 4(d) for Threatened Species) would increase management flexibility for wolves in the Western DPS (but only in areas outside of the experimental population areas) because they would allow take under additional circumstances. Wolves near livestock could be harassed in a noninjurious manner at any time on private land or on public land by the livestock permittee. Intentional or potentially injurious harassment could occur by permit on private land and public land. Wolves attacking not only livestock, but also any domestic animals, on private land could be taken in the act of attacking domestic animals without a permit; on public land a permit would be required for such take. Permits would be required for taking wolves on private land if they are a risk to domestic animals and there are at least 10 breeding pairs of wolves in the State where the permit would apply.

The increased management flexibility for take is expected to reduce and more quickly resolve conflicts between livestock producers and wolves by providing additional methods by which individual problem wolves can be removed from the wild population. We do not expect the take under special management regulations under section 4(d) of the Act (See Special Regulations under Section 4(d) for Threatened Species) to result in a significant increase in the removal of problem wolves nor to appreciably slow wolf recovery, because much of that recovery is occurring, and will continue to occur, within the experimental population areas.

During the EIS process for the reintroduction of nonessential experimental wolves into the West (U.S. Fish and Wildlife Service 1994a) the States of Montana, Idaho, and Wyoming, as well as many State residents, asked that the States be delegated the authority and funding to assume the lead role in wolf restoration. The special regulations under the experimental population designation allowed this opportunity (59 FR 60252–60266 and 60266–60281; November 22, 1994), and all three States produced draft wolf management plans that were funded by us. However, none of the States' plans obtained sufficient public or political support, and they were abandoned. After nearly 3 years of internal debate, on August 19, 1997, the Governors of Montana, Idaho, and Wyoming signed a memorandum of understanding announcing that their States would not be directly involved in wolf management until gray wolves were removed from protections of the Act.

The memorandum also directed the States to be involved in recovery planning, assist in control of problem wolves, facilitate communication, and develop a tri-state plan by the year 2000 that would assist us in the timely delisting of wolves in the northern Rocky Mountains. This process will improve coordination of management of wolves that are listed as threatened.

In 1995, funding levels reduced our northern Rocky Mountains wolf recovery program staff from five people to two, and our direct involvement in wolf management declined. Fortunately, however, the Nez Perce Tribe began managing wolves in Idaho under a cooperative agreement with us in 1996, and personnel from Yellowstone National Park, APHIS-Wildlife Services, and our law enforcement agents assumed nearly all wolf management activities in the Greater Yellowstone Area. After the States formally declined direct involvement in wolf recovery, we redirected our wolf recovery funding to support development of the State wolf management plans to encourage State involvement in wolf recovery. In addition, due to the anticipation of the increased effort that more wolves will require under the special management regulations, we also used the redirected funding to station two Service biologists in Lander, Wyoming, and another two in Helena, Montana, beginning in January 1999. This additional effort by us will greatly assist in the management of gray wolves in the West and allow for full implementation of special management regulations under section 4(d) of the Act (See Special Regulations under Section 4(d) for Threatened Species).

Depredation Control Programs in the Western DPS. In the Northern U.S. Rocky Mountain wolf recovery area, reports of suspected wolf-caused damage to livestock are investigated by APHIS-Wildlife Services specialists using standard techniques (Roy and Dorrance 1976, Fritts *et al.* 1992, Paul and Gipson 1994). If the investigation confirms wolf involvement, APHIS-Wildlife Services specialists conduct wolf control in close coordination with us and Nez Perce Tribal personnel.

In northwestern Montana, wolf control under a section 10(a)(1)(a) permit is conducted only when livestock are attacked. In the experimental areas, wolf control can also occur when other domestic animals, such as dogs, are attacked on private land more than once in a calendar year. Control in both of these situations consists of the minimum actions believed necessary to reduce further depredations. The spectrum of

control measures used includes intensive monitoring of the wolves and livestock (including providing a telemetry receiver to the affected rancher), aversive conditioning (i.e., capturing, radiocollaring, and releasing wolves on site or harassing wolves with noise-makers such as cracker shells), relocating or killing some wolves, or some combination of these approaches. Control measures are continued until livestock depredations cease, even if all wolves eventually have to be removed. When five or fewer breeding pairs are in a recovery area, wolves are relocated on their first offense. When at least six breeding pairs are present, wolves can be killed after their first offense. Wolves that repeatedly depredated on livestock were killed.

In experimental areas, special regulations allowed landowners on private land and livestock producers on public land to harass wolves at any time. In the experimental areas, wolves attacking livestock on private land can be shot by landowners with a permit, and, after six breeding pairs are established, our permit can allow permittees to shoot wolves attacking livestock on public land. A private program has compensated ranchers full market value for confirmed and one-half market value for probable wolf-kills of livestock and livestock guard animals (Fischer 1989).

The control of problem wolves depredating livestock resulted in the removal of less than six percent of the wolves in northwestern Montana between 1987 and 1995. This level of mortality is not expected to prevent wolf populations from reaching recovery levels. Wolves in the Greater Yellowstone and central Idaho areas have attacked livestock less frequently than predicted. Wolf control removed a total of 45 wolves between 1995 and 1999. This represented less than six percent of the wolf population over a 5-year period. While it is expected that wolf control will continue to remove wolves that attack livestock from the population in the Western DPS, we still expect that wolf population recovery will be achieved by 2002. Management of wolves under the special management regulations under section 4(d) of the Act (See Special Regulations under Section 4(d) for Threatened Species) is not expected to significantly increase wolf mortality rates, because relatively few wolves attack livestock.

The only significant difference in the management of problem wolves between the current management and the proposed management of wolves following their reclassification from endangered to threatened would be the taking of wolves in the act of attacking

livestock or domestic animals on private land by private landowners. In the past 4 years in Idaho and Wyoming only two nonessential experimental wolves have been legally taken by landowners. That level of take could not significantly increase wolf mortality rates or decrease the rate of wolf population recovery.

During depredation control actions for problem wolves in Montana, Idaho, and Wyoming, individual wolves have incurred injuries from capture that ultimately resulted in their death or removal from the wild (one in Idaho and two in Montana). Mortality from capture is rare and not a significant portion of total mortality in the wolf population.

We have determined that effective control of problem wolves benefits the conservation of the species in the northern Rocky Mountains (U.S. Fish and Wildlife Service 1999).

Southwestern (Mexican) Gray Wolves. The listing status of Mexican Gray wolves will not change with this proposed regulation. They will continue to be endangered, except for the reintroduced population which will retain its current status of a nonessential experimental population.

E. Other Natural or Manmade Factors Affecting its Continued Existence.

Public Attitudes Toward the Gray Wolf. The primary determinant of the long-term status of gray wolf populations in the United States will be human attitudes toward this large predator. These attitudes are based upon the conflict between human activities and wolves, concern with the perceived danger the species may pose to humans, its symbolic representation of wilderness, the economic effect of livestock losses, the conviction that the species should never be a target of sport hunting or trapping, and the wolf traditions of Native American Tribes.

We have seen a change in public attitudes toward the wolf over the last few decades. Public attitude surveys in Minnesota and Michigan (Kellert 1985, 1990, 1999), as well as the citizen input into the wolf management plans of Minnesota, Wisconsin, and Michigan indicate strong public support for wolf recovery if the adverse impacts on recreational activities and livestock producers can be minimized (MI DNR 1997, MN DNR 1998, WI DNR 1999a). This increased public acceptance of wolves during the last 25 years also has reduced illegal persecution and killing.

Similar national support is evident for wolf recovery and reintroduction in the Northern U.S. Rocky Mountains and appears to be developing for wolf recovery in the northeastern States. With the continued help of private conservation organizations, States, and

Tribes, we can continue to foster public support to maintain viable wolf populations in the western Great Lakes area and for recovery of wolves in the Northeast, West, and Southwest. We believe that special management regulations under section 4(d) of the Act (See Special Regulations under Section 4(d) for Threatened Species) will further foster public support for wolf recovery by providing more effective means for dealing with wolf-human conflicts.

Southwestern (Mexican) Gray Wolves. The primary factor currently affecting the continued existence of the Mexican wolf in the wild is the small number of individuals in the wild population. No wolves are known to exist in the wild in Mexico, and only 7 Mexican wolves exist in the wild in the United States (as of February 2000), most of which are captive-raised animals released by us since March 1998. The continued existence of the Mexican wolf depends upon the success of our reintroduction projects in the Southwest. The reintroduction plan requires an assessment of the success of the project at 3 and 5 years following the first releases. It is too soon to know which factors, if any, may affect the continued existence of Mexican wolves in the wild.

Designation of Distinct Population Segments

Currently, the gray wolf is listed as threatened in Minnesota and as endangered in the other 47 conterminous States, effectively establishing a Minnesota DPS that is delimited by State boundaries in the absence of any other indications of discreteness. This separate designation of Minnesota gray wolves as threatened was established in 1978, before our adoption of the 1996 Vertebrate Population Policy (61 FR 4722; February 7, 1996); this proposed rule brings the current listing of the gray wolf into compliance with the policy.

Due to the extensive geographic separation in current wolf distribution in the conterminous States, and based on the Vertebrate Population Policy, this notice proposes the reclassification of the gray wolf by establishing the following 4 DPSs within the conterminous 48 States and Mexico (refer to Map 2 located at the end of the Alternative Selected for Proposal section).

Western Great Lakes Gray Wolf Distinct Population Segment. Consisting of gray wolves within the States of North Dakota, South Dakota, Minnesota, Wisconsin, and Michigan, and those gray wolves in captivity that originated

from, or whose ancestors originated from, this geographic area.

Southwestern (Mexican) Gray Wolf Distinct Population Segment. Consisting of gray wolves in Arizona south of the Colorado River and the Little Colorado River between Hoover Dam and Winslow and south of Interstate Highway 40 between Winslow and the eastern State boundary; New Mexico south of Interstate Highway 40; Texas south of Interstate Highway 40 and west of Interstate Highway 35; and Mexico; and those gray wolves in captivity that originated from, or whose ancestors originated from, this geographic area.

Western Gray Wolf Distinct Population Segment. Consisting of gray wolves in the States of Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, and the parts of Arizona and New Mexico north of the Colorado River and the Little Colorado River between Hoover Dam and Winslow (Arizona) and north of Interstate Highway 40 between Winslow and the eastern boundary of New Mexico; and those gray wolves in captivity that originated from, or whose ancestors originated from, this geographic area.

Northeastern Gray Wolf Distinct Population Segment. Consisting of gray wolves within the States of New York, Vermont, New Hampshire, and Maine, and those gray wolves in captivity that originated from, or whose ancestors originated from, this geographic area.

The gray wolf populations within each of these proposed DPSs are separated from gray wolf populations in the other DPSs by large areas that are not occupied by, and may not be suitable for, breeding populations of resident wild gray wolves. Although dispersing individual gray wolves have been located in some of these unoccupied areas (Licht and Fritts 1994), and it is possible that individual dispersing wolves can completely cross some of these gaps between occupied areas, we believe that the existing geographic isolation of wolf populations between these four areas fully satisfies the Vertebrate Population Policy's criterion for discreteness of each DPS. The Vertebrate Population Policy allows us to use international borders to delineate the boundaries of a DPS even if the current distribution of the species extends across that border. Therefore, we will use the United States-Canadian border to mark portions of the boundaries of three of the DPSs due to the difference in control of exploitation, conservation status and regulatory mechanisms between the two countries. In general, wolf populations are more numerous and wide-ranging in Canada, therefore, wolves are not protected by

Federal laws in Canada and are publicly trapped in most Canadian provinces.

We further believe that each of these four wolf populations satisfies the significance criterion of the Vertebrate Population Policy. Without viable wolf populations in these four geographic areas the recognized historical range of the species within the 48 conterminous States would have extensive and significant gaps, possibly broader than the dispersal distance of the species (Fritts 1983). Additionally, the Western Great Lakes, Western, and Southwestern (Mexican) Gray Wolf Distinct Population Segments are each being repopulated by wolves of distinct morphological characteristics which may represent different gray wolf subspecies.

The existence of large areas of potentially suitable wolf habitat and prey resources in parts of New England, the possibility that wild wolves may exist in remote areas of Maine, and the presence of wolf populations in neighboring areas of eastern Canada form the basis for our consideration of a DPS for the gray wolf in the Northeast. We have determined that, based on the Vertebrate Population Policy, gray wolves that may exist in Maine are discrete from gray wolves elsewhere in the lower 48 States. We have also determined that a population of gray wolves in this portion of the lower 48 States is significant and will contribute to the overall restoration of the species. In addition, although taxonomic studies have provided conflicting conclusions regarding wolf taxonomy at the subspecies level, we believe it is likely that a separate form of the gray wolf historically occupied the northeastern United States and adjacent Canada. Establishing a Northeastern DPS maximizes the ability of the Service, States, and Tribes to reestablish this form, or its current-day equivalent. The wolves in Canada, which would serve as a source of animals for natural reestablishment or reintroduction, are thought to be taxonomically and genetically similar to the wolves that once populated the northeastern United States.

Establishing a Northeastern DPS with a classification of threatened under the Act would recognize that suitable habitat exists, that a genetically appropriate source of wolves may exist in Canada for natural colonization or reintroduction, that wolf recovery once initiated proceeds quickly based on our experience in the Rockies, and that management flexibility is critical to successful wolf reestablishment. Threatened status would maintain Federal protection for any wolves that

might disperse into historical wolf range in the northeastern United States from Canada. However, a threatened classification, rather than an endangered classification, allows us to develop a special regulation under section 4(d) of the Act. The proposed special regulation under section 4(d) of the Act is intended to promote the restoration and recovery of wolves to one or more States within the Northeastern DPS by providing interested States and Tribes with the authority to assume a leading role in carrying out protection, management, and recovery actions for the species. This flexibility will make it easier for States and Tribes to control and remove problem wolves, and will reduce opposition to wolf restoration in areas where they have been absent for many decades. Any wolf restoration program would be implemented only with the full cooperation of respective State and Tribal natural resource management agencies and general support of landowners and after full compliance with the National Environmental Policy Act.

As discussed earlier (refer to *Distinct Population Segments and Experimental Populations*), our current consideration of designating a multi-state Western Gray Wolf DPS does not mean that we now believe the existing experimental wolf populations and the natural wolf population in Idaho, Wyoming, and Montana constitute a single wolf population. For purposes of gray wolf reintroduction by means of experimental populations in central Idaho and Yellowstone National Park, we examined the biological characteristics of the species to determine if the reintroduced wolves would be geographically separate from other gray wolf populations. We defined a wolf population to be two breeding pairs, each successfully raising two or more young for two consecutive years in a recovery area (U.S. Fish and Wildlife Service 1994a). This wolf population definition was used to evaluate all wolves in the northern U.S. Rocky Mountains to determine if, and where, gray wolf populations might exist. Gray wolves in northwestern Montana qualified as a wolf population under this definition; that existing wolf population was further examined to determine if it was geographically separated from the potential experimental population areas. We determined that the northwestern Montana wolf population was geographically separate, so we designated the two experimental population areas and began gray wolf reintroductions to establish the two

experimental populations. The DPS designation under consideration here would be made for a different purpose and would have to satisfy different criteria than the experimental population designations.

Wolves in Areas Beyond the Scope of Current Recovery Programs

Although the gray wolf currently is listed as either threatened or endangered throughout the 48 conterminous United States and Mexico, all or portions of half of those States are not included within the geographic coverage of the 3 existing recovery plans. Due to the lack of suitable habitat in many of the areas beyond the current scope of recovery programs, these States cannot offer significant potential for gray wolf recovery. In fact, some of the States, for example, California, where the gray wolf currently is listed as endangered, were on the very edges of the former historical range, and wolves were likely never very numerous there.

Thus, we believe the purposes of the Act will be fulfilled if each part of the conterminous States and Mexico, is either (1) included within one of the four DPSs to provide protection for current populations including dispersing and recolonizing wolves, (2) included within one of the four DPSs in order to facilitate potential future restoration efforts in areas where restoration has been determined to be feasible or potentially feasible, or (3) delisted and all protections of the Act are ended for that area. This proposal adopts this approach mentioned above by designating four DPSs and delisting any wolves that may occur outside of the DPS boundaries. We believe this approach will result in the recovery of the gray wolf throughout significant portions of its historical range and ultimately allow us to delist it across the entire geographic area in which it is listed, consistent with the purpose and definitions of the Act.

Increasing numbers of wolves in Minnesota and an expansion of their range westward and southwestward in the State has led to an increase in dispersing, mostly young, wolves that have been documented in North and South Dakota in recent years. An examination of skull morphology of North and South Dakota wolves indicates that of eight examined, seven likely had dispersed from Minnesota; the eighth probably came from Manitoba, Canada (Licht and Fritts 1994). The low potential for the establishment of a viable and self-sustaining wolf population in North and South Dakota, and the belief that all or

most wolves in the Dakotas are biologically part of the Minnesota-Wisconsin-Michigan wolf population, leads us to believe that any wolves in these States should be included in the Western Great Lakes Gray Wolf DPS.

Extensive monitoring since 1990 indicates that wolves may be recolonizing Washington State, probably as dispersing wolves from Canada. Wolves appear to have been eliminated in the State by the 1930s, although occasional unconfirmed individual wolves are reported in the North Cascades and northeastern Washington. Observation data indicate that the wolves mostly occur as individuals, although several wolf family units have been reported in the North Cascades (Almack and Fitkin 1998). However, because efforts to locate family units have been unsuccessful, it is unclear whether wolves are reproducing in the North Cascades. Under their current listing, these animals are protected by the Act as endangered wolves, and we provide protection recommendations for den and rendezvous sites to Federal agencies on a site-specific basis. Furthermore, the State of Washington's forest practices rules provide seasonal protection to wolf den sites. However, the North Cascades are outside of the geographic scope of the Northern Rockies Plan. In order to retain the Act's protections for such wolves, and provide the potential for their inclusion within the Northern Rockies Recovery Program, we are now proposing that all of Washington and Oregon be included in the Western DPS.

A study to determine the feasibility of re-introducing wolves to the Olympic Peninsula was initiated in 1998 and was completed in early 1999. In addition, studies are underway to determine if sufficient habitat and prey base exist within and around Olympic National Park to support a viable wolf population. The initial feasibility study indicates that the existing habitat and land uses could support approximately 56 wolves in 6 to 7 packs within the Park (Ratti *et al.* 1999). However, until more detailed studies of the prey base are completed, we cannot determine the number of wolves that could be supported by the entire Olympic Peninsula, or assess the long-term viability of such a reintroduced population of gray wolves. Results of one prey base study completed in April, 1999 on lands within Olympic National Park determined appropriate survey methods for prey populations that will be crucial if reintroduction efforts move forward. Results of a study on lands outside of Olympic National Park are expected to be available by the middle

of 2000. Here again, the Olympic Peninsula is beyond the geographic scope of the Northern Rockies Plan, so we are proposing that all of Washington be included in the Western DPS.

Over the past 20 years there have been reports of wolves in several other western States, including Oregon, Colorado, and Utah. One radiocollared wolf from northwestern Montana was recently found dead from unknown causes in eastern Washington, and a radiocollared young female wolf from central Idaho dispersed into eastern Oregon in early 1999. Any wolves that are found in these areas at the current time are listed as endangered and are protected under the Act. While there is certainly habitat that could support wolves in these areas, at this time we have no plans to initiate wolf recovery for any areas in the western United States outside of the gray wolf recovery areas already identified in Montana, Idaho, Wyoming, Arizona, New Mexico, and Texas. However, our proposal to include these additional States within a Western DPS will maintain the protections of the Act for any wild gray wolves that disperse or are reintroduced into such areas while Western DPS gray wolves remain listed as threatened.

While we have no plans to actively pursue wolf restoration in other areas of the western United States, we will not actively prevent natural wolf recolonization in other areas. Wolves that naturally disperse into other States will be managed on a case-by-case basis. If there are no conflicts with human activities such wolves will likely not be returned to the area of their origin.

Gray Wolves in Captivity

We recognize that there are many gray wolves being held in captivity for a variety of reasons. Some of these are being held for research, propagation, or educational projects that are part of gray wolf recovery programs; many others are considered pets or are held for other reasons. We see no over-riding reason to retain the protections of the Act for such individuals if they or their ancestors were obtained from an area where wild gray wolves are now proposed for delisting and those wild wolves would no longer be protected by the Act. However, if the captive gray wolves or their ancestors originated from within the boundaries of a DPS that would retain the protections of the Act under this proposal, those captive wolves potentially can be a valuable part of the recovery program for that DPS. For example, they could serve as a potential source of wolves that could be released in the DPS.

Therefore, we have defined the four DPSs to include wolves living within the boundaries of the DPSs, as well as those captive wolves which were removed from the wild, or whose ancestors were removed from the wild, from within the geographic boundaries of a DPS, regardless of where the captive wolves may be held.

Other Alternatives Considered

We considered numerous alternatives to the actions proposed in this notice. These alternatives consisted of combinations of different geographic areas of coverage, changes in classification, and details and geographic areas of coverage of new special regulations.

We initially considered delisting gray wolves within the Western Great Lakes DPS, and on June 29, 1998, we announced (through a press release and media event) our intention to develop such a proposal. In addition, we also announced our intention to create four DPSs, reclassify the Western and Northeastern DPSs, and delist in other States not covered by a DPS. That announcement was based upon our expectation that State wolf management plans for Minnesota, Wisconsin, and Michigan would provide assurances of adequate wolf protection and management following Federal delisting. These assurances are one of the recovery criteria for delisting in the 1992 Eastern Recovery Plan. At that point we began drafting a proposal that included delisting the Western Great Lakes DPS.

At the time of our June 1998 announcement the Minnesota DNR had already held a series of 12 public meetings to receive input on the direction a State wolf management plan should take. The MN DNR subsequently established a Citizens Roundtable and asked that group to address the wolf management issues raised at the public meetings. The MN DNR submitted a wolf management plan, based on the Citizen Roundtable, to the MN Legislature in early 1999 in order to obtain the regulatory authority needed by the DNR to implement the plan.

We completed our analysis of post-delisting threats after the release of the February 1999 MN DNR wolf management plan; that plan closely followed the Roundtable's recommendations. We were prepared to publish a proposal to delist the gray wolves in the Western Great Lakes DPS, based in part on the MN DNR's plan. However, the MN Legislature did not approve the plan during the 1999 legislative session. Legislative approval is necessary to provide the MN DNR

with both the authorities and the funding to implement many of the recommended wolf management practices.

Therefore, at this time we are unable to carry out an adequate evaluation of the future threats, as required by the Act, to wolves in Minnesota following a potential Federal delisting. We are unable to determine what protective regulations will be developed, the extent of State law enforcement that will be provided, what wolf population targets will be used, what depredation control measures will be used, and how the wolf population and wolf health will be monitored. For a large predator like the wolf, which was subject to past extensive government eradication efforts, including bounties at Federal, State, county, and local levels, we believe it is important to have an approved Minnesota wolf management plan that clearly describes the beneficial management practices that will be implemented following Federal delisting. Given this high degree of uncertainty regarding the extent and direction of future management and protection of wolves in Minnesota, we decided it is premature to propose a delisting of this DPS.

We also considered reclassifying a larger or smaller DPS in the eastern United States—reclassifying the entire geographic area included in the Recovery Plan for the Eastern Timber Wolf; reclassifying that area plus North Dakota, South Dakota, Nebraska, and Kansas; reclassifying only Minnesota, Wisconsin, and Michigan; or reclassifying those three States plus adjacent States into which wolves might disperse. Because under the Vertebrate Population Policy State boundaries cannot be used to bisect the continuous range of a species, we have included North and South Dakota within the Western Great Lakes DPS. Wolf recovery in New York and several northern New England States appears biologically feasible and has some public support. We have chosen to list that area as a separate DPS and retain the protections of the Act for wolves that may recolonize or be reintroduced there, but to change their classification to threatened and promulgate a section 4(d) special regulation in order to maximize wolf management flexibility and, therefore, to promote a separate gray wolf recovery program in that area.

We considered retaining all gray wolves in the western States under an endangered status, because they have not yet achieved their reclassification criteria in the strictest sense. Those criteria were based upon our expectations of where wolf packs would

become established; the wolves have subsequently demonstrated their "preference" to establish pack territories that do not all fit within the boundaries of the recovery areas that we established in the Rockies Plan. However, these wolves are showing dramatic population growth in the areas that they have chosen, and we believe they no longer fit the definition of an endangered species. Instead, they fit the definition of a threatened species.

We believe that the listing status of all gray wolves in the conterminous States should be adjusted to accurately reflect their recovery progress and their risk of extinction. Furthermore, wolves in the northern U.S. Rocky Mountains have achieved the biological intent of the reclassification criteria—a total of over 200 adult wolves in more than 20 breeding pairs for 3 successive years.

In addition, the nature of wolves as a predator, which sometimes conflicts with human activities, causes the consideration of additional regulatory flexibility in order to control problem wolves and address other conflicts that might otherwise constrain recovery as wolf populations increase. The flexibility provided by the section 4(d) special regulation has been critically important to the success of wolf recovery in Minnesota. Similarly, wolf recovery to date in the nonessential experimental population areas of Idaho, Montana, and Wyoming has been greatly aided by the depredation control measures provided by the special regulations that were established by the nonessential experimental designation under section 10(j) of the Act. Extending this type of flexibility for wolf management beyond the experimental population areas in Idaho, Montana, and Wyoming should similarly expand the success of wolf recovery there. Reclassifying to threatened in the Western Gray Wolf DPS and the development of a 4(d) special regulation can provide that flexibility throughout the DPS.

We also considered removing the two existing nonessential experimental population designations in the northern U.S. Rocky Mountains. The anticipated merging of the three existing western subpopulations into a single expanding and dispersing gray wolf population (refer to *Dispersal of Western Gray Wolves*, above) indicates that their current treatment as two separate experimental populations and a third natural, non-experimental endangered population without a special regulation (in northwestern Montana) may no longer be appropriate or understandable to the general public. One approach to simplifying this increasingly complex

regulatory situation would be to bring all gray wolves throughout the northern U.S. Rockies under a single set of regulations that accurately reflects current and expected future progress toward recovery in the West and applies only the amount of protection that is appropriate to achieve full recovery. This could be accomplished by removing the two existing experimental population designations and substituting a Western DPS-wide threatened classification with a section 4(d) special regulation.

Under this alternative all wolves throughout Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, and the northern portions of Arizona and New Mexico would become threatened wolves and would then be subject to the more flexible management provisions of the proposed section 4(d) special regulation for the Western DPS. Currently many, but not all, of these wolves are subject to the existing more restrictive protections of the special regulation for the Central Idaho and Greater Yellowstone Area nonessential experimental populations (See "Comparison of the Standard Protections of the Endangered Species Act * * *" below). This alternative would result in a uniform protection and management situation in western States that not only would further reduce conflicts with human activities, but also would be more easily understood by livestock producers and residents. The increased management flexibility contained in the proposed section 4(d) special regulation would allow wolves to be intentionally harassed by private landowners without having to wait for an attack to occur, in addition to being able to take wolves that are in the act of attacking any domestic animals. Current regulations for the nonessential experimental populations allow landowners to take gray wolves only during attacks on their livestock. Other new provisions of the proposed 4(d) would allow us to issue permits for private citizens to take wolves posing a significant risk to domestic animals if there are 10 or more pairs present in that State, and would allow government trapping of problem wolves at all wolf population levels. We would not expect this to result in a significant increase in the removal of problem wolves nor to appreciably slow wolf recovery in the Western DPS. However, we rejected this alternative because we previously stated in our two November 22, 1994, **Federal Register** final rules establishing the Central Idaho and Greater Yellowstone DPSs that "The Service does not foresee any likely

situation which would result in changing the nonessential experimental status until the gray wolf is recovered and delisted * * *" (59 FR pages 60266 and 60281). Due to that previous assurance to the public, we are not proposing the removal of the nonessential experimental population designations at this time despite the likely benefits we believe it would provide to livestock producers and private landowners.

We considered including all of the 48 conterminous States within one of the 4 DPSs. This would result in gray wolves retaining a threatened or endangered classification in many more States (for example, California, Nevada, New Jersey, Massachusetts, Kansas, and Arkansas). However, we do not believe that it is necessary to restore wolves to all 48 conterminous States in order to achieve the purposes of the Act with regard to the gray wolf. The Act contains no reference to the need to restore a species to all or most of its historical range in order to consider it recovered. We believe that recovery is achieved if viable populations are restored across a significant portion of the species' range to a point that it no longer fits the Act's definitions of endangered and threatened. In the case of the gray wolf, we believe the provisions of the Act are not needed where these 4 conditions jointly exist—(1) wolves currently do not occur, (2) wolves are unlikely to arrive on their own, (3) wolf restoration is not potentially feasible, and (4) wolf restoration is not needed to achieve recovery. Thus, we chose to propose the retention of the protections of the Act only in States where wolf recovery is needed to achieve the purposes of the Act and where wolf recovery is potentially feasible.

Finally, we also considered not making any changes in the legal status of the gray wolf. However, this would mean that the species retains its status as an endangered species despite the best available scientific and commercial information shows, in several key recovery areas, it now fits the definitions of a threatened species. It would unnecessarily prevent States and Tribes from managing a species of resident wildlife in a manner consistent with the needs of their citizens, residents, and members in the absence of an overriding national need for different or more protective management. We are obligated under the Act to continue protecting gray wolves only if they fit the Act's definitions of endangered or threatened species.

Alternative Selected for Proposal

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by the gray wolf in determining to propose this rule. Based upon this evaluation, the preferred action is to reclassify gray wolves from endangered to threatened in the Western Great Lakes Gray Wolf DPS, the Northeastern Gray Wolf DPS, and Western Gray Wolf DPS, and to retain an endangered classification for gray wolves in the Southwestern (Mexican) Gray Wolf DPS (refer to Map 3 located at the end of this section). Gray wolves outside of these four DPSs would be removed from the protections of the Act. All three existing experimental population designations will be retained. To further promote gray wolf recovery and management within the Western and Northeastern Gray Wolf DPSs, special regulations under section 4(d) of the Act are proposed. The new special regulation for the Western DPS would only apply to areas outside of the existing experimental population areas. A new special regulation for Michigan, Wisconsin, North Dakota, and South Dakota wolves would also authorize lethal depredation control that is similar to that which has been used to further wolf recovery in Minnesota since 1985. The existing special regulation for Minnesota gray wolves and the critical habitat designations in Minnesota and Michigan would remain in effect.

With wolf populations of 197 and 174 in Wisconsin and Michigan (excluding Isle Royale), respectively, it is clear that those States have each surpassed the numerical reclassification criterion contained in the 1992 Eastern Plan of 80 wolves for 3 years. They have also surpassed the numerical delisting criterion, but the lack of a clear indication of future State wolf management and protection in Minnesota precludes proposing a delisting of these wolves at this time. Instead, proposing reclassification to threatened status for all endangered wolves within the Western Great Lakes DPS recognizes their greatly improved biological situation, provides us with the ability to implement a section 4(d) rule to allow lethal depredation control throughout the DPS, and yet retains Federal protection until such time as delisting is appropriate.

The gray wolves that occasionally appear in North and South Dakota are believed to be part of the Minnesota-Wisconsin-Michigan gray wolf population. These wolves are well isolated from the Montana, Idaho, and

Wyoming gray wolf populations. Therefore, they would be included in the Western Great Lakes DPS and will be reclassified to threatened status. In the future, if we are able to fully analyze the future threats to gray wolves in Minnesota, and appropriate measures are in place to assure their future survival, we will consider a proposal to delist gray wolves in the Western Great Lakes DPS.

There have been small numbers of gray wolves documented in North Dakota and South Dakota in recent years (Licht and Fritts 1994), but there is little likelihood that a viable wolf population can develop in these States in the foreseeable future, largely due to the absence of sufficiently large expanses of unbroken public land with a suitable prey base. Furthermore, a viable wolf population is not needed in either or both of these States for us to determine that western Great Lakes wolves have recovered. Thus, while North Dakota and South Dakota wolves would continue to be provided the protections of the Act as threatened species if this proposal is finalized, we do not intend to establish separate wolf recovery programs for wolves in those States. In recognition of the likelihood that wolves dispersing into these two States frequently will encounter domestic livestock and become predators of them, we are including North Dakota and South Dakota in the proposed 4(d) special regulation that allows lethal control of depredating wolves throughout the Western Great Lakes DPS.

Wolves in the northern U.S. Rocky Mountains are also making steady progress toward recovery. In 1999, wolves achieved the biological intent of the reclassification criterion in the Northern Rockies Plan—20 breeding pairs for 3 years (a total of about 200 adult wolves). Therefore, wolves in the Western DPS no longer meet the Act's definition of endangered ("any species which is in danger of extinction throughout all or a significant portion of its range"), and should be proposed for reclassification to threatened status.

While wolves in the four northeastern States exist in very low numbers, if present at all, we believe a number of factors justify the establishment of a Northeastern Gray Wolf DPS and reclassification to threatened status. We have determined that, based on the Vertebrate Population Policy, wolves that may exist in Maine are discrete from wolves elsewhere in the lower 48 States. We have also determined that a population of wolves in this portion of the lower 48 States is significant and will contribute to the overall restoration

of the species. In addition, there appears to be adequate habitat and a sufficient prey base for one or more viable wolf populations, and a source wolf population exists in nearby areas of Canada for dispersal or reintroduction of gray wolves into the Northeast. Public support for wolf recovery is evident in these States, although at this time we can not evaluate the scope of that support, or the degree of opposition to wolf recovery. Finally, the special regulation that we are proposing for the Northeastern DPS is intended to reduce wolf-human conflicts and land-use restrictions, and therefore the threat of wolf persecution by humans should significantly diminish. Because human-caused wolf mortality is the primary threat to continued viability of wolf populations worldwide, reducing this threat should significantly increase the likelihood of successful wolf recovery in the Northeast.

Wolves in the Southwestern (Mexican) Gray Wolf DPS will remain endangered if this proposed regulation is finalized. Wolf reintroduction in that area is still in its initial stages, and its success is not yet assured. Human-caused mortalities of reintroduced gray wolves in 1998 show that there still is much to be done to reduce the threats to a level where a viable wolf population can be reestablished.

This proposal would not remove the two existing nonessential experimental population designations for gray wolves in the northern U.S. Rocky Mountains. Those experimental population designations would remain superimposed on the geographically larger Western DPS where wolves would be listed as threatened. The regulations associated with those two experimental population designations would remain in effect; the new section 4(d) special regulation for the Western DPS would apply only to areas outside of the experimental population areas.

Similarly, this proposal would not remove the existing nonessential experimental population designation for gray wolves in the Southwestern (Mexican) DPS. The nonessential experimental population designation would remain superimposed on a geographically larger area where wolves would remain listed as endangered.

In addition to proposing to reclassify gray wolves in three DPSs, we are proposing to reduce the geographic area in which gray wolves would continue to be protected by the Act. We believe that several decades of conducting wolf recovery activities have made it clear that the recovery goals of the Act can readily be achieved for the gray wolf without maintaining protection for the

species throughout the many States within its historical range where gray wolf recovery is no longer potentially feasible or is not necessary under the Act.

When a species is first listed as threatened or endangered under the Act we normally apply that listing and its resultant protection across the entire recognized historical range of the species in order to retain a wide spectrum of options for its recovery. As recovery programs are implemented and progress, we gain important information concerning the areas where restoration is necessary and feasible. We also become aware of areas where restoration is unnecessary or unlikely to be successful. For species listed across a broad geographic area, it is especially appropriate for us to use this type of recovery information to reduce or eliminate the Act's restrictions and impacts in those areas where restoration is not necessary or potentially feasible. This is consistent with our Interagency Cooperative Policy on Recovery Plan Participation and Implementation Under the Endangered Species Act (59 FR 34272; July 1, 1994) which established our policy to minimize the social and economic impacts arising from the recovery of species listed as threatened or endangered under the Act.

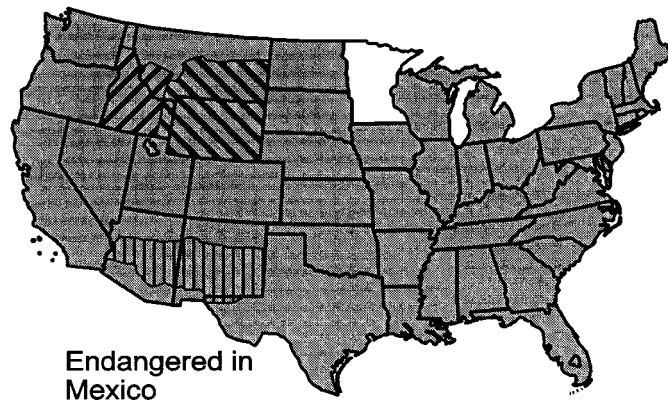
We anticipate successful restoration of viable gray wolf populations in the four DPSs. Upon achieving this recovery of the gray wolf, the species will no longer qualify as either a threatened or endangered species within the definitions of the Act. Thus, we have chosen to also remove the protections of the Act from any gray wolves that may occur now or in the future in all other geographic areas outside of the boundaries of the four DPSs. Gray wolves will remain listed as endangered, threatened, or as experimental populations only in Mexico, the entire States of Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Arizona, New Mexico, New York, Vermont, New Hampshire, Maine, Minnesota, Wisconsin, Michigan, North Dakota, South Dakota, and part of Texas.

We recognize that there is significant private and public interest in initiating programs to restore gray wolves to areas outside of the four proposed DPSs where the gray wolf will remain listed as threatened or endangered. This proposal should not be interpreted that such interest and any resulting non-Service wolf restoration programs are unwise, unjustified, infeasible, or otherwise ill-advised. Rather, with this proposal we are stating that our mandate to recover gray wolves under

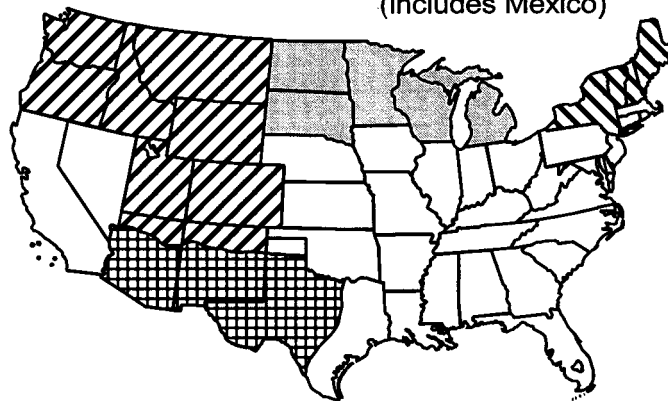
the Act does not require our initiation of such efforts. Our future role in gray wolf recovery would focus only on those four areas where wolves will remain listed as threatened, endangered,	or as experimental populations. However, we remain willing to provide assistance, as budget and staff limitations allow, to other wolf restoration efforts that may be initiated	by other partners, including private organizations. BILLING CODE 4310-55-P

Map 1 - Current Listing

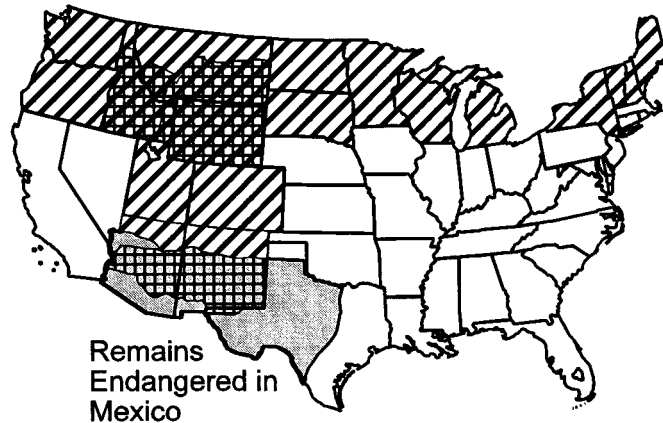
Endangered Threatened
Nonessential Experimental Populations

**Map 2 - Proposed Distinct Population Segments**

Western Great Lakes Northeastern
Western Southwestern (includes Mexico)

**Map 3 - Proposed Listing**

Endangered Threatened Delisted
Nonessential Experimental Populations



Critical Habitat

Critical habitat was designated for the gray wolf in 1978 (43 FR 9607). That rulemaking (50 CFR 17.95(a)) identifies Isle Royale National Park, Michigan, and Minnesota wolf management zones 1, 2, and 3, as delineated in 50 CFR 17.40(d)(1), as critical habitat. Wolf management zones 1, 2, and 3 comprise approximately 3800 sq km (9800 sq mi) in northeastern and north central Minnesota. This proposal will not affect those existing critical habitat designations.

Special Regulations Under Section 4(d) for Threatened Species

General

The Act and its implementing regulations found at 50 CFR 17.21 set forth a series of general prohibitions and exceptions that apply to all endangered wildlife. These prohibitions, in part, make it illegal for any person subject to the jurisdiction of the United States to take (includes harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect; or to attempt any of these), import, export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce any endangered wildlife species. It is also illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to our agents and agents of State conservation agencies.

The implementing regulations for threatened wildlife under the Act incorporate the section 9 prohibitions for endangered wildlife (50 CFR 17.31), except when a special regulation promulgated pursuant to section 4(d) applies (50 CFR 17.31(c)). Section 4(d) of the Act provides that whenever a species is listed as a threatened species, we shall issue regulations deemed necessary and advisable to provide for the conservation of the species. Conservation means the use of all methods and procedures necessary to bring the species to the point at which the protections of the Act are no longer necessary. Section 4(d) also states that we may, by regulation, extend to threatened species, prohibitions provided for endangered species under section 9.

In this proposal we are recommending retaining the special regulation that has been crucial to conserving the gray wolf in Minnesota, and are proposing a similar special regulation to provide similar authority for lethal control of depredating wolves in Michigan, Wisconsin, North Dakota, and South Dakota.

We are also proposing the establishment of two new special regulations for other geographic areas. One new section 4(d) special regulation would assist in managing the rapidly expanding gray wolf numbers in the Western DPS and will apply to wolves outside the boundaries of the currently designated nonessential experimental population areas. The existing 10(j) special regulations for the currently designated nonessential experimental populations in Montana, Idaho, and Wyoming will remain in effect. The other new section 4(d) special regulation is intended to encourage Northeast States and Tribes to become partners with us in wolf recovery in the Northeastern DPS. We intend to continue to work with the States and Tribes in developing management plans and agreements with the objective of recovery and eventual delisting of the gray wolf in the Western, Northeastern, and Western Great Lakes Gray Wolf DPSs. These three proposed section 4(d) special regulations would offer additional management flexibility to assist in meeting this objective.

The existing special regulation for the gray wolf nonessential experimental population in portions of Arizona, New Mexico, and Texas remains unaffected.

Continuation of Existing Special Regulations for Minnesota Gray Wolves

In 1978 we developed special regulations under section 4(d) of the Act for gray wolves in Minnesota in order to reduce the conflicts between gray wolves and livestock producers. These regulations were modified in 1985 (50 FR 50792; December 12, 1985, 50 CFR 17.40(d)) and remain unchanged. The regulations divided the State into five management zones and established the conditions under which certain State or Federal employees or agents may trap and kill wolves that are likely to continue preying on lawfully present domestic animals. The intent of these regulations was to provide an effective means to reduce the economic impact of livestock losses due to wolves. We believe that by reducing these impacts, private citizens would have less incentive to resort to illegal and excessive killing of problem wolves, and that consequently the recovery of the wolf would be hastened in Minnesota.

We operated this Minnesota Wolf Depredation Control Program from 1976 into 1986. However, in 1986 the Animal Damage Control Program was transferred by Congressional action from us to the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS). In 1997 the Animal Damage Control program was

renamed "Wildlife Services." APHIS-Wildlife Services continues to operate the Wolf Depredation Control Program in Minnesota. This proposal, if finalized, will not change the special regulations which authorize these wolf depredation control activities in Minnesota.

New Special Regulations

Special regulations are being proposed for the gray wolf populations in the western, northeastern, and Western Great Lakes States (excluding Minnesota) that will receive a threatened designation if this proposed regulation is finalized. The proposed special regulations are intended to promote the conservation of the gray wolf in those areas by reducing actual and perceived conflicts with human activities, thus reducing the likelihood and extent of illegal killing of wolves.

In the case of the Western Gray Wolf DPS, the proposed section 4(d) regulation will apply only to wolves outside of the nonessential experimental population areas. The existing 1994 special regulations that apply to the two nonessential experimental population areas (50 CFR 17.84(i)) will remain in effect. The proposed special regulations will allow similar, but increased, management flexibility for problem wolves in all areas of the Western DPS that are outside of the boundaries of the two experimental population areas. The existing experimental population special regulations, while not allowing the same degree of management flexibility, will remain in effect within the two experimental population areas as long as those experimental areas remain designated.

Western Gray Wolf DPS Special Regulations

The survival and recovery of the gray wolf in the northern U.S. Rocky Mountain region will continue to depend heavily on human tolerance of wolves. Human actions, legal and illegal, intentional and accidental, remain the primary cause of gray wolf deaths in the western half of the United States (Bangs *et al.* 1998). We are committed to reducing illegal killing of wolves through law enforcement and by minimizing the perception that such killings are "necessary" because wolves are causing too many problems.

The proposed section 4(d) regulations for threatened gray wolves in the Western DPS are designed to conserve the wolf population while addressing local public and State government concerns about conflicts between humans and wolves. The existing special regulations (50 CFR 17.84(i)) for

the central Idaho and Yellowstone nonessential experimental population areas were developed through years of extensive public involvement, scientific review, and agency coordination. To date those special regulations have been effective at both promoting rapid growth in wolf distribution and numbers toward recovery goals, and resolving conflicts with local residents who were fearful of excessive government regulation and ongoing wolf-caused losses of livestock and other domestic animals. During the years that wolf recovery has been occurring in the West we have learned a great deal about both actual and perceived conflicts between wolves and human activities, and we have also learned how these conflicts and perceptions can be reduced while allowing wolf recovery to proceed. Because of the knowledge we have gained during these years of wolf management and recovery, we believe we can provide several additional methods to reduce wolf-human conflicts during wolf recovery. Thus, the

proposed section 4(d) rule is very similar to, but provides more management flexibility than, the existing special regulations that have been successfully implemented for the Yellowstone and central Idaho nonessential experimental populations since January 1995. We believe that the proposed section 4(d) rule will further aid in the conservation and enhancement of the gray wolf in the Western DPS.

The proposed section 4(d) rule would continue to protect wolves under the Act. Wolves that do not depredate on domestic animals would be protected from take by the public, except for non-lethal harassment of wolves. Agencies would have management flexibility to take wolves under controlled circumstances, such as on the rare occasions that wolf predation may significantly affect wild ungulate populations, but only when such take would not affect wolf recovery. The proposed section 4(d) rules would allow increased flexibility by the public and

by agencies to manage those few wolves that come into conflict with people by attacking domestic animals. We believe that, by effectively managing problem wolves and including the affected public in that management, local tolerance of non-depredating wolves will be enhanced. Tolerance of wolves by the local public reduces illegal killing of wolves, allows more opportunity for the public and us to investigate innovative ways to reduce wolf/livestock conflicts without killing wolves (such as aversive conditioning), and enhances communication between resource agencies and people who live near wolves leading to more accurate data gathering on wolf restoration efforts. All this ultimately increases the likelihood of successful wolf recovery in the region.

The provisions of the current special regulations for the two nonessential experimental populations in the northern U.S. Rockies are compared with the proposed special regulation for the Western DPS in the following table.

COMPARISON OF THE NORMAL PROTECTIONS OF THE ENDANGERED SPECIES ACT WITH THE CURRENT EXPERIMENTAL POPULATION SPECIAL RULES AND THE PROPOSED SPECIAL RULE FOR THE NORTHERN U.S. ROCKY MOUNTAIN GRAY WOLVES

[Proposed Western DPS]

Provision	Current experimental populations special rules (50 CFR § 17.84(ii))	Proposed section 4(d) special rule	Normal protections for an endangered species
Geographic area	This special rule applies only to wolves within the areas of two Nonessential Experimental Populations (NEP), which together include—Wyoming, the southern portion of Montana, and Idaho south of Interstate 90. These gray wolves are treated as a threatened species under the Endangered Species Act. Any wolves that disperse beyond this geographic area receive the full protection of the Endangered Species Act under a classification of endangered.	This special rule will apply to any gray wolves that occur throughout the area designated as the Western Distinct Population Segment (WDPS)—Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, and the northern portions of Arizona and New Mexico, except where listed as an experimental population. These gray wolves would be listed as threatened.	Throughout area in which it is listed as endangered.
Interagency Coordination (Sec. 7 consultation).	Federal agency consultation with the U.S. Fish and Wildlife Service on agency actions that may affect gray wolves is not required within the two NEPs, unless those actions are on lands of the National Park System or the National Wildlife Refuge System.	Federal agency consultation with the Service on agency actions that may affect gray wolves is required, but will not result in land-use restrictions unless needed to avoid direct take at active den sites between April 1 and June 30.	Federal agencies must consult with the U.S. Fish and Wildlife Service (Service) on all agency actions that may affect the gray wolf.
Opportunistic harassment.	Landowners and grazing allotment holders can opportunistically harass gray wolves in a non-injurious manner without a Service permit.	Identical to the current experimental population special rules.	Harassment is included within the definition of "take" and is prohibited.
Intentional harassment Permits.	No specific provision for intentional harassment permits. However, see provision below for "Permits for recovery actions that include take of gray wolves".	The Service can issue a 90-day permit to private landowners (not available for public grazing allotments) after verified persistent wolf activity on their private land; permit would allow intentional and potentially injurious, but non-lethal, harassment of wolves.	No specific provision for intentional harassment permits. However, see provision below for "Permits for recovery actions that include take of gray wolves."

COMPARISON OF THE NORMAL PROTECTIONS OF THE ENDANGERED SPECIES ACT WITH THE CURRENT EXPERIMENTAL POPULATION SPECIAL RULES AND THE PROPOSED SPECIAL RULE FOR THE NORTHERN U.S. ROCKY MOUNTAIN GRAY WOLVES—Continued

[Proposed Western DPS]

Provision	Current experimental populations special rules (50 CFR § 17.84(i))	Proposed section 4(d) special rule	Normal protections for an endangered species
Taking wolves "in the act" on PRIVATE land.	Livestock producers on their private land may take a gray wolf in the act of killing, wounding, or biting livestock. Injured or dead livestock must be in evidence to verify the wolf attack.	Similar to the current experimental population special rules, but this provision is broadened to also apply to gray wolves attacking any domestic animals.	No provision for such take.
Taking persistent problem wolves "in the act" on PUBLIC land.	If six breeding pairs of wolves are established in a NEP area, livestock producers and permittees with current valid livestock grazing allotments on public land may receive a 45-day permit from the Service or other agencies designated by the Service, to take gray wolves in the act of killing, wounding, or biting livestock. The Service must have verified previous attacks by wolves, and must have completed agency efforts to resolve the problem. The taking must be reported as soon as possible.	Same permits are available, but they can be issued regardless of the wolf population level. Also allows permits to take wolves attacking livestock guarding or herding animals or other domestic animals.	No provision for such take.
Permits for additional taking by private citizens on their private land.	No specific provision for such permits. However, see provision below for "Permits for recovery actions that include take of gray wolves".	If 10 or more breeding pairs are present in a State and the Service has determined that wolves are routinely present on private property and present a significant risk to domestic animals, a private landowner may receive a permit from the Service to take those wolves, under specified conditions.	No specific provision for such permits. However, see provision below for "Permits for recovery actions that include take of gray wolves."
Government take of problem wolves.	The Service or agencies designated by the Service may take wolves that attack livestock or that twice in a calendar year attack domestic animals other than livestock. When six or more breeding pairs are established in a NEP, lethal control of problem wolves or permanent placement in captivity may be authorized by the Service or agency designated by the Service. When five or fewer breeding pairs are established in a NEP, taking may be limited to non-lethal measures such as aversive conditioning, nonlethal control, and/or translocating wolves. If during depredation control activities on Federal or other public lands, prior to six breeding pairs becoming established in a NEP and prior to October 1, a female wolf having pups is captured, the female and her pups will be released at or near the site of capture. All problem wolves on private land, including female wolves with pups, may be removed (including lethal control) if continued depredation occurs. All chronic problem wolves (wolves that depredate on domestic animals after being moved once for previous domestic animal depredations) will be removed from the wild (killed or placed in captivity).	No numerical threshold applies, so all control measures, including lethal control, can be used regardless of the number of breeding pairs in a State. No upper threshold of six breeding pairs limiting protection of females and their pups prior to October 1 on public lands, thus females and their pups will be released if captured on public land, regardless of the number of breeding pairs of wolves. Otherwise, the proposed special rule is similar to the current experimental population special rules.	No provision for such take.

COMPARISON OF THE NORMAL PROTECTIONS OF THE ENDANGERED SPECIES ACT WITH THE CURRENT EXPERIMENTAL POPULATION SPECIAL RULES AND THE PROPOSED SPECIAL RULE FOR THE NORTHERN U.S. ROCKY MOUNTAIN GRAY WOLVES—Continued

[Proposed Western DPS]

Provision	Current experimental populations special rules (50 CFR § 17.84(i))	Proposed section 4(d) special rule	Normal protections for an endangered species
Govt. translocation of wolves to reduce impacts on wild ungulates.	States and Tribes may capture and translocate wolves to other areas within the same NEP area, if the gray wolf predation is negatively impacting localized wild ungulate populations at an unacceptable level, as defined by the States and Tribes. State/Tribal wolf management plans must be approved by the Service before such movement of wolves may be conducted, and the Service must determine that such translocations will not inhibit wolf population growth toward recovery levels.	Similar to the current experimental population special rules, but translocated wolves must be released within the Western Distinct Population Segment. Additionally, the proposed special rule has a new provision: After 10 breeding pairs are established in a state, the Service, in cooperation with the states and tribes, may translocate wolves that it determines are impacting localized wild ungulate populations at unacceptable levels..	No provision for such relocation.
Protection of human life and safety.	The Service, or agencies authorized by the Service, may promptly remove (that is, place in captivity or kill) any wolf determined by the Service or authorized agency to be a threat to human life or safety.	Identical to the current experimental population special rules.	The Service, other Federal land management agency, a state conservation agency, or an agent of these, may take a wolf that is a demonstrable but non-immediate threat to human safety. (50 CFR 17.21(c)(3)(iv))
Take in self defense	Identical to the normal protections	Identical to the normal protections	Any person may harass or take (kill or injure) a wolf in self defense or in defense of others. (50 CFR 17.21(c))
Incidental take	Any person may take a gray wolf if the take is incidental to an otherwise lawful activity, and is accidental, unavoidable, unintentional, not resulting from negligent conduct lacking reasonable due care, and due care was exercised to avoid taking the wolf.	Similar in intent to the current experimental population special rules, with some minor wording changes.	Can be authorized by permit after Service approval of a habitat conservation plan. (50 CFR 17.22).
Permits for recovery actions that include take of gray wolves.	Available for scientific purposes, enhancement of propagation or survival, zoological exhibition, educational purposes, or other purposes consistent with the Act (50 CFR 17.32).	Identical to the current experimental population special rules.	Available for scientific purposes, and enhancement of propagation or survival (50 CFR 17.22).
Additional taking provisions for agency employees.	Any employee or agent of the Service or appropriate Federal, State, or Tribal agency, who is designated in writing for such purposes by the Service, when acting in the course of official duties, may take a wolf from the wild, if such action is for: (A) Scientific purposes; (B) to avoid conflict with human activities; (C) to relocate a wolf within the NEP areas to improve its survival and recovery prospects; (D) to return wolves that have wandered outside of the NEP areas; (E) to aid or euthanize sick, injured, or orphaned wolves; (F) to salvage a dead specimen which may be used for scientific study; or (G) to aid in law enforcement investigations involving wolves.	Identical to the current experimental population special rules, except it has an additional provision that allows such take of wolves "to prevent wolves with abnormal physical or behavioral characteristics from passing on those traits to other wolves".	Any employee or agent of the Service, a Federal land management agency, or a State conservation agency, who is designated in writing for such purposes, when acting in the course of official duties, may take a wolf from the wild if such action is to: (1) Aid a sick, injured, or orphaned specimen, (2) dispose of a dead specimen, or (3) salvage a dead specimen which may be useful for scientific study. (50 CFR 17.21(c)(3)).

COMPARISON OF THE NORMAL PROTECTIONS OF THE ENDANGERED SPECIES ACT WITH THE CURRENT EXPERIMENTAL POPULATION SPECIAL RULES AND THE PROPOSED SPECIAL RULE FOR THE NORTHERN U.S. ROCKY MOUNTAIN GRAY WOLVES—Continued

[Proposed Western DPS]

Provision	Current experimental populations special rules (50 CFR § 17.84(i))	Proposed section 4(d) special rule	Normal protections for an endangered species
Land-use restrictions on private or Federal lands.	When five or fewer breeding pairs of wolves are in an experimental population area temporary land-use restrictions may be employed on Federal public lands to control human disturbance around active wolf den sites. These restrictions may be required between April 1 and June 30, within 1 mile of active wolf den or rendezvous sites, and would only apply to Federal public lands or other such lands designated in State and Tribal wolf management plans. When six or more breeding pairs are established in an experimental population area, no land-use restrictions may be employed on Federal public lands outside of national parks or national wildlife refuges, unless that wolf population fails to maintain positive growth rates for two consecutive years.	Land-use restrictions may be employed for wolf recovery purposes on national parks and national wildlife refuges. Between April 1 and June 30 land-use restrictions may be employed to prevent direct take of wolves at active den sites on any Federal lands.	Various land-use restrictions may be employed on Federal lands if the Service believes they are necessary to recover the species and to minimize take of wolves. Land-use restrictions may be employed on private land and other non-Federal land if necessary to minimize take of wolves.

Under the proposed section 4(d) rule landowners would be allowed to harass wolves from areas where potential conflicts are of greatest concern, such as private property and near grazing livestock. In addition to the authority for landowners and livestock producers to opportunistically harass gray wolves in a non-injurious manner (as already allowed by the current special regulations within the two experimental populations), the proposed rule would allow us to issue temporary permits for deliberate harassment of wolves in an injurious manner under certain situations. Harassment methods that would be allowed under this provision include rubber bullets and shotgun shells containing small shot (#8). Since all such harassment would be nonlethal, and most is expected to be noninjurious, to wolves, no effect on wolf population growth is expected to occur. Fewer wolf depredations on livestock and pets should result from more focused and more unpleasant harassment of the problem wolves. Fewer depredations will result in fewer control actions, and consequently fewer wolves will be killed by management agencies. This provision allows us to work closely with the public to avoid conflicts between wolves and livestock or pets, thereby reducing the need for wolf control. Because we will have to confirm persistent wolf activity, and each intentional harassment permit will

contain the conditions under which such harassment could occur, there should be little potential for abuse of this management flexibility.

Under the proposed special regulation for the Western DPS, landowners would be allowed to take (kill or injure) wolves actually seen attacking their livestock on private land (as currently allowed by the current special regulations within the two experimental populations). The proposed special regulation would also expand this provision so that it applies to wolves attacking any domestic animals on private land outside of the experimental areas. Furthermore, the proposed special regulation would allow us to issue permits to take wolves seen attacking livestock and livestock guard or herding animals on public land. (The current special regulations that will continue to apply to the two experimental population areas do not allow such permits to be issued for attacks on guard or herding animals, and do not allow such permits to be issued if there are fewer than six breeding pairs of wolves in the experimental population area.) Because such take has to be reported and confirmation of livestock attacks must be made by agency investigators, we anticipate that no additional significant wolf mortality will result from this provision. However, those few wolves that are killed will be animals with behavioral traits that were not

conducive to the long term survival and recovery of the wolf in the northern Rocky Mountains. The required confirmation process will greatly reduce the chances that wolves that have not attacked domestic animals would be killed under this provision. Once a depredating wolf is shot, no further control on the pack would be implemented by the agencies unless additional livestock were attacked. This could result in even fewer wolves being taken in agency control actions, because the wolf that was killed would be the individual from that pack that was attacking livestock.

The proposed special regulation will allow us or other agencies and the public to continue to take wolves in the rare event that they threaten human life or safety. While this is a highly unlikely situation, and one that is already addressed by the Act and the current special regulation, emphasizing the Act's provision to defend human life and safety should reduce the public's concern about human safety.

The proposed special regulation would allow government agencies to remove problem wolves (wolves that attack livestock or twice in a year attack other domestic animals) outside the experimental areas using lethal methods regardless of the number of breeding pairs present in the area. (The current special regulations that will continue to apply within the two experimental

population areas allow lethal methods only if there are six or more breeding pairs present in that experimental population area.)

Prior to October 1 of each year, the proposed special regulation would require the release of trapped female wolves with pups, regardless of the number of breeding pairs on public land. (The current special regulations that will continue to apply within the two experimental population areas require the release of such female wolves if there are fewer than six breeding pairs present in that experimental population area.)

The proposed special regulation would allow us to issue permits for private landowners to take wolves on their private lands if 10 or more breeding pairs are present in the State and if we have determined that wolves are routinely present on that land and present a significant risk to domestic animals. (The current special regulations that will continue to apply within the two experimental areas have no provision for this type of permit to take wolves.)

The proposed special regulation addresses public concerns about the presence of wolves disrupting traditional human uses of public and private land. Except for within national parks and national wildlife refuges, the only potential restrictions on Federal lands, may be seasonal restrictions to avoid the take of wolves at active den sites. These seasonal restrictions would likely run from April 1 to June 30 of each year and apply to land within one mile of the active den site. Managing wolves in the northern Rocky Mountains has shown that successful wolf recovery does not depend upon land-use restrictions due to the wolves' ability to thrive in a variety of land uses. Since 1987, as a result of the experience we gained in the northern Rockies, we believe there is little, if any, need for land-use restrictions to protect wolves in most situations, with the possible exception of temporary restrictions around active den sites on Federal lands. Additionally, the public is much more tolerant of wolf recolonization if restrictive government regulations do not result from the presence of wolves. While the threatened status of wolves will require Federal agencies to consult under section 7, the proposed special regulation will simplify that process by stating that no land-use restrictions will be imposed except to protect wolves at active den sites on Federal lands, as described above.

All other provisions of the proposed section 4(d) special regulation for the Western DPS are identical or very

similar to the current special regulations that will continue to apply to the two nonessential experimental populations in the northern United States Rocky Mountains.

We reemphasize that the management flexibility provided by the current special regulation will continue to apply to the two nonessential experimental populations established in 1994 in Wyoming and in portions of Idaho and Montana (refer to Map 1). Currently, any western gray wolves that reside outside of, or disperse beyond, those experimental areas are protected under the Act as endangered gray wolves; thus, wolves in and around Glacier National Park in northwestern Montana are endangered wolves. Captured wolves known to be experimental are not endangered. In contrast, the proposed reclassification to threatened status and the proposed section 4(d) special regulation would apply a degree of greater management flexibility across the rest of the area defined as the Western DPS, which includes all of seven States and portions of two others.

In conclusion, the proposed 4(d) rule for the Western Gray Wolf DPS would continue to protect wolves from human persecution outside of the two experimental population areas, but would improve and expand the management options for problem wolves. By focusing management efforts on the occasional problem wolf, we believe that the public will become more tolerant of non-depredating wolves. Based on our experience with wolf recovery in Minnesota, this increased public tolerance is expected to result in fewer illegal killings of Western DPS wolves and more opportunity for us to work with local agencies and the public to find innovative solutions to potential conflicts between wolves and humans. Overall, we expect that this proposed special regulation will promote the conservation of the gray wolf and speed the species' recovery in the northern U.S. Rocky Mountains.

Northeastern Gray Wolf DPS Special Regulations

Using section 4(d) of the Act and 50 CFR 17.31(c), we propose to define the conditions under which intentional and incidental take of gray wolves resulting from activities regulated or carried out by State and Tribal governments will not violate section 9 of the Act or any regulations under 50 CFR part 17 that implement section 9, and thus could be performed without need for a permit under sections 10(a)(1)(A) or 10(a)(1)(B) of the Act. Under the proposed special regulation for the Northeastern DPS, the

normal provisions of 50 CFR 17.31(b) will continue to apply to any employee or agent of the Service and of a State conservation agency. Furthermore, incidental take of wolves when conducting otherwise lawful activities, regardless of their relationship to wolf conservation, addressed in a wolf conservation plan prepared by individual States or Tribes and approved by us, would not be considered a violation of section 9 of the Act.

The intent of this special regulation is to provide those northeastern States and Tribes that have an active interest in participating in gray wolf conservation the authority to maintain the lead role in protection, management, and recovery of the species. Importantly, this special regulation will increase the options for wolf restoration to portions of historical gray wolf range in the northeastern United States by providing greater regulatory flexibility to State and Tribal governments. Greater regulatory flexibility will enable participating States and Tribes to manage wolves released as part of a reintroduction effort and to address problem wolves, such as those that depredate domestic animals.

In addition to accommodating concerns for domestic animals, we realize that the effects of introduced wolves on moose and deer populations are significant concerns among State and Tribal wildlife agencies and hunters. There is concern that wolves compete with hunters for moose and deer. For this reason, we propose a special provision to allow limited lethal take of wolves by Service, U.S. Department of Agriculture, and State and Tribal agency personnel to take effect 5 years after reintroductions are completed in the Northeastern Gray Wolf DPS. Such take can occur only after the agency has informed us of the need for lethal control and established the extent to which individual packs will be reduced. No pack will be reduced by more than 30 percent, and no packs will be reduced more frequently than every 3 years.

This special regulation will provide northeastern State and Tribal governments that have developed and implemented a wolf conservation plan the following authority:

1. Lethal control of wolves depredating domestic animals. This authority does not extend to wolf pups less than 6 months of age.

2. Incidental take of wolves resulting from otherwise lawful activities that are included in the conservation plan.

3. Capture and relocation of wolves that have dispersed outside of areas considered suitable for wolf restoration.

4. Five years after reintroduction is completed, the capture and relocation of wolves that threaten ungulate populations of management concern will be allowable if consistent with the terms of the conservation plan.

5. Capture and lethal control of diseased wolves (*e.g.*, carriers of rabies or canine parvovirus) determined to be a potential threat to other wolves domestic animals, or humans.

We believe that activities that modify gray wolf habitat will not adversely affect or incidentally take gray wolves within northeastern State boundaries or on Tribal lands. Therefore, it is not anticipated that land use restrictions will generally be needed to achieve conservation for the wolf in the Northeast. Wolves can successfully inhabit a variety of habitats provided that adequate prey are available and that they are not persecuted by humans. However, we encourage States and Tribes to identify any such activities that may modify wolf habitat that result in incidental take, along with actions ongoing or planned to reduce the effects of those activities, and submit them to us as part of a wolf conservation plan.

When wolf conservation plans are received, we will make them available for public comment through **Federal Register** notice. We will consider public comments and the criteria outlined in this section to determine whether the plan will reduce threats and promote the conservation of the gray wolf within State boundaries or on Tribal lands. We will work closely with northeastern State or Tribal officials to revise or strengthen sections of the plan as may be necessary to obtain plan approval. We will comply with the National Environmental Policy Act and section 7 of the Endangered Species Act in reviewing and approving conservation plans.

We recommend that the conservation plans contain, but not be limited to, the following sections: (1) A discussion of the status of the wolf in the State or on Tribal lands, including population estimates, habitat quantity and quality, and threats to its existence; (2) a discussion of the lawful activities having the potential to incidentally take wolves; such activities may include trapping and hunting programs that target other species; forest management; road construction, maintenance, and use; and recreational activities and development; (3) a discussion of potential impacts to gray wolves from these activities and existing or planned provisions to monitor, minimize, and

mitigate those effects; (4) provisions for identifying and correcting any situations that are likely to be causing incidental take and monitoring the effects of such corrective actions; (5) a discussion of existing or planned conservation measures to promote wolf recovery; and (6) a discussion of measures that may be needed to reduce conflicts with domestic animals and significant effects to wild ungulate populations. The plan must be consistent with the conservation of the gray wolf.

The criteria we will use to evaluate the conservation plans are as follows:

1. Any incidental taking of gray wolves, as described in the plan, occurs unintentionally while conducting an otherwise lawful activity. The purpose of the activity cannot be to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect wolves from the wild. The plan explains why alternatives that would not result in incidental take are not being used.

2. The plan includes a strategy to avoid, minimize, and mitigate any proposed incidental take. Compliance with this standard involves a planning strategy that emphasizes avoidance of impacts to gray wolves and provides measures to minimize potential impacts by modifying practices.

3. The plan is adequately funded and contains provisions to deal with unforeseen circumstances. A summary of the funding that will be available to implement provisions of the plan, including enforcement and monitoring, is provided. The plan outlines how it will be determined that a previously unforeseen problem has arisen and should include the specific steps that will be taken to correct that problem.

4. Any incidental taking allowed pursuant to the plan does not appreciably reduce the likelihood of survival and recovery of wolves in the wild. This criterion is equivalent to the regulatory requirement to avoid causing "jeopardy" under section 7(a)(2) of the Act (*i.e.*, to avoid engaging in any activity that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the gray wolf). In the case of incidental trapping of wolves, the plan includes an assessment of the potential for gray wolves to be incidentally caught by trappers targeting other species, the likelihood of mortality to a wolf that is trapped and released (including the potential for it to be trapped more than once), and the resulting impact to the wolf population.

5. We are assured that the plan will be implemented. The plan specifies how the State or Tribal governments will

exercise the existing authorities to adhere to the commitments made in the plan. Terms and conditions for implementation and monitoring of the plan are included to ensure that the plan's requirements and the requirements of the Act are met. Any violations could be a basis for revocation of our approval of the plan.

6. We are assured that States and Tribes have involved stakeholders in plan development (*e.g.*, timber companies or associations, trappers associations, recreational interests).

The take prohibitions of section 9 will be in effect throughout the Northeastern DPS until a conservation plan is approved by us. Once a plan is approved by us, the conditions contained in the approved plan will be the conditions, pursuant to section 4(d), under which the intentional and incidental take of gray wolves resulting from activities regulated by the State and Tribal governments included in the conservation plan would not be a violation of section 9.

Michigan, Wisconsin, North Dakota, and South Dakota Special Regulation

The current endangered status of wolves in Michigan and Wisconsin restricts depredation control activities in these States to capturing depredating wolves and releasing them at another location in the State. Wolves released in this manner commonly either return to the vicinity of their capture and resume their depredating habits, begin pursuing domestic animals at their new location, or are killed by resident wolf packs in the release area. Thus, in order for translocation to have a reasonable probability of succeeding, there must be unoccupied wolf habitat available within the State, but at a great distance from the depredation incident site.

As the Michigan and Wisconsin wolf populations expand in number and range, the frequency of depredation incidents is increasing, yet there are fewer suitable release sites available. Releases of depredating wolves at marginal locations (that is, near existing wolf packs or too close to their capture site) are likely to fail. For example, a depredating wolf recently released into the Nicolet National Forest in Wisconsin at a location 46 miles from his initial capture had returned to within 23 miles of his capture location when he was mistaken for a coyote and shot only 13 days after his release.

Similar problems with relocating depredating wolves have occurred in northwestern Montana. Of 28 relocated wolves, 25 either died a short time after their release or resumed attacking livestock again and had to be killed.

Only 2 of the 28 relocated wolves survived long enough to reproduce and contribute to wolf recovery. A review of wolf relocation as a means of reducing depredations on livestock in northwestern Montana concluded that relocation should be discontinued and that both livestock losses and depredation control costs could be reduced by killing, instead of relocating, depredating wolves (63 FR 20212, April 23, 1998; Bangs 1998; Bangs *et al.* 1998).

This proposed regulation would allow us, the Michigan and Wisconsin DNRs, the North Dakota Game and Fish Department, the South Dakota Game, Fish and Parks Department, or Tribes within these States, or the designated agents of these agencies to carry out lethal control of depredating wolves. The restrictions for these actions would be similar to those used for the Minnesota wolf depredation control program since 1985: (1) Wolf depredation must be verified, (2) the depredation is likely to be repeated, (3) the taking must occur within one mile of the depredation site in Michigan and Wisconsin, and within 4 miles of the depredation site in North Dakota and South Dakota, (4) taking, wolf handling, and euthanizing must be carried out in a humane manner, which includes the use of steel leghold traps, and (5) any young of the year trapped before August 1 must be released.

Lethal depredation control has been successful in reducing conflicts between the recovering wolf population and domestic animals in Minnesota. It resolves the immediate depredation problem without the removal of excessive numbers of wolves, and avoids removing any wolves when the depredation was not verified as being caused by wolves or is not likely to be repeated. It is significantly less expensive than translocating such problem wolves, and thus is more appropriate for the rapidly expanding wolf populations that exist in Michigan and Wisconsin.

Based upon Minnesota wolf depredation control data from the early 1980s when the wolf population was probably less than 1,500 animals, we estimate that a maximum of about 2 to 3 percent of Wisconsin and Michigan wolves would be taken annually under the provisions of this special regulation. At current population levels this would be about 4 to 6 wolves per State. This level of take should not appreciably affect the wolf population or its continued expansion in either of these States. As their wolf population already exceeds the numerical delisting criterion, this take will have no effect on the recovery of Michigan and Wisconsin

wolves under the Act. The level and effects of this take will be closely monitored by continuing the annual monitoring of wolf populations in these States and the required reporting of the lethal take under this special regulation.

We propose to limit depredation control activities to an area within one mile of the depredation site in Wisconsin and Michigan. Because wolf pack territories are large (in Wisconsin and Michigan they range from 52 to 518 sq km (20 to 200 sq mi), and the locations of Wisconsin and Michigan wolf packs are much more precisely known than is the case for Minnesota wolf packs, it will be possible for depredation control actions to be directed at only the depredating pack. Thus, the one-mile limit will enable depredation control trappers to focus their trapping within the activity areas of the target pack without significant risk of trapping wolves from nearby non-depredating packs.

The situation in North Dakota and South Dakota is quite different from that in Michigan or Wisconsin. Wolves that appear in North Dakota and South Dakota are dispersing individuals from Minnesota and Canada, or rarely may be a pair or small pack along North Dakota's border with Canada. None of our recovery plans or recovery programs recommends actions to promote gray wolf recovery in either of these two States, and we do not believe the Act requires nor encourages such recovery actions. We also recognize that, due to the more open landscape of these States, and the high likelihood that dispersing wolves will encounter livestock, wolves are more likely to become involved in depredations on domestic animals. Therefore, we believe we should provide a mechanism for prompt control of depredating wolves in these States. Because there are very few or no established wolf packs in these States, and there are very few wolves dispersing into these States, we believe there is minimal risk of trapping or shooting wolves from a nearby non-depredating pack or dispersers not involved in the depredation under the proposed special regulation. For this reason, as well as recognition that the much more open landscape of North Dakota and South Dakota means that depredating wolves are likely to travel a much greater distance from the depredation site to secure cover, we propose to allow lethal depredation control actions to be undertaken up to 4 miles from the depredation site.

Available Conservation Measures

Conservation measures provided to species listed as endangered or

threatened under the Act include recognition, recovery actions, requirements for Federal protection, and prohibitions against certain practices. Recognition through listing encourages and results in conservation actions by Federal, State, and private agencies, groups, and individuals. The Act provides for possible land acquisition and cooperation with the States and requires that recovery actions be carried out for all listed species. Many of these measures have already been successfully applied to gray wolves in the conterminous States.

If this proposed regulation is finalized, the protections of the Act will continue to apply to the endangered Southwestern (Mexican) Gray Wolf DPS and to the threatened Western Great Lakes, Northeastern, and Western DPSs. The protections of the Act will be removed only from wild gray wolves in areas outside of these four DPSs. We do not believe there are any wild gray wolves in the States outside of the these four DPSs, nor would they be significant to gray wolf recovery, under the Act, if they are found there. This proposal does not modify or withdraw the existing special regulations or the nonessential experimental population designations for the reintroduced gray wolf populations in Idaho, Montana, Wyoming, Arizona, and New Mexico, nor does it make any changes to the threatened classification and existing section 4(d) special regulation for gray wolves in Minnesota. Similarly, the existing critical habitat designations for portions of Minnesota and Michigan will remain unchanged, and will continue to be considered during consultations with other Federal agencies. This proposal does not affect the protection or listing of the red wolf (*Canis rufus*).

To the extent necessary, we will revise our existing gray wolf recovery plans to accommodate the potential changes in geographic coverage, Federal status, and gray wolf protection that would be brought about by new special regulations. Changes to the recovery plan for northern U.S. Rocky Mountain wolves will also be considered in light of the localities chosen by the colonizing wolves and the expansion and anticipated merging of the three recovery populations. We will also consider developing, in partnership with interested agencies and organizations, a Federal recovery plan for the Northeastern DPS.

The protection required of Federal agencies and the prohibitions against taking and harm are discussed in Summary of Factors Affecting the Species, part D, above.

Section 7(a) of the Act requires Federal agencies to evaluate their actions with respect to any species that is listed as endangered or threatened and with respect to its critical habitat, if any is being designated. Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR part 402. Section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of any species listed as endangered or threatened, or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into formal consultation with us. If a Federal action is likely to jeopardize a species proposed to be listed as threatened or endangered or destroy or adversely modify proposed critical habitat, the responsible Federal agency must confer with us.

Federal agency actions that may require consultation or conferencing, as described in the preceding paragraph, include activities by the U.S. Forest Service, the National Park Service, the U.S. Geological Survey, USDA/APHIS-Wildlife Services, the Bureau of Land Management, the U.S. Department of Transportation, and the U.S. Environmental Protection Agency.

However, under section 10(j)(2)(C) of the Act, for those three areas currently designated as nonessential experimental populations in Montana, Idaho, Wyoming, Arizona, New Mexico, and Texas for the purpose of interagency consultation under section 7 of the Act the gray wolf will continue to be considered a species proposed for listing under the Act, except where the species occurs on an area within the National Wildlife Refuge System or the National Park System. For all other purposes of the Act, gray wolves that are currently designated as experimental populations shall continue to be treated as a threatened species. Furthermore, the existing special regulations found in 50 CFR 17.84(i) and 17.84(k) regarding the taking of wolves depredating on livestock in these experimental population areas will continue to apply as long as these experimental population designations remain in force.

The Act and implementing regulations set forth a series of general prohibitions and exceptions that apply to endangered and threatened wildlife. The prohibitions codified at 50 CFR 17.21 and 17.31 in part make it illegal for any person subject to the jurisdiction of the United States to take (including harass, harm, pursue, hunt, shoot,

wound, kill, trap, or collect; or to attempt any of these), import or export, ship in interstate commerce in the course of commercial activity, or sell or offer for sale in interstate or foreign commerce, any listed species. It also is illegal to possess, sell, deliver, carry, transport, or ship any such wildlife that has been taken illegally. Certain exceptions apply to agents of the Service and State conservation agencies. Additionally, as discussed above, special regulations promulgated under sections 4(d) and 10(j) of the Act provide additional exceptions to these general prohibitions for the gray wolf.

The proposed 4(d) rule for gray wolves in the northeastern DPS will have no immediate effect on current conservation measures in place for any naturally occurring or recolonizing gray wolves. It is the intent of the 4(d) rule to provide regulatory flexibility so that there will be fewer obstacles for States and Tribes to assume an active role in wolf restoration. As a threatened species with a 4(d) rule, States and Tribes can undertake wolf restoration without nullifying the authority to manage introduced "problem" wolves in a manner consistent with other wildlife population objectives. As stated earlier in the section *Northeastern Gray Wolves*, if future wolf reintroductions occur in the Northeast, and conditions allowing incidental or intentional take pursuant to the 4(d) rule are met, it will not be possible in every instance to distinguish naturally occurring wolves from the unmarked progeny of reintroduced wolves. Therefore, in the event that one or more States or Tribes actively reintroduce wolves into the Northeast, some incidental or intentional take of naturally occurring wolves may occur in the future.

It is our policy (59 FR 34272; July 1, 1994) to identify to the maximum extent practicable at the time a species is listed those activities that would or would not constitute a violation of section 9 of the Act. The intent of this policy is to increase public awareness of the effect of the listing on proposed and ongoing activities within a species' range. Activities that we believe could potentially harm or kill the gray wolf in the area where it will remain listed as threatened or endangered and may result in take include, but are not limited to:

(1) Taking of gray wolves by any means or manner not authorized under the provisions of the existing special regulation established for the designated nonessential experimental population in Arizona, New Mexico, and Texas as long as that designation and special regulation remain in effect;

(2) Taking of gray wolves within the Western Gray Wolf DPS or in the Northeastern DPS in a manner not authorized under the provisions of the 4(d) special regulations proposed in this document, or in a manner not authorized under the existing experimental population regulations which would continue to apply to gray wolves in Wyoming and in parts of Idaho and Montana;

(3) Taking of gray wolves within the Western Great Lakes DPS in a manner not authorized in either the existing section 4(d) special regulation for Minnesota or the proposed section 4(d) special regulation for Michigan, Wisconsin, North Dakota, and South Dakota;

(4) Taking of captive members of the Southwestern (Mexican) DPS unless such taking results from implementation of husbandry protocols approved under the Mexican Wolf Species Survival Plan or are otherwise approved or permitted by the Service;

(5) Intentional killing of a live-trapped canid that is demonstrably too large to be a coyote (that is, greater than 27 kg (60 lb)) in the Northeastern Gray Wolf DPS; or

(6) Killing or injuring of, or engaging in the interstate commerce of, captive wolves which originated from, or whose ancestors originated from, the areas included within the Western Great Lakes, Western, Northeastern, or Southwestern (Mexican) Gray Wolf DPSs, unless authorized in a Service permit.

We believe, based on the best available information, that the following actions will not result in a violation of section 9:

(1) Taking of a gray wolf in defense of human life;

(2) Taking of gray wolves outside of the areas described as the Western, Western Great Lakes, Northeastern, or Southwestern (Mexican) Gray Wolf DPS;

(3) Taking of gray wolves under the provisions of the existing special regulations established for the three designated nonessential experimental populations in Arizona, New Mexico, Texas, Wyoming, Idaho, and Montana as long as those designations and special regulations remain in effect;

(4) Taking of gray wolves under the provisions of the special regulations under section 4(d) of the Act, as proposed at this time for threatened gray wolves in the Northeastern Gray Wolf DPS, the Western Gray Wolf DPS, or the Western Great Lakes Gray Wolf DPS States of Michigan, Wisconsin, North Dakota, and South Dakota;

(5) Taking of gray wolves under the provisions of the existing special

regulation at 50 CFR § 17.40(d) for Minnesota wolves; or

(6) Taking of captive members of the Southwestern (Mexican) Gray Wolf DPS in accordance with husbandry protocols approved under the Mexican Wolf Species Survival Plan or other approvals or permits issued by the Service.

Permits may be issued to carry out otherwise prohibited activities involving endangered and threatened wildlife under certain circumstances. Regulations governing permits are at 50 CFR 17.22, 17.23, and 17.32. For endangered species such permits are available for scientific purposes, to enhance the propagation or survival of the species, for incidental take in connection with otherwise lawful activities, and/or for economic hardship. For threatened species such permits are also available for zoological exhibition, educational purposes, and/or for special purposes consistent with the purposes of the Act, but not for economic hardship.

Questions regarding whether specific activities may constitute a violation of section 9 should be directed to the nearest regional or Ecological Services field office of the Service. Requests for copies of the regulations regarding listed species and inquiries about prohibitions and permits may be addressed to any Service regional office or to the Washington headquarters office. The location, address, and phone number of the nearest regional or Ecological Services/Endangered Species field office may be obtained by calling us at 703-358-2171 or by using our World Wide Web site at: <http://www.fws.gov/where/index.html>.

Required Determinations

Regulatory Planning and Review, Regulatory Flexibility Act, and Small Business Regulatory Enforcement Fairness Act

This proposed rule was subject to Office of Management and Budget review under Executive Order 12866. An economic analysis is not required because this proposed regulation will result in only minor (positive) effects on the very small percentage of livestock producers within wolf range.

Currently the vast majority of wolves that occur in the western Great Lakes area are found in the State of Minnesota where they are listed as threatened. A special regulation exists for Minnesota wolves that allows the Fish and Wildlife Service, the Minnesota DNR, other designated agencies, and their agents to manage wolves to ensure minimal economic impact. These special regulations allow some direct "take" of

wolves. A State program compensates livestock producers up to \$750 per head if they suffer confirmed livestock losses by wolves. The value of the confirmed livestock losses amounted to an annual average of about \$53,000 over the last five years. Because this proposal will not affect the existing special regulations for Minnesota wolves, there will be no economic effect on livestock producers or other economic activities in Minnesota.

This proposed regulation will reclassify wolves in Michigan and Wisconsin from endangered to threatened and provide special regulations similar to those for Minnesota as described above. Thus specified State, Tribal, and Federal agencies and their designated agents will be allowed to take wolves in certain circumstances without a permit. Under normal protections of the Act, that is, without the benefit of special regulations proposed for Michigan and Wisconsin, permits would be required. This proposed special regulations will benefit the small percentage of livestock producers in wolf range in Michigan and Wisconsin that experience wolf attacks on their animals. Since only about 1.2 percent of livestock producers in nearby Minnesota, where the wolf population is much greater (Minnesota contains 2500 wolves, while Michigan and Wisconsin have 197 and 174 wolves, respectively), are adversely affected by wolves, the potential beneficial effect to livestock producers in Michigan and Wisconsin is small, but it may be significant to a few producers. In addition, State programs in Michigan and Wisconsin compensates livestock producers if they suffer confirmed livestock losses by wolves. In Wisconsin compensation is at full market value, while Michigan provides partial compensation and is planning on offering full compensation soon. The net effect of the proposed reclassification and 4(d) rule to livestock producers in Michigan and Wisconsin is the control of depredating wolves will become more efficient and effective, thus reducing the economic burden of livestock producers resulting from wolf recovery in those states. Similar positive, but geographically scattered and minor economic benefits will occur for livestock producers in North and South Dakota.

The majority of wolves in the West are protected under nonessential experimental population designations that cover Wyoming, most of Idaho, and southern Montana that effectively treat wolves as threatened species. A smaller, but naturally-occurring population of about 80 wolves is found in

northwestern Montana. The wolves with the nonessential experimental population designation were reintroduced into these States from Canada. Special regulations exist for these experimental populations that allow government employees and designated agents, as well as livestock producers, to take problem wolves. Because this proposal does not change the nonessential experimental designation or associated special regulations, it will have no economic impact on livestock producers or other entities in these areas. However, the naturally occurring wolves in northwestern Montana (outside of the nonessential experimental population areas) and wolves that may occur in other Western States are proposed for reclassification to threatened. Under normal protections of the Act, that is, without the benefit of special regulations proposed for the Western States not included in the nonessential experimental designation, permits would be required for nearly all forms of take. For example, currently a private landowner on his or her own land in northwestern Montana could not take a wolf in the act of attacking a domestic animal. This proposed rule would allow such take without a permit. The proposed reduction of the restrictions on taking problem wolves will make their control easier and more effective, thus, reducing the economic losses that result from wolf depredation on livestock and other domestic animals. Furthermore, a private program compensates livestock producers if they suffer confirmed livestock losses by wolves. Average compensation for livestock losses has been slightly over \$7,000 per year. The potential effect on livestock producers in Western States outside of the experimental population is small, but could be entirely beneficial to their operation.

We propose delisting the gray wolf in a large number of states outside of the four distinct population segments identified in the proposed rule. We are proposing these areas for delisting because we believe wolf recovery in these areas is not feasible or is not necessary in order to carry out our responsibilities under the ESA. These areas currently contain no wolves and are not likely to contain wolves in the future given the modification of the habitat by humans. Current regulations that protect wolves are unnecessary and currently provide no protection to wolves. Livestock producers and other economic activities in these States have not been affected by the wolf and will not be affected by the actions in this

proposal because we are simply proposing to remove the current regulations which have no effect on landowners.

a. This proposed regulation would not have an annual economic effect of \$100 million or adversely affect an economic sector, productivity, jobs, the environment, or other units of government. As explained above, this proposed regulation will result in only minor positive economic effects for a very small percentage of livestock producers.

b. If finalized, this proposed regulation would not create inconsistencies with other agencies' actions. This proposed regulation reflects continuing success in recovering the gray wolf through long-standing cooperative and complementary programs by a number of federal, state, and tribal agencies.

c. This proposed regulation would not materially affect entitlements, grants, user fees, loan programs, or the rights and obligations of their recipients.

d. This proposed regulation would not raise novel legal or policy issues. This proposed regulation is consistent with the ESA, regulations, and policy.

This proposed regulation would not have a significant economic effect on a substantial number of small entities as defined under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). As stated above, this proposed regulation will result in only minor positive economic effects for a very small percentage of livestock producers. Only 1.2 percent of the livestock producers are affected in Minnesota and fewer are expected to be effected in the other States.

This proposed regulation would not be a major rule under 5 U.S.C. 801 *et seq.*, the Small Business Regulatory Enforcement Fairness Act.

a. This proposed regulation would not produce an annual economic effect of \$100 million. The majority of livestock producers within the range of the wolf are small family-owned dairies or ranches and the total number of livestock producers that may be affected by wolves is small. (For example, only about 1.2 percent of livestock producers in Minnesota are affected by wolves where the largest wolf population, by far, exists.) The proposed take regulations that are proposed further reduce the effect that wolves will have on individual livestock producers by reducing or eliminating permit requirements. Compensation programs are also in place to offset losses to individual livestock producers. Thus, even if livestock producers affected are small businesses, their combined economic effects will be minimal and

the effects are a benefit to small business by reducing or eliminating paperwork requirements.

b. This proposed regulation would not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. This proposed regulation would not have a significant adverse effect on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501, *et seq.*):

a. The Service has determined and certifies pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 *et seq.*, that this proposed rulemaking will not impose a cost of \$100 million or more in any given year on local or State governments or private entities. As stated above, this proposed regulation will result in only minor positive economic effects for a very small percentage of livestock producers.

b. This proposed regulation would not produce a Federal mandate of \$100 million or greater in any year, that is, it is not a "significant regulatory action" under the Unfunded Mandates Reform Act. This proposed regulation will not impose any additional wolf management or protection requirements on the States or other entities.

Takings Implications Assessment

In accordance with Executive Order 12630, this proposed regulation would not have significant implications concerning taking of private property by the Federal government. This proposed regulation will reduce regulatory restrictions on private lands and, as stated above, will result in minor positive economic effects for a small percentage of livestock producers.

Federalism Assessment

In accordance with Executive Order 13132, this proposed regulation would not have significant Federalism effects. This proposed regulation would not have a substantial direct effect on the States, on the relationship between the States and the Federal government, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform

In accordance with Executive Order 12988, this proposed regulation does not unduly burden the judicial system.

Paperwork Reduction Act

This proposed regulation does not contain any new collections of information other than those already approved under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, and assigned Office of Management and Budget clearance number 1018-0094.

National Environmental Policy Act

We have analyzed this proposed rulemaking in accordance with the criteria of the National Environmental Policy Act and 318 DM 2.2(g) and 6.3(D). We have determined that Environmental Assessments and Environmental Impact Statements, as defined under the authority of the National Environmental Policy Act of 1969, need not be prepared in connection with regulations adopted pursuant to section 4(a) of the Act. A notice outlining our reasons for this determination was published in the **Federal Register** on October 25, 1983 (48 FR 49244).

Section 7 Consultation

We do not need to complete a section 7 consultation on this proposed rulemaking. An intra-Service consultation is completed prior to the implementation of recovery or permitting actions for listed species; however, the acts of listing, delisting, or reclassifying species under the ESA are not subject to the requirements of section 7 of the ESA.

Public Comments Solicited

We intend that any final action resulting from this proposal will be as accurate and as effective as possible. Therefore, we solicit data, comments, or suggestions from the public, other concerned governmental agencies, the scientific community, industry, or any other interested party concerning the actions contained in this proposal. Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. In some circumstances, we would withhold from the rulemaking record a respondent's identity, as allowable by law. If you wish for us to withhold your name and/or address, you must state this request prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, available for public inspection in their entirety (see

ADDRESSES section). Comments particularly are sought concerning:

(1) Biological, commercial trade, or other relevant data concerning any threat, or lack thereof, to gray wolves in the 48 conterminous States and Mexico;

(2) Additional information concerning the range, distribution, population size, and population trends of gray wolves in the conterminous 48 States and Mexico;

(3) Information concerning the adequacy of the reclassification and recovery criteria described in the 1992 Recovery Plan for the Eastern Timber Wolf, the 1987 Northern Rocky Mountain Wolf Recovery Plan, and the 1982 Mexican Wolf Recovery Plan;

(4) The extent of State and Tribal protection and management that would be provided to the gray wolf in the western Great Lakes area as either a threatened or a delisted species;

(5) Information concerning the potential for recovery of gray wolves in the northeastern United States, and the potential involvement of the Service in such recovery activities;

(6) Information concerning approaches to controlling wolf depredation on domestic animals and significant impacts to wild ungulate populations in States where the wolf may be reclassified to a threatened species, including the use of section 4(d) special regulations to allow lethal depredation control and additional opportunities for harassment of wolves by livestock producers;

(7) Comments and information regarding the merits of alternatives described in this proposal that were not selected, including the alternative of removing the two existing nonessential experimental population designations for the northern U.S. Rocky Mountains; and

(8) Information concerning other alternative approaches to changing the listing status of the gray wolf to reflect recovery progress and recovery needs, including alternatives not discussed in this proposal.

(9) Appropriateness of authorizing take in the Northeastern DPS in accordance with an approved State or Tribal Conservation Plan.

References Cited

A complete list of all references cited in this proposal is available upon request from the U.S. Fish and Wildlife Service Region 3 Office at Ft. Snelling, Minnesota (see **FOR FURTHER INFORMATION** section).

Author

The primary author of this notice is Ronald L. Refsnider, U.S. Fish and Wildlife Service, Ft. Snelling, Minnesota Regional Office (see **ADDRESSES** section). Substantial contributions were also made by Service employees Michael Amaral (Concord, New Hampshire), Ed Bangs (Helena, Montana), John Fay (Arlington, Virginia), Scott Johnston (Washington, D.C.), Paul Nickerson (Hadley,

Massachusetts), and David Parsons (Albuquerque, New Mexico).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and record keeping requirements, Transportation.

Regulation Promulgation

Accordingly, we propose to amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulation, as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. Section 17.11(h) is amended by removing the first two entries for the gray wolf (*Canis lupus*) under MAMMALS in the list of Endangered and Threatened Wildlife and adding in their place the following three entries, while retaining the current final two entries for the gray wolf, which designate nonessential experimental populations in Wyoming, Idaho, Montana, Arizona, New Mexico, and Texas:

§ 17.11 Endangered and threatened wildlife.

* * * * *

(h) * * *

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
*	*	*	*	*	*		*
Mammals							
*	*	*	*	*	*		*
Wolf, gray	<i>Canis lupus</i>	Holarctic	U.S.A. (AZ south of the Colorado and Little Colorado Rivers between Hoover Dam and Winslow and south of Interstate Highway 40 between Winslow and the eastern State boundary, NM south of Interstate Highway 40, TX south of Interstate Highway 40 and west of Interstate Highway 35), Mexico, except where listed as an experimental population; captive wolves who were, or whose ancestors were, removed from the wild in this area.	E	1, 6, 13, 15, 35, 631,____	NA	NA.
Do	do	do	U.S.A. (MI, MN, ND, SD, WI); captive wolves who were, or whose ancestors were, removed from the wild in this area.	T	1, 6, 13, 15, 35,____	17.95(a)	17.40(d), 17.40(n).
Do	do	do	U.S.A. (ME, NH, NY, VT); captive wolves who were, or whose ancestors were, removed from the wild in this area.	T	1, 6, 13, 15, 35,____	NA	17.40(m).

Species		Historic range	Vertebrate population where endangered or threatened	Status	When listed	Critical habitat	Special rules
Common name	Scientific name						
Do	do	do	U.S.A. (CO, ID, MT, OR, UT, WA, WY, AZ north of the Colorado and Little Colorado Rivers between Hoover Dam and Winslow and north of Interstate Highway 40 between Winslow and the eastern State boundary, and NM north of Interstate Highway 40), except where listed as an experimental population; captive wolves who were, or whose ancestors were, removed from the wild in this area.	T	1, 6, 13, 15, 35, 561, 562,____	NA	17.40(l).
*	*	*	*	*	*		*

3. The Service amends § 17.40 by adding new paragraphs (m), (n), and (o) to read as follows:

§ 17.40 Special rules—mammals

* * * * *

(m) Gray wolf (*Canis lupus*) Western Distinct Population Segment (DPS). The gray wolf Western DPS occurs in the States of Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, and the parts of Arizona and New Mexico north of the Colorado River and the Little Colorado River between Hoover Dam and Winslow (Arizona) and north of Interstate Highway 40 between Winslow and the eastern boundary of New Mexico, except where listed as an experimental population.

(1) *Does this Special rule apply to the experimental populations located in the Western DPS?* No. Paragraphs (m)(2) through (6) of this section apply to gray wolves within the Western Gray Wolf Distinct Population Segment, but excludes those wolves occurring in areas that are designated as experimental populations in Idaho, Montana, and Wyoming under section 10(j) of the Endangered Species Act of 1973, as amended.

(2) *What are the definitions of terms used in this paragraph (m)?*

(i) *Active den site.* A den or a specific aboveground site that is being used on a daily basis by wolves to raise newborn pups during the period April 1 to June 30.

(ii) *Breeding pair.* An adult male and an adult female wolf that, during the previous breeding season, have produced at least two pups that survived until December 31 of the year of their birth.

(iii) *Domestic animals.* Animals that have been tamed for use by humans, including use as pets.

(iv) *Livestock.* Cattle, sheep, horses, and mules or as otherwise defined in

State and Tribal wolf management plans as approved by the Service.

(v) *Noninjurious.* Does not cause either temporary or permanent physical damage or death.

(vi) *Opportunistic harassment.* Harassment without the conduct of prior purposeful actions to attract, track, wait for, or search out the wolf.

(vii) *Problem wolves.* Wolves that attack livestock, or wolves that twice in a calendar year attack domestic animals other than livestock.

(viii) *Public land.* Federal land and any other public land designated in State and Tribal wolf management plans as approved by the Service.

(ix) *Remove.* Place in captivity or kill.

(x) *Service (we).* The Fish and Wildlife Service of the Department of the Interior.

(xi) *Take (taking).* To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(xii) *Wounded.* Torn flesh and bleeding or evidence of physical damage caused by a wolf bite.

(3) *What forms of take of gray wolves are allowed in the Western DPS?* The following activities, in certain circumstances as described below, are allowed: Opportunistic harassment; intentional harassment; taking on private land; taking on public land; taking in response to impacts on wild ungulates; taking in defense of human life; taking to protect human safety; taking to remove problem wolves; incidental take; taking under permits; and taking authorizations for agency employees. Other than as expressly allowed in the rule, all the prohibitions of 50 CFR 17.31(a) and (b) apply to gray wolves in this DPS, and all other activities are considered a violation of section 9 of the Act. Any wolf, or wolf part, taken legally must be turned over to the Service. Any taking of wolves

must be reported to the Service as outlined in paragraph (m)(6) of this section.

(i) *Opportunistic harassment.* Landowners on their own land and livestock producers or permittees who are legally using public land under valid livestock grazing allotments may conduct opportunistic harassment of any gray wolf in a noninjurious manner at any time. Opportunistic harassment must be reported to us within 7 days.

(ii) *Intentional harassment.* After we or our designated agent have confirmed persistent wolf activity on privately owned land, we may, pursuant to section 10(a)(1)(A) of the Act, issue a 90-day permit, with appropriate conditions, to any landowner to harass wolves in a potentially injurious manner (such as by projectiles designed to be nonlethal to larger mammals). The harassment must occur as specifically identified in the Service permit.

(iii) *Taking on private land.* We allow landowners to take wolves on privately owned land in two circumstances:

(A) Any landowner may take a gray wolf that is in the act of biting, wounding, or killing any domestic animal, provided that the domestic animal(s) freshly (less than 24 hours) wounded or killed by wolves are evident, and we or our designated agent are able to confirm that the domestic animal(s) were wounded or killed by wolves. The taking of any wolf without such evidence may be referred to the appropriate authorities for prosecution.

(B) A private landowner who has a permit issued by the Service pursuant to section 10(a)(1)(A) of the Act may take a gray wolf on their private land if:

(1) Ten or more breeding pairs of gray wolves are present in that State where the permit is to be used, and

(2) We or our designated agent have determined that wolves are routinely present on that private property and

present a significant risk to the health and safety of domestic animals. The landowner must conduct the take in compliance with the permit issued by the Service.

(iv) *Take on public land.* Under the authority of section 10(a)(1)(A) of the Act, we may issue permits to take gray wolves under certain circumstances to livestock producers or permittees who are legally using public land under valid livestock grazing allotments. The permits, which may be valid for up to 45 days, can allow the take of a gray wolf that is in the act of killing, wounding, or biting livestock, livestock guard and herding animals, or other domestic animals, provided that we or our designated agent have confirmed that wolves have previously wounded or killed livestock and agency efforts to resolve the problem have been completed. We or our designated agent will investigate and determine if the previously wounded or killed livestock were wounded or killed by wolves. There must be evidence of livestock freshly wounded or killed by wolves. The taking of any wolf without such evidence may be referred to the appropriate authorities for prosecution.

(v) *Take in response to wild ungulate impacts.* If wolves are causing unacceptable impacts to wild ungulate populations, a State or Tribe may capture and translocate wolves to other areas within the Western DPS. In their State or Tribal wolf management plans, the States or Tribes will define such unacceptable impacts, describe how they will be measured, and identify possible mitigation measures. Before wolves can be captured and translocated, we must approve these plans and determine that such translocations will not inhibit wolf population growth toward recovery levels. In addition, if, after 10 or more breeding pairs are established in a State, we determine that wolves are causing unacceptable impacts to wild ungulate populations, we may, in cooperation with the appropriate State fish and game agencies or Tribes, relocate wolves to other States within the Western DPS.

(vi) *Take in defense of human life.* Any person may take a gray wolf in defense of the individual's life or the life of another person. The taking of a wolf without an immediate and direct threat to human life may be referred to the appropriate authorities for prosecution.

(vii) *Take to protect human safety.* We or a Federal land management agency or a State or Tribal conservation agency may promptly remove any wolf that we or our designated agent determines to present a threat to human life or safety.

(viii) *Take of problem wolves.* We or our designated agent may carry out aversive conditioning, nonlethal control, translocation, permanent placement in captivity, or lethal control of problem wolves. If nonlethal depredation control activities occurring on Federal lands or other public lands identified in State or Tribal wolf management plans result in the capture, prior to October 1, of a female wolf showing signs that she is still raising pups of the year (*e.g.*, evidence of lactation, recent sightings with pups), whether or not she is captured with her pups, then she and her pups will be released at or near the site of capture. All problem wolves on private land, including female wolves with pups, may be removed if continued depredation occurs. All chronic problem wolves (wolves that repeatedly depredate on domestic animals including female wolves with pups regardless of whether on public or private lands) will be removed from the wild (killed or placed in captivity). To determine the status of problem wolves, we must have the following:

(A) Evidence of wounded livestock or remains of a livestock carcass that clearly shows that the injury or death was caused by wolves (such evidence is essential because wolves feed on carrion that they find and did not kill);

(B) Reason to believe that additional livestock losses would occur if no control action is taken;

(C) No evidence of attractants or artificial or intentional feeding of wolves; and

(D) Evidence that, on public lands, animal husbandry practices previously identified in existing approved allotment plans and annual operating plans for allotments were followed.

(ix) *Incidental take.* We will allow certain incidental take of gray wolves in the Western DPS if the take was accidental and incidental to an otherwise lawful activity. Take that does not conform with the provisions above may be referred to the appropriate authorities for prosecution. Shooters have the responsibility to identify their target before shooting. Shooting a wolf as a result of mistaking it for another species is not considered accidental and may be referred to the appropriate authorities for prosecution.

(x) *Take under permits.* Any person with a valid permit issued by the Service under 50 CFR 17.32 may take wolves in the wild in the Western DPS, pursuant to terms of the permit.

(xi) *Additional taking authorizations for agency employees.* When acting in the course of official duties, any employee or agent of the Service or

appropriate Federal, State, or Tribal agency, who is designated in writing for such purposes by the Service, may take a wolf if such action is for:

(A) Scientific purposes;

(B) To avoid conflict with human activities;

(C) To improve wolf survival and recovery prospects;

(D) To aid or euthanize sick, injured, or orphaned wolves;

(E) To salvage a dead specimen that may be used for scientific study;

(F) To aid in law enforcement investigations involving wolves; or

(G) To prevent wolves with abnormal physical or behavioral characteristics, as determined by the Service, from passing on those traits to other wolves.

Any additional taking authorizations for agency employees identified in this subparagraph must be reported to us within 15 calendar days.

(4) *What types of take of gray wolves are not allowed in the Western DPS?*

(i) Any manner of take not described under paragraph (m) (3) of this section.

(ii) No person may possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any wolf or wolf part from the State of origin taken in violation of the regulations in this paragraph (m) or in violation of applicable State or Tribal fish and wildlife laws or regulations or the Act.

(iii) In addition to the offenses defined in this paragraph (m), we consider any attempts to commit, solicitations of another to commit, or actions that cause to be committed any such offenses to be unlawful.

(iv) *Use of unlawfully taken wolves.*

No person, except for an authorized person, may possess, deliver, carry, transport, or ship a gray wolf taken unlawfully in the Western DPS.

(5) *How does the gray wolf Western DPS affect use of Federal lands.*

Restrictions on the use of any Federal lands within the Western DPS may be put in place to prevent the direct take of wolves at active den sites between April 1 and June 30. Otherwise, no additional land-use restrictions on Federal lands, except for national parks or national wildlife refuges, may be employed to reduce or prevent take of wolves solely to benefit gray wolf recovery under the Act. This prohibition does not preclude restricting land use when necessary to reduce negative impacts of wolf restoration efforts on other endangered or threatened species.

(6) *What are the reporting requirements when a gray wolf is taken?* Except when otherwise indicated in this paragraph (m), or when a permit issued under 50 CFR 17.32 specifies otherwise, any taking must be reported to us within

24 hours. We will allow additional reasonable time if access is limited. Report wolf takings or opportunistic harassment to Fish and Wildlife Service, Western Gray Wolf Recovery Coordinator, 100 N. Park, #320, Helena, MT 59601; 406-449-5225; facsimile 406-449-5339, or a Service-designated representative of another Federal, State, or Tribal agency. Any wolf, or wolf part taken legally, must be turned over to the Service which will determine the disposition of any live or dead wolves.

(n) Gray wolf (*Canis lupus*) Northeastern Distinct Population Segment (DPS). The gray wolf Northeastern DPS occurs in New York, Vermont, New Hampshire, and Maine.

(1) *What are the definitions of terms used in paragraph (n)?*

(i) *Domestic animals*. Animals that have been tamed for use by humans, including use as pets.

(ii) *Livestock*. Cattle, sheep, horses, and mules or as otherwise defined in State and Tribal wolf management plans as approved by the Service.

(iii) *Service (we)*. The Fish and Wildlife Service of the Department of the Interior.

(iv) *Take (taking)*. To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(2) *What forms of take of gray wolf are allowed in the Northeastern DPS?* The following activities, in certain circumstances as described below, are allowed: take in defense of human life, take to protect human safety, take under permits, take for conservation purposes, and incidental take. Other than as expressly allowed in this rule, all the prohibitions of 50 CFR 17.31(a) apply to gray wolves in this DPS, and all other activities are considered a violation of section 9 of the Act. Any wolf, or wolf part, taken legally must be turned over to the Service. Any taking of wolves must be reported to the Service as outlined in paragraph (n)(6) of this section.

(i) *Take in defense of human life*. Any person may take a gray wolf in defense of the individual's life or the life of another person. The taking of a wolf without an immediate and direct threat to human life may be referred to the appropriate authorities for prosecution.

(ii) *Take to protect human safety*. We or a Federal land management agency or a State or Tribal conservation agency may promptly remove any wolf that we or our designated agent determines to present a threat to human life or safety.

(iii) *Take under permits*. Any person with a valid permit issued by the Service under 50 CFR section 17.32 may take wolves in the wild in the

Northeastern DPS, pursuant to terms of the permit.

(iv) *Take for conservation purposes*.

(A) When acting in the course of official duties, any authorized Service employee or agent, as described in § 17.31(b), or State conservation agency who is designated by his/her agency for such purposes under a Cooperative Agreement under section 6 of the Act, may take a gray wolf in his/her respective State to carry out scientific research or conservation programs.

(B) Federally recognized Tribes or States that have an approved gray wolf conservation plan as described below in paragraph (n)(3) of this section may take gray wolf in accordance with that plan.

(v) *Incidental Take*. Take that is incidental to an otherwise lawful activity included in an approved State or Tribal gray wolf conservation plan in accordance with (n)(3) of this section is not unlawful.

(3) *What are the elements that may comprise an approved State or Tribal gray wolf conservation plan?* We will review these plans, make them available for public comment, and approve them if the plans promote the conservation of the gray wolf. Elements that may be included in the conservation plan are listed below.

(i) A discussion of the status of the wolf in the State or on Tribal lands, including population estimates, habitat quantity and quality, and threats to its existence.

(ii) A discussion of existing or planned conservation measures to promote wolf recovery.

(iii) A discussion of the lawful activities having the potential to incidentally take wolves.

(iv) A discussion of potential impacts to gray wolves from these activities and existing or planned provisions to monitor, minimize, and mitigate those effects.

(v) Provisions for identifying and correcting any situations that are likely to be causing incidental take and monitoring the effects of such corrective actions.

(vi) A discussion of measures that may be needed to reduce conflicts with domestic animals and significant effects to wild ungulate populations.

(vii) Conservation plans that include provisions for lethal control of wolves depredating on livestock or domestic animals will not include provisions for euthanizing wolf pups less than 6 months of age.

(viii) A conservation plan may contain provisions for control activities to include capturing, relocating, or euthanizing wolves that threaten

ungulate populations of management concern if the control activities:

(A) Do not begin until at least 5 years after wolf reintroduction is completed;

(B) Occur only after the State or Tribal natural resources agency has informed the Service of the need for such activities and the extent of control that will be implemented; and

(C) Will not reduce any wolf pack by more than 30 percent and more frequently than every 3 years.

(ix) A conservation plan may contain provisions for capture and lethal control of diseased wolves (e.g., carriers of rabies or canine parvovirus) determined to be a potential threat to other wolves, domestic animals, or humans.

(4) *What are the criteria that will be used to evaluate the conservation plans?*

(i) Any incidental taking of gray wolves, as described in the plan, occurs unintentionally while conducting an otherwise lawful activity. The purpose of the activity cannot be to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect wolves from the wild. The plan explains why alternatives that would not result in incidental take are not being used.

(ii) The plan includes a strategy to avoid, minimize, and mitigate any proposed incidental take. Compliance with this standard involves a planning strategy that emphasizes avoidance of impacts to gray wolves and provides measures to minimize potential impacts by modifying practices.

(iii) The plan is adequately funded and contains provisions to deal with unforeseen circumstances. A summary of the funding that will be available to implement provisions of the plan, including enforcement and monitoring, is provided. The plan outlines how it will be determined that a previously unforeseen problem has arisen and should include the specific steps that will be taken to correct that problem.

(iv) Any incidental taking allowed pursuant to the plan does not appreciably reduce the likelihood of survival and recovery of wolves in the wild. This criterion is equivalent to the regulatory requirement to avoid causing "jeopardy" under section 7(a)(2) of the Act (i.e., to avoid engaging in any activity that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of the gray wolf). In the case of incidental trapping of wolves, the plan includes an assessment of the potential for gray wolves to be incidentally caught by trappers targeting other species, the likelihood of mortality to a wolf that is trapped and released (including the potential for it to be trapped more than

once), and the resulting impact to the wolf population.

(v) We are assured that the plan will be implemented. The plan specifies how the State or Tribal governments will exercise the existing authorities to adhere to the commitments made in the plan. Terms and conditions for implementation and monitoring of the plan are included to ensure that the plan's requirements and the requirements of the Act are met. Any violations could be a basis for revocation of our approval of the plan.

(vi) We are assured that States and Tribes have involved stakeholders in plan development (e.g., timber companies or associations, trappers associations, recreational interests, conservation organizations).

(5) *How will the conservation plans be reviewed?* We will annually review the conservation plans with the States and Tribes to measure progress, identify problems, and recommend corrective action. If we determine that a plan is not being effectively implemented, we will present our concerns to the State or Tribe for joint determination of an appropriate resolution. If the State or Tribe does not take the agreed-upon corrective action within 90 days, we may partially or completely revoke approval of the plan. We will publish notice of our decision to revoke our approval and our reasons for doing so in the **Federal Register**, providing a 30-day public comment period prior to revocation. If we decide to revoke our approval, the take prohibitions that had been removed through approval of the conservation plan will be reinstated.

(6) *What types of take of gray wolves are not allowed in the Northeastern DPS?*

(i) Any manner of take not described under paragraph (n)(2) of this section.

(ii) *Export and commercial transactions.* Except as may be authorized by a permit issued under 50 CFR 17.32, no person may possess, sell, deliver, carry, transport, ship, import, or export by any means whatsoever, any wolf or wolf part from the State of origin taken in violation of the regulations in this paragraph (n) or in violation of applicable State or Tribal fish and wildlife laws or regulations or the Act.

(iii) In addition to the offenses defined in this paragraph (n), we consider any attempts to commit, solicitations of another to commit, or actions that cause to be committed any such offenses to be unlawful.

(iv) *Use of unlawfully taken wolves.* No person, except for an authorized person, may possess, deliver, carry, transport, or ship a gray wolf taken unlawfully in the Northeastern DPS.

(7) *What are the reporting requirements when a gray wolf is taken?*

Except when otherwise indicated in this paragraph (n), or when a permit issued under 50 CFR 17.32 specifies otherwise, any taking must be reported to us within 24 hours. We will allow additional reasonable time if access is limited. Report wolf takings to Fish and Wildlife Service, Chief, Endangered Species, 300 Westgate Center Drive, Hadley, MA; 413-253-8657. Any wolf or wolf part taken legally, must be turned over to the Service which will determine the disposition of any live or dead wolves.

(o) Gray wolf (*Canis lupus*) in Michigan, Wisconsin, North Dakota, and South Dakota.

(1) *What are the definitions of terms used in paragraph (o)?*

(i) *Domestic animals.* Animals that have been tamed for use by humans, including use as pets.

(ii) *Livestock.* Cattle, sheep, horses, and mules or as otherwise defined in State and Tribal wolf management plans as approved by the Service.

(iii) *Service (we).* The Fish and Wildlife Service of the Department of the Interior.

(iv) *Take (taking).* To harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(2) *What forms of take of gray wolves are allowed in Michigan, Wisconsin, North Dakota, and South Dakota?* The following activities, in certain circumstances as described below, are allowed: Take in defense of human life; take to protect human safety; take to aid, salvage, or dispose; take for depredation control; take under cooperative agreements; and take under permit. Other than as expressly allowed in this rule, all the prohibitions of 50 CFR 17.31(a) apply to gray wolves in this DPS, and all other activities are considered a violation of section 9 of the Act. Any wolf, or wolf part, taken legally must be turned over to the Service. Any taking of wolves must be reported to the Service as outlined in paragraph (o)(4) of this section.

(i) *Take in defense of human life.* Any person may take a gray wolf in defense of the individual's life or the life of another person. The taking of a wolf without an immediate and direct threat to human life may be referred to the appropriate authorities for prosecution.

(ii) *Take to protect human safety.* We or a Federal land management agency or a State or Tribal conservation agency may promptly remove any wolf that we or our designated agent determines to present a threat to human life or safety.

(iii) *Allowable take for Aiding, Salvaging, or Disposing of Specimens.*

When acting in the course of official duties, any authorized employee or agent of the Service; any other Federal land management agency; the Michigan Department of Natural Resources; the Wisconsin Department of Natural Resources; the North Dakota Game and Fish Department; the South Dakota Game, Fish and Parks Department; or a federally recognized American Indian Tribe, who is designated by his/her agency for such purposes, may take a gray wolf in Michigan, Wisconsin, North Dakota, and South Dakota without a Federal permit if such action is necessary to:

(A) Aid a sick, injured, or orphaned specimen;

(B) Dispose of a dead specimen; or

(C) Salvage a dead specimen that may be useful for scientific study or for traditional, cultural, or spiritual purposes by Indian Tribes. Any taking to aid, salvage, or dispose of a specimen must be reported to a Law Enforcement Office of the Service within 15 calendar days. The specimen may be retained, disposed of, or salvaged only in accordance with directions from the Service.

(iv) *Allowable take for Depredation Control.* When acting in the course of official duties, any authorized employee or agent of the Service; the Michigan Department of Natural Resources; the Wisconsin Department of Natural Resources; the North Dakota Game and Fish Department; the South Dakota Game, Fish and Parks Department; or a federally recognized American Indian Tribe, who is designated by his/her agency for such purposes, may take a gray wolf or wolves within the person's State or Reservation boundaries, in response to depredation by a gray wolf on lawfully present livestock or domestic animals. However, such taking must be preceded by a determination by one of the agencies listed above in this subparagraph that the depredation was likely to have been caused by a gray wolf and depredation at the site is likely to continue in the absence of a taking. In addition, such taking must be performed in a humane manner and occur within 1 mile of the place where the depredation occurred if in Michigan or Wisconsin and within 4 miles of the place where the depredation occurred if in North Dakota or South Dakota. Any young of the year taken by trapping on or before August 1 of that year must be released. Any take for depredation control must be reported to a Law Enforcement Office of the Service within 15 calendar days. The specimen may be retained, disposed of, or salvaged only in accordance with directions from the Service.

(v) *Take Under Section 6 Cooperative Agreements.* When acting in the course of official duties, any authorized employee or agent of the Michigan Department of Natural Resources; the Wisconsin Department of Natural Resources; the North Dakota Game and Fish Department; or the South Dakota Game, Fish and Parks Department, as described in section 17.31(b), who is designated by his/her agency for such purposes under a Cooperative Agreement under section 6 of the Act, may take a gray wolf in his/her respective State to carry out scientific research or conservation programs. Such takings must be reported to the Service as specified in the reporting provisions of the Cooperative Agreement.

(vi) *Take under permit.* Any person who has a permit under section 50 CFR 17.32 of this subpart may carry out activities as specified by the permit with regard to gray wolves in Michigan,

North Dakota, South Dakota, and Wisconsin.

(3) *What types of take are not allowed for gray wolves in Michigan, Wisconsin, North Dakota, and South Dakota?*

(i) Any form of taking not described in paragraph (o)(2) of this section is prohibited.

(ii) *Export and commercial transactions.* Except as may be authorized by a permit issued under section 17.32 of this subpart, no person may sell or offer for sale in interstate commerce, import or export, or in the course of a commercial activity transport or receive any gray wolves from Michigan, North Dakota, South Dakota, or Wisconsin.

(iii) In addition to the offenses defined in this paragraph (o), we consider any attempts to commit, solicitations of another to commit, or actions that cause to be committed any such offenses to be unlawful.

(iv) *Use of unlawfully taken wolves.* No person, except for an authorized person, may possess, deliver, carry, transport, or ship a gray wolf taken unlawfully in Michigan, North Dakota, South Dakota, or Wisconsin.

(4) *What are the reporting requirements for gray wolf takings?* Except when otherwise indicated in this paragraph (o), or when a permit issued under 50 CFR 17.32 specifies otherwise, any taking must be reported to us within 24 hours. Any wolf, or wolf part taken legally, must be turned over to the Service which will determine the disposition of any live or dead wolves.

Dated: June 9, 2000.

Stephen C. Saunders,

Deputy Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 00-17621 Filed 7-11-00; 8:45 am]

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Federal Register

**Thursday,
July 13, 2000**

Part IV

Department of Agriculture

Agricultural Marketing Service

7 CFR Part 1230

**Pork Promotion, Research, and Consumer
Information Program: Procedures for the
Conduct of Referendum; Final Rule**

DEPARTMENT OF AGRICULTURE**Agricultural Marketing Service****7 CFR Part 1230**

[No. LS-99-14]

Pork Promotion, Research, and Consumer Information Program: Procedures for the Conduct of Referendum**AGENCY:** Agricultural Marketing Service, USDA.**ACTION:** Final rule.

SUMMARY: This final rule sets forth the procedures for conducting a referendum to determine if producers and importers favor continuation of the Pork Checkoff Program, formally known as the Pork Promotion, Research, and Consumer Information Order (Order). The Pork Checkoff Program was implemented September 5, 1986, as authorized by the Pork Promotion, Research, and Consumer Information Act of 1985 (Act). The Secretary of Agriculture (Secretary) will conduct a referendum among persons who have been producers and importers during the period August 18, 1999, through August 17, 2000, to determine whether producers and importers favor the continuation of the Pork Checkoff Program. Producers and importers can vote from August 18, 2000, through September 21, 2000. The Pork Checkoff Program would be terminated if a majority of producers and importers voting in the referendum favor termination.

EFFECTIVE DATE: This final rule is effective July 14, 2000.

Referendum Dates: Producers can vote in-person in the referendum on September 19, 20, 21, 2000, at the county Farm Service Agency (FSA) offices. Absentee ballots for producers will be available from county FSA offices from August 18, 2000, through September 18, 2000. Importers can obtain ballots from the FSA headquarters office in Washington, DC, from August 18, 2000, through September 21, 2000, at the address listed in this rule. The representative period to establish voter eligibility will be the period from August 18, 1999, through August 17, 2000.

FOR FURTHER INFORMATION CONTACT: Ralph L. Tapp, Chief, Marketing Programs Branch, Room 2627-S; Livestock and Seed Program, Agricultural Marketing Service (AMS), USDA; Stop 0251; 1400 Independence Avenue, SW.; Washington, DC 20250-0251; telephone number 202/720-1115,

fax 202/720-1125, or by e-mail Ralph.Tapp@usda.gov.

Producers can determine the location of county FSA offices by contacting (1) The nearest county FSA office; (2) the State FSA office; or (3) through an online search of the FSA website at www.fsa.usda.gov/pas/search.htm. From the options available on this webpage select "FSA Field Office Search," select "St Abbrev," and enter the county name in the "Cnty code" block. Some county FSA offices service multiple counties.

SUPPLEMENTARY INFORMATION: This final rule is being carried out in accordance with the Act (7 U.S.C. 4801-4819).

Question and Answer Overview*When Will the Referendum Be Held?*

Producers can vote in-person in the referendum on 3-consecutive days on September 19, 20, 21, 2000. Producers voting by absentee ballot may obtain ballot packages from August 18, 2000, through September 18, 2000. Importers may obtain mail ballot packages from August 18, 2000, through September 21, 2000.

Who Is Eligible To Vote in the Referendum?

People and businesses who owned and sold hogs or pigs or imported hogs, pigs, pork, or pork products during the representative period from August 18, 1999, through August 17, 2000, are eligible to vote. This means that there are three types of eligible voters: (1) Persons who own and sell hogs or pigs in the United States in their own name; (2) persons who import hogs, pigs, pork, or pork products into the United States in their own name; and (3) persons who are designated to cast the single vote for a business entity that owns and sells, or imports hogs, pigs, pork, or pork products into the United States. Persons ineligible to vote include persons who do not pay the pork checkoff such as contract growers unless they have owned and sold hogs or pigs in their own name at some time during the representative period of August 18, 1999, to August 17, 2000, as well as persons who left hog farming prior to the beginning date of the representative period of August 18, 1999.

Where Do I Vote if I'm a U.S. Producer?

In-person voting will take place at the Department of Agriculture's (Department) FSA county offices. If you currently participate in FSA programs, you should vote at the FSA county office where you normally do business. If you do not participate in FSA programs, go to the FSA office in the

county where you raise hogs or pigs (or if you raise hogs or pigs in more than one county, the county FSA office where most of your business is conducted). All county FSA office locations can be found on the FSA website at www.fsa.usda.gov/pas/search.htm.

Can I Vote by Absentee Ballot?

Yes. We recognize that producers are very busy so absentee voting will be allowed from August 18, 2000, through September 21, 2000, in addition to the September 19-21, 2000, 3-day in-person voting period. Eligible voters may request an absentee ballot from the appropriate county FSA office. Producers can begin requesting absentee ballots on August 1, 2000. However, absentee ballots will not be available for distribution to producers until August 18, 2000. Producers can request an absentee ballot in-person, by telephone, by facsimile, or by mail beginning August 1, 2000. To count, absentee ballots must be delivered to the county office no later than September 21, 2000, or be postmarked by September 21, 2000, and be received by the county FSA office no later than September 28, 2000.

Where do I Vote if I'm an Importer?

Voting will take place by mail. Voting by mail will be allowed for the same 35-day period of producer voting. Importers can request a ballot beginning August 1, 2000, from the FSA headquarters office in Washington, DC, at the address listed in this final rule. However, mail ballots will not be available for distribution to importers until August 18, 2000.

How Will the Department Make Certain That Only Eligible Persons Vote in the Referendum?

FSA county offices will publicly display a list of all people who have voted at that office, by absentee ballot as well as in-person. This will allow scrutiny by everyone. If a person believes that an ineligible person has voted, he or she can challenge that person's ballot. When a person's vote has been challenged, the challenged voter will be required to submit documentation to the county FSA office to prove eligibility. The Department will require importers to submit proof that they paid the pork assessment when they request ballots.

One commenter suggested several minor clarifying changes in the answers to three of the eight questions published with the proposed rule. We agree that these changes clarify the answers and have made the suggested changes. The

comments and responses are discussed in the section on comments.

Regulatory Impact Analysis

Executive Orders 12866 and 12998 and the Regulatory Flexibility Act

This final rule has been determined to be not significant for purposes of Executive Order 12866 and therefore has not been reviewed by Office of Management and Budget (OMB).

This final rule has been reviewed under Executive Order 12998, Civil Justice Reform. It is not intended to have a retroactive effect. The Act states that the statute is intended to occupy the field of promotion and consumer education involving pork and pork products and of obtaining funds thereof from pork producers and that regulation of such activity (other than a regulation or requirement relating to a matter of public health or the provision of State or local funds for such activity) that is in addition to or different from the Act may not be imposed by a State.

The Act provides that any person subject to the Order may file with the Secretary a petition stating that the Order, any provision of the Order, or any obligation imposed in connection with the Order is not in accordance with the law, and requesting a modification of the Order or an exemption from certain provisions or obligations of the Order. The petitioner will have the opportunity for a hearing on the petition. Thereafter the Secretary will issue a decision on the petition. The Act provides that the district court of the United States in any district in which the petitioner resides or carries on business has jurisdiction to review a ruling on the petition, if the petitioner files a complaint for that purpose not later than 20 days after the date of the entry of the Secretary's decision. The petitioner must exhaust his or her administrative remedies before he or she can initiate any such proceedings in the district court.

Pursuant to requirements set forth in the Regulatory Flexibility Act (5 United States Code (U.S.C.) 601 *et seq.*), the Administrator of AMS has considered the economic impact of this final action on small entities.

According to the December 29, 1999, issue of the "Hogs and Pigs" report published by the National Agricultural Statistics Service (NASS), the number of farms with hogs or pigs was 98,460. According to the U.S. Customs Service, in 1999 there were 524 importers of hogs, pigs, pork, or pork products in the United States. The majority of the 98,460 hog producers and 524 importers subject to the Order should be classified

as small entities under the criteria established by the Small Business Administration.

This rule is being carried out in accordance with the Act and establishes procedures for the conduct of a referendum to determine whether producers and importers favor continuation of the Pork Checkoff Program. Such procedures will permit all eligible producers who have been engaged in the production and sale of hogs or pigs and importers who have been engaged in the importation of hogs, pigs, pork, or pork products to vote in the referendum. Participation in the referendum is voluntary. Producers may cast their votes either by absentee ballot or in-person at county FSA offices. Importers may cast their ballots by mail at the FSA headquarters office in Washington, DC.

The information collection requirements, as discussed below, will be minimal. Casting votes by mail or in-person will not impose a significant economic burden on participants. Accordingly, the Administrator of AMS has determined that this rule will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

In accordance with the OMB regulation 5 CFR part 1320 that implements the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), OMB has approved the information collection requirements contained in this final rule.

Title: Pork Promotion, Research, and Consumer Information Program: Procedures for the Conduct of Referendum.

OMB Number: 0581-0194.

Expiration Date of Approval: 06/30/2003.

Type of Request: Revision of an approved information collection.

Abstract: The purpose of this final rule is to determine whether pork producers and importers favor continuation of the Pork Checkoff Program. The question on the ballot will be: "Do you favor continuing the Pork Checkoff program? Yes or No." For producers, provisions are made for in-person voting, absentee voting, and the challenge of voters. For importers, provision is made for voting by mail only. Importers will submit a copy of the U.S. Customs Service Form 7501 (as proof of eligibility) along with their request for a mail ballot.

AMS estimates that the cost per person to comply with the reporting provision of this rule is \$20 per hour for a total cost of \$222,400. This is based on

an estimated 50,000 voters participating in the referendum.

In this final rule, information collection requirements include a one-time submission of the required information on the following forms that are included in an Appendix at the end of this action.

(a) Producers voting in-person will:

(1) Print their name and address on the In-Person Voter Registration List (Form LS-75).

(2) Complete a Pork Producer In-Person Voting form (Form LS-72).

(3) Insert the ballot into the "Pork Ballot" envelope (Form LS-72-1).

(4) Complete the In-Person Registration and Certification form (printed on the "Pork Referendum" envelope) (Form LS-72-2), and insert the sealed "Pork Ballot" envelope (Form LS-72-1), containing the ballot, into the "Pork Referendum" envelope (Form LS-72-2).

(b) Producers voting absentee will:

(1) Complete, a combined registration and absentee ballot form (Form LS-73).

(2) Insert the ballot portion into a "Pork Ballot" envelope (Form LS-72-1).

(3) Put the sealed "Pork Ballot" (Form LS-72-1) envelope and the completed registration form in the "Pork Referendum" envelope (Form LS-73-1).

(c) Importers voting in the referendum will have their names placed on an Importer Ballot Request List (Form LS-77) by FSA employees. Importers will vote using a mail ballot package consisting of a combined ballot and registration and certification form (Form LS-76), a "Pork Ballot" envelope (Form LS-72-1), and a "Pork Referendum" envelope (Form LS-73-1). They will complete the ballot and registration and certification form and place the ballot portion into the "Pork Ballot" envelope (Form LS-72-1), and place the sealed "Pork Ballot" envelope (Form LS-72-1) into the "Pork Referendum" envelope (Form LS-73-1) along with the completed registration form.

(d) This final rule requires each producer of hogs or pigs, who votes in-person to print on the In-Person Voter Registration List (Form LS-75) his or her name and address and, if applicable, the name and address of the corporation or other business entity he or she represents. Employees in each county FSA office will fill out the Absentee Voter Request List (Form LS-74).

1. Pork Producer In-Person Voting: Form LS-72, Pork Ballot envelope: Form LS-72-1, and In-Person Registration and Certification envelope: Form LS-72-2

Estimate of Burden: The public reporting burden for this collection of

information is estimated to average .10 hour per response.

Respondents: Only producers voting in-person in the referendum will use these forms.

Estimated Number of Respondents: 25,000.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 2,500 hours.

Total Cost: \$50,000.

2. Pork Producer Absentee Voting: Form LS-73, Pork Ballot envelope: Form LS-72-1, and Pork Referendum envelope: Form LS-73-1

Estimate of Burden: The public reporting burden for this collection of information is estimated to average .10 hour per response.

Respondents: Only producers requesting an absentee ballot to vote in the referendum will use these forms.

Estimated Number of Respondents: 25,000.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 2,500 hours.

Total Cost: \$50,000.

3. In-Person Voter Registration List: Form LS-75

Estimate of Burden: The public reporting burden for this collection of information is estimated to average .03 hour per response.

Respondents: Only producers voting in-person in the referendum will use this form.

Estimated Number of Respondents: 25,000.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 750 hours.

Total Cost: \$15,000.

4. Absentee Voter Request List: Form LS-74

Estimate of Burden: Employees in each county FSA office will fill out one or more of the Absentee Voter Request Lists (Form LS-74). Because only county FSA employees will complete the Absentee Voter Request List, the estimated average reporting burden would not apply to producers voting absentee in the referendum.

5. Challenge of Voters

Estimate of Burden: The public reporting burden for this collection of information is estimated to average .08 hour per response.

Respondents: Only persons wishing to challenge a vote of another producer will be required to provide such

challenge in writing to the county FSA office.

Estimated Number of Respondents: 2,000.

Estimated Number of Responses per Respondent: 2.

Estimated Total Annual Burden on Respondents: 320 hours.

Total Cost: \$6,400.

6. Proof of Eligibility

Estimate of Burden: The public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Producers responding to a challenge of their eligibility to vote will be required to submit to the county FSA office records such as sales documents, tax records, or other similar documents to prove that the person owned and sold hogs or pigs during the representative period.

Estimated Number of Respondents: 4,000.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 4,000 hours.

Total Cost: \$80,000.

7. Appealing a Challenge of Eligibility

Estimate of Burden: The public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Producers appealing a determination of their ineligibility to vote in the referendum will be required to submit to the county FSA office records such as sales documents, tax records, or other similar documents to prove that the person owned and sold hogs or pigs during the representative period.

Estimated Number of Respondents: 500.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 500 hours.

Total Cost: \$10,000.

8. Pork Importer Mail Voting: Form LS-76, Pork Ballot Envelope: Form LS-72-1, and Pork Referendum Envelope: Form LS-73-1

Estimate of Burden: The public reporting burden for this collection of information is estimated to average .10 hour per response.

Respondents: Importers can only vote by mail ballot in the referendum and will use these forms.

Estimated Number of Respondents: 500.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 50 hours.

Total Cost: \$1,000.

9. Submission of U.S. Customs Service Form 7501 as Proof of Importer Eligibility

Estimate of Burden: The public reporting burden for this collection of information is estimated to average 1 hour per response.

Respondents: Importers voting in the referendum will submit a copy of U.S. Customs Service Form 7501 with their request for a mail ballot.

Estimated Number of Respondents: 500.

Estimated Number of Responses per Respondent: 1.

Estimated Total Annual Burden on Respondents: 500 hours.

Total Cost: \$10,000.

10. Importer Ballot Request List: Form LS-77

Estimate of Burden: Employees in the Washington, DC, FSA headquarters office will print the name and address of the importer requesting the ballot on the Importer Ballot Request List (Form LS-77). Because only headquarters FSA employees will complete the Importer Ballot Request List, the estimated average reporting burden would not apply to importers voting in the referendum.

In the proposed rule published April 18, 2000, comments were invited on: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information would have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

One commenter recommended several changes to the Paperwork Reduction Act section of the proposed rule. They are organized below by the applicable section.

Abstract

The commenter suggested that the Department require producers to provide documentation as evidence of their status as a producer to be eligible to vote the same as it requires for importers to obtain a ballot. The commenter believed that requiring

producer documentation when requesting a ballot would reduce the costs of challenges. Importers must submit a U.S. Custom Form 7501 with their request for a mail ballot. The Department is requiring importers to submit this form because unlike producers who vote in the county FSA offices, and may be known by the FSA county employees and by other producers in the county, importers are not typically known by these persons. For this reason, FSA is requiring that importers vote in one location, the FSA headquarters office in Washington, DC. The submission of Form 7501 up-front will eliminate the challenge process.

The Department believes that requiring producers to present documentation that they have sold hogs or pigs during the representative period, to prove their eligibility prior to obtaining a ballot, would increase the paperwork burden on the public. Assuming that it takes a producer the same amount of time to acquire and present documentation at the time of voting as it does to present the same proof in responding to a challenge, the public paperwork burden would be 50,000 hours if required of all producers at a cost of \$1,000,000. By contrast, if 4,000 producers' ballots are challenged, the public paperwork burden would be 4,000 hours at a cost of \$80,000.

Section 5 Challenge of Voters

The same commenter recommended that under section 5, Challenge of Voters, the wording under Respondents should be corrected to be consistent with the rule section by replacing the word "producers" with the word "persons." The Department agrees. Any person can challenge the ballot of another person. Accordingly "persons" is substituted for "producers" making that statement consistent with the regulatory text.

Section 6 Proof of Eligibility

The same commenter suggested that the number of producers having to respond to challenges listed as Estimated Number of Respondents under section 6, Proof of Eligibility, would be approximately 8,000 as opposed to the proposed 2,000. The commenter based his estimate on his interpretation of the results of AMS' evaluation of petitions submitted by the Campaign for Family Farms (CFF) requesting that the Secretary conduct a referendum of the Pork Checkoff Program. The Department based the proposed number of challenged ballots of 2,000 on the percentage of challenged ballots in previous referenda that was 1.5 to 2 percent of the number of voters

and doubled that figure to reflect approximately 4 percent. Upon further review, the Department agrees that the number of challenged ballots is likely to be greater than the original estimated number of 2,000, but is not persuaded it will be as high as 8,000.

The Department has reconsidered the Estimated Number of Responses per Respondent and has increased the number from an average of 1 to an average of 2 in section 5, Challenge of Voters. Therefore, the Department has changed the Estimated Number of Respondents from 2,000 to 4,000 in section 6, Proof of Eligibility. The Department has also reconsidered the Estimated Number of Respondents in section 7, Appealing a Challenge of Eligibility, and reduced the number from 2,000 in the proposed rule to 500. In the proposed rule the Department estimated that 2,000 producers whose votes would be challenged would appeal. However, upon review, the Department now estimates that all 2,000 producers challenged would not have been found to be ineligible. Recognizing this fact, the Department now believes that a smaller number of persons will be declared ineligible to vote and thus appeal. The Department has estimated the number of respondents to be 500.

The same commenter also suggested that the estimate of 25,000 voters may be too low. The Department estimated that 50,000 producers and importers would vote in the pork referendum and further estimated that 25,000 would vote in-person and 25,000 would vote absentee or by mail ballot. The Department agrees with the commenter that more than 25,000 voters should be expected in the referendum and thus continues to estimate that there will be approximately 50,000 voters. Accordingly, no change is made based upon this comment.

Background

The Act provides for the establishment of a coordinated program of promotion and research designed to strengthen the pork industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for pork and pork products. The program is financed by a pork checkoff assessment of 0.45 percent of the market value of domestic and imported hogs and pigs and an equivalent amount on imported pork and pork products. Pursuant to the Act, an Order was made effective on September 5, 1986, and the collection of assessments began on November 1, 1986.

The Act provides that at the request of a number of persons equal to at least

15 percent of persons who have been producers and importers during a representative period as determined by the Secretary, the Secretary shall conduct a referendum to determine whether the producers and importers favor the continuation of the Pork Checkoff Program. Based on statistical data reported by NASS in the December 29, 1998, issue of the "Hogs and Pigs" report and information from the 1997 Census, there were 98,892 producers who sold hogs or pigs in 1998. According to data submitted by U.S. Customs Service, in 1998, there were 1,017 importers of hogs, pigs, pork, or pork products. The total number of producers and importers who would be eligible to sign a petition was 99,909. Fifteen percent of 99,909 equals 14,986. Therefore, AMS determined that a petition containing 14,986 valid signatures was sufficient to request a referendum.

On May 24, 1999, a petition containing 19,043 names was submitted to AMS. AMS conducted a signature validation process to ensure that the petitioners were pork producers or importers during the representative period, January 1, 1997, to June 1, 1999, and signed the petition. However, the Department concluded that the validation process was vulnerable to criticism in a number of respects and that the Department cannot be certain of the exact number of valid signatures. Because many thousands of valid signatures were received, however, the Secretary determined that a referendum would be held at the Department's expense in the interest of fairness. Pork producers and importers have not voted on the continuation of the Pork Checkoff Program since the initial referendum in 1988.

The purpose of the final rule is to determine whether pork producers and importers favor continuation of the Order. Therefore, the question on the ballot will be: "Do you favor continuing the Pork Checkoff program? Yes or No." Support of the program by a majority of persons who pay assessments is essential to both the establishment and the continuation of this program. Assessment collection under the Order would be terminated not later than 30 days after the date it is determined that termination of the Order is favored by a majority of the producers and importers voting in the referendum. The Order would be terminated in an orderly manner, as soon as practical, after the date of such determination. The proceedings after termination are set forth in § 1230.85 of the Order.

The final rule sets forth procedures to be followed in conducting the

referendum, including definitions, representative period, supervision of the referendum, mail ballots, challenge of voters and appeals, in-person voting procedures, absentee voting procedures, importer voting procedures, reporting referendum results, and disposition of the ballots and records. FSA will assist in the conduct of the referendum by (1) Providing the polling places; (2) counting ballots; (3) determining the eligibility of challenged voters; and (4) reporting referendum results.

The proposed rule was published (65 FR 20861, April 18, 2000) with a request for comments to be submitted by May 18, 2000. The Department received 1,005 comments in a timely manner. In addition, 73 late comments were received. These comments generally reflected the substance of comments timely received. The bulk of the comments were submitted by individual hog producers. About 40 comments were received from organizations or associations representing hog producers, pork importers, and farmers. The comments have been posted on AMS' website at (<http://www.ams.usda.gov/lsg/mpb/pork/pkreftule.htm>).

The changes suggested by commenters are discussed below, along with the changes made by the Department upon further review of the proposed procedures for the conduct of the referendum. Also, the Department has made other minor changes for the purpose of clarity and accuracy. For the readers' convenience the discussion of comments is organized by the topic headings of the proposed rule.

Background

One commenter pointed out that an assessment of 0.45 percent of the market value not only applies to domestic hogs and pigs but also to imported market hogs and pigs. The proposed Order stated that an equivalent amount applied to imported market hogs and pigs. The commenter is correct. The 0.45 percent of market value applies to domestic and imported pigs and hogs. An assessment equivalent to 0.45 percent of market value applies only to imported pork and pork products. The commenter's recommended change has been incorporated in the final rule.

One commenter stated that the last statements in paragraph three concerning the Department's determination to hold a referendum are biased or "positioned" comments and should be deleted since the Department should maintain a neutral role. The Department does not agree. The statements are factual and are an integral part of the background information that explains why the

referendum is being held. This recommendation is not adopted.

One commenter pointed out that the Order has information concerning the proceedings after termination, suggesting that it should be referenced and included for producer knowledge in the final rule. The Department agrees. A reference to § 1230.85 in the Order concerning these proceedings has been included in the Background Section.

Definitions

Section 1230.608 Farm Service Agency State Committee

AMS and FSA reviewed the procedures for determining an appeal in § 1230.631(g) after the proposed rule was published. They agreed the appeals of the FSA County Committee's determination would be faxed to the Administrator of AMS for a final determination of voter eligibility rather than be sent to the FSA State Committee. For the purpose of this final rule, the FSA State Committee is not involved in the procedures for the conduct of the referendum. Consequently, the definition of FSA State Committee at § 1230.608 has been deleted and each following section has been renumbered.

Section 1230.615 Producer

Some commenters suggested that the definition of producer should be clarified by inserting "2 or more" after "animals" and suggested "and markets" be inserted after "produces." The Department finds that the suggestion that the production of two or more hogs is needed to qualify as a producer is not consistent with the language and intent of the Act and Order. The definition of producer in the proposed rule is consistent with the definition of a producer in the Act. The Act specifies no minimum number of hogs a person must own to be eligible to vote in the referendum. A person who produces one hog or pig in the United States for sale in commerce must pay the checkoff just as a person who produces more than one. Accordingly, this suggestion is not adopted. The commenter's suggestion to include "and markets" in the definition of producer is also not adopted. The Department has determined that this addition is not needed as the language of the definition from the Act "produces for sale in commerce" includes porcine animals that are marketed.

Section 1230.617 Referendum

One commenter suggested that the phrase "* * * continuation of the Order." should be replaced with

"ending the mandatory pork checkoff assessment program."

The Secretary in announcing that a referendum would be held stated "* * * it is appropriate and necessary to determine whether a majority of pork producers do in fact continue to support the checkoff." The Department has determined that the language in the proposed rule with some modification is appropriate and reflects the intent of this referendum. Accordingly, this suggestion is not adopted.

Section 1230.618 Representative Period

Numerous commenters supported the proposed representative period of 12-consecutive months prior to the referendum, which is the timeframe during which producers must have owned and sold hogs or pigs to be eligible to vote in the referendum. However, many commenters recommended changes in the length (both longer and shorter) of the representative period. Many commenters recommended lengthening the period by a varying number of years, including 2 years, 3 years, 4 years, and even to a much longer timeframe such as 12 years or since the beginning of the Pork Checkoff Program. These commenters contended that an extended period is necessary for a variety of reasons. The reasons given most often were to enable all producers who signed the CFF petition requesting a referendum on the Pork Checkoff Program to participate in the referendum; to permit producers who may have temporarily left the business due to the extremely low hog prices experienced in 1998 and 1999 to participate in the referendum; and to allow all producers who have paid the checkoff at some time in the past to participate in the referendum. In contrast, some commenters recommended shortening the representative period. These comments included limiting the representative period to the year 2000; to the period from April 18, 2000, until the referendum begins; and to requiring ownership of hogs on the date the producer votes in the referendum. These commenters emphasized the need for current producers, who will be paying the checkoff in the future, to determine whether the checkoff continues.

Some commenters recommended an earlier ending date for the representative period than the one included in the proposed rule. Their comments included ending the representative period on February 28, 2000 (the day the Secretary announced a pork referendum would be held); on April 18,

2000 (the day the proposed referendum rule was published); and the date the final referendum rule is published. These commenters expressed concern that questionable hog transactions could occur after these dates solely for the purpose of establishing a person's eligibility to vote in the referendum.

The Department has carefully considered these comments and recognizes the importance of this issue to all producers desiring to vote in the referendum. The Department has determined that the representative period will be the 12-consecutive month period prior to the beginning of absentee balloting for producers and mail balloting for importers. Producers who may have temporarily left the hog business in 1998 and 1999 and were interested in getting back into hog production due in part to significant capital investments in hog production facilities most likely would have since returned to the business due to higher hog prices (current price is approximately \$50/cwt) and low corn prices (current price is approximately \$2.00/bu).

The Department finds that the 1-year representative period is a period used by AMS in many other referenda and that the period will provide an opportunity for all pork producers presently engaged in producing and selling hogs and paying the checkoff assessments to determine whether the checkoff continues.

One commenter suggested that the exact dates of the representative period should be clear to producers, importers, and FSA representatives who will vote in the referendum or implement the referendum rules. The dates of the representative period are August 18, 1999, through August 17, 2000. These dates are set forth in the Dates section of this final rule and other sections, as applicable, as well as being included in the voting materials for all voters.

Section 1230.621 Voting Period

Numerous commenters recommended increasing the length of the in-person voting period. These commenters suggested that the 2-day in-person voting period be extended by 1 week to as many as 8 weeks. The commenters contend that the longer time period is needed to accommodate producers' busy schedules and to promote maximum eligible producer participation. Many other commenters supported the 2-day in-person voting period.

The Department recognizes the need for producers to have ample time to participate in the referendum and is extending the 2-day in-person voting

period to 3 days. The Department believes a 3-day in-person voting period in conjunction with a 32-day absentee voting period will give producers who want to vote ample time to cast their ballot. During the 32-day absentee voting period, producers may request absentee ballots in-person, by telephone, facsimile, or by mail. This final rule permits producers to obtain an absentee ballot and vote at the county FSA office during any business day during the 32-day absentee voting period. Any producer who is concerned about being able to vote during the 3-day in-person voting period may use the absentee voting option. Accordingly, the suggestion for a longer in-person voting period is accepted in part by extending the in-person voting period from 2 days to 3 days. Section 1230.621 has been revised to reflect the expanded voting period. References in other sections to the length of the in-person voting period have been changed as appropriate.

Section 1230.622 General

A number of commenters questioned the legitimacy of holding a referendum expressing their belief that there is no authority in the law, the Order, or the regulations to call for a referendum.

The Department disagrees. The Department has authority to conduct a referendum to determine if producers do in fact wish to continue to pay assessments to fund the Pork Checkoff Program.

Section 1230.624 Eligibility

One commenter recommended revising § 1230.625 so that groups of family members raising hogs are not presumed to be selling hogs under one business entity. Individual family members should be presumed to be individual producers unless there is evidence that all hogs are owned and sold under a single business entity. The language in § 1230.624 of this final rule (§ 1230.625 in the proposed rule) makes it clear that any member of a group, *i.e.*, member of a family may register to vote if he or she sells hogs or pigs in his or her own name. Accordingly, this suggestion is not adopted.

The same commenter also recommended that the terms "joint tenants" and "tenants in common" refer to ownership in real estate interests, not personal property interests such as hogs. This comment has merit. The words "joint tenants" and "tenants in common" have been deleted from § 1230.624(a)(2) and (a)(3). These terms have also been deleted from the voting registration and certification forms.

Numerous comments supported either "one hog or pig" or "two or more hogs

or pigs" as the number that a producer must own and sell to be eligible to vote. Those supporting two or more hogs and pigs assert that a producer as defined in the Act, is a person who produces porcine animals in the United States for sale in commerce and argue that "porcine animals" is plural and thus means two or more hogs or pigs.

Those who support the need to own only one hog or pig to be eligible to vote argue that producers who produce one hog or pig for sale in commerce must pay the assessment just as producers who produce more than one hog or pig. The Department agrees. All producers subject to paying the checkoff including those producing and selling one hog or pig are eligible to vote in this referendum. Accordingly, the Department has amended § 1230.624(a)(1) to clarify that producers owning and selling at least one hog or pig are eligible to vote.

Numerous commenters suggested that there should be a minimum voting age. The majority of commenters recommended 18 years as the minimum age. The commenters point out that a person must be 18 years old to vote in general elections in the United States and that younger voters in general would not understand the implications of their vote.

The Act (in defining producers) does not differentiate between producers by age. Younger producers are subject to assessment the same as producers 18 years of age and older. Therefore, the suggestion for a minimum voting age of 18 is not adopted. However, individual producers must be old enough to complete the required registration and certification form and mark the ballot since no proxy voting is permitted for individual producers.

Several commenters recommended the words "and markets" be added after "produces" in both § 1230.624(a)(1) and § 1230.624(a)(2). As mentioned previously, in order to prove that a person whose eligibility to vote is challenged has met the definition of a producer, it will be necessary to provide a sales document, tax records, or other similar documents showing that the producer owned and sold hogs or pigs. The Department believes that producers will understand the terms "owned and sold" better than "marketed." Therefore, this suggestion is not adopted.

Several commenters expressed opinions on the eligibility to vote of individuals or business entities that raise hogs or pigs through production contracts but who do not own the hogs or pigs they raise. The commenters asserted that individuals or business entities that raise hogs or pigs through

production contracts but who do not own the hogs or pigs they raise should not be eligible to vote. Other commenters argued that these individuals or business entities are often more dependent on the hog industry for a major share of their income than many small diversified farming operations that have hogs as a minor enterprise and thus should be eligible to vote. Likewise, other commenters argued that full-time employees in hog operations are fully dependent on the viability of these hog businesses and, thus, should be eligible to vote.

Individuals or business entities that raise hogs or pigs under production contracts do not take ownership of the hogs and pigs and sell them. They are not subject to paying assessments when the hogs or pigs are sold. Therefore, contract producers are not eligible to vote in this referendum, unless they have produced and sold pigs or hogs in their own names during the representative period. Full-time employees of hog enterprises are not eligible to vote as a result of employment in the hog industry. Eligibility to vote is based on the ownership and sale of hogs or pigs. Accordingly, the suggestions that contract growers of hogs or pigs and employees of hog operations be allowed to vote based on their involvement in the industry is not adopted.

Section 1230.625 Time and Place of Registration and Voting.

A large number of commenters expressed opinions on the length of the producer voting period. These commenters suggested that the 2-day in-person voting period be extended by 1 week to 8 weeks. Commenters contend that the longer time period is needed to accommodate producers' busy schedules and to promote maximum eligible producer participation. Many other commenters supported the 2-day in-person voting period.

The Department recognizes the need for producers to have ample time to participate in the referendum and is extending the 2-day in-person voting period to 3 days. The Department believes a 3-day in-person voting period in conjunction with a 32-day absentee voting period will give producers who want to vote ample time to cast their ballot. During the 32-day absentee voting period, producers may request absentee ballots in-person, by telephone, facsimile, or by mail. This final rule permits producers to obtain an absentee ballot and vote at the county FSA office during any business day during the 32-day absentee voting period. Any producer who is concerned

about being able to vote during the 3-day in-person period may use the absentee voting option. Accordingly, the suggestion for a longer in-person voting period is accepted in part by extending the in-person voting period from 2 days to 3 days.

Commenters in general were supportive of holding the referendum for producers at county FSA offices. County FSA offices will conduct the referendum for producers and the FSA headquarters office will conduct the referendum for importers as proposed.

A number of commenters requested that ballots be mailed by the Department to producers such as those producers who signed the petition for a pork referendum and those who received Small Hog Operation Payment (SHOP) program payments. Other commenters agreed with the proposed 2-day in-person voting period and 30-day absentee voting period, citing that it was consistent with the procedures of the initial referendum. They also expressed their belief that the Department has no current comprehensive list of eligible producers and providing ballots to some groups of producers would be inequitable and unfair.

The Department does not have a list of the names and addresses of all pork producers in the United States. Further, to rely solely on lists that do not identify the names and addresses of all hog producers in the United States to mail ballots to producers would not be equitable. Thus, the recommendation to mail ballots to producers who signed the petition or other lists of producers is not adopted. Producers who wish to vote by mail ballot can obtain absentee ballots from county FSA offices.

One commenter suggested that the final rule should clarify that in-person registration and voting will be carried out "on-site" at FSA offices. The commenter suggested the rule was not clear whether a person could pickup a ballot, leave the office, and return with a completed ballot. The intent of the rule is that in-person voting will be carried out "on-site." The suggestion is adopted and §1230.625 has been revised accordingly.

Section 1230.626 Facilities for Registering and Voting

Many commenters requested that absentee ballots be made available if requested by telephone or electronic mail.

The Department has determined that in the interest of making voting more convenient for producers, absentee ballots will be made available to producers if requested by telephone. Thus, the suggestion to provide ballots

by telephone is adopted and incorporated into this final rule. Obtaining importer ballots by telephone is addressed in the discussion of comments on §1230.629 registration and voting procedures for importers.

The Department has determined that not all county FSA offices can receive electronic mail from sources outside of the Department. Thus, the suggestion that voters could request ballots by electronic mail is not adopted.

Several commenters recommended that the final rule clarify the fact that voting materials would not be faxed to participants due to the nature of materials that include special envelopes needed for a valid ballot. This clarification is made in §1230.626 of the final rule by stating that ballot materials requested by telephone, mail, and facsimile will be provided to the requestor by mail.

Several commenters suggested that it should be made clear that county FSA offices will keep a list of absentee ballot requests and will match it with the returned voting materials to ensure only those registered are considered to be valid ballots. This was the intent of the proposed rule and is the intent of this final rule. Accordingly, §1230.633 canvassing ballots is revised to emphasize this requirement. Instructions issued to FSA county offices also will reflect this requirement.

Section 1230.627 Registration Form and Ballot

Several commenters recommended that the ballot question be changed and the certification statement should be more prominently displayed on the voting forms. This suggestion has been adopted. The ballot and ballot question as well as the certification statement have been revised to make them easier to use and understand. The ballot portions of the registration and certification forms have been redesigned so they will appear more prominent.

Many commenters had a wide range of recommendations on the wording of the ballot question. Some commenters recommended the ballot read as follows: "Do you vote to end the mandatory Pork Checkoff assessment program?" These commenters believe that the ballot question must emphasize that the referendum is about ending the mandatory Pork Checkoff Program.

Other commenters recommended that the language emphasize that the purpose of the referendum is to determine whether the Order is to continue and should be exactly the same as the language used in the 1988 referendum.

Some commenters were concerned that the proposed language could confuse some voters since these voters might not understand that a "No" vote in the referendum would mean that both the Pork Checkoff Program and the Order would be terminated.

To make the ballot question as simple and straightforward as possible, the Department has determined that the ballot question will read as follows: "Do you favor continuing the Pork Checkoff program?" Therefore, the specific language recommended by the various commenters is not adopted.

Commenters suggested that the instructions to voters on the ballot forms and the registration and certification statements be amended and clarified to: (1) Clarify the difference between voting as an individual producer and voting as a representative of a corporation or other business entity; (2) clarify that contract growers are not eligible to vote; (3) clarify eligibility requirements; and (4) strengthen the language in the certification statement.

The Department finds that these suggestions have merit and these forms have been revised to incorporate each of these suggestions. In addition, there will be handouts given to voters at the county FSA offices for easy reference on eligibility, challenges, and appeals.

One commenter recommended that there needed to be instructions on how to complete the county blank on the registration forms as it is confusing because the form did not indicate what county a voter is supposed to enter, *i.e.*, county of residence, county voting in, etc. The Department upon further review finds that county has little significance on the form and, therefore the requirement for providing county, has been deleted from this final rule and the forms for the registration and certification of voters.

Some commenters suggested that the In-Person Voter Registration List (Form LS-75) be amended to provide the address of the voter. They assert that in the event that multiple producers with the same last name are voting, having the address would facilitate the challenge process by helping to distinguish between persons with the same last name. The Department agrees. Recording of the voter's address in addition to his or her name on Form LS-75 would help distinguish between producers having the same last name for purposes of challenging voters. This suggestion is adopted. The Department is also requiring that the address of a voting business entity be added to Form LS-75.

Section 1230.628 Registration and Voting Procedures for Producers

Many commenters registered opinions on both sides of the issue of whether producers should be required to provide documentation of eligibility to vote. The proposed rule did not require documentation to vote but provided for certification of eligibility and a challenge process. Many commenters suggested that an up-front documentation requirement would eliminate time-consuming challenges, give more integrity to the process, and better ensure equal treatment among all voters. They assert that large numbers of challenges are likely and that resolution of the challenges would be much more cumbersome and time consuming than requiring documentation up-front. Other commenters were opposed to up-front documentation of eligibility and supported the challenge process. These commenters believe that many eligible voters would not vote if required to provide documentation of eligibility up-front and believe that the challenge procedures would adequately protect the integrity of the process.

The Department has carefully considered the pros and cons of up-front documentation. The Department believes that requiring a person voting in this referendum to sign a certification statement attesting to the fact that they are a producer and that they comply with the eligibility requirement when they vote coupled with having to provide documentation to prove eligibility as a producer if challenged protects the integrity of the voting process. This suggestion is not adopted.

One commenter recommended that the word "on-site" be added to the last sentence in § 1230.628(a)(2) to clarify that in-person voters must complete the voting procedure before leaving the FSA county office. The proposed wording is consistent with the intent of the section and provides clarification. Therefore, the recommendation has been adopted and incorporated in the language of this section in the final rule.

One commenter recommended that a procedure be incorporated in this final rule to allow producers to obtain a clean package of voting materials if they spoiled a ballot by merely returning the initial package received whether it was received in-person or by mail. The In-person Ballot, the Absentee Ballot, and the Importer Mail Ballot only require that a person check "yes" or "no." The ballot portion of the forms shown in the appendix in the proposed rule have been redesigned and the ballot question simplified. The Department believes that this redesign and simplification

will make it easier for producers to clearly mark their choice on the ballot. Accordingly, this suggestion is not adopted.

Some commenters recommended that changes to § 1230.628(b)(3) should include the actual dates ballots and registration forms could be requested rather than the term "during a specified time period." When the Department published the proposed rule, the dates that the referendum would be held had not been decided. Consequently, actual dates that ballots and registration forms could be requested were not included in the proposed rule. However, the Department has established the date for the referendum and other dates associated with the referendum and has included these dates in appropriate sections in this final rule and on the registration and ballot forms.

One commenter recommended that language confirm that the absentee ballot materials could be picked up in-person at county FSA offices as well as received by mail upon request. Section 1230.628(b)(2) registration and voting procedures states in part " * * * he or she [the producer] may request an absentee voting package by telephone, by mail, by facsimile, or pick it up in-person from the county FSA office * * * " The Department finds the present language clearly states the ways in which producers can obtain absentee ballots, including by mail or by picking them up in-person. For this reason, this suggestion is not adopted.

One commenter recommended that § 1230.628(b)(6) be amended to stipulate that the county FSA office has responsibility to check that no absentee ballot is returned that was not duly requested and logged on the Absentee Voter Request List (Form LS-74). The Department finds no need to include such language in this section as this requirement is covered in § 1230.633 canvassing ballots and is in the instructions to FSA county offices.

Some commenters recommended that § 1230.628(b)(7) be clarified to specify the deadline for receipt of absentee ballots delivered in-person. This suggestion has merit and is included in the final rule in § 1230.628(b)(6) for clarity.

Section 1230.629 Registration and Voting Procedures for Importers

Some commenters recommended that the period for importer voting be the same as the total period for producer voting including absentee and in-person voting. This was the intent of the proposed rule and this final rule emphasizes that the same 35-day voting

period is provided for both producer and importer voting.

One commenter recommended that importers' votes should be weighted to equal the percent of total assessment collections attributed to importers. There is no provision in the Act that permits weighted voting based on the amount of annual assessment. Eligibility to vote is based on owning and selling one or more hogs or pigs or importing hogs, pigs, pork, or pork products during the representative period and each eligible individual and each eligible business entity is entitled to cast one vote.

Consistent with the requirements of the Act, the results of the referendum will be determined by a majority of producers and importers casting valid ballots. Thus, the recommendation for weighted voting based on the level of contributions to the Pork Checkoff Program is not adopted.

Several commenters requested that ballots be available if requested by telephone by producers or importers. The Department has determined that producers and importers can request ballot materials by telephone. Section 1230.628(b) and (c) of the final rule have been amended to provide for producers to request absentee voting materials by telephone and for importers to request mail ballots by telephone.

Section 1230.630 List of Registered Voters

One commenter recommended that the Importer Ballot Request Lists (Form LS-77) be posted for public inspection just as the producer absentee and in-person lists are posted and that there be a provision for the challenge of importers.

Unlike for producer voting, documentation of an individual importer's or importer entities' eligibility to vote is required to obtain a ballot package. FSA employees will maintain an Importer Ballot Request List and will check the returned voting materials against the list. FSA officials and AMS officials will review the U.S. Custom Form 7501 to ascertain that importers and importer entities are eligible to vote. The Department concludes there is no need for posting the names of importers or importer entities who have been declared eligible to vote.

Several commenters recommended that only producers who actually vote be subject to challenge and that absentee voters' names be posted as their absentee ballots are received. In § 1230.631(c) the language of the proposed and final rules clearly states: "Absentee ballots have to be received in

the county FSA office before a producer's vote can be challenged." The Absentee Voter Request List will contain the name and address of producers and producer entities requesting absentee ballots. The date that each absentee ballot is received in the county FSA office will be entered for each name. The list will be posted in the county FSA office beginning on the first day of the in-person voting period. Producers who requested absentee ballots have until close of business on the 5th business day after the end of the in-person voting period, for absentee ballots mailed on the last day of the in-person voting period to arrive at FSA county offices by mail. The names of those producers who do not have a date of receipt of their ballot by their name will remain on the list for that 5-day period. To do otherwise, would necessitate county FSA employees maintaining separate lists that will increase their workload and increase the chance for errors. In § 1230.630(a) the language of the proposed and final rules clearly states: "Absentee ballots arriving after the Absentee Voter Request List is first posted will be recorded on the Absentee Voter Request List each day." The Department believes this final rule adequately addresses the posting of the Absentee Voter Request List. These two suggestions are not adopted.

Section 1230.631 Challenge of Voters

Some commenters suggested that the challenge period should be extended from the proposed 6 business days to 7 or 10 business days after the last day of in-person voting. They contend that the proposed challenge period is unreasonably short because absentee ballots may not arrive at the county FSA office until 5 business days after the close of voting resulting in only 1 day to challenge the ballots of absentee voters. The Department has determined that this suggestion has merit and will facilitate a person's review of the Absentee Voter Request List. Accordingly, § 1280.631 has been revised to show the challenge period has been extended from 6 to 7 business days after the last day of in-person voting. This coupled with the 3-day in-person voting period will provide a total of 10 days to review these two voter lists and submit challenges.

One commenter suggested that county offices should provide a standard challenge form for a person to complete when challenging a producer's eligibility to vote. The Department does not agree. The information required for challenging a producer is minimal and each challenge of a voter's ballot must

be made on a separate sheet of paper and signed. Thus, the Department believes that a form is not necessary. This suggestion has not been adopted.

One commenter recommended that a person challenging a ballot should be required to state in-writing specific reasons why he or she believes that the person challenged does not meet the eligibility requirements to vote. They further recommended that a person challenging a ballot should be required to sign a certification statement that he or she has good reason for challenging the voter. While the Department believes that challengers should have a good reason for challenging a person's eligibility to vote and discourages frivolous challenges, the Department does not believe it is necessary to require challengers to give specific reasons for challenges or to sign a certification statement that he or she has good reason for challenging the voter. Therefore, the suggestion is not adopted.

Some commenters suggested that the final rule should make it clear that the identity of the challenger should remain confidential. The Department agrees. Therefore, this suggestion is adopted and appropriate language has been added to § 1230.631 of this final rule.

Some commenters recommended that all challenged producers be required to provide documentation of eligibility. They assert that this is necessary to ensure valid proof of eligibility and equitable treatment of all persons challenged. Other commenters recommended that the FSA County Committee use its own knowledge, records, and other available information to resolve challenges, whenever possible, to minimize the burden on challenged producers. The Department agrees that requiring all voters whose ballots have been challenged to provide documentation that they have sold one or more hogs will provide for increased uniformity and fairness in the resolution of challenges.

To incorporate this revision into the challenge resolution process, a new subsection (d) notification of challenges has been added to § 1230.631 challenge of votes. Notifying all challenged producers that they have been challenged and providing time for producers to provide documentation of eligibility once notified, will add 10 business days to the challenge resolution process, but it will be fair to all challenged producers. As a result of the 10 additional business day change and the additional day for challenges discussed earlier, a determination of eligibility will now be made no later than 22 business days after the last day of in-person voting rather than the 11

business days after the last day of in-person voting permitted in the proposed rule.

The proposed rule provided for the FSA State committees to resolve appeals. After the proposed rule was published, AMS and FSA agreed that appeals of the FSA County Committee's determinations would be faxed to the Administrator, AMS, for a final determination of eligibility rather than be sent to the State committees. When appeals of the FSA County Committee's determinations are submitted to the Administrator of AMS, the Administrator will review the challenge to determine whether the FSA County Committee conducted a full and impartial review of the information presented to correctly resolve the original challenge. This change was made to provide increased consistency in the determination of appeals and to minimize the workload and costs incurred at the FSA State offices. Section 1280.631 of this final rule has been modified accordingly.

One commenter suggested that the referendum rule should provide objective standards for deciding challenges including documentation. Documentation is being required in the final rule to resolve all challenges and examples of the types of documentation that will be acceptable are included in the final rule, posted in county FSA offices, and listed in FSA's instructions to county offices. Thus, changes have been made to incorporate the concepts proposed in this recommendation.

Section 1230.633 Canvassing Ballots

One commenter recommended that by the time of in-person voting, FSA county offices should have posted the date, place, and time that ballots will be tabulated so that interested parties can observe. This commenter also suggested that the results be made public at the time of counting and be reportable to interested parties.

The Department will allow interested parties to observe the counting of ballots. The ballots will be counted on the day following the end of the challenge resolution process which will be November 29, 2000. Section 1230.633 has been revised to include the date the ballots will be counted and indicate during normal business hours. The date and time the county FSA offices will count the ballots will be posted. However, to minimize speculation on the results of the referendum, the county level and State level results will not be made available until the Secretary has announced the results of the referendum.

Section 1230.634 FSA County Report

One commenter recommended that time specific reporting dates for reporting county office results should be included in the final rule. The Department finds no compelling reason to have such requirements in the final rule. The results will be reported from the county level, to the State level, and to the national level in a timely manner and in accordance with FSA instructions, once all challenges are resolved. This suggestion is not adopted.

Section 1230.635 FSA State Office Report

One commenter recommended that specific reporting dates for reporting State results as well as a report of results on a county-by-county basis should be included in the final rule. The Department finds no compelling reason to have such requirements in the final rule. The results will be reported from the State level to the national level in a timely manner in accordance with FSA instructions once all challenges are resolved. This suggestion is not adopted.

Section 1230.636 Results of the Referendum

Some commenters recommended that results be announced within 2 weeks of the vote. With 7 business days after the in-person voting period provided for challenges and with a lengthy challenge resolution process including provisions for an appeal to the Administrator of AMS, the results of the referendum will not be available within the time period recommended. This suggestion is not adopted.

Section 1230.637 Disposition of Ballots and Records

One commenter recommended that AMS maintain accurate records of the vote that would be made available in the event the vote is challenged. The proposed and final rule provide that the FSA County Executive Director maintain all referendum records for at least 12 months and longer if notified to do so by the Administrator of FSA. Any challenge of referendum results would likely occur within less than 12 months of the referendum. No change in the rule appears to be necessary to accommodate this suggestion.

General Comments

Some commenters recommended a section be added in the final rule to cover false statements. They recommended the following language:

False Statements—Persons who participate in the referendum who

knowingly or willfully make false statements on documents related to the referendum may be fined up to \$10,000, imprisoned up to 5 years or both penalties applied (19 U.S.C. 1001 *et seq.*). Notice of this penalty shall be displayed at the FSA polling site and on related documents for registration and voting.

The Department has determined it is not necessary to have this language in the final rule. Language concerning the penalties for making false statements is displayed prominently on the voting forms and will be posted at the FSA polling sites. Providing information about penalties for false statements in this manner is deemed to be sufficient and so the recommendation to incorporate it in the final rule is not adopted.

One commenter recommended that procedures be added to prevent a company with multiple production locations from voting in multiple counties. The voting materials clearly indicate that only an authorized individual can cast the one vote a business entity is entitled to cast. In addition, as indicated above the penalty for false statements is clearly displayed in conjunction with the producers' certification of eligibility to vote. Thus, no changes have been made as a result of this comment.

Pursuant to the provisions in 5 U.S.C. 553 *et seq.*, good cause exists for not postponing the effective date of this action until 30 days after publication in the **Federal Register** because postponing the final rule until 30 days after publication would make the rule effective after the date pork producers can request absentee ballots.

Referendum Order

It is hereby directed that a referendum be conducted among eligible pork producers who owned and sold one or more hogs or pigs and importers who imported pigs, hogs, pork, or pork products to determine whether the Order will continue. Producer in-person voting in the referendum will be on September 19, 20, 21, 2000, at county FSA offices. Producer absentee ballots will be available at those offices from August 18, 2000, through September 18, 2000. Importers can obtain ballots from the FSA headquarters office in Washington, DC, from August 18, 2000, through September 21, 2000. The representative period to establish voter eligibility will be the period from August 18, 1999, through August 17, 2000.

In summary, this final rule adopts provisions of the April 18, 2000, proposed rule with the changes

discussed herein and with other minor changes made for purposes of clarity and accuracy.

List of Subjects in 7 CFR Part 1230

Administrative practice and procedure, Advertising, Agricultural research, Marketing agreements, Pork and pork products, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble, 7 CFR part 1230 is amended as follows:

PART 1230—PORK PROMOTION, RESEARCH, AND INFORMATION

1. The authority citation for 7 CFR part 1230 continues to read as follows:

Authority: 7 U.S.C. 4801–4819.

2. A new subpart E is added to read as follows:

Subpart E—Procedures for the Conduct of Referendum

Definitions

Sec.

- 1230.601 Act.
- 1230.602 Administrator, AMS.
- 1230.603 Administrator, FSA.
- 1230.604 Department.
- 1230.605 Farm Service Agency.
- 1230.606 Farm Service Agency County Committee.
- 1230.607 Farm Service Agency County Executive Director.
- 1230.608 Imported porcine animals, pork, and pork products.
- 1230.609 Importer.
- 1230.610 Order.
- 1230.611 Porcine animal.
- 1230.612 Person.
- 1230.613 Pork.
- 1230.614 Pork product.
- 1230.615 Producer.
- 1230.616 Public notice.
- 1230.617 Referendum.
- 1230.618 Representative period.
- 1230.619 Secretary.
- 1230.620 State.
- 1230.621 Voting period.

Referendum

- 1230.622 General.
- 1230.623 Supervision of referendum.
- 1230.624 Eligibility.
- 1230.625 Time and place of registration and voting.
- 1230.626 Facilities for registering and voting.
- 1230.627 Registration form and ballot.
- 1230.628 Registration and voting procedures for producers.
- 1230.629 Registration and voting procedures for importers.
- 1230.630 List of registered voters.
- 1230.631 Challenge of votes.
- 1230.632 Receiving ballots.
- 1230.633 Canvassing ballots.
- 1230.634 FSA county office report.
- 1230.635 FSA State office report.
- 1230.636 Results of the referendum.

- 1230.637 Disposition of ballots and records.
- 1230.638 Instructions and forms.

Subpart E—Procedures for the Conduct of Referendum

Definitions

§ 1230.601 Act.

The term *Act* means the Pork Promotion, Research, and Consumer Information Act of 1985 (7 U.S.C. 4801–4819) and any amendments thereto.

§ 1230.602 Administrator, AMS.

The term *Administrator, AMS*, means the Administrator of the Agricultural Marketing Service, or any officer or employee of the Department to whom there has heretofore been delegated or may hereafter be delegated the authority to act in the Administrator's stead.

§ 1230.603 Administrator, FSA.

The term *Administrator, FSA*, means the Administrator, of the Farm Service Agency, or any officer or employee of the Department to whom there has heretofore been delegated or may hereafter be delegated the authority to act in the Administrator's stead.

§ 1230.604 Department.

The term *Department* means the United States Department of Agriculture.

§ 1280.605 Farm Service Agency.

The term *Farm Service Agency* also referred to as “FSA” means the Farm Service Agency of the Department.

§ 1230.606 Farm Service Agency County Committee.

The term *Farm Service Agency County Committee*, also referred to as the *FSA County Committee* or *COC*, means the group of persons within a county elected to act as the Farm Service Agency County Committee.

§ 1230.607 Farm Service Agency County Executive Director.

The term *Farm Service Agency County Executive Director* also referred to as the *CED*, means the person employed by the FSA County Committee to execute the policies of the FSA County Committee and be responsible for the day-to-day operations of the FSA county office or the person acting in such capacity.

§ 1230.608 Imported porcine animals, pork, and pork products.

The term *Imported porcine animals, pork, and pork products* means those animals, pork, or pork products that are imported into the United States and subject to assessment under the harmonized tariff schedule numbers

identified in § 1230.110 of the regulations.

§ 1230.609 Importer.

The term *Importer* means a person who imports porcine animals, pork, or pork products into the United States.

§ 1280.610 Order.

The term *Order* means the Pork Promotion, Research, and Consumer Information Order.

§ 1230.611 Porcine animal.

The term *Porcine animal* means a swine, that is raised:

(a) As a feeder pig, that is, a young pig sold to another person to be finished over a period of more than 1 month for slaughtering;

(b) For breeding purposes as seedstock and included in the breeding herd; and

(c) As a market hog, slaughtered by the producer or sold to be slaughtered, usually within 1 month of such transfer.

§ 1230.612 Person.

The term *Person* means any individual, group of individuals, partnership, corporation, association, cooperative, or any other legal entity.

§ 1230.613 Pork.

The term *Pork* means the flesh of a porcine animal.

§ 1230.614 Pork product.

The term *Pork product* means an edible product processed in whole or in part from pork.

§ 1230.615 Producer.

The term *Producer* means a person who produces porcine animals in the United States for sale in commerce.

§ 1230.616 Public notice.

The term *Public notice* means information regarding a referendum that would be provided by the Secretary, such as press releases, newspapers, electronic media, FSA county newsletters, and the like. Such notice would contain the referendum date and location, registration and voting requirements, rules regarding absentee voting, and other pertinent information.

§ 1230.617 Referendum.

The term *Referendum* means any referendum to be conducted by the Secretary pursuant to the Act whereby persons who have been producers and importers during a representative period would be given the opportunity to vote to determine whether producers and importers favor continuation of the Order.

§ 1230.618 Representative period.

The term *Representative period* means the 12-consecutive months prior to the first day of absentee and importer voting in the referendum. The representative period for this referendum is August 18, 1999, through August 17, 2000.

§ 1230.619 Secretary.

The term *Secretary* means the Secretary of Agriculture of the United States or any other officer or employee of the Department to whom there has been delegated or to whom authority may hereafter be delegated to act in the Secretary's stead.

§ 1230.620 State.

The term *State* means each of the 50 States.

§ 1230.621 Voting period.

The term *Voting period* means the 3-consecutive business day period for in-person voting.

Referendum**§ 1230.622 General.**

(a) A referendum to determine whether eligible pork producers and importers favor continuation of the Pork Checkoff Program will be conducted in accordance with this subpart.

(b) The Pork Checkoff Program will be terminated only if a majority of producers and importers voting in the referendum favor such termination.

(c) The referendum will be conducted at the county FSA offices for producers and at FSA headquarters office in Washington, DC, for importers.

§ 1230.623 Supervision of referendum.

The Administrator, AMS, will be responsible for conducting the referendum in accordance with this subpart.

§ 1230.624 Eligibility.

(a) Eligible producers and importers. Persons eligible to register and vote in the referendum include:

(1) Individual Producers. Each individual that owns and sells at least one hog or pig during the representative period and does so in his or her own name is entitled to cast one ballot.

(2) Producers who are a corporation or other entity. Each corporation or other entity that owns and sells at least one hog or pig during the representative period is entitled to cast one ballot. A group of individuals, such as members of a family, a partnership, owners of community property, or a corporation engaged in the production of hogs and pigs will be entitled to only one vote; provided, however, that any member of

a group may register to vote as a producer if he or she sells at least one hog or pig in his or her own name.

(3) Importers. Each importer who imports hogs, pigs, pork, or pork products during the representative period is entitled to cast one ballot. A group of individuals, such as members of a family, a partnership, or a corporation engaged in the importation of hogs, pigs, pork, or pork products will be entitled to only one vote; provided, however, that any member of a group may register to vote as a importer if he or she imports hogs, pigs, pork, or pork products in his or her own name.

(b) Proxy registration and voting. Proxy registration and voting is not authorized, except that an officer or employee of a corporate producer or importer, or any guardian, administrator, executor, or trustee of a producer's or importer's estate, or an authorized representative of any eligible producer or importer (other than an individual producer or importer), such as a corporation or partnership, may register and cast a ballot on behalf of that entity. Any individual who registers to vote in the referendum on behalf of any eligible producer or importer corporation or other entity must certify that he or she is authorized to take such action.

§ 1230.625 Time and place of registration and voting.

(a) Producers. The referendum shall be held for 3-consecutive days on September 19, 20, 21, 2000. Eligible producers shall register and vote on-site following the procedures in 1230.628. Producers shall register and vote during the normal business hours of each county FSA office or request absentee ballots from the county FSA offices by mail, telephone, or facsimile, or pick up an absentee ballot in-person. The absentee voting period shall be from August 18, 2000, through September 21, 2000.

(b) Importers. Importer voting shall take place during the same time period provided producers for in-person and absentee voting in the referendum. The referendum shall be conducted by mail ballot by the FSA headquarters office in Washington, DC, between August 18, 2000, through September 21, 2000.

§ 1230.626 Facilities for registering and voting.

(a) Producers. Each county FSA office shall provide:

(1) Adequate facilities and space to permit producers of hogs and pigs to register and to mark their ballots in secret;

(2) A sealed box or other designated receptacle for registration forms and ballots that is kept under observation during office hours and secured at all times; and

(3) Copies of the Order for review.

(b) Absentee ballots. Each FSA county office shall provide each producer an absentee ballot package upon request. Producers can pick up an absentee ballot in-person or request it by telephone, mail, or facsimile. The FSA county office will provide absentee ballots by mail for all requests received by telephone, mail, or facsimile. The FSA county office shall record date of receipt of the "Pork Referendum" envelope containing the completed absentee ballot on the Absentee Voter Request List and place it unopened in a secure ballot box.

(c) Importers. The FSA headquarters office in Washington, DC, will:

(1) Mail ballot packages to eligible importers upon request;

(2) Have a sealed box or other designated receptacle for registration forms and ballots that is kept under observation during office hours and secured at all times; and

(3) Mail copies of the Order to importers if requested by mail, telephone, or facsimile. Importers can also pickup a ballot in-person.

§ 1230.627 Registration form and ballot.

(a) *Producers.* (1) A ballot (Form LS-72) and combined registration and certification form (Form LS-72-2) will be used for voting in-person. The information required on the registration form includes name, address, and telephone number. Form LS-72-2 also contains the certification statement referenced in § 1230.628. The ballot will require producers to check a "yes" or "no."

(2) A combined registration and voting form (Form LS-73) will be used for absentee voting. The information required on this combined registration and voting form includes name, address, and telephone number. Form LS-73 also contains the certification statement referenced in § 1230.628. The ballot will require producers to check "yes" or "no."

(b) *Importers.* A combined registration and ballot form (Form LS-76) will be used for importer voting. The information required on this combined registration and ballot form includes name, address, and telephone number. Form LS-76 also contains the certification statement referenced in § 1230.629. The ballot will require importers to check "yes" or "no."

§ 1230.628 Registration and voting procedures for producers.*(a) Registering and voting in-person.*

(1) Each eligible producer who wants to vote whether as an individual or as a representative of a corporation or other entity shall register during the 3-day in-person voting period at the county FSA office where FSA maintains and processes the individual producer's or corporation's or other entities' administrative farm records. A producer voting as an individual or as a representative of a corporation or other entity not participating in FSA programs, shall register and vote in the county FSA office serving the county where the individual producer or corporation or other entity owns hogs or pigs. An individual or an authorized representative of a corporation or other entity who owns hogs or pigs in more than one county shall register and vote in the FSA county office where the individual or corporation or other entity does most of their business. Producers shall be required to record on the In-Person Voter Registration List (Form LS-75) their name and address, and if applicable, the name and address of the corporation or other entity they represent before they can receive a registration form and ballot. To register, producers shall complete the in-person registration and certification form (Form LS-72-2) and certify that:

(i) They or the corporation or other entity they represent were producers during the specified representative period; and

(ii) The person voting on behalf of a corporation or other entity referred to in § 1230.612 is authorized to do so.

(2) Each eligible producer who has not voted by means of an absentee ballot may cast a ballot in-person at the location and time set forth in § 1230.625 and on September 19, 20, 21, 2000. Eligible producers who record their names and addresses and, if applicable, the name and address of the corporation or other entity they are authorized to represent on the In-Person Voter Registration List (Form LS-75) will receive a combined registration and certification form printed on an envelope (Form LS-72-2) and a ballot (Form LS-72). Producers will enter the information requested on the combined registration and certification form/envelope (Form LS-72-2) as indicated above. Producers will then mark their ballots to indicate "yes" or "no." Producers will place their completed ballots in an envelope marked "Pork Ballot" (Form LS-72-1), seal and place it in the completed and signed registration form/envelope marked "Pork Referendum" (Form LS-72-2),

seal that envelope and personally place it in a box marked "Ballot Box" or other designated receptacle. Voting will be conducted on-site under the supervision of the county FSA County Executive Director (CED).

(b) *Absentee voting.* (1) Eligible producers who are unable to vote in-person may request an absentee voting package consisting of a combined registration and absentee ballot form (Form LS-73) and two envelopes—one marked "Pork Ballot" (Form LS-72-1) and the other marked "Pork Referendum" (Form LS-73-1) by mail, telephone, facsimile, or by picking up one in-person from the county FSA office where FSA maintains and processes the producer's administrative farm records.

(2) If a producer, whether requesting an absentee ballot as an individual or as an authorized representative of a corporation or other entity that does not participate in FSA programs, and therefore does not have administrative records at a county FSA office, he or she may request an absentee voting package by telephone, mail, facsimile, or pick it up in-person from the county FSA office serving the county where the individual or corporation or other entity owns hogs or pigs. An individual or authorized representative of a corporation or other entity, who owns hogs or pigs in more than one county can request an absentee ballot from the county FSA office where the producer or corporation or other entity does most of their business.

(3) An absentee voting package will be mailed to producers by the FSA CED to the address provided by the prospective voter. Only one absentee registration form and absentee ballot will be provided to each eligible producer. The absentee ballots and registration forms may be requested during August 1, 2000, through September 18, 2000.

(4) The county FSA office will enter on the Absentee Voter Request List (Form LS-74) the name and address of the individual or corporation or other entity requesting an absentee ballot and the date the forms were requested.

(5) To register, eligible producers shall complete and sign the combined registration and certification form and absentee ballot (Form LS-73) and certify that:

(i) They or the corporation or other entity they represent were producers during the specified representative period;

(ii) If voting on behalf of a corporation or other entity referred to in § 1230.612, they are authorized to do so.

(6) A producer, after completing the absentee voter registration form and marking the ballot, shall remove the

ballot portion of the combined registration and absentee ballot form (Form LS-73) and seal the completed ballot in a separate envelope marked "Pork Ballot" (Form LS-72-1) and place the sealed "Pork Ballot" envelope in the mailing envelope marked "Pork Referendum" (Form LS-73-1) along with the signed registration form. Producers are required to print their name and address on the mailing envelope marked "Pork Referendum" (Form LS-73-1), and mail or hand deliver it to the county FSA office from which the producer or corporation or other entity obtained the absentee voting package. Absentee ballots returned in-person must be received by close of business on the last day of the in-person voting period, which is September 21, 2000. Ballots received after that date will be counted as invalid ballots.

(7) Absentee ballots returned by mail have to be postmarked with a date not later than the last day of the in-person voting period, which is September 21, 2000, and be received in the county FSA office by the close of business on the 5th business day after the last day of the in-person voting period, which is September 28, 2000. Absentee ballots received after that date will be counted as invalid ballots. Upon receiving the "Pork Referendum" envelope (Form LS-73-1) containing the registration form and ballot, the county FSA CED will record the date the "Pork Referendum" envelope (Form LS-73-1) containing the absentee ballot was received in the FSA county office on the Absentee Voter Request List (Form LS-74) opposite the name of the producer voting absentee. The county FSA CED will place it, unopened, in a secure ballot box.

§ 1230.629 Registration and voting procedures for importers.

(a) Individual importers, corporations, or other entities can obtain the registration and certification forms, ballots, and envelopes by mail from the following address: USDA, FSA, Operations Review and Analysis Staff, Attention: William A. Brown, P.O. Box 44366, Washington, DC 20026-4366. Importers may pick up the voting materials in-person at USDA, FSA, Operations Review and Analysis Staff, Room 2741, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC. Importers may also request voting materials by facsimile or telephone. The facsimile number is 202/690-3354. The telephone number is 202/720-6833.

(b) When requesting a ballot, eligible importers will be required to submit a

U.S. Customs Service Form 7501 showing that they paid the pork assessment during the representative period.

(c) Upon receipt of a request and U.S. Customs Service Form 7501, the voting materials will be mailed to importers by the FSA headquarters office in Washington, DC, to the address provided by the importer or importer corporation or other entity. Only one mail ballot and registration form will be provided to each eligible importer. The forms must be requested during August 1, 2000, through September 21, 2000.

(d) The FSA headquarters office in Washington, DC, will enter on the Importer Ballot Request List (Form LS-77) the name and address of the importer requesting a ballot and the date of the request.

(e) To register, eligible importers will complete and sign the combined registration form and ballot (Form LS-76) and certify that:

(1) To the best of their knowledge and belief the information provided on the form is true and accurate;

(2) If voting on behalf of an importer corporation or other entity referred to in § 1230.612, they are authorized to do so.

(f) Eligible importers, after completing the combined ballot and registration form, will remove the ballot portion of the combined registration and ballot form (Form LS-76) and seal the completed ballot in a separate envelope marked "Pork Ballot" (Form LS-72-1) and place the sealed "Pork Ballot" envelope in the mailing envelope marked "Pork Referendum" (Form LS-73-1) along with the signed registration form. Importers, corporations, or other entities must legibly print their name and address on the mailing envelope marked "Pork Referendum" (Form LS-73-1), and mail the envelope to the FSA headquarters office at the following address: USDA, FSA, Operations Review and Analysis Staff, Attention: William A. Brown, Post Office Box 44366, Washington, DC 20026-4366. Importers may hand deliver the "Pork Referendum" envelope to USDA, FSA, Operations Review and Analysis Staff, Room 2741, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC.

(g) The "Pork Referendum" envelope (Form LS-73-1) containing the registration form and ballot has to be postmarked with a date not later than the last day of the in-person voting period, which is September 21, 2000, and be received in the FSA headquarters office by the close of business on the 5th business day after the date of the last day of the in-person voting period, which is September 28, 2000. If

delivered in-person, it has to reach headquarters office not later than the last day of the in-person voting period. Ballots received after that date will be counted as invalid ballots. Upon receiving the "Pork Referendum" envelope (Form LS-73-1) containing the registration form and ballot, an FSA employee will record the date the "Pork Referendum" envelope containing the completed ballot was received in the FSA headquarters office in Washington, DC, on the Importer Ballot Request List (Form LS-77) directly opposite the voting importer's name. The FSA employee will place the "Pork Referendum" envelope, unopened, in a secure ballot box.

§ 1230.630 List of registered voters.

(a) *Producers.* The In-Person Voter Registration List (Form LS-75) and the Absentee Voter Request List (Form LS-74) will be available for inspection during the 3 days of the voting period and during the 7 business days following the date of the last day of the voting period at the county FSA office. The lists will be posted during regular office hours in a conspicuous public location at the FSA county office. The Absentee and In-Person Voter Registration Lists will be updated and posted daily. The complete In-Person Voter Request List (Form LS-75) will be posted in the FSA county office on the 1st business day after the date of the last day of the voting period. The complete Absentee Voter Request List (Form LS-74) will be posted in the FSA county office on the 6th business day after the date of the last day of the voting period.

(b) *Importers.* The Importer Ballot Request List (Form LS-77) will be maintained by the FSA headquarters office in Washington, DC, and not posted.

§ 1230.631 Challenge of votes.

(a) *Challenge period.* During the dates of the 3-consecutive day voting period and the 7 business days following the voting period, the ballots of producers may be challenged at the FSA county office.

(b) *Who can challenge.* Any person can challenge a producer's vote. Any person who wants to challenge shall do so in writing and shall include the full name of the individual or corporation or other entity being challenged. Each challenge of a producer vote must be made on a separate sheet of paper and each challenge must be signed by the challenger. The identity of the challenger will be kept confidential except as the Secretary may direct or as otherwise required by law.

(c) *Who can be challenged.* Any producer having cast an in-person ballot or an absentee ballot whose name is posted on the In-Person Voter Registration List (Form LS-75) or the Absentee Voter Request List (Form LS-74) can be challenged. Absentee ballots have to be received in the FSA county office before a producer's vote can be challenged. There is no challenge process for importers.

(d) *Notification of challenges.* The FSA County Committee or its representative, acting on behalf of the Administrator, AMS, will notify challenged producers as soon as practicable, but no later than 12 business days after the date of the last day of the in-person voting period. FSA will notify all challenged persons that documentation such as sales documents, tax records, or other similar documents proving that the person owned and sold hogs or pigs during the representative period must be submitted or his or her vote will not be counted. The documentation must be provided to the FSA county offices within 5 business days of notification and not later than 17 business days after the date of the last day of the voting period.

(e) *Determination of challenges.* The FSA County Committee or its representative, acting on behalf of the Administrator, AMS, will make a determination concerning the challenge based on documentation provided by the producer and will notify challenged producers as soon as practicable, but no later than 22 business days after the date of the last day of the in-person voting period of its decision.

(f) *Challenged ballot.* A challenge to a ballot shall be deemed to have been resolved if the determination of the FSA County Committee or its representative, acting on behalf of the Administrator, AMS, is not appealed within the time allowed for appeal or there has been a determination by the Administrator, AMS, after an appeal.

(g) *Appeal.* A person declared to be ineligible to register and vote by the FSA County Committee or its representative, acting on behalf of the Administrator, AMS, can file an appeal at the FSA county office within 5 business days after the date of receipt of the letter of notification of ineligibility, but not later than November 2, 2000. The FSA county office shall send a producer's appeal by facsimile to the Administrator, AMS, on the date it is filed at the FSA county office or as soon as practical thereafter.

(h) An appeal will be determined by the Administrator, AMS, as soon as practical, but in all cases not later than the 45th business day after the date of

the last day of the voting period. The Administrator, AMS, shall send her decision on a producer's appeal to the FSA county office where the producer was initially challenged. The FSA county office shall notify the challenged producer of the Administrator's, AMS, determination on his or her appeal. The Administrator's, AMS, determination on an appeal shall be final.

§ 1230.632 Receiving ballots.

(a) *Producers.* A ballot shall be considered to be received on time if:

(1) It was cast in-person in the county FSA office prior to the close of business on the date of the last day of the in-person voting period; or

(2) It was cast as an absentee ballot, having a postmarked date not later than the last day of the in-person voting period and was received in the county FSA office not later than the close of business, 5 business days after the last day of the in-person voting period.

(b) *Importers.* A ballot shall be considered to be received on time if it had a postmarked date not later than the date of the last day of the in-person voting period and was received in the FSA headquarters office in Washington, DC, not later than the close of business, 5 business days after the last day of the in-person voting period.

§ 1230.633 Canvassing ballots.

(a) *Producers.* (1) Counting the ballots. Under the supervision of FSA CED, acting on behalf of the Administrator, AMS, the in-person registration and certification form envelopes (Form LS-72-2) and the absentee "Pork Referendum" envelopes (Form LS-73-1) containing the "Pork Ballot" envelopes for producer voters will be checked against the In-Person Voter Registration List (Form LS-75) and the Absentee Voter Request List (Form LS-74), respectively, to determine properly registered voters. The ballots of producers voting in-person whose names are not on the In-Person Voter Registration List (Form LS-75), will be declared invalid. Likewise, the ballots of producers voting absentee whose names are not on the Absentee Voter Request List (Form LS-74) will be declared invalid. All ballots of challenged producer voters declared ineligible and invalid ballots will be kept separate from the other ballots and the envelopes containing these ballots will not be opened. The valid ballots will be counted on November 29, 2000, during regular business hours on the 46th business day after the last day of the in-person voting period. FSA county office employees will remove the sealed "Pork Ballot" envelopes (Form LS-72-1) from

the registration form envelopes and "Pork Referendum" envelopes (absentee voting) envelopes of all eligible producer voters and all challenged producer voters determined to be eligible. After removing all "Pork Ballot" envelopes, FSA county employees will shuffle the sealed "Pork Ballot" envelopes or otherwise mix them up so that ballots cannot be matched with producers' names. After shuffling the "Pork Ballot" envelopes, FSA county employees will open them and count the ballots. The ballots will be counted as follows:

(i) Number of eligible producers casting valid ballots;

(ii) Number of producers favoring continuation of the Pork Checkoff Program;

(iii) Number of producers favoring termination of the Pork Checkoff Program;

(iv) Number of challenged producer ballots deemed ineligible;

(v) Number of invalid ballots; and

(vi) Number of spoiled ballots.

(2) *Invalid ballots.* Ballots will be declared invalid if a producer voting in-person has failed to print his or her name and address on the In-Person Voter Registration List (Form LS-75) or if an absentee voter's name and address is not recorded on the Absentee Voter Request List (Form LS-74), or the registration form or ballot was incomplete or incorrectly completed.

(3) *Spoiled ballots.* Ballots will be considered spoiled if they are mutilated or marked in such a way that it cannot be determined whether the voter is voting "yes" or "no." Spoiled ballots shall not be considered as approving or disapproving the Pork Checkoff Program, or as a ballot cast in the referendum.

(4) *Confidentiality.* All ballots shall be confidential and the contents of the ballots not divulged except as the Secretary may direct. The public may witness the opening of the ballot box and the counting of the votes but may not interfere with the process.

(b) *Importers.* (1) *Counting the ballots.* FSA headquarters personnel, acting on behalf of the Administrator, AMS, will check the registration forms and ballots for all importer voters against the Importer Ballot Request List (Form LS-77) to determine properly registered voters. The ballots of importers voting whose names are not recorded on the Importer Ballot Request List (Form LS-77), will be declared invalid. All ballots of importer voters declared invalid will be kept separate from the other ballots and the envelopes containing these ballots will not be opened. The valid ballots will be counted on November 29,

2000, during regular office hours on the 46th business day after the date of the last day of the in-person voting period. FSA headquarter office employees will remove the sealed "Pork Ballot" envelope (Form LS-72-1) from the "Pork Referendum" envelopes (Form LS-73-1) of all eligible importer voters. After removing all "Pork Ballot" envelopes, FSA headquarter employees will shuffle the sealed "Pork Ballot" envelopes or otherwise mix them up so that ballots cannot be matched with importers' names. After shuffling the "Pork Ballot" envelopes, FSA headquarters employees will open the envelopes and count the ballots. The ballots will be counted as follows:

(i) Number of eligible importers casting valid ballots;

(ii) Number of importers favoring continuation of the Pork Checkoff Program;

(iii) Number of importers favoring termination of the Pork Checkoff Program;

(iv) Number of importer ballots deemed invalid; and

(v) Number of spoiled ballots.

(2) *Invalid ballots.* Ballots will be declared invalid if an importer voter's name was not recorded on the Importer Ballot Request List (Form LS-77), or the registration form or ballot was incomplete or incorrectly completed.

(3) *Spoiled ballots.* Ballots will be considered spoiled if they were mutilated or marked in such a way that it cannot be determined whether the voter is voting "yes" or "no." Spoiled ballots shall not be considered as a ballot cast in the referendum.

(4) *Confidentiality.* All ballots shall be confidential and the contents of the ballots not divulged except as the Secretary may direct. The public can witness the opening of the ballot box and the counting of the votes but can not interfere with the process.

§ 1230.634 FSA county office report.

The FSA county office will notify the FSA State office of the results of the referendum. Each FSA county office will transmit the results of the referendum in its county to the FSA State office. Such report will include the information listed in § 1230.633. The results of the referendum in each county will be made available to the public, after the results of the referendum are announced by the Secretary. A copy of the report of results will be posted for 30 days in the FSA county office in a conspicuous place accessible to the public and a copy will be kept on file in the FSA county office for a period of at least 12 months after the referendum.

§ 1230.635 FSA State office report.

Each FSA State office will transmit to the Administrator, FSA, a written summary of the results of the referendum received from all FSA county offices within the State. The summary shall include the information on the referendum results contained in the reports from all county offices within each State and be certified by the FSA State Executive Director. The FSA State office will maintain a copy of the summary where it will be available for public inspection for a period of not less than 12 months.

§ 1230.636 Results of the referendum.

(a) The Administrator, FSA, will submit the combined results of the FSA State offices' results of the producers' vote and the FSA headquarters office results of the importers' vote to the Administrator, AMS. The Administrator, AMS, will prepare and submit to the Secretary a report of the results of the referendum. The results of the referendum will be announced by the Department in an official press release and published in the **Federal Register**. State reports on producer balloting, FSA headquarters office report on importer balloting, and related papers will be available for public inspection in the office of the Marketing Programs Branch, Livestock and Seed Program, AMS, USDA, Room 2627, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC.

(b) If the Secretary deems it necessary, the report of producer voting results in

any State or county or the report of importer voting results shall be reexamined and checked by such persons as may be designated by the Secretary.

§ 1230.637 Disposition of ballots and records.

(a) *Producer ballots and records.* Each FSA CED will place in sealed containers marked with the identification of the referendum, the voter registration list, absentee voter request list, voted ballots, challenged registration forms/envelopes, challenged absentee voter registration forms, challenged ballots found to be ineligible, invalid ballots, spoiled ballots, and county summaries. Such records will be placed under lock in a safe place under the custody of the FSA CED for a period of not less than 12 months after the referendum. If no notice to the contrary is received from the Administrator, FSA, by the end of such time, the records shall be destroyed.

(b) *Importer ballots and records.* The FSA headquarters office in Washington, DC, will deliver the importers' U.S. Customs Service Form 7501s, the voter registration list, voted ballots, invalid ballots, spoiled ballots, and national summaries and records to the Marketing Programs Branch, Livestock and Seed Program, AMS, USDA, Room 2627, South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC. A Marketing Programs Branch employee will place the ballots and records in sealed containers marked with the identification of the

referendum. Such ballots and records will be placed under lock in a safe place under the custody of the Marketing Programs Branch for a period of not less than 12 months after the referendum. If no notice to the contrary is received from the Administrator, AMS, by the end of such time, the records shall be destroyed.

§ 1230.638 Instructions and forms.

The Administrator, AMS, is authorized to prescribe additional instructions and forms not inconsistent with the provisions of this subpart to govern the conduct of the referendum.

Dated: July 7, 2000.

Kathleen A. Merrigan,

Administrator, Agricultural Marketing Service.

BILLING CODE 3410-02-P

Note: The following Appendix will not appear in the Code of Federal Regulations.

Appendix—Pork Referendum Forms

The following nine forms referenced in Subpart E Part 1230—Procedures for the Conduct of a Referendum—will be used for registering and voting in the pork referendum and for listing registered voters.

LS-72 Pork Producer In-Person Voting
LS-72-1 Pork Ballot (Envelope)
LS-72-2 In-Person Registration and Certification (Envelope)
LS-73 Pork Producer Absentee Voting
LS-73-1 Pork Referendum (Envelope)
LS-74 Absentee Voter Request List
LS-75 In-Person Voter Registration List
LS-76 Pork Importer Mail Voting
LS-77 Importer Ballot Request List

PORK PRODUCER IN-PERSON VOTING

UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE REFERENDUM ON THE PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION ORDER

ELIGIBLE VOTERS:

- **Individual Producers:** Any individual who owned and sold one or more pigs or hogs at any time between August 18, 1999, and August 17, 2000, in his or her own name may cast one vote as an individual producer.
- **Business Entity Producers:** A corporation, partnership, estate, or other legal business entity that owned and sold one or more pigs or hogs at any time between August 18, 1999, and August 17, 2000, is entitled to one vote. An authorized individual may cast the business entities' vote.
- **Producers Who Sell Hogs as Individuals and Represent a Business Entity:** If an individual owned and sold one or more pigs or hogs between August 18, 1999, and August 17, 2000, in his or her own name and is an authorized representative of a legal business entity who owned and sold one or more pigs or hogs between August 18, 1999 and August 17, 2000, he or she may cast the one vote for the business entity and one vote as an individual producer.
- **Contract Producers are Not Eligible to Vote:** Individuals or business entities that raise pigs or hogs under production contracts are not eligible to vote unless they owned and sold one or more pigs or hogs in their own name.

INSTRUCTIONS TO VOTERS (Please read carefully):

1. Before you **VOTE**, you must *print your name and address* on the **In-Person Voter Registration List**, and if you are voting on behalf of a legal business entity, such as a partnership, corporation, estate, etc., also print its name and address on the **In-Person Voter Registration List**.
2. Individual producers and other producer entities may vote at the county Farm Service Agency (FSA) office where FSA maintains and processes the producer's administrative farm records. Producers not participating in FSA programs may vote in the county FSA office serving the county where the producer owns hogs and pigs.
3. If you are voting as an individual, please print your name, address, and telephone number in the spaces provided and sign the **Registration and Certification Statement**. If you are voting on behalf of a legal business entity, such as a partnership, corporation, estate, etc., print your name first and then print its name, address, and telephone number in the spaces provided and sign the **Registration and Certification Statement**.
(If you do not complete this step your ballot will be invalidated and your vote will not be counted.)
4. Check "Yes" or "No" on the **Ballot** below. Put this form in the envelope marked "**PORK BALLOT**" and seal it.
5. Put the "**PORK BALLOT**" envelope into the "**PORK REFERENDUM**" envelope, seal it, and place it in the designated "Ballot Box."

BALLOT

Do you favor continuing the Pork Checkoff program?

☐

YES

☐

NO

NOTE: According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0581-0194. The time required to complete this information collection is estimated to average .05 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call 202-720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

PORK BALLOT

Seal and insert into envelope marked "Pork Referendum".

LS-72-1 (06-00)

3 5/8" x 6 1/2" ENVELOPE

PORK REFERENDUM

FORM APPROVED - OMB NO. 0581-0194

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

REFERENDUM ON THE PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION ORDER

IN-PERSON REGISTRATION AND CERTIFICATION

According to the Privacy Act of 1974 (5 USC 552a) and the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0581-0093. The time required to complete this information collection is estimated to average .05 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The authority for requesting the information to be supplied on this form is the Pork, Promotion, Research, and Consumer Information Act of 1985. The information would be furnished to pork producers and importers of pork and pork products who voluntarily participate in the referendum.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means of communication of program information (Braille, large print, audio, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD). To file a complaint of discrimination write USDA, Director, Office of Civil Rights, Room 324-W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call (202) 720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

You may, by law, be fined up to \$10,000, imprisoned up to 5 years, or both, for knowingly or willfully making false statements within this document (18 USC Section 1001).

NOTE: If you are voting as an individual, please print your name, address, and telephone number in the spaces provided and sign the Registration and Certification Statement. If you are voting on behalf of a legal business entity, such as a partnership, corporation, estate, etc., print your name first and then print its name, address, and telephone number in the spaces provided and sign the Registration and Certification Statement.

NAME (See note above)

REPRESENTING (if applicable)

MAILING ADDRESS (Street, P.O. Box, or Route No., City, State, ZIP Code)

TELEPHONE NUMBER (including area code)

CERTIFICATION STATEMENT

I HEREBY CERTIFY at some time between August 18, 1999, and August 17, 2000, I, or the entity that I am authorized to represent, owned and sold one or more pigs or hogs and that this is the only vote I am casting in this capacity in the pork referendum. I further certify that to the best of my knowledge and belief the information provided herein is true and accurate.

SIGNATURE

DATE

LS-72-2 (06-00)

4 1/8" X 9 1/2" ENVELOPE

Form Approved - 0581-0194

PORK PRODUCER ABSENTEE VOTING

UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE REFERENDUM ON THE PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION ORDER

ELIGIBLE VOTERS:

- **Individual Producers:** Any individual who owned and sold one or more pigs or hogs at any time between August 18, 1999, and August 17, 2000, in his or her own name may cast one vote as an individual producer.
- **Business Entity Producers:** A corporation, partnership, estate, or other legal business entity that owned and sold one or more pigs or hogs at any time between August 18, 1999, and August 17, 2000, is entitled to one vote. An authorized individual may cast the business entity's vote.
- **Producers Who Sell Hogs as Individuals and Represent a Business Entity:** If an individual owned and sold one or more pigs or hogs between August 18, 1999, and August 17, 2000, in his or her own name and is an authorized representative of a legal business entity who owned and sold one or more pigs or hogs between August 18, 1999, and August 17, 2000, he or she may cast the one vote for the business entity and one vote as an individual producer.
- **Contract Producers are Not Eligible to Vote:** Individuals or business entities that raise pigs or hogs under production contracts are not eligible to vote unless they owned and sold one or more pigs or hogs in their own name.

INSTRUCTIONS TO VOTERS (Please read carefully):

1. If you are voting as an individual, please print your name, address, and telephone number in the spaces provided below and sign the Registration and Certification Statement. If you are voting on behalf of a legal business entity, such as a partnership, corporation, estate, etc., print your name first and then print its name, address, and telephone number in the spaces provided and sign the Registration and Certification Statement.
2. Mark "Yes" or "No" on the Ballot below.
3. Separate the completed Ballot from the rest of this form, and put the Ballot in the envelope marked "PORK BALLOT." Seal the "PORK BALLOT" envelope.
4. Place both the sealed "PORK BALLOT" envelope and remainder of the form containing the completed and signed Registration and Certification Statement into the envelope marked "PORK REFERENDUM." Seal the "PORK REFERENDUM" envelope. *Print your name and address in the upper left-hand corner of the "PORK REFERENDUM" envelope.*
5. Mail or deliver the "PORK REFERENDUM" envelope to the county Farm Service Agency (FSA) office from which you obtained the absentee voting materials. To be counted, your "PORK REFERENDUM" envelope must contain the correct and completed forms.
6. If the "PORK REFERENDUM" envelope is mailed, it must be postmarked not later than September 21, 2000, and arrive in the county FSA office not later than September 28, 2000.
7. If the "PORK REFERENDUM" envelope is hand delivered, it must arrive at the FSA county office by close of business September 21, 2000.
8. Failure to complete, sign, and return this Registration and Certification Statement with the Ballot will invalidate the Ballot and your vote will not be counted. Late ballots will not be counted.

REGISTRATION AND CERTIFICATION STATEMENT (Absentee voting)	
NAME (See instruction number 1)	REPRESENTING (if applicable)
MAILING ADDRESS (Street, P.O. Box, or Route No., City, State, ZIP Code)	TELEPHONE NUMBER (including area code)
I HEREBY CERTIFY at some time between August 18, 1999, and August 17, 2000, I, or the entity that I am authorized to represent, owned and sold one or more pigs or hogs and that this is the only vote I am casting in this capacity in the pork referendum. I further certify that to the best of my knowledge and belief the information provided herein is true and accurate.	
SIGNATURE	DATE

LS-73 (06-00)

You may, by law, be fined up to \$10,000, imprisoned up to 5 years, or both, for knowingly or willfully making false statements within this document (18 USC Section 1001).

SEPARATE HERE

BALLOT	
Do you favor continuing the Pork Checkoff program?	
☐ YES	☐ NO

(See reverse of form for Burden and Nondiscriminatory Statements.)

NOTE: According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a persons is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0581-0194. The time required to complete this information collection is estimated to average .10 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, sex, religion, age, disability, political beliefs, sexual orientation, or marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, audiotape, etc.) should contact USDA's TARGET Center at 202-720-2600 (voice and TDD).

To file a complaint of discrimination, write USDA, Director, Office of Civil Rights, Room 326-W, Whitten Building, 14th and Independence Avenue, SW, Washington, DC 20250-9410 or call 202-720-5964 (voice and TDD). USDA is an equal opportunity provider and employer.

PLACE
STAMP
HERE

LS-73-1 (06-00)

Name and Return Address

PORK
REFERENDUM

4 1/8" x 9 1/2" Envelope

FORM APPROVED - OMB NO. 0581-0194

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

COUNTY *(Enter name of county)*

PLEASE PRINT REQUIRED INFORMATION[illegible]

FORM APPROVED - OMB NO. 0581-0194

UNITED STATES DEPARTMENT OF AGRICULTURE
AGRICULTURAL MARKETING SERVICE

**REFERENDUM ON THE PORK PROMOTION,
RESEARCH, AND CONSUMER INFORMATION ORDER**

NOTE: A separate "In-Person" Voter Registration List must be maintained for each county served.

PLEASE PRINT REQUIRED INFORMATION[illegible]

Form Approved - 0581-0194

PORK IMPORTER MAIL VOTING

UNITED STATES DEPARTMENT OF AGRICULTURE AGRICULTURAL MARKETING SERVICE REFERENDUM ON THE PORK PROMOTION, RESEARCH, AND CONSUMER INFORMATION ORDER

ELIGIBLE VOTERS:

- **Individual Importers:** Any individual who imported pigs, hogs, pork, or pork products at any time between August 18, 1999, and August 17, 2000, in his or her own name may cast one vote as an individual importer.
- **Business Entity Importers:** A corporation, partnership, estate, or other legal business entity that imported pigs, hogs, pork, or pork products at any time between August 18, 1999, and August 17, 2000, is entitled to one vote. An authorized individual may cast the business entities' vote.
- **Importers Who Import as Individuals and Represent a Business Entity:** If an individual imported pigs, hogs, pork, or pork products between August 18, 1999, and August 17, 2000, in his or her own name and is an authorized representative of a legal business entity who imported pigs, hogs, pork, or pork products between August 18, 1999, and August 17, 2000, he or she may cast the one vote for the business entity and one vote as an individual importer.

INSTRUCTIONS TO VOTERS (Please read carefully):

1. If you are voting as an individual, please print your name, address, and telephone number in the spaces provided below and sign the **Registration and Certification Statement**. If you are voting on behalf of a legal business entity, such as a partnership, corporation, estate, etc., print your name first and then print its name, address, and telephone number in the spaces provided and sign the **Registration and Certification Statement**.
2. Mark "Yes" or "No" on the **Ballot** below.
3. Separate the completed **Ballot** from the rest of this form, and put the **Ballot** in the envelope marked "PORK BALLOT." Seal the "PORK BALLOT" envelope.
4. Place both the sealed "PORK BALLOT" envelope and the remainder of the form containing the completed and signed **Registration and Certification Statement** into the envelope marked "PORK REFERENDUM." Seal the "PORK REFERENDUM" envelope. *Print your name and address in the upper left-hand corner of the "PORK REFERENDUM" envelope.*
5. Mail or deliver the "PORK REFERENDUM" envelope to the Farm Service Agency (FSA) office in Washington, D.C. To be counted, your "PORK REFERENDUM" envelope must be postmarked not later than September 21, 2000, and arrive in the Washington, D.C., FSA office not later than September 28, 2000.
6. Mailing address of Washington D.C. Office: USDA, FSA, Review and Analysis Staff, Attention: William A. Brown, P.O. Box 44366, Washington, D.C. 20026-4366.
7. If hand delivered the "PORK REFERENDUM" envelope must arrive in the FSA office at the following address: FSA, Operations Review and Analysis Staff, Room 2741, South Agriculture Building, 1400 Independence Avenue, SW., Washington, D.C., not later than September 21, 2000.
8. Failure to complete, sign and return this **Registration and Certification Statement** with the **Ballot** will invalidate the **Ballot** and your vote will not be counted. **Late ballots will not be counted.**

REGISTRATION AND CERTIFICATION STATEMENT (Mail voting)	
NAME (See instruction number 1)	REPRESENTING (if applicable)
MAILING ADDRESS (Street, P.O. Box, or Route No., City, State, ZIP Code)	TELEPHONE NUMBER (including area code)
I HEREBY CERTIFY that sometime between August 18, 1999, and August 17, 2000, I, or the entity that I am authorized to represent, imported pigs, hogs, pork, or pork products and that this is the only vote I am casting in this capacity in the pork referendum. I further certify that to the best of my knowledge and belief the information provided herein is true and accurate.	
SIGNATURE	DATE

LS-76 (06-00)

You may, by law, be fined up to \$10,000, imprisoned up to 5 years, or both, for knowingly or willfully making false statements within this document (18 USC Section 1001).

SEPARATE HERE

BALLOT

Do you favor continuing the Pork Checkoff program?



YES



NO

(See reverse of form for Burden and Nondiscriminatory Statements.)

NOTE: According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a persons is not required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 0581-0194. The time required to complete this information collection is estimated to average .10 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

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Federal Register

**Thursday,
July 13, 2000**

Part V

Department of Justice

Immigration and Naturalization Service

8 CFR Parts 103, 214, 248, 264

**Nonimmigrant Classes: Aliens Coming
Temporarily to U.S. to Perform
Agricultural Labor or Services; H-2A
Classification Petitions; Final Rule**

**Nonimmigrant Classes: Temporary
Agricultural Worker (H-2A) Petitions;
Processing Procedures; Proposed Rule**

Department of Labor

Employment and Training Administration

20 CFR Part 655

**Labor Certification and Petition Process
for the Temporary Employment of
Nonimmigrant Aliens in the United States
Agriculture; Authority Delegation to
Adjudicate; Final Rule and Modification of
Fee Structure; Proposed Rule**

DEPARTMENT OF JUSTICE**Immigration and Naturalization Service****8 CFR Parts 103 and 214**

[INS No. 1946-98, AG Order No. 2313-2000]

RIN 1115-AF29

Delegation of the Adjudication of Certain Temporary Agricultural Worker (H-2A) Petitions, Appellate and Revocation Authority for Those Petitions to the Secretary of Labor**AGENCY:** Immigration and Naturalization Service, Justice.**ACTION:** Final rule.

SUMMARY: This rule amends the Immigration and Naturalization Service (Service) regulations to transfer to the Secretary of Labor the authority to adjudicate petitions for temporary agricultural workers (H-2As), and the authority to decide appeals on those decisions and to make determinations for revocation of petition approvals. This rule does not affect the Service's authority to make determinations at a port-of-entry of an alien's admissibility to the United States, or of an alien's eligibility for change of nonimmigrant status, or for extension of stay. This rule streamlines the existing H-2A petitioning process and makes the process easier and faster for employers of temporary agricultural workers.

DATES: This rule is effective November 13, 2000.

FOR FURTHER INFORMATION CONTACT: Bert Rizzo, Supervisory Immigration Adjudications Officer, Programs Division, Immigration and Naturalization Service, 425 I Street, NW, Room 4213, Washington, DC 20536, telephone (202) 307-8996.

SUPPLEMENTARY INFORMATION:**What Is An H-2A Petition?**

The Immigration and Nationality Act (Act) provides for an employer to seek the services of foreign workers to perform temporary or seasonal agricultural services in the United States. These temporary agricultural workers are known as H-2As.

What Are the Department of Labor's (DOL) and Service's Current Roles?

Under present procedures, DOL plays the principal role with respect to employment of H-2A workers since DOL must first consider an employer's application and issue a labor certification for the hiring of temporary agricultural workers. Once DOL issues a

labor certification, the employer then files an H-2A petition with the Service and attaches DOL certification.

The Service's role in the process consists mainly of confirming that DOL has issued a labor certification, that the services required are temporary or seasonal (which is also considered by DOL), and that any prior H-2A violations by that employer have been corrected.

Why Is the Service Delegating Authority to the Secretary of Labor?

On December 7, 1998, the Service published a proposed rule in the **Federal Register** at 63 FR 67431 to transfer authority to adjudicate certain temporary agricultural worker petitions (H-2As) to the Secretary of Labor. The initial proposal was to allow DOL to adjudicate all H-2A petitions where the alien beneficiaries were located outside of the United States, while the Service would continue to adjudicate petitions when the alien beneficiaries were located within the United States. As described below, the Service has revised the approach of the proposed rule to effectuate a more comprehensive, one-step process for the adjudication of H-2A petitions by DOL.

This rule is intended to streamline the process and consolidate the H-2A determinations within DOL, the agency having the far greater role in the existing process. Consolidation under DOL is logical because of the Service's minimal role and the ability of DOL to handle the limited additional considerations to adjudicate completely both the labor certification and petition portions of the process.

However, the transfer of authority to DOL is being made only for determinations of the eligibility for classification of alien beneficiaries for H-2A status. The Attorney General is not further delegating to DOL the control of aliens within the United States. Therefore, this rule provides that DOL will forward requests to extend the stay or change the status of alien beneficiaries of H-2A petitions to the Service for adjudication. Since DOL and the Service will conduct the necessary interagency coordination, the petitioners will still have the advantage of a one-stop forum for the filing of all H-2A matters.

What Comments Did the Service Receive on the Proposed Rule?

The Service received eight comments to the proposed rule. The comments were from employer associations and the American Immigration Lawyers Association. The comments generally were divided among six issues. The

following is a discussion of the comments and the Service's response:

1. Filing Form

Five of the commenters believed that the Service was not properly planning for its continued role in developing the filing form(s) or the data to be gathered from the petitioner, although they did not offer reasons for this belief. DOL and the Service engaged in extensive discussions on the appropriate filing vehicle for H-2As. The Service has specific data requirements for its management information system, statistical records, and the administration of immigration laws. The Service is ensuring that those data requirements are met through the consultation process and through an interagency agreement outlining all areas of concern in the transfer of this process to DOL.

The agencies will use a single form with multiple pages to capture all the necessary data for both agencies. DOL envisions a scannable form that can be machine read, which will expedite its data input into a new management information system and assist in the adjudication process. Data elements derived from the current DOL Forms ETA-750 and the Service Form I-129 will be combined on a new filing form. The new Form ETA-9079 will be submitted for approval to the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995. This rule will not be implemented until that form has received approval under the Paperwork Reduction Act requirements. The new Form ETA-9079, Application for Temporary Agricultural Labor Certification and H-2A Petition, will replace the Service Form I-129 for all H-2A filings, as well as replace DOL Form ETA-750 for this purpose. It will contain separate sections for capturing data on individual aliens named in the new form. The separate section, which is being created through our proposed rule published elsewhere in this **Federal Register**, will require that an alien beneficiary who is present in the United States and seeking an extension of stay or change of status to H-2A sign that section. This will ensure that the alien has taken legal responsibility for the information entered on the form concerning himself or herself and that the alien is a responsible party to the request for extension of stay or change of status.

2. Split Filing Locations

Four commenters believed that the split in required filing location, based upon the location of the beneficiaries

either inside or outside of the United States, would be confusing and would not streamline the process.

The Service believes that the commenters correctly identified a weakness in the proposal and has revised it accordingly. As mentioned earlier, the proposed split in filing between DOL and the Service has been amended to require employers to file all H-2A filings with DOL. DOL will also have authority to approve the H-2A petitions as well as issue labor certifications.

Although all H-2A filings will now be made with DOL, the Service is retaining the authority over requests by individual aliens who are already present in the United States to change their status to H-2A or to extend their H-2A stay. As explained in a new proposed rule to accomplish this published elsewhere in this issue of the **Federal Register**, we are separating the determinations on change of status and extension of stay from the determination on the petition. DOL will forward to the Service the information from the joint application concerning an alien beneficiary in the United States in all cases where change of status or extension of stay is requested. The process will require that after the joint application (Form ETA-9079) is adjudicated by DOL, the Service's management information system would be updated with information indicating whether the labor certification application/petition was approved or denied. With this information, the Service can complete its adjudication of the extension of stay or change of status application (Form ETA-9079W) and notify the individual alien(s) of its determination.

The worker and employer will benefit from complete one-stop filing because all forms and supporting documentation are submitted to a single agency. DOL will determine the correct processing routes needed for all pieces of the one-stop package. The Service will receive data from DOL and the Form(s) ETA-9079W (Named Alien Addendum) to adjudicate. The Service's determination(s) on the Addendum will be based upon the individual alien's eligibility and a final determination by DOL on the Form ETA-9079.

3. Countervailing Evidence

As discussed in the proposed rule, the Service's role in most H-2A petition proceedings is limited. Most H-2A petitions are filed before the petitioner has identified, or named, the H-2A workers (beneficiaries). Currently, the Service's role is limited to a review of the determinations made by DOL that

the job offer is for temporary or seasonal agricultural employment, that the petitioner is making a valid job offer, and that any liquidated damages from prior H-2A petition proceedings have been paid. Liquidated damages are assessed to an employer who fails to notify the Service of the departure of workers from the United States or when the employer cannot establish that workers have left the employment for other legal status. In cases with named beneficiaries, the Service judges the ability of the beneficiary to perform the needed services. Additionally, in rare cases, the Service reviews countervailing evidence on the availability of U.S. workers.

Four commenters pointed out that the proposed rule was silent about the countervailing evidence procedure currently provided in regulations. Briefly, this procedure allows a petitioner to seek a review by the Service of DOL determination on the labor certification, if countervailing evidence can be produced to establish that U.S. workers are not in fact available to the petitioner. Only DOL determination concerning the availability of U.S. workers is reviewable by the Service. The Service rarely entertains countervailing evidence on H-2A petitions and almost universally follows the DOL determination because of DOL's expertise. Under this rule change, a separate review of this availability issue is no longer practical or necessary. Because DOL/Employment and Training Administration will be making the determination on the labor certification and petition concurrently, and a fresh review of these determinations is already provided for through appeal to DOL Office of Administrative Law Judges, an additional review is not useful and is removed from this rule.

The Service is establishing a mechanism to notify DOL of any unpaid liquidated damage claims to enable DOL to judge this factor as part of the adjudication process. Finally, in instances in which the petitioner identifies named beneficiaries, DOL has the necessary expertise to review the documentation presented to establish that each beneficiary is qualified to perform the unskilled agricultural labor.

4. DOL Capabilities

Five of the commenters objected to the proposal due to various concerns about the ability of DOL to perform its current functions in a timely fashion and to handle requests for expedited processing of problem cases. The Service believes that the consolidated new process is not highly complex and

will allow concurrent adjudication of the petition with the labor certification. The additional determinations to be made by DOL will encompass whether the Service has notified DOL of a failure to pay liquidated damages and whether the worker has the qualifications to perform the stated services. The Service is providing training to DOL personnel on the issues considered by the Service under its present role in the H-2A petition process. The time savings for the average case under the new system should be at least 3 to 6 days, which is normally consumed by mail notification by DOL to the employer and the employer's filing by mail of the petition with the Service, in addition to the time needed to process the petition by the Service (normally 15 to 21 days). The additional work for DOL presented by the combined process should not adversely impact the H-2A process and should result in a combined reduction of 18 to 27 days in the time taken from initial filing with DOL to completion of petition processing by the Service under the current system.

5. Department of State Notification

The proposed rule was silent on how DOL would notify the Department of State (DOS) of its determinations on the new combined application. One commenter was concerned that DOL is unfamiliar with the current notification process and that the process itself needed improvement. Currently, the Service mails the duplicate copy of the petition (Form I-129) to the consulate selected by the petitioner. Occasionally, when warranted, the Service notifies the consulate by telephone or telefax. The three agencies have now agreed that routine telefax notification from DOL to DOS will assist the efforts to streamline the H-2A process. The agencies are finalizing the internal details to ensure that these notifications are secure. This process should result in an additional 2 to 5 day reduction in obtaining workers through the faster notification to DOS. DOL will notify the Service of approvals for any workers not requiring a visa for admission to the United States. Notification will be either to the port-of-entry or to the Nebraska Service Center for extension of stay or change of status cases.

6. Earlier Filing of H-2A Cases

One commenter expressed a desire to be able to file a request for H-2As earlier than the current process permits to allow for determination before the current "20-day notice in advance of need." DOL regulations currently encourage earlier filing of applications for labor certification. DOL has recently

reduced its minimum lead-time for submission of a labor certification request from 60 days to 45 days (64 FR 34958). This minimum is intended to assist employers by reducing the advance filing requirement to allow them to better determine the dates of need for the services to be performed. This also leaves sufficient time for DOL to make determinations at least 20 days in advance of the date of need for the workers. DOL regulations will still encourage earlier filing. However, DOL is only legally required to issue its determination 20 days in advance of the need and cannot guarantee an earlier issuance. Also, the combined process should realize large savings in time from initial filings to final notifications as previously described.

What Other Change Does This Rule Make?

The Service is authorizing DOL to accept Form I-824, Application for Action on an Approved Application or Petition (or its equivalent), and to process the application when DOL has previously processed a request for temporary agricultural workers on the Service's behalf. The Form I-824 is used to request a change in notification to a consulate or port-of-entry after a petition has been approved. DOL will use an addendum to its proposed Form ETA-9079, which is the ETA-9079M, for this purpose.

What Is the Intended Effect of These Changes?

This rule will provide a more streamlined procedure for the processing of temporary agricultural worker cases (H-2As) from initial submission seeking labor certification to notification of either DOS or the Service for issuance of a visa or status changes, respectively. It simplifies employers' points of contact with the Government by requiring all certification and petition filings to occur with the same agency. It also allows for simultaneous adjudication of DOL and the Service portions of the case. Finally, it provides these benefits to all employers needing H-2A workers.

Currently, a number of employers seek labor certification from DOL but do not follow through by filing an H-2A petition with the Service. The Service and DOL believe that these cases represent situations where an employer was using the system as insurance against not obtaining adequate U.S. workers to perform the needed services. The new procedure will require all users of the H-2A process to file for both DOL and Service benefits.

This rule is designed to benefit employers who do need to hire H-2A temporary workers to perform needed services, by providing ease of use and greatly shortened processing times. The new, streamlined one-stop filing procedure allows an employer to access the Government system in a simplified process that requires less burdensome paperwork and provides faster service.

Effective Date of This Rule

We are publishing this as a delayed effective final rule to allow the Service and DOL time to establish the administrative systems needed to accomplish the electronic capture and transfer of data and funds between the agencies. Also, DOL needs to issue a notice of proposed rulemaking to modify its fee collection process and amount of the fee before the new H-2A process can begin. Delay is further justified to allow for clearance of the Form ETA-9079 joint application for labor certification issuance and petition approval. The Service is also making changes to the H-2A program in a new notice of proposed rulemaking included elsewhere in this issue of the **Federal Register**.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because the regulation is administrative in nature and merely transfers authority to make certain determinations to DOL. Moreover, it does not expand the existing process requirements. Finally, the rule does not involve an increase in fees.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 251 of the Small Business Regulatory Enforcement Act of 1996. 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100 million or more; a

major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under section 3(f) of Executive Order 12866, Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

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

Executive Order 12988

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988: Civil Justice Reform.

Paperwork Reduction Act

The information collection requirement addressed in this rule (Form I-129) has been previously approved for use by the Office of Management and Budget (OMB). The OMB control number for this collection is contained in 8 CFR 299.5, Display of control numbers.

Instead of using Form I-129, H-2A petitioners who seek the services of foreign workers must complete Department of Labor Form ETA-9079, Application for Temporary Agricultural Labor Certification and H-2A Petition. The Form ETA-9079 will be submitted by the Department of Labor for OMB approval in accordance with the Paperwork Reduction Act. The effective date of this rule will be adjusted if necessary to make sure that it does not go into effect until that process has been completed.

List of Subjects**8 CFR Part 103**

Administrative practice and procedure, Authority delegations (Government agencies).

8 CFR Part 214

Administrative practice and procedure, Aliens, Employment, Reporting and recordkeeping requirements.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 103—POWERS AND DUTIES OF SERVICE OFFICERS; AVAILABILITY OF SERVICE RECORDS

1. The authority citation for part 103 continues to read as follows:

Authority: 5 U.S.C. 552, 552(a); 8 U.S.C. 1101, 1103, 1201, 1252 note, 1252b, 1304, 1356; 31 U.S.C. 9701; E.O. 12356, 47 FR 14874, 15557, 3 CFR 1982 Comp., p. 166; 8 CFR part 2.

2. Section 103.1 is amended by:

- a. Revising paragraph (f)(3)(iii)(J); and
- b. Revising paragraph (f)(3)(iii)(W), to read as follows:

§ 103.1 Delegation of authority.

* * * * *

- (f) * * *
- (3) * * *
- (iii) * * *

(J) Petitions for temporary workers or trainees and fiancées or fiancés of U.S. citizens under § 214.2 and § 214.6 of this chapter, except petitions for temporary agricultural workers (H-2As), which are delegated to the Secretary of Labor.

* * * * *

(W) Revoking approval of certain petitions, as provided in § 214.2 and § 214.6 of this chapter, except petitions for temporary agricultural workers (H-2As), which are delegated to the Secretary of Labor.

* * * * *

3. Section 103.7(b)(1) is amended by adding the entry for "Form ETA-9079" immediately following "Form EOIR-42", to read as follows:

§ 103.7 Fees.

* * * * *

- (b) * * * (1) * * *

* * * * *

Form ETA-9079. The fee for filing for a labor certification is designated in 20 CFR 655.100. The fee for filing the Service's petition portion of Form ETA-9079, to classify an agricultural worker as an H-2A nonimmigrant, is \$110. The total fee will be the sum of DOL labor certification fee and the

Service's fee. There is no additional fee if supplemental Form(s) ETA-9079W is filed with Form ETA-9079. A fee of \$120 is required to file supplemental Form ETA-9079M (the equivalent to Form I-824).

* * * * *

PART 214—NONIMMIGRANT CLASSES

4. The authority citation for part 214 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

5. Section 214.1 is amended by:

- a. Removing the reference to "H-2A," from the first sentence in paragraph (c)(1); and by
- b. Adding a new sentence immediately after the first sentence in paragraph (c)(1) to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

- (c) * * *
- (1) * * * An employer seeking extension of services for an H-2A must petition on Form ETA-9079 and ETA-9079W and file with the Department of Labor. * * *

* * * * *

6. Section 214.2 is amended by:

- a. Revising paragraphs (h)(2)(i)(A), (B), (D), and (E);
- b. Revising paragraphs (h)(2)(iii), (iv), and (v);
- c. Revising paragraphs (h)(5)(i)(A), (B), (C), and (D);
- d. Revising paragraph (h)(5)(ii);
- e. Revising paragraph (h)(5)(iv)(B);
- f. Revising paragraph (h)(5)(v);
- g. Revising paragraph (h)(5)(ix);
- h. Adding paragraph (h)(9)(i)(C);
- i. Revising paragraph (h)(9)(ii)(C);
- j. Revising paragraphs (h)(10)(ii) and (iii);
- k. Revising paragraph (h)(11)(i);
- l. Revising paragraph (h)(11)(ii);
- m. Revising paragraph (h)(11)(iii)(A) introductory text and paragraph (h)(11)(iii)(B);
- n. Revising paragraph (h)(12)(i);
- o. Revising paragraph (h)(13)(i)(A);
- p. Revising paragraph (h)(14);
- q. Revising paragraph (h)(16)(ii); and

by

r. Revising paragraph (h)(18), to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

- (h) * * *
- (2) * * *
- (i) * * *

(A) *General.* Except as provided in this section, even in emergency situations, a United States employer

seeking to classify an alien as an H-1B, H-2B, or H-3 temporary employee must file a petition on Form I-129, Petition for Nonimmigrant Worker, with the service center which has jurisdiction in the area where the alien will perform services or receive training. A United States employer seeking to classify an alien as an H-2A worker must file a petition on Department of Labor (DOL) Form ETA-9079, Application for Temporary Agricultural Labor Certification and H-2A Petition, only with the DOL Regional Administrator having jurisdiction in the area where the alien will first perform services (see 20 CFR 655, Subpart B). All petitions for temporary workers, except petitions for temporary agricultural workers (H-2As), in Guam and the Virgin Islands, and petitions involving special filing situations as determined by Service Headquarters, must be filed with the local Service office or a designated Service office. Petitions for temporary agricultural workers (H-2A) in Guam and the Virgin Islands must be filed with the DOL Regional Administrator having jurisdiction. The petitioner may submit a legible photocopy of a document in support of the petition in lieu of the original document. However, the original document must be submitted if requested by the Service.

(B) *Service or training in more than one location.* A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with the Service office that has jurisdiction over petitions in the area where the petitioner is located, or in the case of H-2As, it must be filed with the DOL Regional Administrator having jurisdiction over the location where services will be performed first. The address that the petitioner specifies as its location on the petition must be where the petitioner is located for purposes of this paragraph.

* * * * *

(D) *Change of employers.* (1) If the alien is in the United States and seeks to change employers, the prospective new employer (except in the case of H-2As) must file a petition on Form I-129, with the fee required in § 103.7(b)(1) of this chapter, requesting classification and extension of the alien's stay in the United States. If the new petition is approved, the extension of stay may be granted for the validity of the approved petition. The validity of the petition and the alien's extension of stay must conform to the limits on the alien's temporary stay that are prescribed in paragraph (h)(13) of this section. The

alien is not authorized to begin the employment with the new petitioner until the petition is approved.

(2) [Reserved]

(3) An H-1A nonimmigrant alien may not change employers.

(E) *Amended or new petition.* The petitioner must file an amended or new petition, with fee, with the Service Center or, in the case of H-2A workers, with the DOL Regional Administrator where the original petition was filed, to reflect any material changes in the terms and conditions of employment or training or the beneficiary's eligibility as specified in the original approved petition. An amended or new H-1A, H-1B, or H-2B petition must be accompanied by a current or new DOL determination. An H-2A petition must be filed with a valid labor certification or an application for the certification. In the case of an H-1B petition, this requirement includes a new labor condition application.

* * * * *

(iii) *Named beneficiaries.*

Nonagricultural petitions must include the names of beneficiaries and other required information at the time of filing. Under the H-2B classification, exceptions may be granted in emergency situations involving multiple beneficiaries at the discretion of the Service Center Director, and in special filing situations as determined by the Service's Headquarters. If all of the beneficiaries covered by an H-2B labor certification have not been identified at the time a petition is filed, multiple petitions naming subsequent beneficiaries may be filed at different times with a copy of the same labor certification. Each petition must reference all previously filed petitions for that labor certification. An H-2A petition may contain both named and unnamed beneficiaries and must agree in total number of positions with the labor certification request. The H-2A petition does not need to agree in total number when seeking an extension of stay for H-2A beneficiaries in the United States.

(iv) *Substitution of beneficiaries.* Beneficiaries may be substituted in H-2B petitions that are approved for a group, or H-2B petitions that are approved for unnamed beneficiaries, or approved H-2B petitions where the job offered to the alien(s) does not require any education, training, and/or experience. To request a substitution, the petitioner must, by letter and a copy of the petition approval notice, notify the consular office where the alien will apply for a visa or the port-of-entry where the alien will apply for

admission. Where evidence of the qualifications of beneficiaries is required in petitions for unnamed beneficiaries, the petitioner must also submit such evidence to the consular office or port-of-entry prior to issuance of a visa or admission. (See paragraph (h)(5) of this section for substitution of H-2A beneficiaries.)

(v) *H-2A petitions.* Special criteria for admission, extension, maintenance of status, and substitution of beneficiaries apply to H-2A petitions and are specified in paragraph (h)(5) of this section. The other provisions of § 214.2(h) apply to H-2A only to the extent that they do not conflict with the special agricultural provisions in paragraph (h)(5) of this section.

* * * * *

(5) * * *

(i) * * *

(A) *General.* An H-2A petition must be filed on Form ETA-9079 with the DOL Regional Administrator having jurisdiction over the area of employment and be accompanied by the filing fee specified in § 103.7(b)(1) of this chapter. An H-2A petition may be filed by either the employer listed on the certification application, the employer's agent, or the association of United States agricultural producers named as a joint employer on the certification application.

(B) *Multiple beneficiaries.* The total number of beneficiaries of a petition must equal the number of workers indicated on the application for labor certification, except when the petitioner is seeking an extension of stay for H-2A beneficiaries in the United States. A petition can include more than one beneficiary even when all beneficiaries will not obtain a visa at the same consulate or are not required to have a visa and will not apply for admission at the same port-of-entry. A petition may also include beneficiaries seeking change of status or extension of stay.

(C) *Identification of beneficiaries.* The sole beneficiary of an H-2A petition must be named in the petition. All beneficiaries located in the United States must be named in the petition. The total number of unnamed beneficiaries must be shown on the petition. Names of beneficiaries located outside of the United States may be included on the petition, but are not required to be identified until application for visa issuance from the Department of State.

(D) *Evidence.* An H-2A petitioner must show that the proposed employment qualifies as a basis for H-2A status, and that any named beneficiary satisfies any qualifications

for that employment. A petition will be automatically denied if filed without the initial evidence required in paragraph (h)(5)(v) of this section for each named beneficiary.

* * * * *

(ii) *Effect of the labor certification process.* The temporary agricultural labor certification process determines whether employment is for a temporary or seasonal agricultural worker, whether it is open to U.S. workers, if qualified U.S. workers are available, the adverse impact of employment of a qualified alien, and whether employment conditions, including housing, meet applicable requirements. In petition proceedings, a petitioner must establish that the employment and beneficiary meet the requirements of paragraph (h)(5) of this section.

* * * * *

(iv) * * *

(B) *Effect of permanent labor certification application.* Employment will be found not to be temporary or seasonal where an application for permanent labor certification has been filed for the same alien, or for another alien to be employed in the same position, by the same employer or by its parent, subsidiary or affiliate. This can be overcome only by the petitioner's demonstration that there will be at least a 6 month interruption of employment in the United States after H-2A status ends.

(v) The beneficiary's qualifications—

(A) *Eligibility requirements.* An H-2A petitioner must establish that any named beneficiary met the stated minimum requirements and was fully able to perform the stated duties when the application for certification was filed. It must be established at the time of application for an H-2A visa, or for admission if a visa is not required, that any unnamed beneficiary either met these requirements when the certification was applied for or passed any certified aptitude test at any time prior to visa issuance, or prior to admission if a visa is not required.

(B) *Initial evidence of employment/job training.* A petition must be filed with evidence that at the time of filing the named beneficiary met the certification's minimum employment and job training requirements. Initial evidence must be in the form of the past employer's detailed statement or actual employment documents, such as company payroll or tax records. Alternately, a petitioner must show that such evidence cannot be obtained, and submit affidavits from people who worked with the beneficiary that demonstrate the claimed employment.

(C) *Initial evidence of education and other training.* A petition must be filed with evidence that at the time of filing each named beneficiary met the certification's minimum post-secondary education and other formal training requirements. Initial evidence must be in the form of documents, issued by the relevant institution or organization, that show periods of attendance, majors, and degrees or certificates accorded.

* * * * *

(ix) *Substitution of beneficiaries after admission.* An H-2A petition may be filed with the DOL Regional Administrator to replace H-2A workers whose employment was terminated early. The petition must be filed with a copy of the labor certification, a copy of the approval notice covering the workers for whom replacements are sought, and other evidence required by paragraph (h)(5)(i)(D) of this section. It must also be filed with a statement giving each terminated worker's name, date and country of birth, termination date, and evidence the worker has departed the United States. A petition for a replacement may not be approved when the requirements of paragraph (h)(5)(vi) of this section have not been met. A petition for replacements does not constitute the notice to the Service that an H-2A worker has absconded or has ended authorized employment more than 5 days before the relating certification expires.

* * * * *

(9) * * *

(i) * * *

(C) For H-2As, the Department of Labor will issue a notice of petition approval as part of its notification of labor certification approval. The notice will conform with paragraph (h)(9)(i)(A) of this section.

(ii) * * *

(C) If the period of services or training requested by the petitioner exceeds the limit specified in paragraph (h)(5)(vii), or (h)(9)(iii) of this section, the petition will be approved only up to the limit specified in that paragraph.

* * * * *

(10) * * *

(ii) *Notice of intent to deny.* When an adverse decision is proposed on the basis of derogatory information of which the petitioner is unaware, the director, or the DOL Regional Administrator in the case of H-2A petitions, must notify the petitioner of the intent to deny the petition and the basis for the denial. The petitioner may inspect and rebut the evidence and will be granted a period of 30 days from the date of the notice (7 days for H-2A petitions) in which to do

so. All relevant rebuttal material will be considered in making a final decision.

(iii) *Notice of denial.* The petitioner must be notified of the reasons for the petition denial, and of the right to appeal the denial of the petition under 8 CFR part 103, and in the case of H-2A petitions, under the rules established by DOL in 20 CFR 655, subpart B. There is no appeal from a decision to deny a change of status or an extension of stay to the alien.

(11) * * *

(i) *General.*

(A) The petitioner must immediately notify the Service (or the DOL Regional Administrator for H-2As) of any changes in the terms and conditions of employment of a beneficiary that may affect eligibility under section 101(a)(15)(H) of the Act and paragraph (h) of this section. An amended petition on Form I-129, or on Form ETA-9079 in the case of H-2A workers, must be filed when the petitioner continues to employ the beneficiary. If the petitioner no longer employs the beneficiary, the petitioner must send a letter notifying the director or the Regional Administrator who approved the petition.

(B) The director or the Regional Administrator who approved the petition may revoke a petition at any time, even after the expiration of the petition.

(ii) *Automatic revocation.* The approval of any petition is automatically revoked if the petitioner goes out of business or files a written withdrawal of the petition. No notice to the petitioner is required.

(iii) * * *

(A) *Grounds for revocation.* The director (or the DOL Regional Administrator in the case of H-2A workers) must send to the petitioner a notice of intent to revoke the petition, or relevant part of the petition, if he or she finds that:

* * * * *

(B) *Notice and decision.* The notice of intent to revoke must contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. The petitioner may submit evidence in rebuttal within 30 days of receipt of the notice. The director or the DOL Regional Administrator must consider all relevant evidence presented in deciding whether to revoke the petition in whole or in part. If the petition is revoked in part, the remainder of the petition must remain approved and a revised approval notice must be sent to the petitioner with the revocation notice.

(12) * * *

(i) *Denial.* A petition (other than an H-2A petition) denied in whole or in part by the Service may be appealed under 8 CFR part 103. In the case of an H-2A petition, the appeal must be filed with DOL concurrently with the appeal of the denial of a labor certification (or if the certification was not denied, within 30 days) under the rules established by DOL in 20 CFR 655 subpart B.

* * * * *

(13) * * *

(i) * * *

(A) A beneficiary may be admitted to the United States for the validity period of the petition, plus a period of up to 10 days before the validity period begins and 10 days after the validity period ends. The beneficiary may not work except during the validity period of the petition. (See paragraph (h)(5)(viii) of this section for admission and limits on admission for H-2As.)

* * * * *

(14) *Extension of petition validity.* Except with respect to H-2A petitions, the petitioner must file a request for a petition extension on Form I-129 to extend the validity of the original petition under section 101(a)(15)(H) of the Act. Supporting evidence is not required unless requested by the director. A request for a petition extension may be filed only if the validity of the original petition has not expired. (See paragraph (h)(5)(x) of this section for extension requirements for H-2A petitions.)

* * * * *

(16) * * *

(ii) *H-2A, H-2B, and H-3 classification.* The approval of a permanent labor certification, or the filing of a preference petition for an alien currently employed by or in a training position with the same petitioner, may be a reason, by itself, to deny a petition extension request and the alien's extension of stay.

* * * * *

(18) *Use of approval notice, Form I-797 and DOL notification.* The Service must notify the petitioner on Form I-797 whenever a petition, an extension of a petition, or an alien's extension of stay is approved under the H classification (except with respect to H-2A). DOL must notify the petitioner as part of its certification notice whenever an H-2A petition or an extension of a petition is approved by a Regional Administrator. The beneficiary of an H petition who does not require a nonimmigrant visa may present a copy of the approval notice at a port-of-entry to facilitate entry into the United States. A beneficiary who is required to present a

visa for admission and whose visa will have expired before the date of his or her intended return may use a copy of Form I-797 or DOL notification to apply for a new or revalidated visa during the validity period of the petition. The copy of Form I-797 or DOL notification must

be retained by the beneficiary and presented during the validity period of the petition when re-entering the United States to resume the same employment with the same petitioner.

* * * * *

Dated: July 5, 2000.

Janet Reno,

Attorney General.

[FR Doc. 00-17598 Filed 7-12-00; 8:45 am]

BILLING CODE 4410-10-P

DEPARTMENT OF JUSTICE**Immigration and Naturalization Service****8 CFR Parts 103, 214, 248, and 264**

[INS No. 2059-00]

RIN 1115-AF29

Procedures For Processing Temporary Agricultural Worker (H-2A) Petitions by the Secretary of Labor**AGENCY:** Immigration and Naturalization Service, Justice.**ACTION:** Proposed rule.

SUMMARY: This proposed rule will amend the Immigration and Naturalization Service (Service) regulations regarding the temporary agricultural worker (H-2A) program. The proposed rule requires alien workers to sign a petition request for change of status or extension of stay; provides that all petition requests including extension of stay and change of status petitions must be filed with the Department of Labor (DOL); and provides that the current Service petition fee will be collected by DOL as a part of a combined fee. These changes will further streamline the H-2A petitioning process. (See the final rule published elsewhere in this issue of the **FEDERAL REGISTER** in which the Attorney General has delegated the authority to adjudicate petitions for H-2A workers to the Secretary of Labor.)

DATES: Written comments must be submitted on or before August 14, 2000.

ADDRESSES: Please submit written comments, in triplicate, to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street, NW, Room 5307, Washington, DC 20536. To ensure proper handling, please reference INS No. 2059-00 on your correspondence. Comments are available for public inspection at the above address by calling (202) 514-3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Bert Rizzo, Supervisory Immigration Adjudications Officer, Programs Division, Immigration and Naturalization Service, 425 I Street, NW, Room 4213, Washington, DC 20536, telephone (202) 307-8996.

SUPPLEMENTARY INFORMATION:**What is an H-2A petition?**

The Immigration and Nationality Act (Act) provides for an employer to seek the services of foreign workers to perform temporary or seasonal agricultural services in the United

States. These temporary agricultural workers are known as H-2A workers.

What Changes Does This Rule Make?

Under this proposed rule, the DOL would accept additional forms and fees associated with the H-2A program on the Service's behalf. The DOL would forward petitions requesting extension of stay or change of status to the Service for adjudication of those portions of the petitions. For example, the DOL would accept Service Forms I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, and Forms I-539, Application to Extend/Change Nonimmigrant Status, that are filed concurrently with the DOL's Form ETA-9079. Service Forms I-102 are sometimes filed by H-2A workers or their dependents to replace a Form I-94, Arrival-Departure Record. Forms I-539 are sometimes filed by accompanying dependents who need a change of nonimmigrant status or extension of stay to remain with the principal H-2A worker. The DOL would accept these forms and fees on the Service's behalf, and would forward them to the Service for adjudication after the ETA-9079 decision is made.

Are There Any Other Requirements Being Imposed?

Yes, the proposed regulation requires an alien worker who seeks a change of status or extension of stay as an H-2A worker to sign the application for this purpose. This requirement demonstrates the alien's assent to his or her benefit request ensuring that the alien has taken the legal responsibility for the information entered on the form concerning the alien, and that the alien is a responsible party to the request for extension of stay or change of nonimmigrant status.

What About Short Term Extensions of Employment?

Where an employer needs a short term extension of the employment period for up to 14 days, the existing procedure allows for the employer to obtain an extension of the petition authorization by filing a Form I-129. The DOL provides an automatic co-extension of the underlying labor certification if the petition is approved. The proposed procedure provides that an automatic grace period of 14 days or the length of the labor certification if issued for less than 14 days, be added to the validity date of the approved labor certification and petition if the H-2A petition is approved. No separate application or fee is required to receive this grace period. Any extension of the employer's need beyond the initially

authorized period (which includes the grace period) requires that a petition and application for labor certification be filed with the DOL along with an application to extend the alien's temporary stay. The Service requests comments on this change.

Is There Any Change in the Fee Required for the Service's Petition Portion of the H-2A Process?

No; the Service will not change the fee requirement for the petition at this time. The current fee charged for the Form I-129 will be charged as part of the combined fee for the DOL's new Form ETA-9079 (\$110 plus the DOL fee). The Service will collect no separate fee for the adjudication of changes of status or extensions of stay at this time. The Service does conduct periodic reviews of its fees in order to ensure that the cost to the Service for adjudication of benefit applications and petitions is recovered. These reviews are scheduled every 2 years. The existing fee will be reevaluated during those periodic reviews and adjusted accordingly.

Is There Any Change in the Requirement to Report Workers Who Depart Before Completing the Services Requested?

The Service has required employers to report alien workers who abscond or leave their employment more than 5 days in advance of the completion of the stated employment period. The employer must make this report within 24 hours, and in order to avoid paying a liquidated damage, must establish that the worker departed from the United States or found other authorized status. The proposed rule requires this same reporting but specifies that the report be made to the Nebraska Service Center. This Center will handle all aspects of the H-2A process for the Service. The Service requires compliance with this reporting requirement in order to provide meaningful data on violations of the H-2A employment program, and to help ensure that employers do everything possible to assist the Service in ensuring the departure of these workers from the United States.

Regulatory Flexibility Act

The Attorney General, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)), has reviewed this regulation and, by approving it, certifies that this rule will not have a significant economic impact on a substantial number of small entities because of the following factors: The regulation is administrative in nature and merely transfers authority to make certain determinations to the DOL. It does not

expand the existing process requirements. The interim rule does not involve an increase in fees. The number of Form I-129 petitions filed in the past few years has ranged from 1,400 to 4,000.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

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

Executive Order 12866

This rule is considered by the Department of Justice, Immigration and Naturalization Service, to be a "significant regulatory action" under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this regulation has been submitted to the Office of Management and Budget for review.

Executive Order 13132

This rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 12132, it is determined that this rule does not have sufficient federalism implications to warrant the preparation of a federalism summary statement.

Executive Order 12988: Civil Justice Reform

This rule meets the applicable standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects

8 CFR Part 214

Administrative practice and procedures, Aliens, Employment, Reporting and recordkeeping requirements.

8 CFR Part 248

Aliens, Reporting and recordkeeping requirements.

8 CFR Part 264

Reporting and recordkeeping requirement.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is proposed to be amended as follows:

PART 214—NONIMMIGRANT CLASSES

1. The authority citation for part 214 would continue to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1182, 1184, 1186a, 1187, 1221, 1281, 1282; 8 CFR part 2.

Section 214.1 is amended by adding a new sentence at the end of paragraph (c) (2), to read as follows:

§ 214.1 Requirements for admission, extension, and maintenance of status.

* * * * *

(c) * * *

(2) * * * A Form I-539 filed for dependents of an H-2A seeking extension(s) of stay must be filed along with the ETA-9079, and ETA-9079W, with the Department of Labor.

* * * * *

3. Section 214.2 is amended by:
a. Adding paragraph (h)(2)(i)(D)(2);
b. Revising paragraph (h)(5)(vi)(A);
c. Revising paragraphs (h)(5)(vii) and (h)(5)(x);
d. Revising paragraph (h)(9)(ii)(B);
e. Revising the parenthetical phrase at the end of paragraph (h)(14); and by
f. Revising paragraph (h)(15)(ii)(C), to read as follows:

§ 214.2 Special requirements for admission, extension, and maintenance of status.

* * * * *

(h) * * *

(2) * * *

(i) * * *

(D) * * *

(2) A prospective new employer of H-2A workers must file a petition and a request for labor certification, if needed, on Form ETA-9079, with the appropriate fee specified in § 103.7(b) (1) of this chapter. Each named beneficiary must sign an individual request for extension of stay, if extension of that individual's stay is required, on Form ETA-9079W (Named Alien Addendum), along with the

employer's application to the DOL. The Service fee submitted with the Form ETA-9079 includes processing of the petition for classification as an H-2A agricultural worker and for change(s) of nonimmigrant status to H-2A and extension(s) of stay. There is no separate direct fee for filing Form ETA-9079W (Named Alien Addendum) for change(s) of status and extension(s) of stay.

* * * * *

(5) * * *

(vi) *Petition agreements—*

(A) *Consent and liabilities.* In filing an H-2A petition, a petitioner and each employer consents to allow the Government access to the site where the labor is being performed for the purpose of determining compliance with H-2A requirements. The petitioner further agrees to notify the Nebraska Service Center, by overnight delivery service or overnight mail within 24 hours, if an H-2A worker absconds, or if the authorized employment ends more than 5 days before the relating certification document expires, and to pay liquidated damages of \$10 for each instance where the petitioner cannot demonstrate compliance with this notification requirement. The petitioner also agrees to pay liquidated damages of \$200 for each instance where the petitioner cannot demonstrate that its H-2A worker either departed the United States or obtained other authorized status during the period of admission of within 5 calendar days of early termination that is based upon the expiration date of the labor certification, whichever comes first.

* * * * *

(vii) *Validity.* An approved H-2A petition is valid through the expiration of the relating certification, plus 14 days (or the length of the labor certification if less than 14 days), for the purpose of allowing a beneficiary to seek issuance of an H-2A nonimmigrant visa, admission, change of status, or an extension of stay for the purpose of engaging in the specific certified employment.

* * * * *

(x) *Petition extensions.* All employers have received an automatic extension of an H-2A petition for 14 days (or the length of the labor certification if less than 14 days) as part of the initial approval. If the employer requests an extension beyond the initial petition validity, the employer must file a request for an H-2A petition extension with an application for an extension of a labor certification, with the DOL Regional Administrator on Form ETA-9079, including the fee specified in § 103.7(b)(1) of this chapter. For

extensions of stay for individual beneficiaries, see paragraph (h)(15) of this section.

* * * *

(9) * * *

(ii) * * *

(B) If a new H petition is approved after the date the petitioner indicates that the services or training will begin, the approved petition and approval notice will show a validity period commencing with the date of approval and ending with the date requested by the petitioner, as long as that date does not exceed either the limits specified by paragraph (h)(5)(vii), or (h)(9)(iii) of this section, or other Service policy.

* * * *

(14) * * * (See paragraph (h)(5)(x) of this section for extension requirements for H-2A petitions.)

(15) * * *

(ii) * * *

(C) *H-2A or H-2B extension of stay.*

An extension of stay for an alien in H-2A status must be requested on Form ETA-9079W (Named Alien Addendum). It must be submitted concurrently with a petition filed by the employer on the alien's behalf with the DOL on Form ETA-9079. The DOL will forward the extension requests to the Nebraska Service Center for adjudication. An extension of stay for the beneficiary of an H-2A petition is included in the Form I-129 petition extension request. An extension of stay for the beneficiary of an H-2A or H-2B petition may be authorized for the validity of the labor certification and approved petition or for a period of up to 1 year, except as provided for in paragraph (h)(5)(x) of this section. The alien's total period of stay as an H-2A or H-2B worker may

not exceed 3 years, except in the Virgin Islands where the alien's total period of stay may not exceed 45 days.

* * * *

PART 248—CHANGE OF NONIMMIGRANT CLASSIFICATION

4. The authority citation for part 248 continues to read as follows:

Authority: 8 U.S.C. 1101, 1103, 1184, 1187, 1258; 8 CFR part 2.

5. Section 248.3 is amended by:

- a. Removing the reference to "H-2A," from the first sentence in paragraph (a);
- b. Revising the first sentence of paragraph (b);
- c. Adding a new sentence immediately after the first sentence of paragraph (b);
- d. Redesignating paragraph (c) as paragraph (d); and by
- e. Adding a new paragraph (c), to read as follows:

§ 248.3 Application.

* * * *

(b) * * * Any nonimmigrant, except an H-2A, who desires a change of status to any other nonimmigrant classification, other than those listed in paragraph (a) of this section, or to E-1 or E-2 classification as the spouse or child of a principal E-1 or E-2, must apply for a change of status on Form I-539. A Form I-539 application filed by a dependent of an H-2A must be submitted along with the fee specified in § 103.7(b)(1) of this chapter, to the Department of Labor if filed at the same time as an ETA-9079, or submitted to the Nebraska Service Center, if filed at any other time. * * *

(c) *Change of status on Form ETA-9079W.* Any nonimmigrant seeking a

change of status to H-2A must apply for that change on Form ETA-9079W. The application must be filed with the Form ETA-9079 filed by the prospective employer of the nonimmigrant. All Forms ETA 9079 and ETA 9079W are submitted to the Department of Labor, along with the fee specified in § 103.7(b)(1) of this chapter.

* * * *

PART 264—REGISTRATION AND FINGERPRINTING OF ALIENS IN THE UNITED STATES

6. The authority citation for part 264 continues to read as follows:

Authority: 8 U.S.C. 1103, 1201, 1201a, 1301-1305.

7. Section 264.6 is amended by adding a sentence at the end of paragraph (a) to read as follows:

§ 264.6 Application for an initial or replacement Form I-94, Nonimmigrant Arrival-Departure Document, or Form I-95, Crewmen's Landing Permit.

(a) * * * An application filed by an H-2A or the dependent of an H-2A must be submitted along with the fee specified in § 103.7(b)(1) of this chapter, to the Department of Labor, if filed at the same time as an ETA-9079, or submitted to the Nebraska Service Center, if filed at any other time.

* * * *

Dated: June 9, 2000.

Doris Meissner,

Commissioner, Immigration and Naturalization Service.

[FR Doc. 00-17640 Filed 7-12-00; 8:45 am]

BILLING CODE 4410-10-M

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 655**

RIN 1205-AB23

**Labor Certification and Petition
Process for the Temporary
Employment of Nonimmigrant Aliens
in Agriculture in the United States;
Delegation of Authority to Adjudicate
Petitions**AGENCY: Employment and Training
Administration, Labor.

ACTION: Final rule.

SUMMARY: This rule amends the Employment and Training Administration (ETA) regulations to implement the delegation of authority to adjudicate petitions for temporary nonimmigrant agricultural workers (H-2A's) from the Department of Justice/Immigration and Naturalization Service (INS) to the United States Department of Labor (DOL or Department). Among the implementation measures is a new Form ETA 9079, *Application for Temporary Agricultural Labor Certification and H-2A Petition*, which consolidates two current forms, ETA 750 (Application for Alien Employment Certification) and INS I-129 (Petition for Nonimmigrant Workers) for use in the H-2A program. This form is set forth as an appendix to a proposed rule published simultaneously with this final rule to implement a new fee schedule. The proposed rule requests comments on the form in accordance with the Paperwork Reduction Act. This rulemaking further implements the delegation of authority, from INS to DOL, to hear appeals on determinations and to revoke petition approvals. The INS delegation is also published simultaneously in the **Federal Register**, together with a proposed rule regarding collection of the INS fee by DOL. The rule does not affect INS authority to make determinations at the port-of-entry of an alien's admissibility to the United States, to make determinations of an alien's eligibility for change of nonimmigrant status, or to make determinations of an alien's eligibility for extension of stay. This rule streamlines existing H-2A processes to make it more efficient for petitioners seeking the admission of temporary agricultural workers without diminishing the workplace rights of U.S. workers or foreign workers admitted under the program.

DATES: *Effective Date:* This final rule is effective November 13, 2000. Affected

parties do not have to comply with the information and recordkeeping requirements in §§ 655.101(a)(1), 655.101(a)(2) and 655.101(h), until the Department publishes in the **Federal Register** the control numbers assigned by the Office of Management and Budget (OMB) to these information collection requirements. Publication of the control numbers notifies the public that OMB has approved these information collection requirements under the Paperwork Reduction Act of 1995.

FOR FURTHER INFORMATION CONTACT: Denis M. Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue, NW., Room N-4456, Washington, DC 20210. Telephone: (202) 219-4369 (this is not a toll-free number).

SUPPLEMENTARY INFORMATION:**Background and Explanation of
Changes**

ETA published a proposed rule on October 2, 1998, which included a proposal to delegate from INS to DOL authority to adjudicate certain temporary agricultural worker (H-2A) petitions. 63 FR 53244. As proposed, INS would delegate authority to ETA to adjudicate H-2A petitions for alien beneficiaries located outside of the United States. Under that proposal, INS would have continued to adjudicate petitions in those relatively few instances when the alien beneficiaries are located within the United States. The INS published a proposed rule to delegate this authority to DOL on December 7, 1998 (63 FR 6743).

INS is concurrently publishing a final rule implementing its delegation of petition and revocation authority to ETA. The INS rule addresses changes in its regulations necessary to effectuate this delegation and guide ETA in the exercise of its delegated authority to grant and revoke petitions. This final rule implements the delegation from INS. The process is being modified to require all H-2A petitions to be filed with ETA, hereafter the sole recipient of H-2A petitions. Requests for change of status and extension of stay for individual aliens already present in the United States made on the Form ETA 9079 at the time the H-2A petition is filed will be forwarded to INS by ETA so that INS can adjudicate the requests for extension of stay or change of status.

H-2A petition revocation authority also is being delegated to ETA as a natural extension of the adjudication process. INS currently confers that

authority upon the person who was responsible for the initial determination. Granting to ETA INS revocation authority allows ETA to reexamine its original decision based on evidence sufficient to consider petition revocation using INS criteria found in 8 CFR 214.2.

Administrative appeals of petition denials and determinations to revoke petitions are also being delegated to DOL. Appeals of determinations made by ETA on petitions and revocations of H-2A petitions based on existing INS criteria will be decided by the Department's Office of Administrative Law Judges (OALJ). The OALJ is separate from the agency (ETA) making determinations on temporary agricultural labor certification applications, petitions, and revocation of petitions. The OALJ has the necessary separation of function and authority to allow for independent, impartial determinations from ETA. This administrative review process is similar to INS' separation of field office determinations and its Administrative Appeals Unit (AAU).

To implement the delegation of authority and to further streamline the H-2A process, ETA is developing a form that will allow the employer to submit a consolidated application that includes all the information concerning the application for certification and the petition. This new Form ETA 9079 will replace the current Form ETA 750 (Application for Alien Employment Certification), and Form I-129 (Petition for a Nonimmigrant Worker) for those employers seeking temporary agricultural workers under the H-2A program. This consolidated form will eliminate the need to submit multiple forms to multiple agencies and greatly reduce the paperwork burden associated with the H-2A program. Form ETA 9079 is incorporated as an appendix to a proposed rule separately published in the **Federal Register** as discussed below, and is available for public comment in accordance with the Paperwork Reduction Act.

The delegation of authority to the Department from INS also includes the authority to process applications from employers involving changes in the Consulate designated on a petition, to process requests for changes in the designation of the port of entry for aliens entering without visas, and requests for duplicate notices after a decision notice has been sent. Such applications must be filed with the Department on the ETA 9079M, Visa Issuance Change Addendum. The ETA 9079M is functionally equivalent to the I-824 that has been used by INS to

process changes in the Consulates and ports of entry designated on approved petitions.

ETA also publishes today a notice of proposed rulemaking to address issues concerning fees associated with both H-2A labor certification and H-2A petitions.

The changes made by this rule are a logical outgrowth of ETA's October 2, 1998, proposed rule (63 FR at 53244 and 53248), as well as INS' December 7, 1998, proposed rule (63 FR 67431). In any event, the changes from the ETA notice of proposed rulemaking are rules of agency procedure exempt from the requirements of the Administrative Procedure Act requiring notice of proposed rulemaking. See U.S.C. 553(b)(A). These changes merely affect the administration of the H-2A program without making material changes to or modifying any substantive requirements of the petition process.

The effect of this and the INS rule will be to greatly simplify the process H-2A users must use when seeking H-2A certification and petition adjudication. Instead of seeking a determination from two agencies on virtually the identical factual criteria, only one agency will be involved in the determinations. Instead of submitting two forms with redundant information, only one will be required: a combined H-2A certification application and H-2A petition. Finally, the time necessary to make determinations on labor certification and petitions will be greatly reduced, potentially eliminating weeks from the process.

Discussion of Comments

ETA received thirty-six comments on the proposed rule. Seventeen comments addressed the proposed delegation of petition authority from INS to ETA. The comments were from agricultural employer associations, farmworker advocacy organizations, State agencies, the American Immigration Lawyers Association (AILA), two private attorneys and one ETA regional office. Most commenters were generally supportive of the delegation. Some commenters raised concerns about the revised petition process and questioned whether or not the process, in fact, would result in less paperwork and a more efficient certification and petition process. AILA was opposed to the delegation. The specific comments are addressed below.

1. Comments on the Delegation of H-2A Petition Determination From INS to ETA

Four agricultural employer organizations commented on the proposal to delegate adjudication of the

H-2A petition from INS to ETA. The Florida Fruit and Vegetable Association (FFVA) stated that it believed the delegation would "greatly expedite the grower's ability to receive the H-2A workers in a timely manner." The National Council of Agricultural Employers (NCAE) strongly supported the intent of the delegation but emphasized the need for combining the H-2A labor certification and petition into a single document and indicated that DOL and INS should issue a proposal in the **Federal Register** setting forth the precise regulation and procedures for public comment. In a similar vein the American Farm Bureau Federation urged the Department to withdraw the delegation proposal until the Department and INS have worked out the procedures and developed the forms so that an employer can file one form which will serve as a certification application and petition, ensuring that the certification also constitutes the visa approval decision. The New England Apple Council, a major user of the H-2A program, stated that the proposed delegation could make good common sense but also indicated that a more detailed proposal should be published so that it could comment intelligently, and emphasized the need for combining the H-2A labor certification and H-2A petition. This rule and the proposed rule published in this edition of the **Federal Register** have incorporated a combined form concept.

The Farmworker Justice Fund (FJF) opposed the delegation on the basis that the Department should institute a wide-ranging review and comprehensive approach to improving the administration of the H-2A program. FJF further stated that the delegation should be accomplished only after the Department addresses worker needs identified by FJF and the informational and data collection failings identified by the General Accounting Office.

Several State agencies commented on the delegation. Four States—Texas, Arizona, New Jersey, and Nevada—asserted that additional funding was needed for the regional offices performing the new function. A transfer of funds from INS to ETA to perform the new petition functions will address this concern. Three States—Washington, Idaho, and Kentucky—supported the delegation and stated it would result in reduced time needed for employers to obtain foreign workers. One State—Ohio—"guardedly" agreed with the change but expressed reservation because the proposed delegation may result in more work for State agencies, which are underfunded. AILA and two private attorneys expressed the greatest

opposition to the proposal. They questioned the Department's capability to adjudicate visa petitions for a variety of reasons.

2. Combined Form

As indicated above the development of a combined labor certification and H-2A petition form discussed in the October 1998, Notice of Proposed Rulemaking (63 FR at 53246) were extremely important to some of the commenters. They were concerned in view of delays that employers have experienced in obtaining labor certifications, that sequential processing of two forms by DOL would lead to lengthening the time to complete the process necessary to obtain nonimmigrant H-2A workers. Extensive discussions have taken place between ETA and INS on the development of a combined H-2A labor certification and petition, which would enable the DOL to make a determination on both the labor certification and H-2A petition based on submission of a properly completed form and supporting documentation. Since most petitions are filed on behalf of unnamed aliens and most job opportunities involving named aliens require little or no skill, it would be an extremely rare occurrence that a certification would be issued and the H-2A petition would be denied. Further, it should also be recognized, as pointed out in the NPRM published today concerning fees for the H-2A labor certification and petition, that historically the denial rate for labor certifications has been low. The new Form ETA 9079, Application for Temporary Agricultural Labor Certification and H-2A Petition, will replace Form ETA 750 and INS Form I-129 for all H-2A filings. Whenever the employer is petitioning for named aliens the 9079W, an addendum to Form ETA 9079, must be completed and the Department will determine whether the aliens qualify for the proposed employment. Further, as explained in the proposed rule, requests to change nonimmigrant status or for extension of stay for named beneficiaries will be made on the form 9079W and will be sent to INS, which will continue to make determinations about the named beneficiaries' eligibility to change nonimmigrant status or eligibility for extension of stay. The new Form ETA 9079 is incorporated as an appendix to the proposed rule being published today and is available for public comment in accordance with the Paperwork Reduction Act.

3. Countervailing Evidence

As pointed out in the concurrently published INS final rule, INS' role in H-2A petition processing is limited. Most H-2A petitions are filed before the petitioner has identified or named the H-2A workers (beneficiaries) to be admitted. INS reviews the certification determinations made by ETA, and determines that the petitioner is making a valid job offer and that any INS assessed liquidated damages have been paid. Liquidated damages are assessed to an employer who fails to notify INS of the departure of H-2A workers from the United States or when the employer cannot establish that H-2A workers who have left employment have obtained other legal status. See 8 CFR 214.2(h)(5)(vi). The overwhelming majority of applications for temporary agricultural labor certifications and H-2A petitions are for unnamed aliens. In the rare cases with named beneficiaries, INS reviews the ability of the beneficiary to perform the needed temporary services. Also in rare cases, INS reviews countervailing evidence on the availability of U.S. workers to perform needed services under 8 U.S.C. 1101(a)(15)(H)(ii).

Three commenters indicated that the provision in the INS regulations which permits the filing of a petition with countervailing evidence with INS should be retained. In delegating adjudication of petition authority to the Secretary, INS has determined that a separate review concerning the availability of U.S. workers is unwarranted. ETA will make the labor certification and petition determination concurrently and administrative-judicial review of these determinations will be available through the existing appeal process before the Department of Labor Office of Administrative Law Judges. An additional review by INS would be redundant.

DOL and INS are establishing a mechanism to notify ETA of any unpaid liquidated damage claims, in order for ETA to consider this factor in its adjudication of the petition.

4. ETA Capabilities

Several commenters opposed the proposal due to concerns about ETA's ability to perform its current function in a timely manner. The INS and ETA believe that the new, consolidated process is not complex. Only rarely will ETA be required to make additional findings or consider additional evidence. The additional determinations to be made by ETA will encompass whether INS has notified ETA of a failure to pay liquidated damages. If a

named beneficiary(ies) is included with the petition, ETA will determine whether the worker has the qualifications to perform the stated services. Knowledge of all areas of immigration law alluded to by AILA and some individual attorneys is not necessary to address the limited issues normally arising in the adjudication of H-2A petitions. Further, DOL and INS will be providing training to ETA personnel on the issues considered by INS under its current role in the H-2A process.

Finally, the processing time for the overwhelming majority of cases should be reduced substantially. Currently, three to six days are normally consumed by mail notification from ETA to the employer and the employer's subsequent H-2A petition filing with INS. INS then takes two to three weeks to process the petition. The additional work presented by the combined form and adjudication process should not adversely impact the H-2A process for ETA. The new process should result in a reduction from the current process of at least two to three weeks in the time taken from initial filing with ETA to completion of the certification and petition process. This is a very substantial time saving in a process that now commonly commences only 45 days before the "date of need." ETA is continuing to explore additional means for streamlining the H-2A nonagricultural labor certification program.

Some commenters expressed concern about the resources available to DOL to take on the additional responsibilities associated with processing visa petitions. The Department as explained in the NPRM concerning the fee issues published concurrently with this rule, will be collecting the petition fee on behalf of INS and will be reimbursed by INS for the costs it incurs in processing H-2A petitions.

5. Changes in Consulate or Port of Entry and Requests for Duplicate Approval Notices

In the interests of further simplifying the petition process INS has also delegated to ETA the responsibility of processing the small number of requests involving changes in the Consulate or port of entry (for aliens entering without visas) designated on the petition when it was approved, and to respond to requests for duplicates of approval notices. To make such requests the employer shall file the ETA Form 9079M, Visa Issuance Change Addendum, with the \$120.00 fee currently required by INS to process an I-824, Application for Action on an

Approved Application or Petition. The ETA 9079M is functionally equivalent to the I-824. The Department would, as explained in the above mentioned NPRM, collect the fee on behalf of INS and be reimbursed by INS for its costs in processing requests to make changes in the Consulates or port of entry that were designated on the approved H-2A petition.

6. Notification of State Department

Two attorneys raised concerns about notifying the Department of State (DOS) about approvals of H-2A petitions. This issue is fully addressed in the final rule transferring authority to adjudicate visa petitions concurrently published in the **Federal Register** by INS. As explained in INS' final rule, currently, the INS mails the duplicate copy of the H-2A petition to the consulate selected by the petitioner. Occasionally, when warranted, the INS notifies the consulate by telephone or telefax. The three agencies have now agreed that routine telefax notification from DOL to DOS will assist in streamlining the H-2A process and are finalizing the internal details to ensure that such notifications are secure. Telefax notification should result in an additional 2 to 3 days reduction in obtaining workers.

7. Certification 30 Days Before Date of Need

The regulations are amended to conform to Public Law 106-78, sec. 748, effective October 22, 1999, which amended section 218(c)(3)(A) of the Immigration and Nationality Act (Act) (8 U.S.C. 1188(c)(3)(A)) to enlarge the time that certifications must be issued before the employer's date of need from 20 days to 30 days. The Department points out that its regulation at 20 CFR 656.403, effective, July 29, 1999, requires that the employer's housing be in full compliance with the requirements of the housing standards at least 20 days before the date the housing is to be occupied, which in cases involving foreign agricultural workers is the employer's date of need. (See 64 FR 34958). The Act, however, also requires that employers furnish housing that meets the applicable standards before certification can be issued. (See section 218(c)(4) of the Act, 8 U.S.C. 1188(c)(4).) The amendment to the Act that certifications be issued 20 days before the employer's date of need does not negate the statutory requirement regarding housing in the Act. Consequently, certifications cannot be issued if housing does not meet applicable standards. ETA provided this guidance to its regional offices regarding

the administration of the H-2A program in light of amendments to the Act by section 748 of Public Law 107-78 in Field Memorandum No. 16-00, issued February 10, 2000, which is published as Appendix A to the preamble of this rule.

Effective Date of Final Rule

The 120 day effective date of this rule will allow INS and ETA to establish the automated systems needed to electronically capture and share data between the Department of Labor, INS, and the Department of State; seek comments and obtain OMB approval of the consolidated Form ETA 9079 to be used for the application for H-2A labor certification and petition; and complete the proposed rulemaking on the fee provisions.

Executive Order 12866

The Department has determined that this proposed rule should be treated as a "significant regulatory action," within the meaning of Executive Order 12866, because of the inter-agency coordination with INS. However, this rule is not an "economically significant regulatory action," because it would not have an economic effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Regulatory Flexibility Act

At the time the proposed rule was published, the Department of Labor notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the proposed rule would not have a significant economic impact on a substantial number of small entities. The amendments will enhance the administrative efficiency and convenience to employers by having them file a combined *Application for Temporary Agricultural Labor Certification and H-2A Petition* with one agency, as opposed to successively filing two forms to two agencies as at present.

The regulation is administrative in nature and merely transfers authority to make certain determinations from INS to ETA. It does not expand the existing procedural requirements and should reduce the administrative and paperwork burden on users, including small businesses. The total number of employers utilizing H-2A workers is only approximately 4,400.

Therefore, the amendments will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

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

Executive Order 13132

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

Paperwork Reduction Act

The combined Form ETA 9079 is being published for comment as an appendix with the proposed rule being published today, in accordance with the Paperwork Reduction Act of 1995.

Catalogue of Federal Domestic Assistance Number

This program is listed in the *Catalogue of Federal Domestic Assistance* as Number 17.202, "Certification of Foreign Workers for Agricultural and Logging Employment."

List of Subjects in 20 CFR Part 655

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Forest and forest products, Guam, Health professions, Immigration, Labor, Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and record keeping

requirements, Specialty occupation, Students, Wages.

Appendix A Field Memorandum No. 16-00, Changes to H-2A Program

Note: Appendix A will not be codified in the Code of Federal Regulations.

U.S. Department of Labor

Employment and Training Administration, Washington, DC 20210

Classification: ES.

Correspondence Symbol: TEES.

Date: February 10, 2000.

DIRECTIVE: FIELD MEMORANDUM NO. 16-00

TO: ALL REGIONAL

ADMINISTRATORS

FROM: LENITA JACOBS-SIMMONS, Deputy Assistant Secretary.

SUBJECT: CHANGES TO H-2A PROGRAM

1. *Purpose.* To provide policy and guidance regarding the effect on the H-2A program of recent amendments to the Immigration and Nationality Act by Pub. L. 106-78 sec. 748 (McConnell Amendment).

2. *References.* 20 CFR Part 655, Subpart B (H-2A Regulations); 29 CFR Part 501 (H-2A Enforcement); 20 CFR Part 653, Subpart F (Agricultural Clearance Orders); 20 CFR Part 654, Subpart E, and 29 CFR 1910.142 (Migrant Housing Standards); 8 U.S.C. 1188(c)(1) and (c)(3)(A), as amended by Pub. L. 106-78 sec. 748 (McConnell Amendment); 64 FR 34957-34966 (June 29, 1999).

3. *Background.* The McConnell Amendment became effective on June 29, 1999. The McConnell Amendment shortens the lead time for filing the certification before the date of need from 60 days to 45 days and requires that certifications be issued 30 days before the date of need. The reduction in the lead time for filing labor certification applications is consistent with the amendments to the labor certification regulations for temporary agricultural employment that were effective on July 29, 1999. (See 64 FR 34957-34966, June 29, 99). The new statutory requirement that certification be issued 30 days prior to date of need differs considerably from the current statutory and regulatory requirement that certification be issued 20 days before the date of need. While the requirement that the certification be issued 30 days prior to the date of need reduced the recruitment period prior to certification to 15 days, the employer continues to have an obligation to actively recruit U.S. workers up until the date on which the H-2A workers leave their home country of origin.

RESCISSIONS

EXPIRATION DATE: September 30, 2002.

The requirement that certification be issued 30 days before the date of need is inconsistent with the recent amendment to the regulations that the employer's housing be in full compliance with the requirements of the applicable housing standards at least 20 days before the date the housing is to be occupied, which in cases involving certification of foreign agricultural workers is 20 days before the date of need. However, the statute requires that employers furnish housing that meets the applicable standards before certification can be issued. (See section 218(c)(4) of the Immigration and Nationality Act of 1952 as amended.) The McConnell amendment does not negate this statutory requirement. Consequently, certifications cannot be issued if housing does not meet applicable standards.

The following guidance should be followed in processing H-2A applications to ensure the timeliness of certifications:

4. *Guidance:*

a. *Acceptance of Applications:*

Regional offices should accept H-2A applications for consideration that are filed 45 days prior to the date of need.

b. *Housing:* Documentation that the employer's housing meets applicable standards must be received by Certifying Officers prior to certification being granted. State Employment Security Agencies (SESAs) should encourage employers who expect to obtain their certification 30 days before the date of need to have housing ready for inspection at the time of filing their application or earlier. SESAs should be prepared to conduct housing inspections prior to the filing of applications, as appropriate; and should even plan to schedule housing inspections prior to filing for those employers who regularly use the H-2A program.

c. *Recruitment:* The employer must show that an advertisement and job order have been placed prior to the issuance of the labor certification, however, recruitment results do not have to be finalized. The employer should provide a report on the recruitment results 24 hours prior to certification. If workers have been referred, the employer must also provide the disposition of those workers referred prior to the 30th day before the date of need. We anticipate that there will be some instances where the required advertising will not be completed prior to the certification date.

Therefore, the employer must provide documentation to show that the job order has been placed and that advertising has been contracted for the job openings, by submitting the text of the contracted advertising. As soon as tear sheets are received they should be submitted to the Regional Office.

Moreover, the McConnell Amendment did not make any changes to the current recruitment requirements. 20 CFR 655.103(d)(1)(2)(i)(ii). All of the recruitment measures are still intact and employers should be instructed to place advertisements in order to attract potentially qualified and available U.S. workers. Even if advertising occurs after certification is granted, the employer remains obligated to hire workers until fifty percent of the period of the work contract has elapsed.

d. *Workers Compensation.* The employer must provide documentation to support the fact that workers compensation insurance coverage is in effect prior to the 30th day before the date of need.

5. *Action Required:* Regional Administrators are requested to provide the above guidance to appropriate staff in the Regional Offices and State Agencies.

6. *Inquiries.* Inquiries should be directed to Charlene G. Giles on (202) 219-5263 x113.

Final Rule

Accordingly, Part 655 of Chapter V of Title 20 of the Code of Federal Regulations is amended as follows:

PART 655—[AMENDED]

1. The authority citations for Part 655 is revised to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); Pub. L. 103-206, 107 Stat. 2419; 8 CFR 103.1(f)(3)(iii)(j) and (W); 8 CFR 214.2(h)(4)(i); 8 CFR 214.2(h)(5), (11), and (12).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; 8 CFR 103.1(f)(3)(iii)(j) and (W); 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(5), (11), and (12).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*; 8 CFR 103.1(f)(3)(iii)(j) and (W); 8 CFR 214.2(h)(4)(i); and 8 CFR 214.2(h)(5), (11), and (12).

Subparts D and E issued under 8 U.S.C. 1101(a)(15) (H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L.

101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c) and (d); and 29 U.S.C. 49 *et seq.*; and Pub. L. 103-206, 107 Stat. 2419.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

§ 655.0 [Amended]

2. Section 655.0 is amended by adding a new paragraph (a)(4), to read as follows:

§ 655.0 Scope and purpose of part.

(a) * * *

(4) *Subpart B; Delegation From Immigration and Naturalization Service.* Subpart B also contains the authority from the Commissioner of Immigration and Naturalization for the Secretary to consider H-2A petitions and revocations under criteria set out in 8 CFR 214.2(h) of the Immigration and Naturalization Service's regulations.

* * * * *

§ 655.00 [Amended]

3. Section 655.00 is amended by revising the second sentence to read as follows:

* * * The Director, however, may direct that certain applications, types of applications, H-2A petitions, or H-2A petition revocations shall be handled by, and the determinations made by, the United States Employment Service (USES) in Washington, DC. * * *

Subpart B—Labor Certification and Petition Process for Temporary Agricultural Employment in the United States (H-2A Workers)

3a. Subpart B is amended by revising the heading to read as set forth above.

§ 655.90 [Amended]

4. Section 655.90(a) is amended by adding before the last sentence a new sentence to read as follows: (a) * * * This subpart also describes the processes and procedures governing consideration of requests for H-2A petition approval and revocation, set out in the Immigration and Naturalization Service regulations at 8 CFR 214.2(h). * * *

§ 655.92 [Amended]

5. Section 655.92 is amended by revising the first sentence to read as follows:

Under this subpart and INS regulations at 8 CFR 214.2(h), the accepting for consideration, the making of temporary alien agricultural labor certification determinations, and H-2A petition determinations ordinarily are performed by the Regional Administrator (RA) of an Employment and Training Administration region, who, in turn, may delegate this responsibility to a designated staff member. * * *

§ 655.100 [Amended]

6. Section 655.100(a)(1) is amended as follows:

(a) By adding after "certification" in the first sentence, the phrase "and H-2A petition approval"; and

(b) By adding at the end thereof a new sentence to read as follows:

(a) * * * (1) * * * The term 'application' here used in this subpart shall mean an application for temporary alien labor certification and an H-2A petition unless otherwise stated.

7. Section 655.100(a)(4)(i) is amended as follows:

a. In the second sentence the phrase "20 calendar days" is removed and the phrase "30 calendar days" is added in lieu thereof.

b. In the last sentence the phrase "for certification" is removed.

8. Section 655.100(a)(4)(iv) is amended by removing the phrase "for temporary alien agricultural labor certification".

9. Section 655.100(b) is amended as follows:

a. In the final sentence of the definition of *Accept for consideration* by removing the phrase "in a temporary alien agricultural labor certification determination"; and

b. In the definition of "Immigration and Naturalization Service (INS)", by removing the phrase "which makes" and adding in lieu thereof the phrase "having the authority to make".

§ 655.101 [Amended]

10. Section 655.101(a)(1) is amended by removing from the first sentence the final period and by adding in lieu thereof the phrase "and H-2A petition on Form ETA 9079, Application for Temporary Agricultural Labor Certification and H-2A Petition."; and by removing from the second sentence the phrase "for temporary alien agricultural worker certification".

11. Section 655.101 is amended by revising paragraph (a)(2) and the section heading as follows:

§ 655.101 Temporary alien agricultural labor certification applications and petitions.

(a) * * *

(2) *Applications filed by agents.* If an employer intends to be represented by an agent, the employer shall sign the statement set forth on the Form ETA 9079—*Application for Temporary Agricultural Labor Certification and H-2A Petition* that the agent is representing the employer and that the employer takes full responsibility for the accuracy of any representations made by the agent. The agent may accept for interview workers being referred to the job and make hiring commitments on behalf of the employer.

12. Section 655.101(b)(1) is amended by removing from the first sentence the phrase "A copy of the" and adding in lieu thereof the word "The".

13. Section 655.101(b)(2) is amended by removing the period at the end of the sentence and adding in lieu thereof the phrase "; and".

14. Section 655.101 is amended by adding new paragraphs (b)(3) and (h) to read as follows:

§ 655.101 Temporary alien agricultural labor certification applications and petitions.

* * * * *

(b) * * *

(3) An H-2A petition.

* * * * *

(h) Requests to change Consulates or ports of entry designated on approved petitions or to request a duplicate approval notice, shall be made by filing an ETA Form 9079M, *Visa Issuance Change Addendum*, with the Certifying Officer that approved ETA Form 9079, *Application for Temporary Agricultural Labor Certification and H-2A Petition*.

15. Section 655.101(c), introductory text, is amended as follows:

a. In the first sentence the phrase "for temporary alien agricultural labor certification is removed.

b. In the third sentence the phrase "20 calendar days" is removed and the phrase "30 calendar days" is added in lieu thereof.

16. Section 655.101(c)(2) is amended by removing the phrase "20 calendar days" in the four places it appears and the phrase "30 calendar days" is added in each place in lieu thereof.

§ 655.103 [Amended]

17. Section 655.103 is amended by removing from the first sentence of the introductory text the phrase "temporary alien agricultural labor certification".

§ 655.104 [Amended]

18. Section 655.104 (e) is amended by removing in the two places it appears

the phrase "20 calendar days" and adding in each place the phrase "30 calendar days" in lieu thereof.

§ 655.105 [Amended]

19. Section 655.105 is amended by revising the section heading to read as follows:

§ 655.105 Recruitment of U.S. workers and final determinations on certification and H-2A petition.

* * * * *

20. Section 655.105(a) is amended by removing from the first sentence the word "H-2A".

21. Section 655.105(b) is amended by removing the phrase "for temporary alien agricultural labor certification".

22. Section 655.105(c) is amended by removing from the last sentence the phrase "20 calendar days" and adding the phrase "30 calendar days" in lieu thereof.

23. Section 655.105(d) is amended as follows:

a. In the first sentence the phrase "20 calendar days" is removed and the phrase "30 calendar days" is added in lieu thereof.

b. Adding after the second sentence the following sentence:

(d) * * * If the RA denies the application for temporary alien agricultural labor certification, the RA shall also deny the petition for lack of a labor certification and any other applicable reason in accordance with the criteria set out in 8 CFR 214.2(h). * * *

§ 655.106 [Amended]

24. Section 655.106(a) is amended by removing the phrase "for temporary alien agricultural labor certification".

25. Section 655.106(b)(1) is amended by removing from the first sentence the phrase "20 calendar days" and adding the phrase "30 calendar days" in lieu thereof.

26. Section 655.106(c), introductory text, is amended by removing from the paragraph heading the phrase "temporary alien agricultural labor certifications", and adding in lieu thereof the word "applications".

27. Section 655.106(c)(1) is amended as follows:

a. By removing from the first sentence the phrase "Temporary alien agricultural labor certifications are" and adding in lieu thereof the phrase "The application is"; and

b. By removing from the third sentence the phrase "certification shall be" and adding in lieu thereof the phrase "certifications and H-2A petitions shall be".

28. Section 655.106(c)(2)(i) is amended as follows:

a. By removing from the first sentence the phrase “certification as a joint employer” and adding in lieu thereof the phrase “certification and H-2A petition as a joint employer” and by removing the phrase “the temporary alien agricultural labor certification granted” and adding in lieu thereof the phrase “the temporary labor certification and petition granted”;

b. By removing from the second sentence the phrase “certification was” and adding in lieu thereof the phrase “certification and H-2A petition were”;

c. By removing from the third sentence the phrase “certifications to associations” and adding in lieu thereof the phrase “certifications and H-2A petitions to associations”; and

d. By removing from the fourth sentence the phrase “certification as a sole employer” and adding in lieu thereof the phrase “certification and H-2A petition as a sole employer”.

29. Section 655.106(d) is amended by removing from the first sentence the phrase “certification (in whole or in part)” and adding in lieu thereof the

phrase “certification and H-2A petition (in whole or in part)”.

30. Section 655.106(e)(1) is amended by removing the phrase “a temporary agricultural labor certification” and adding in lieu thereof the phrase “an application”.

31. Section 655.106(h) is amended by removing from the first sentence the phrase “20 calendar days” and adding in lieu thereof the phrase “30 calendar days”.

§ 655.108 [Amended]

32. Section 655.108(a) is amended as follows:

a. By removing from the first sentence the phrase “temporary alien agricultural labor certification” and adding in lieu thereof the phrase “an application”; and

b. By removing from the second sentence the word “certification” and adding in lieu thereof the phrase “certification and the determination on the H-2A petition cannot be made until the investigation has been completed”.

§ 655.112 [Amended]

33. Section 655.112(a)(1) is amended by removing from the first sentence the phrase “of the denial of the temporary alien agricultural labor certification” and adding in lieu thereof the phrase “of the denial of the temporary alien agricultural labor certification, the H-2A petition, or the revocation of an H-2A petition”.

34. A new § 655.114 is added, to read as follows:

§ 655.114 Revocation of H-2A petition approval.

Determinations to revoke an approved H-2A petition shall be made by the RA in accordance with the criteria established by the Immigration and Naturalization Service at 8 CFR 214.2(h).

Signed at Washington, DC, this 7th day of July, 2000.

Raymond L. Bramucci,

Assistant Secretary of Labor for Employment and Training.

[FR Doc. 00-17641 Filed 7-12-00; 8:45 am]

BILLING CODE 4510-30-P

DEPARTMENT OF LABOR**Employment and Training
Administration****20 CFR Part 655**

RIN 1205-AB24

**Labor Certification and Petition
Process for the Temporary
Employment of Nonimmigrant Aliens
in Agriculture in the United States;
Modification of Fee Structure****AGENCY:** Employment and Training
Administration, Labor.**ACTION:** Proposed rule; request for
comments.

SUMMARY: The Employment and Training Administration (ETA) of the Department of Labor (Department or DOL) proposes to amend its regulations relating to the temporary employment of nonimmigrant agricultural workers (H-2A workers) in the United States. The proposed amendments would require employers to submit the fees for labor certification and the associated H-2A petition with a consolidated application form at the time of filing. The proposal also would modify the fee structure for H-2A labor certification applications.

Concurrently with the publication of this proposed rule, the Department is publishing a final rule setting forth the procedures and requirements for submission and processing of a consolidated *Application for Temporary Agricultural Labor Certification and H-2A Petition* (Form ETA 9079). Form ETA 9079 is attached as Appendix A to the proposed rule and comments are requested thereon.

DATES: Interested persons are invited to submit written comments on the proposed rule, on or before August 14, 2000.

ADDRESSES: Submit written comments to the Assistant Secretary for Employment and Training, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-4456, Washington, DC 20210, Attention: James H. Norris, Chief, Division of Foreign Labor Certifications.

FOR FURTHER INFORMATION: Contact Denis M. Gruskin, Senior Specialist, Division of Foreign Labor Certifications, Employment and Training Administration, 200 Constitution Avenue, NW., Room N-4456, Washington, DC 20210. Telephone: (202) 219-5263 (this is not a toll-free number.)

SUPPLEMENTARY INFORMATION:**I. Introduction**

On October 2, 1998, ETA published in the **Federal Register** a Notice of Proposed Rulemaking (NPRM) proposing amendments to ETA's regulations at 20 CFR part 655, subpart B, relating to the temporary employment of nonimmigrant agricultural H-2A workers in the United States. One of those proposed amendments was to implement a proposed delegation from the Commissioner, Immigration and Naturalization Service (INS), to the Secretary of Labor (Secretary) of authority to adjudicate petitions currently processed by INS under 8 CFR 214.2(h)(5), "Petition for alien to perform agricultural labor or services of a temporary or seasonal nature (H-2A)." 63 FR at 53244 and 53248 (Oct. 2, 1998). The INS published an NPRM on December 7, 1998, proposing to amend its regulations by delegating to the Department of Labor such adjudication of H-2A petitions. 63 FR 67431 (Dec. 7, 1998). The Department published a final rule on June 29, 1999, relating to most of the amendments it had proposed on October 2, 1998. 64 FR 34958 (June 29, 1999). However, amendments to implement the delegation of H-2A petition authority were not included in that final rule. At that time, INS had not completed the rulemaking necessary to delegate the processing of H-2A petitions to the Department. Further, a number of technical issues had to be resolved by INS and the Department to implement a delegation of H-2A petition authority to DOL. The Department noted in the preamble to the June 29 final rule, however, that it was committed to completing the necessary rulemaking and associated procedural changes as soon as possible, if INS delegated to DOL the authority to adjudicate H-2A petitions. Comments received on that issue during the course of the earlier rulemaking have been considered in the development of this proposed rule and the concurrently published final rule.

**II. Statutory Standard and
Implementing Regulation**

The decision whether to grant or deny an employer's petition to import nonimmigrant agricultural workers to the United States for the purpose of temporary employment is the responsibility of the Attorney General or her designee. The Immigration and Nationality Act (INA) (8 U.S.C. 1101 *et seq.*) provides that the Attorney General may not approve a petition from an employer for employment of nonimmigrant agricultural workers (H-2A visa holders) for temporary or

seasonal services or labor in agriculture unless the petitioner has applied to the Secretary for a labor certification showing that:

(A) There are not sufficient U.S. workers who are able, willing, and qualified, and who will be available at the time and place needed to perform the labor or services involved in the petition; and

(B) The employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

(8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184(c), and 1188.)

The Department of Labor has published regulations at 20 CFR part 655, subpart B, and 29 CFR part 501 to implement its responsibilities under the H-2A program. Regulations affecting employer-provided agricultural worker housing are in 20 CFR part 654, subpart E, and 29 CFR 1910.42.

III. Change in H-2A Fee Structure

The change in the H-2A fee structure which this NPRM addresses enhances the administrative efficiency and convenience to employers of filing a combined *Application for Temporary Agricultural Labor Certification and H-2A Petition*. This efficiency can best be achieved if employers submit a single check to cover the fees for both the issuance of the labor certification and the processing of the H-2A petition at the time the consolidated application is submitted to the Department.

The proposed procedural modification in the method of fee payment would depart from the current process in which the employer pays for the labor certification *after* it is issued and subsequently submits the H-2A petition to INS together with the INS filing fee. It is important to note that the proposed rule provides that both the certification fee and the money collected for the H-2A petition would be refunded if the labor certification were denied. The Department interprets the H-2A statute as permitting the collection of a fee only if a certification is issued. In the course of the 1987 rulemaking under the H-2A program Senator Simpson, the primary sponsor of the 1986 amendments to the INA, pointed out in response to the Department's proposal to require employers to submit a fee with the application, that the statute used the language as a "condition of issuing the certification" and not as a condition of processing the application. See 8 U.S.C. 1188(a)(2) ("The Secretary of Labor may require by regulation, as a condition of issuing the certification, the payment of

a fee to recover the reasonable costs of processing applications for certification.”). Since the fee for labor certification would be returned if the application is denied, the money collected for the labor certification would remain a *certification* fee, as it is characterized in the statute and current regulations, as opposed to a *processing* fee. Few fees paid with requests for labor certification will require a refund as the denial rate has historically been low. Moreover, as stated above, the proposed rule provides that the H-2A petition fee would be returned to the employer if the certification is denied. Currently, the petition fee is collected as an up-front processing fee by INS and is not returned to the employer if the petition is denied. See 8 CFR 103.7. In the rare instances when certification is granted but the petition is denied, the fees would not be returned.

IV. Fee Structure

The proposed rule provides that the consolidated labor certification and H-2A petition application must be accompanied by a check or money order sufficient to cover the fee for the labor certification and the fee for the H-2A petition as specified by INS regulations at 8 CFR 103.7. The Department is proposing a three-tiered labor certification fee. Employers that file applications for 10 or fewer H-2A temporary workers would be charged \$150.00 per certification issued, employers that file applications for more than 10 H-2A workers up to and including 99 workers would be charged \$250.00 per certification issued, and employers that apply for 100 workers or more would be charged \$1,000.00 per certification issued. The petition fee would be set at whatever fee is specified in INS regulation at 8 CFR 103.7. The petition fee is reviewed by INS every 2 years and currently is set at \$110.00. 63 FR 43604 (Aug. 14, 1998). Consistent with current INS requirements, a joint employer association would pay one petition fee and, consistent with current DOL requirements, pay the appropriate labor certification fee for *each* of its members listed in the association's application.

The Department estimates that the proposed three-tiered fee structure for issuance of a labor certification would likely yield about the same revenue for a given number of employers as the current DOL fee structure, which requires employers to pay a fee of \$100.00 for the issued certification plus \$10.00 per H-2A job opportunity certified. In Fiscal Year 1998, ETA collected \$775,380.00 in fees.

The Department is authorized by the INA, as amended by the Immigration Reform and Control Act of 1986, to require as a condition of certification a fee to recover the reasonable costs of processing applications for certification. 8 U.S.C. 1188(a)(2). The monies collected under the proposed certification fee structure will continue, like the current fee structure, to fall substantially short of the monies expended by ETA to administer the H-2A labor certification program.

ETA has not conducted a study to establish fees since the 1987 study referred to in the preamble to the 1987 rule. That study did not include all costs that could be attributed to the H-2A labor certification program. Specifically, the study did not include the cost of activities of State employment service agencies, post-certification activities and post-denial activities at all levels, ETA national office activities, DOL Office of the Solicitor activities, and DOL Office of Administrative Law Judges activities. 52 FR at 20499 (June 1, 1987). ETA plans to conduct a study to determine what it expends to administer the H-2A labor certification program at the same time INS will review its petition fee early in calendar year 2002.

As indicated above, fees for H-2A petitions are established by INS through notice and comment rulemaking. See 63 FR 1775 (Jan. 12, 1998) and 63 FR 43604 (Aug. 14, 1998). INS reviews the petition fee every two years, and, accordingly, the proposed rule would require that the fee collected for the H-2A petition be the amount specified in the INS regulations that are current at the time the *Application for Temporary Agricultural Labor Certification and H-2A Petition* is filed with the Department. It is contemplated that under the administrative procedures arrived at by INS and ETA to implement the delegation of H-2A petition authority from INS to the Department, DOL will collect the petition fee on behalf of INS and will be reimbursed by INS for the costs involved in processing the H-2A petition.

Consistent with INS' proposed rule, the Department's proposed rule would also provide that if the H-2A petition is approved, DOL will forward to INS for action any requests for change of status or extension of stay pertaining to H-2A petitions for named aliens made on Form ETA 9079W, Named Alien Addendum.

INS has also delegated to the Department the authority to process applications to change the Consulate or port of entry on an approved petitions when DOL has previously processed a

request for temporary agricultural workers on INS' behalf, and to respond to requests for duplicate approval notices issued by DOL. Such applications shall be made on the ETA 9079M, Visa Issuance Change Addendum, and accompanied by a check or money order made payable to the “U.S. Department of Labor” in the amount specified by INS regulations at 8 CFR 103.7 for the I-824, Application for Action on an Approved Application or Petition—currently \$120.00. The ETA 9079M is functionally equivalent to the I-824.

INS has also proposed to authorize DOL to accept on INS' behalf any Forms I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, and Forms I-539, Application to Extend/Change Nonimmigrant status, that are filed concurrently with DOL's form ETA-9079. The I-102 is used to obtain a replacement for a lost or mutilated arrival-departure document and the I-539 is used to extend or change the nonimmigrant status of dependents (H-4's) of the H-2A nonimmigrant. The submission of any Forms I-102 or I-539 must be accompanied by a check made payable to the “U.S. Department of Labor” in the amount specified by INS regulations at 8 CFR 103.7. The forms and fees will be forwarded to INS for adjudication after the ETA-9079 decision is made.

V. Short-term Extensions of Employment

INS is proposing to add automatically to every H-2A employer's petition a 14-day extension grace “period,” and to discontinue charging a separate fee for such short-term extensions. Thus, an employer's H-2A petition for any requested/certified period of employment, if approved, would be granted for the requested/certified period plus an additional 14 days (or the length of the labor certification if issued for less than 14 days). Should this proposal be included in INS' final rule, DOL would add corresponding implementing regulations to Part 655. Comments are requested on such a change. Should this proposal not be included in the INS final rule, the current procedures (as described below) would continue, although a rule of agency procedure would be promulgated to delegate from INS to DOL the INS functions under the existing process.

Under the existing regulations and procedures, an employer seeking to extend the authorized period of employment by two weeks or less applies to INS for the short-term

extension. 8 CFR 214.2(h)(5)(x) (1999); and 20 CFR 655.106(c)(3)(i) (1999); see also 214.2(h)(15)(ii)(C) (1999). INS charges a fee of \$120.00 for this service. In such circumstances, the employer is not required to apply for extension of the labor certification granted by DOL and is granted a 14 day grace period. It is the agency's experience that a small minority of employers seek short-term extensions and that INS rarely disapproves such requests. Thus, the proposed change would further streamline the H-2A process for those employers that seek short-term extensions.

An automatic 14-day "grace period" extension, as proposed, may encourage some H-2A employers to understate the offered period of employment disclosed on their labor certification application(s) and H-2A petition(s), thereby affecting recruitment of U.S. workers and such existing rights under the H-2A program as the "50 percent rule," the "three-quarter guarantee," and reimbursement of in-bound and return transportation. U.S. workers must be offered employment during the first half (50 percent) of the work contract, which is ordinarily the work period specified by the employer on the job offer (see 20 CFR 655.103(e) (1999); 29 CFR 501.10(d)); covered workers are guaranteed pay for three-quarters of the workdays offered by the employer under the work contract (see 20 CFR 655.102(b)(6)(i) (1999)), and reimbursement for in-bound transportation costs on completion and payment for return transportation on completion of the offered employment under the work contract (see 20 CFR 655.102(b)(5)(i) and (ii) (1999)). If adopted DOL would evaluate whether the proposed automatic 14-day "grace period" extension is treated as offered employment for these various purposes and the consequences which occur if a worker declines to continue employment during the 14-day "grace period" extension.

The agency requests comments on the extent, if any, to which the addition of the 14-day "grace period" automatic extension, as proposed, impacts U.S. and foreign workers' rights, including their rights under the underlying work contract, as well as employers' responsibilities and obligations.

Executive Order 12866

The Department has determined that this proposed rule should be treated as a "significant regulatory action," within the meaning of Executive Order 12866, because of the inter-agency coordination with INS. However, this rule is not an "economically significant regulatory

action." because it would not have an economic effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Regulatory Flexibility Act

The Department of Labor has notified the Chief Counsel for Advocacy, Small Business Administration, and made the certification pursuant to the Regulatory Flexibility Act at 5 U.S.C. 605(b), that the proposed rule would not have a significant economic impact on a substantial number of small entities. The proposed amendments would enhance the administrative efficiency and convenience to employers by having them file a combined *Application for Temporary Agricultural Labor Certification and H-2A Petition* with one agency, as opposed to two forms filed with two agencies as at present. The total number of employers utilizing H-2A workers is only approximately 4,400.

Therefore, the proposed amendments would not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any 1 year, and it will not significantly or uniquely affect small governments. Therefore, no actions are necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

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

Paperwork Reduction Act

Title: Form ETA 9079 Application for Temporary Agricultural Labor Certification and H-2A Petition.

Summary: Section 218 of the Immigration and Nationality Act (Act) provides that an H-2A petition to

import an H-2A worker may not be approved by the Attorney General unless the petitioner has applied to the Secretary of Labor for a certification that: (1) There are not sufficient workers who are able, willing and qualified, and who will not be available at the time and place needed to perform the labor or services involved in the petition; and (2) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

Section 214(c) of the Act provides the Attorney General with the authority to determine the admission of an alien for such and under such conditions as the attorney general may prescribe by regulation. The Attorney general has delegated her responsibilities under section 214(c) of the Act to the Commissioner, Immigration and Naturalization Service.

Currently, employers file an ETA Form 750 with the Department to obtain a labor certification and they file the labor certification in support of the I-129 to obtain a petition from INS.

Need: The current process has been criticized by some employers as complicated hard to understand, and too time consuming. In some instances the result has been that foreign workers have not arrived by the first date of the employer's need. In an effort to reduce the number of steps, paperwork and time necessary to obtain foreign workers necessary to perform critical agricultural functions the Department of Labor and INS issued final rules simultaneously with this proposed rule transferring the function of adjudicating H-2A petitions to the Department of Labor.

To streamline the process of obtaining certifications and petitions, the INS and DOL have developed the form ETA 9079 which includes all the information necessary to INS and DOL to administer and monitor the certification and petition process. The new form ETA 9079, and addendums thereto, will replace Form ETA 750 and INS Form I-129 for all H-2A filings. It is envisaged that the process will enable employers to obtain foreign agricultural workers by implementation of a one stop filing whereby all forms and supporting documentation are submitted to DOL. Currently employers have to complete a two step process to obtain a labor certification and petition which necessitates the filing of different forms with the Department and the Immigration and Naturalization Service. The final rule when it becomes effective and the Form ETA 9079 when it is approved will result in employers being able to obtain both the labor

certification and petition for aliens outside the United States from the Department. The Department of Justice estimates that transferring the authority to adjudicate petitions to DOL will result in a combined reduction of 18 to 27 days in the time now taken from initial filing with DOL to completion of the petition processing by INS.

In cases involving named aliens, employers would file with the Department an ETA 9079W, Named Alien Addendum. The proposed rule issued by INS would require the alien to sign the form if an extension of stay or change of status is requested. If the petition is approved, this form will be sent to INS for a determination on any extension of stay or change of status requested for the alien.

INS has also in the interests of further simplifying the petition process delegated to DOL the responsibility of processing the small number of requests involving changes in the Consulate or port of entry designated on the petition when it was approved, and issue duplicate approval notices it has issued. To make such requests the employer will be required to file form ETA 9079M, Visa Issuance Change Addendum, with the fee specified by INS regulations at 8 CFR 103.7 for the I-824, Application for Action on an Approved Application or Petition. The 9079M is functionally equivalent to the I-824.

Respondents and proposed frequency of response: ETA estimates that 2,270 sole employers and joint-employer associations filing on behalf of member employers will submit about 1.3 Forms ETA 9079 each year, for a total of 2,950 forms filed annually. The actual number filed will depend upon the needs of the employers, which are dependent in part upon agricultural conditions, such as crop maturation.

Estimated total annual burden for filing: ETA estimates that approximately 2,950 Forms ETA 9079 will be submitted each year. The reporting burden is estimated to average 1½ hours. This estimate includes the time for reviewing instructions, searching existing information/data sources, gathering and maintaining information and completing and reviewing the application.

The preparation of the application form may be done by a company employee, official, proprietor, or chief executive officer. Therefore, the salaries could range from about \$5.15 an hour for an employee to \$300.00 for a proprietor or chief executive officer of a large farming enterprise. The average hourly remuneration is estimated to be

\$25.00. This results in the estimated annual cost to respondents (employers) for filing the ETA 9079, "Application for Temporary Agricultural Labor Certification and H-2A Petition" of \$110,625 ($2,950 \times 1\frac{1}{2} \times \$25.00$).

The public is invited to provide comments on this information collection requirement so that the Department of Labor may:

(1) Evaluate whether the proposed collections of information are necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimates of the burdens of the collections of information, including the validity of the methodology and assumptions used;

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

(4) Minimize the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. Written comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for Employment and Training Administration, U.S. Department of Labor, Washington, D.C. 20503.

Catalogue of Federal Domestic Assistance Number

This program is listed in the Catalogue of Federal Domestic Assistance as Number 17.202, "Certification of Foreign Workers for Agricultural and Logging Employment."

List of Subjects:

Administrative practice and procedure, Agriculture, Aliens, Crewmembers, Employment, Enforcement, Forest and forest products, Guam, Health professions, Immigration, Labor, Longshore work, Migrant labor, Nurse, Penalties, Registered nurse, Reporting and record keeping requirements, Specialty occupation, Students, Wages.

Proposed Rule

Accordingly, part 655 of Chapter V of title 20, code of Federal Regulations is amended as follows:

PART 655—[AMENDED]

1. The authority citation for part 655 continues to read as follows:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c) and (d); 29 U.S.C. 49 *et seq.*; sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); P.L. 103-206, 107 Stat 2419; and 8 CFR 214.2(h)(4)(i).

Section 655.00 issued under 8 U.S.C. 1101(a)(15)(H)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*, and 8 CFR 103.1(f)(iii)(J), (W), 214.2(h)(5), (11) and (12).

Subparts D and E issued under 8 U.S.C. 1101(a)(15) (H)(i)(a), 1182(m), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L. 101-238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c) and (d); and 29 U.S.C. 49 *et seq.*; and P.L. 103-206, 107 Stat 2419.

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; 29 U.S.C. 49 *et seq.*; and sec. 303(a)(8), Pub. L. 102-232, 105 Stat. 1733, 1748 (8 U.S.C. 1182 note).

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101-649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

§ 655.100 [Amended]

2. Section 655.100 is amended by revising paragraph (a)(4)(iii) to read as follows:

§ 655.100 Overview of this subpart and definition of terms.

(a) * * *

(4) * * *

(iii) *Fees*—(A) *General.* Fees must be submitted with the Form ETA 9079 *Application for Temporary Agricultural Labor Certification and H-2A Petition.* The fees which must accompany the form must include the fee for the issuance of the labor certification, and the fee required for the H-2A petition as specified by INS regulations at 8 CFR 103.7. The amount of the labor certification fee is dependent upon the number of job openings for which the employer requests certification. The labor certification fee for applications for 10 job openings or fewer is \$150.00, the certification fee for applications for more than 10 job openings up to and including 99 job openings is \$250.00, and the certification fee is \$1,000 when the application is for 100 job openings or more. The INS fee was set at \$110.00 as of October 13, 1998 and is subject to revision by INS every two years. Requests for changes in the Consulate or

port of entry designated on the petition when it was approved or to request a duplicate of a lost approval notice shall be made by filing an ETA 9079M, which is functionally equivalent to INS Form I-824 (Application for Action on an Approved Application or Petition), and the fee specified in INS regulations at 8 CFR 103.7 with DOL. As of October 13, 1998, the INS fee for the Form I-824 was set at \$120.00. INS has authorized DOL to accept on behalf of INS any Forms I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, and Forms I-539, Application to Extend/Change Nonimmigrant Status, which are filed concurrently with the DOL's new form ETA 9079. The submission of any Forms I-102 or I-539 must be accompanied by a check made payable to the "U.S. Department of Labor" in the amount specified by INS regulations at 8 CFR 103.7. Fees will be deposited in a special account while the application is being processed and adjudicated. If the labor certification is denied, all fees will be refunded. If certification is granted, but the petition is denied, the fees will not be refunded.

(B) *Payment.* Payment must be made by check or money drawn on a financial institution in the United States and payable to the "U.S. Department of Labor" in United States currency. A charge of \$30.00 will be imposed if a check in payment of a fee is not honored by the financial institution on which it is drawn and, if a certification has not been issued, processing of the application will be suspended until a certified check or money order made payable to the U.S. Department of Labor is received by the Department.

(C) *Application and Petition.* Fees must be paid at the time the application is filed as follows:

(1) Sole employers filing a Form ETA 9079—*Application for Temporary Agricultural Labor Certification and H-2A Petition* shall submit with their application a single check or money order made payable to the "U.S. Department of Labor" for the total amount of the required fees to include:

(i) A certification fee of \$150.00 when the application is for 10 job openings or fewer, \$250.00 when the application is for more than 10 openings up to and including 99 job openings, or \$1,000 when the application is for 100 job openings or more;

(ii) The fee required to pay for the processing of the H-2A petition as specified in INS regulations at 8 CFR 103.7.

(2) In the case of a joint employer association filing a single Form ETA 9079—*Application for Temporary*

Agricultural Labor Certification and H-2A Petition on behalf of its members, the application shall be accompanied by a single check or money order made payable to the "U.S. Department of Labor" for the total amount of required fees. The amount of the check or money order must include:

(i) A certification fee of \$150.00 for each member applying for 10 job openings or fewer, \$250.00 for each member applying for more than 10 job openings up to and including 99 job openings, and \$1000.00 for each member applying for 100 or more job openings. The joint employer association shall not be charged a separate fee; and

(ii) The fee required for the H-2A petition filed by the joint employer association as specified by the INS regulations at 8 CFR 103.7.

(3) In the case of an employer association acting as an agent for its employer-members in filing of individual applications by its members, each Form ETA 9079—*Application for Temporary Agricultural Labor Certification and H-2A Petition* shall be accompanied by a single check or money order made payable to the "U.S. Department of Labor" for an amount sufficient to include:

(i) A certification fee of \$150.00 from each member applying for 10 job openings or fewer, \$250.00 from each member applying for more than 10 job openings up to and including 99 job openings, and \$1,000.00 from each member applying for 100 or more job openings;

(ii) The fee required for the processing of the H-2A petition from each member as specified by INS regulations at 8 CFR 103.7.

(D) *INS Forms I-102 and I-539.* Forms I-102, Application for Replacement/Initial Nonimmigrant Arrival-Departure Document, and Forms I-539, Application to Extend/Change Nonimmigrant Status, which are filed concurrently with the DOL's form ETA 9079 must be accompanied by a check made payable to the "U.S. Department of Labor" in the amount specified by INS regulations at 8 CFR 103.7.

(E) *Refunds.* (1) If a labor certification is denied, all fees will be refunded to the employer or association as appropriate. If a labor certification is partially denied a refund shall be made, if appropriate, in accordance with the fee schedule in paragraph (a)(4)(iii)(C) of this section. If the certification is granted whole or in part, but the petition is denied, no refund will be made of the petition fee.

(2) If an amendment to decrease the number workers is made prior to an RA

certification, a refund shall be made, if appropriate, in accordance with the fee schedule in paragraph (a)(4)(iii)(C) of this section.

(F) *Increase in Number of Workers.* Amendments to applications to increase the number of workers requested made prior to an RA certification determination shall be accompanied by an increase in fees that are in accordance with the fee schedule in paragraph (a)(4)(iii)(B) of this section. Amendments to increase the number of workers requested shall not be processed if they are not accompanied by a check made out to the "U.S. Department of Labor" sufficient to cover any increase in fees required due to the increase in workers requested.

(G) *Applications for Change in Consulate or to Obtain Duplicate Approval Notice.* Applications requesting changes in the notification to the Consulate or port of entry designated on an approved petition, or to request a duplicate approval notice, shall be filed on ETA Form 9079M, Visa Issuance Change Addendum, with the RA who originally processed the case, and must be accompanied by a check or money order made payable to the "U.S. Department of Labor" in the amount specified by INS regulations at 8 CFR 103.7.

* * * * *

3. Section 655.101 is amended by removing the period at the end of paragraph (b)(3) and adding in lieu thereof the phrase "; and", and by adding new paragraphs (b)(4) and (i) to read as follows:

§ 655.101 Temporary alien labor certification applications and petitions.

* * * * *

(b) * * *

(4) A check or money order for the fee in accordance with § 655.100(a)(4)(iii).

* * * * *

(i) *Changes of status and extensions of stay.* If the H-2A petition is granted, any requests to change nonimmigrant status or for extension of stay for named beneficiaries made on the Form ETA 9079W will be sent by ETA to INS, which will make determinations about the named beneficiaries' eligibility to change nonimmigrant status or eligibility for extension of stay.

§ 655.103 [Amended]

4. Section 655.103 is amended by removing paragraph (h).

§ 655.106 [Amended]

5. Section 655.106 is amended by removing paragraph (b)(2).

Signed at Washington, DC, this 7th day of July, 2000.

Raymond L. Bramucci,

Assistant Secretary of Labor for Employment and Training.

Appendix 1 (Not to be codified in the CFR): Form ETA 9079

Printed below is a copy of Form ETA 9079.

BILLING CODE 4510-30-P

**Instructions for Completing
ETA FORM 9079 PACKET**

**Application for Temporary Agricultural
Labor Certification and H-2A Petition**

Developed by the
Division of Foreign Labor Certification
United States Department of Labor
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CONTENTS:

I.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079 PACKET	3
II.	INSTRUCTIONS FOR COMPLETION OF ETA FORM 9079	7
III.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079-W Named Worker Addendum	11
IV.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079-C Visa Issuance Location Addendum	13
V.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079-S Additional Work-Sites for a Sole-Employer Application Addendum	14
VI.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079-A Joint-Employer & Joint-Employer Association Registration Addendum	15
VII.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079-E Employer Membership in an Association Registration Addendum	16
VIII.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079-L Listing Of Members for an Association Application Addendum	17
IX.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079-M Post Certification Visa Issuance Location Change Addendum	18
X.	INSTRUCTIONS FOR COMPLETING ETA FORM 9079-X Request for Extension of Labor Certification and H-2A Visas Petition	20

DRAFT

June 6, 2000

I. INSTRUCTIONS FOR COMPLETING ETA FORM 9079 PACKET**Application for Temporary Agricultural Labor Certification and H-2A Petition****IMPORTANT: READ ALL INSTRUCTIONS!!**

These instructions will help Applicants understand the information that is being requested. Please read the instructions carefully and follow them to minimize the chances of an application package being returned due to incomplete information.

The following forms, attachments, and statements must be submitted by an Applicant:

FORM/ PART	PURPOSE/DESCRIPTION	WHO USES THIS FORM	WHEN AND HOW SUBMITTED
Mandatory Forms for ALL Applicants:			
9079	Base form, replaces ETA-750 and I-129 for unnamed alien workers.	All Applicants	Submit by regular and overnight mail only.
790	Agricultural and Food Processing Clearance Order. This is the job order portion of the application package. Information on form ETA 790 must be comprehensive and precise because form ETA 790, in effect, will constitute a contract between the employer and the worker, and can be the basis for enforcement. Includes all attachments and explanations.	All Applicants	Submit by regular and overnight mail only with ETA Form 9079.
ETA 9079 Addenda which may be used by any Applicant if needed:			
9079-W (I-539)	Named alien <u>Workers</u> for both new visas and modifications.	Any Applicants with named workers	Submit by regular or overnight mail or fax any time after acceptance and 5 days prior to certification.
9079-C	Allows for additional visa issuance locations (<u>C</u> onsulates, port of entry, pre-flight issuance).	Applicants with more than one visa issuance location	Submit by regular or overnight mail or fax any time after acceptance letter and 5 days prior to certification.
ETA 9079 Addenda for Sole-Employer, including Associations as Sole-Employer (An Association filing an application on their own behalf):			
9079-S	Allows for additional Work- <u>S</u> ite locations.	Sole-Employer Applicants with more than one work-site	Submit by regular or overnight mail or fax any time after acceptance letter and 5 days prior to certification.

DRAFT

June 6, 2000

ETA 9079 Addenda for Joint-Employer (Two or more employers sharing workers and responsibility) & Joint-Employer Association (An Association and its members sharing employees and responsibility):			
FORM/ PART	PURPOSE/DESCRIPTION	WHO USES THIS FORM	WHEN AND HOW SUBMITTED
9079-A	Register a Joint-Employer Association.	Associations	Submit by regular or overnight mail or fax prior to submission of any applications.
9079-E	Register an Employer as a member of an Association.	Associations	Submit by regular or overnight mail or fax prior to submission of any applications.
9079-L	Listing of employer information (member's EIN, City or County of work-site, number of workers requested, work hours, worker housing, and guaranteed wage for each crop activity) for an Association application.	Associations	Submit by regular or overnight mail or fax any time after acceptance letter and 5 days prior to certification.
ETA 9079 Addenda to be used AFTER CERTIFICATION:			
9079-M (I-824)	Move worker(s) from one Consulate to another.	Applicants who need to change the location where workers will apply for visas AFTER CERTIFICATION	Submit by regular or overnight mail after certification.
9079-X	Request for eXtension of the Labor Certification and H-2A Visas	Applicants meeting the criteria for an extension per the regulations	Submit by regular or overnight mail or fax.

BASIC PROCEDURE FOR FILING A LABOR CERTIFICATION AND H-2A VISA PETITION

There are four distinct types of Applicants:

1. **Sole-Employer**,
2. **Association as Sole-Employer** - an Association filing an application on their own behalf,
3. **Joint-Employer** - two or more employers sharing workers and responsibility,
4. **Joint-Employer Association** - an Association and its members sharing employees and responsibility.

In the steps below those which apply to *Associations only will be in italics*. Each of the other steps apply to all applicants.

1. *Submit form ETA 9079-A to register the Association. **This needs to be done only once per fiscal year.** The Association may complete form ETA 9079-A prior to filing the application or along with the application. Form ETA 9079-A goes to the Philadelphia or San Francisco Servicing Office (see page 6).*
2. *Submit form ETA 9079-E to register each of the member employers. **This needs to be done only once per fiscal year.** To change an employer's information, submit a corrected form ETA 9079-E. Form ETA 9079-E goes to the Philadelphia or San Francisco Servicing Office (see page 6).*
3. Complete forms ETA 9079 and ETA 790 with all of the required attachments and explanations. Please proof read the forms to avoid confusion. NOTE on form ETA 9079: There is an Employer's Control

DRAFT

June 6, 2000

Number (ECN) on each page. The ECN is used by the computer to make sure that the correct pages are kept together. Make sure that the ECN is the same on all pages.

4. Calculate the correct fee: Each application has a base charge of \$110 for the Visa petition. Each employer on an application has a charge of \$150 for 10 or fewer workers, \$250 for 11 to 99 workers, and \$1,000 for 100+ workers. This is indicated in the following tables. Associations will have the \$110 charge plus a charge of \$150, \$250 or \$1,000 for each employer based on the numbers of workers that each employer requests. Example: A Joint-Employer Association submits an application for 3 employers who wish to hire 3 workers each and 2 employers who wish to hire 12 workers each, for a total of five employers. The fee will be $\$(110 + (3 \times 150) + (2 \times 250)) = \$1060$.

	Cost
Each Application	\$110.00

# of Workers	Cost
0-10	\$150.00
11-99	\$250.00
100+	\$1000.00

5. Submit forms ETA 9079 and ETA 790 with all required attachments and explanations and a check for the correct fee to the appropriate Servicing Office (see page 6) at least 45 days prior to the date of need. **A copy of forms ETA 9079 and ETA 790 with all of the required attachments and explanations must be sent to the appropriate State Employment Security Agency at the same time as filing with the appropriate Servicing Office.**
6. The Servicing Office will check the application for completeness and correct fee upon receipt. If an application is incomplete, it will be returned. Otherwise, the application will be sent to the appropriate Regional Office for processing. The Regional Office will send an Acceptance Letter with the required recruitment efforts if the application package has been accepted for processing. If the package has not been accepted, a Modification Letter with the modifications needed for the application to be acceptable will be sent.
7. *Associations must submit form ETA 9079-L pages which support the initial application and the fee submitted with it to the appropriate Servicing Office.*
8. *Associations can now submit any needed changes to the application's employer list by sending an additional ETA 9079-L and a check for any fee change to the appropriate Servicing Office. The final changes must be received no later than 5 days prior to the certification date. Another way of saying this is 35 days before the date of need. This will ensure that all information has been updated and the certification granted is correct.*
9. If more than two consulates are to be used for the workers requested, submit form ETA 9079-C to the appropriate Servicing Office. If you wish to change where or how many workers will apply at the consulate, use form ETA 9079-C. Use zero in the number of workers section and that consulate will not be notified. The final changes must be received no later than 5 days prior to the certification date. Another way of saying this is 35 days before the date of need. This will ensure that all information has been updated.
10. If any of the workers covered by this application are already in the U.S., submit form ETA 9079-W for each worker to the appropriate Servicing Office. Each named worker will reduce the number requested from the last listed consulate. The final changes must be received no later than 5 days prior to the certification date. Another way of saying this is 35 days before the date of need. This will ensure that all information has been updated and the certification granted is correct.
11. Recruitment by the employer or Association should begin only upon instruction from the appropriate

DRAFT

June 6, 2000

Regional Office through the acceptance letter.

12. Obtain the appropriate Workers' Compensation insurance. Proof of the Workers' Compensation insurance may be submitted to the appropriate Regional Office at the time of the initial application. However, if not available at that time, it may be submitted to the appropriate Regional Office at any time during the processing of the application prior to certification.
13. Schedule a housing inspection by the State. A housing inspection may be submitted to the appropriate Regional Office at the time of the initial application. However, if it has not been completed at that time, it can be submitted at any time during the processing of the application prior to certification.
14. Recruitment results should be submitted to the appropriate Regional Office 24 hours prior to the certification date.
15. A final determination will be made 30 days prior to the date of need.

What is the difference between a Servicing Office and a Regional Office?

A Serving Office is a data entry and computer service facility. No decision making occurs at this site.

A Regional Office is where the review of the application will occur and where the technical expertise resides. The Regional Office coordinates processing of the application with the appropriate State agencies.

SERVICING OFFICE LOCATIONS

The Philadelphia Servicing Office processes applications from the following locations:

Alabama, Connecticut, Delaware, District of Columbia, Florida, Georgia, Kentucky, Maine, Maryland, Massachusetts, Missouri, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Puerto Rico, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia.

The Philadelphia Servicing Office mailing address for applications is:

Department of Labor
Employment and Training Administration
3535 Market St., #13300
Philadelphia, PA 19104

The San Francisco Servicing Office processes applications from the following locations:

Alaska, Arizona, Arkansas, California, Colorado, Guam, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, Wisconsin, Wyoming.

The San Francisco Servicing Office mailing address for applications is:

Department of Labor
Employment and Training Administration
71 Stevens St., #715
San Francisco, CA 94105

DRAFT

June 6, 2000

II. INSTRUCTIONS FOR COMPLETION OF ETA FORM 9079**Application for Temporary Agricultural Labor Certification and H-2A Petition**

These instructions will help employers understand the information that is being requested on the ETA FORM 9079. Please read the instructions carefully and follow them to minimize the chances of an application being returned due to incomplete information.

NOTE: Mark the box with an X to indicate that this is either a New Application or a Response to a Modification Letter. If it is a response to a Modification Letter, enter the DOL case number. This will ensure that the application is credited correctly and will not be returned due to not having a check for the fee attached.

SECTION I: APPLICANT'S INFORMATION (Page 1 of 5 of form ETA 9079)**1. Applicant Type:**

Fill in the circle that indicates the appropriate applicant type. Fill in only one circle.

2. Full Legal Name of Applicant:

Enter the full name of the individual employer or Association. Associations will use the same information as entered on form ETA 9079-A.

3. Federal Employer ID Number:

Enter Applicant's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service. This is the EIN that will be used on subsequent Addenda for this application.

4. Applicant's Telephone Number:

Enter a ten digit telephone number (include the area code) for the Applicant. If applicable, use the four digits after the slash for the extension.

5. Return Fax Number:

Enter a ten digit fax number (include the area code) for the Applicant.

6. Contact's Telephone Number (Optional):

Enter a ten digit telephone number (include the area code) for the contact person for the individual employer or Association. If applicable, use the four digits after the slash for the extension.

7. Applicant's Address:

Enter the complete mailing address of the Applicant including number/street, city, state and postal (zip) code.

8. Contact's Name (Optional):

Enter the complete name of the person to which correspondence should be sent. Provide the family (last) name on the first line and the given (first) name and initial on the second line.

9. Correspondence Address:

Enter the complete mailing address where correspondence should be sent. Include number/street, city, state and postal (zip) code.

10. E-Mail Address:

Enter the complete e-mail address that matches the Correspondence Address if you would like notification via e-mail.

SECTION II: JOINT-EMPLOYERS AND JOINT-EMPLOYER ASSOCIATIONS ONLY

If you are an ASSOCIATION: The next item applies only to Associations.

1. Number of Employers Requesting:

Enter the number of employers for each category (less than 10 workers, 11 to 99 workers or 100+ workers) who will be initially included in the application using form ETA 9079-L which must be completed immediately after receipt of the Acceptance Letter.

DRAFT

June 6, 2000

SECTION III: SOLE-EMPLOYERS ONLY

If you are a SOLE-EMPLOYER: The next four items are for Sole-Employers only – Associations will fill out forms ETA 9079-E and ETA 9079-L.

1. Total Number of Alien Workers Requested:

Enter the number of workers requested and include those who are already in the U.S.

2. Total Work Hours per Week:

Enter the number of normal hours per worker to be worked each week.

3. Number of Workers Which can be housed:

Enter the total number of employees which can be housed at the work-site.

4. Location of Work:

Enter the city or county where the alien workers will work.

EMPLOYER CONTROL NUMBER:

The Employer Control Number (ECN) must be completed by the Applicant and must be the same number on each page. The ECN can be any sequence of digits and is used to keep all pages together during processing. Failure to do so can delay the processing of the application.

SECTION IV: DATES OF NEED (Page 2 of 5 of form ETA 9079)**Dates of Need:**

Enter the begin and end dates for the period of employment. The dates should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

SECTION V: JOB OPENING INFORMATION**1. Job Title:**

Enter the payroll title/common name of the job being offered.

2. Education:

Fill in the appropriate circle that indicates the highest diploma or degree required for the job. Fill in only one circle. **NOTE: If 'None' or 'High School' is selected, do not fill in items 3 and 4.**

3. Foreign equivalent acceptable:

Mark the box with an X if a foreign equivalent is acceptable for this job.

4. Field of Study:

Enter the field of study that is needed to be successful in this job.

5. Field of Training:

Enter the type of training that is needed to be successful in this job. This training is above and beyond the training provided by the employer.

6. Months of Training:

Enter the minimum number of months of training necessary for the worker to carry out the described duties.

7. Field of Experience:

Enter the minimum experience necessary for the worker to carry out the described duties.

8. Months of Experience:

Enter the minimum number of months of experience necessary for the worker to carry out the described duties.

9. Job Description:

PLEASE PRINT CLEARLY. In step-by-step detail, describe the duties (work tasks) which make up the job. Avoid technical terms as much as possible. If they must be used, define them. The job description needs to include: equipment that will be used, worker performance standards, training (if provided), required experience, licenses or permits that are necessary, level of supervision that will be provided, and the provision of tools and equipment.

SECTION VI: CROP AND WAGE INFORMATION (Page 3 of 5 of form ETA 9079)**1. Crop Activity:**

Enter the type of activity for each crop (e.g., Apple Picking Drops, Apple Picking Fresh Market, Apple Picking Processing, Blueberry, Mechanical Harvest Operator). If crop activity is more than 58 letters, use appropriate abbreviation. For example: Use the abbreviation "Oper." for the word "Operator."

DRAFT

June 6, 2000

2. Proposed Minimum Guaranteed Wage:

Enter the higher of the Adverse Effect Wage Rate (AEWR), Prevailing, Federal, State or Local hourly minimum wage (see ETA Form 790). Indicate the pay unit (hour, day, week, month). Note: If activity is a "Special Processing" activity, refer to those instructions for wage information. For example: Refer to special Sheep herding/Goat herding and Custom Combine procedures and prevailing wage memoranda.

SECTION VII: DESIGNATION OF AGENT (Page 4 of 5 of form ETA 9079)**1. Full Legal Name of Agent's Organization or Company:**

Enter the full name of the agent's organization or company representing the employer.

2. Contact Name:

Enter the full name of the contact person from the agent's organization. Provide the family (last) name on the first line and the given (first) name and initial on the second line.

3. Federal Employer ID Number:

Enter employer's nine digit Federal Employer Identification Number (EIN) that has been assigned by the Internal Revenue Service.

4. Agent's Telephone Number:

Enter a ten digit telephone number (include the area code) for the Agent. If applicable, use the four digits after the slash for the extension.

5. Agent's Correspondence Address:

Enter the complete mailing address where all materials should be sent. Include number/street, city, state and postal (zip) code.

6. Agent's E-Mail Address:

Enter the complete e-mail address if you would like notification sent via e-mail.

7. Agent's Signature and Date:

After the agent reads the statement, they must sign the form with their full legal name. Do not let the signature extend beyond the box. The date of signing should be entered in the block to the right. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

8. Applicant's Signature and Date:

The Applicant's designated official that has hiring authority must sign the form with their full legal name. Do not let the signature extend beyond the box. The date of signing should be entered in the block to the right of the signature. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

SECTION VIII: VISA REQUEST INFORMATION**1. Number of Individuals who will apply at this site:**

Enter the total number of alien workers who will apply at the location indicated in item 2.

2. City and Country of the Consulate/Port of Entry or Pre-flight Inspection:

Enter the location where non-immigrants will be applying for their Visas. If more than one location, you will need to fill out form ETA 9079-C after receiving the Acceptance Letter from the appropriate Regional Office and no more than 5 days prior to the scheduled certification date.

SECTION IX: STATE AGENCY JOB ORDER INFORMATION

This information must be filled out. Enter the city and state where you sent the duplicate application.

DRAFT

June 6, 2000

SECTION X: DECLARATION OF EMPLOYER (Page 5 of 5 of form ETA 9079)

NOTE: By signing this form, the employer agrees to comply with all of the requirements of 20 CAR 655.90 et seq.

1. Hiring Official's Name:

Enter the hiring official's name. Provide the family (last) name on the first line and the given (first) name and initial on the second line.

2. Title of Hiring or Other Designated Official:

Enter the title of the person whose name appears above.

3. Applicant's Signature:

The Applicant must sign the form with their full legal name. Do not let the signature extend beyond the box. The date of signing should be entered in the block to the right of the signature. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

DRAFT

June 6, 2000

III. INSTRUCTIONS FOR COMPLETING ETA FORM 9079-W**Named Worker Addendum**

General: This form is completed for each worker that is located within the United States at the time of filing form ETA 9079 with the DOL. A single form ETA 9079-W is used for each worker in the United States that is included on the ETA 9079. There is no additional fee required for form ETA 9079W. Upon approval of form ETA 9079, DOL will forward all ETA 9079-W's to the Immigration and Naturalization Service (INS) for adjudication. The employer and the workers will be contacted directly by INS with the results.

This Addendum to the application can be submitted at the time of filing form ETA 9079 or up to 5 days prior to certification.

SECTION I: DEPARTMENT OF LABOR CASE TRACKING INFORMATION**1. Applicant's Federal Employer ID Number:**

Enter Applicant's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service. This must be the same as the EIN from Section I, page 1 of 5 of form ETA 9079.

2. Department of Labor Case Number:

If form ETA 9079-W is submitted after form ETA 9079, enter the case number from the Acceptance Letter.

SECTION II: ALIEN BENEFICIARY INFORMATION**1. Full Legal Name of Alien:**

Provide the alien's family (last) name on the first line and the given (first) name and initial on the second line.

2. Alien's Current U.S. Address:

Enter the complete mailing address of the Alien including number/street, city, state and postal (zip) code.

3. SSN:

Enter the alien's social security number if applicable.

4. Date of Birth:

Enter the alien's date of birth. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

5. Country where alien was born:

Enter the Country where the alien was born.

6. Country where alien's passport was issued:

Enter the Country where the alien's passport was issued.

7. City and Country of the Consulate/Port of Entry or Pre-flight Inspection:

Enter the location where non-immigrants will be applying for their visas.

8. Change of Status or Extension of Stay:

Mark an X in the appropriate box(s) to indicate if the alien requires a change of status and/or an extension of stay.

9. Date Passport Expires:

Enter the date when the alien's passport expires. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

10. Alien Registration Number:

Enter the Alien's Registration Number.

11. Is Alien already in the USA?

Indicate whether the alien is already in the USA.

12. Fill in the appropriate circle:

Fill in the appropriate circle to indicate whether this is new employment, continuation of employment or change in Employment Conditions. Fill in only one circle.

DRAFT

June 6, 2000

13. From I-94:

Provide the alien registration number (if any); I-94 number; date of arrival/admission (from I-94); date of expiration of stay (from I-94); visa/non-immigrant status (from I-94). Enter worker's current non-immigrant status (examples: H-2A, B-2, H-2B). All dates should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

14. Fill the appropriate circle for each questions below:

Fill in the appropriate yes or no circle as it pertains to the worker. Assure that the alien has provided any additional forms for replacement of I-94s or to seek changes for dependents (I-539 or I-102).

15. Alien's Signature:

The alien must sign the form with their full legal name. Their signature indicates that all of the above information is accurate and true. Do not let the signature extend beyond the box. The date of signing should be entered in the block to the right of the signature. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

DRAFT

June 6, 2000

IV. INSTRUCTIONS FOR COMPLETING ETA FORM 9079-C**Visa Issuance Location Addendum**

General: Form ETA 9079-C is a continuation form for form ETA 9079, **SECTION C:** "Visa Request Information". This form can be used to change where or how many workers will apply at a Consulate.

This Addendum to the application can be submitted at the time of filing form ETA 9079 or up to 5 days prior to certification.

SECTION I: DEPARTMENT OF LABOR CASE TRACKING INFORMATION**1. Applicant's Federal Employer ID Number:**

Enter Applicant's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service. This must be the same as the EIN from Section I, page 1 of 5 of form ETA 9079.

2. Department of Labor Case Number:

If form ETA 9079-C is submitted after form ETA 9079, enter the case number from the Acceptance Letter.

SECTION II: VISA ISSUANCE LOCATIONS AND NUMBERS

Repeat the information for items 1 and 2 for each location. The number of individuals at each location should add up to the total number of unnamed workers requested.

1. City and Country of the Consulate, Port of Entry or Pre-flight inspection:

Enter location where non-immigrants will be applying for their visas.

2. Number of Individuals Who Will Apply At This Site:

Enter the number of H-2A non-immigrants that will apply. To remove a Consulate from the list, enter zero in this section.

DRAFT

June 6, 2000

V. INSTRUCTIONS FOR COMPLETING ETA FORM 9079-S**Additional Work-Sites for a Sole-Employer Application Addendum**

General: Only Sole-Employers or Associations as Sole-Employers should fill out this form. Complete a form for all additions, removal or updates of work-sites from the application (ETA Form 9079).

This Addendum to the application can be submitted at the time of filing form ETA 9079 or up to 5 days prior to certification.

SECTION I: DEPARTMENT OF LABOR CASE TRACKING INFORMATION**1. Applicant's Federal Employer ID Number:**

Enter Applicant's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service. This must be the same as the EIN from Section I, page 1 of 5 of form ETA 9079.

2. Department of Labor Case Number:

If form ETA 9079-S is submitted after form ETA 9079, enter the case number from the Acceptance Letter.

SECTION II: WORK-SITE INFORMATION**Action for 9079-S:**

Fill in the appropriate circle: ADD to include work-site(s) on this application if they have not already been added; REMOVE to remove previously included work-site(s) from this application; UPDATE to change the information for a previously included work-site. Fill in only one circle.

1. City or County of Work Site:

Enter the City or County where the work will be performed.

2. H-2A Workers:

Enter the number of H-2A workers requested for each member. If two employers expect to be sharing the same workers, either split them number between them or enter them all for the first one and '0000' for the second. If only one employer has housing, list the total number of workers residing with the employer that has housing. Put '0000' for the number of workers residing with the employers that has no housing.

3. Work Hours Per Week:

Enter the number of hours workers will be expected to work per week.

4. Worker Housing:

Enter the number of workers which will be housed at the specific work site.

Crops A through E**Minimum Guaranteed Wage:**

Enter the wage offered at the specific work site for the specific crop activity listed on form ETA 9079, page 3 of 5.

DRAFT

June 6, 2000

VI. INSTRUCTIONS FOR COMPLETING ETA FORM 9079-A**Joint-Employer & Joint-Employer Association Registration Addendum**

General: Form ETA 9079-A is used to provide information regarding an Association.

This Addendum to the application must be filed before or at the same time as form ETA 9079 is filed.

SECTION I: APPLICANT'S INFORMATION**1. Applicant Type:**

Fill in the appropriate circle to indicate if form ETA 9079-E is for a Joint-Employer or a Joint-Employer Association. Fill in only one circle.

2. Full Legal Name of Association:

Enter full name of the Association or primary employer's information.

3. Federal Employer I.D. Number:

Enter employer's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service.

4. Applicant's Telephone Number:

Enter a ten digit telephone number (include the area code) for the Applicant. If applicable, use the four digits after the slash for the extension.

5. Return Fax Number:

Enter a ten digit fax number (include the area code) for the Applicant.

6. Contact's Telephone Number (Optional):

Enter a ten digit telephone number (include the area code) of the person to call if there are questions regarding this application. If applicable, use the four digits after the slash for the extension.

7. Applicant's Address:

Enter the complete mailing address of the Applicant including number/street, city, state and postal (zip) code.

8. Contact's Name (Optional):

Enter the name of the person in the Association who will be contacted concerning an application. This may be other than the hiring official. Provide the family (last) name on the first line and the given (first) name and initial on the second line.

9. E-Mail Address:

Enter an e-mail address if you would like to receive notification via e-mail.

DRAFT

June 6, 2000

VII. INSTRUCTIONS FOR COMPLETING ETA FORM 9079-E**Employer Membership in an Association Registration Addendum**

General: This addendum is used in conjunction with form ETA 9079-A (Joint-Employer Association Registration) and ETA 9079-L (Listing of Members for an Association Application). This is used to declare membership in an Association and to authorize the Association to act on behalf of the employer on appropriate applications.

This Addendum to the application must be submitted before or at the same time as form ETA 9079 is filed.

SECTION I: EMPLOYER'S INFORMATION**1. Full Legal Of Employer:**

Enter the business name as it is on record with the IRS.

2. Federal Employer I.D. Number:

Enter employer's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service.

3. Employer's Telephone Number:

Enter a ten digit telephone number (include the area code) for the employer. If applicable, use the four digits after the slash for the extension.

4. Return Fax Number:

Enter a ten digit fax number (include the area code) for the Applicant.

5. Contact Telephone Number:

Enter a ten digit telephone number (include the area code) for the contact. If applicable, use the four digits after the slash for the extension.

6. Employer's Address:

Enter the complete mailing address of the employer including number/street, city, state and postal (zip) code.

SECTION II: ASSOCIATION'S INFORMATION**1. Association's Federal Employer I.D. Number:**

Use the Association's EIN from Section I of form ETA 9079-A

2. Name of Association:

Enter full legal name of the Association as it appears in Section I of form ETA 9079-A.

SECTION III: ASSOCIATION AUTHORIZATION**1. Hiring Official's Name:**

Provide the family (last) name on the first line and the given (first) name and initial on the second line.

2. Title of Hiring Official or Other Designated Official:

Enter the title of the person whose name appears above.

3. Employer's Signature:

The Employer must sign the form with their full legal name. Do not let the signature extend beyond the box. The date of signing should be entered in the block to the right of the signature. The date should be entered in an MM/DD/YYYY format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

DRAFT

June 6, 2000

VIII. INSTRUCTIONS FOR COMPLETING ETA FORM 9079-L**Listing of Members for an Association Application Addendum**

General: Only Joint-Employer Associations should fill out this form. Complete a form for all additions, removals or updates of members from the application (form ETA 9079). This addendum is used in conjunction with ETA 9079-A (Registration of Association) and ETA 9079-E (Registration of Employer Membership in an Association)

This Addendum to the application can be submitted at the time of filing form ETA 9079 or up to 5 days prior to certification.

SECTION I: DEPARTMENT OF LABOR CASE TRACKING INFORMATION**1. Applicant's Federal Employer ID Number:**

Enter Applicant's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service. This must be the same as the EIN from Section I, page 1 of 5 of form ETA 9079.

2. Department of Labor Case Number:

If form ETA 9079-W is submitted after form ETA 9079, enter the case number from the Acceptance Letter.

SECTION II: MEMBER INFORMATION**Action for 9079-L:**

Fill in the appropriate circle: ADD to include employer(s) on this application if they have not already been added; REMOVE to remove previously included employer(s) from this application, UPDATE to change the information for previously included employer(s). Fill in only one circle.

1. Member's EIN:

Enter each member's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service.

2. City or County of Work Site:

Enter the City or County where the work will be performed.

3. H-2A Workers:

Enter the number of H-2A workers requested for each member. If two employers expect to share the same workers, either split the workers between the employers or enter all workers for the first employer and '0000' for the second. If only one employer has housing, list the total number of workers residing with the employer that has housing. Put '0000' for the number of workers residing with the employer that has no housing.

4. Work Hours Per week:

Enter the number of hours workers will be expected to work per week.

5. Worker Housing:

Enter the number of workers which will be housed at the specific work site.

Crops A through E**Minimum Guaranteed Wage:**

Enter the wage offered at the specific work site for the specific crop activity listed on form ETA 9079, page 3 of 5.

DRAFT

June 6, 2000

IX. INSTRUCTIONS FOR COMPLETING ETA FORM 9079-M**Post Certification Visa Issuance Location Change Addendum**

General: This Addendum is used after certification and is equivalent to INS form I-824. A separate fee is required for this addendum to be processed. The current fee is \$120. A check for this amount must be included with the form or the form will be returned. Use form ETA 9079-C to change Consulates before certification.

This Addendum to the application should be filed after the application has been certified.

SECTION I: DEPARTMENT OF LABOR CASE TRACKING INFORMATION**1. Applicant's Federal Employer ID Number:**

Enter Applicant's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service. This must be the same as the EIN from Section I, page 1 of 5 of form ETA 9079.

2. Department of Labor Case Number:

If form ETA 9079-W is submitted after form ETA 9079, enter the case number from the Acceptance Letter.

SECTION II: APPLICANT'S INFORMATION**1. Full Legal Name of Applicant:**

Enter the full name of the individual employer or Association. Associations will use the same information as entered on form ETA 9079-A.

2. Applicant's Telephone Number:

Enter a ten digit telephone number (include the area code) for the Applicant.

3. Return Fax Number:

Enter a ten digit fax number (include the area code) for the Applicant.

4. Contact's Telephone Number:

This information is optional but recommended. Enter a ten digit telephone number (include the area code) for the contact person from the individual employer or Association.

5. Applicants' Address:

Enter the complete mailing address of the Applicant including number/street, city, state and postal (zip) code.

6. Contact's Name:

Enter the name of the contact.

7. Correspondence Address:

Enter the complete mailing address where correspondence is to be sent. Include number/street, city, state and postal (zip) code.

SECTION III: ACTION REQUEST

Fill in the appropriate circle to indicate the action requested. Fill in only one circle.

SECTION IV: CONSULATE CHANGE INFORMATION

Enter the new information for the two locations below. If you wish all of the H-2A visas to be moved from one location to the other enter '0000' where appropriate.

1. City and Country of the Consulate, Port of Entry or Pre-flight inspection:

Enter location where non-immigrants will be applying for their visas.

2. Number of individuals who will apply at this site:

Enter the number of H-2A non-immigrants that will apply.

DRAFT

June 6, 2000

SECTION IV: AUTHORIZATION FOR CHANGE**1. Hiring Official's Name:**

Enter the hiring official's name. Provide the family (last) name on the first line and the given (first) name and initial on the second line.

2. Title of Hiring or Other Designated Official:

Enter the title of the person whose name appears above.

3. Applicant's Signature:

Applicant must sign the form with their full legal name. Do not let the signature extend beyond the box. The date of signing should be entered in the block to the right of the signature. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

DRAFT

June 6, 2000

X. INSTRUCTIONS FOR COMPLETING ETA FORM 9079-X**Request for Extension of Labor Certification and H-2A Visas Petition**

This Addendum to the application should be filed after the application has been certified.

SECTION I: DEPARTMENT OF LABOR CASE TRACKING INFORMATION**1. Federal Employer I.D. Number:**

Enter Applicant's nine digit Federal Employer identification Number (EIN) that has been assigned by the Internal Revenue Service. This must be the same as the EIN from Section I, page 1 of 5 of form ETA 9079.

2. Department of Labor Case Number from Acceptance Letter

Enter the case number from the Acceptance Letter.

3. Full Legal Name of Applicant:

Enter the full name of the individual employer or Association. Associations will use the same information as entered on form ETA 9079-A.

4. Applicant's Telephone Number:

Enter a ten digit telephone number (include the area code) for the Applicant. If applicable, use the four digits after the slash for the extension.

5. Requested End Date:

Enter the new ending date you are requesting to be certified. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).

SECTION II: REASON FOR REQUESTING EXTENSION

Enter the reason why an extension to the certified period is being requested.

SECTION III: AUTHORIZATION**1. Hiring Official's Name:**

Enter the hiring official's name. Provide the family (last) name on the first line and the given (first) name and initial on the second line.

2. Title of Hiring or Other Designated Official:

Enter the title of the person whose name appears above.

3. Applicant's Signature:

Applicant must sign the form with their full legal name. Do not let the signature extend beyond the box. The date of signing should be entered in the block to the right of the signature. The date should be entered in an **MM/DD/YYYY** format and have a 0 in front of any number less than 10 (for example: February 5, 2002 is entered as 02/05/2002).



OMB Approval:
Expiration Date:

	-						-				

Joint-Employer Association

[illegible][illegible]

17. Applicant's Telephone Number						-				/			

			-			/			

[illegible][illegible]

[illegible][illegible][illegible]

[illegible]

employers requesting:	10 or fewer workers		11 to 99 workers		100 or more workers	

(1) Total Number of Alien Workers Requested (includes those already in the U.S.)

(2) Total Work Hours per Week

(3) Number of workers which can be housed			

(4) Location of Work - City or County - use the 9079-S for additional Work-Sites

[illegible]

Draft

Employer's
Control
Number

Employer's Control Number must be the same on all five (5) pages, including the last page



OMB Approval:
Expiration Date:

Begin Date

M	M

1

A rectangle is divided into two equal squares by a vertical line. Each square is labeled with the letter 'D' below it.

1

Y	Y	Y	Y

End Date

M	M

1

D	D

4

Y	Y	Y	Y

(1) Job Title

[illegible]

**Fill Only
ONE Circle**

None

High School

Associate

Bachelor

Master

Doctorate

(3) Foreign Equivalent Acceptable

le

Field of Study

[illegible]

Field of Training

[illegible]

Months of Training

(3) Field of Experience

[illegible]

Months of Experience

(4) Job Description

[illegible]

NOTE: See OMB notice on page 4 of this form.

Page - 2 of 5

Employer's
Control
Number

Employer's Control Number must be the same on all five (5) pages, including the last page

Draft



OMB Approval:
Expiration Date:

(1) Crop Activity

[illegible]

\$

 .

 PER

Fill Only Month Week Day Hour
ONE Circle ☐ ☐ ☐ ☐

Any piece rate/ wage listed on the ETA 790 will be the required payment, subject to DoL approval. See form instructions for details.

Crop Activity

[illegible]

\$

 .

 PER

Fill Only Month Week Day Hour
ONE Circle ☐ ☐ ☐ ☐

Any piece rate/ wage listed on the ETA 790 will be the required payment, subject to DoL approval. See form instructions for details.

Crop Activity

[illegible]

\$

 .

 PER

Fill Only Month Week Day Hour
ONE Circle ☐ ☐ ☐ ☐

Any piece rate/ wage listed on the ETA 790 will be the required payment, subject to DoL approval. See form instructions for details..

Crop Activity

[illegible]

\$

 .

 PER

Fill Only Month Week Day Hour
ONE Circle ☐ ☐ ☐ ☐

Any piece rate/ wage listed on the ETA 790 will be the required payment, subject to DoL approval. See form instructions for details.

Crop Activity

[illegible]

\$

 .

 PER

Fill Only Month Week Day Hour
ONE Circle ☐ ☐ ☐ ☐

Any piece rate/ wage listed on the ETA 790 will be the required payment, subject to DoL approval. See form instructions for details.

Draft

						Employer's Control Number

Employer's Control Number must be the same on all five (5) pages, including the last page



Application for Temporary Agricultural Labor Certification and H-2A Petition



OMB Approval:
Expiration Date:

(1) Full Legal Name of Agent's Organization or Company

[illegible]

(2) Contact's Name (Optional) - Family name on the first line, Given name then initial on the second line.

[illegible][illegible]

(4) Agent's Telephone Number

[illegible]

(5) Agent's Correspondence Address (Number / Street)

[illegible]

City

State

Zip Code

City										State		County									

(6) E-mail Address

[illegible]

I hereby agree to act as the agent for the applicant listed on page 1 of this application.

$$\begin{array}{|c|c|} \hline & \\ \hline \end{array} \quad / \quad \begin{array}{|c|c|} \hline & \\ \hline \end{array} \quad / \quad \begin{array}{|c|c|c|c|} \hline & & & \\ \hline \end{array}$$

M M P P Y Y Y Y

(7) **Agent's Signature** -- *DO NOT* let signature extend beyond the box.

I hereby designate the above as my agent.

Diagram illustrating the division of a 2x2 grid into four 1x1 grids, then a 2x2 grid into four 1x1 grids, and finally a 4x4 grid into sixteen 1x1 grids.

(8) **Applicant's Signature** -- DO NOT let signature extend beyond the

VIII. Visa Request

(1) Number of Individuals who will apply at this site.

(2) City and Country of the Consulate, Port of Entry or Preflight

[illegible]

IX. State Agency Job Order

City

[illegible]

State

Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number. Respondents obligation to reply to these reporting requirements are mandatory (NA Act, Section 205). Public reporting burden for this collection of information is estimated to average 1 1/4 hour per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Division of Foreign Labor Certification, U.S. Department of Labor, Room N-4456, 200 Constitution Avenue, NW., Washington, DC 20210. (Paperwork Reduction Project 1205-0310). **DO NOT SEND THE COMPLETED FORM TO THIS OFFICE.**

Employer's
Control
Number

Employer's Control Number must be the same on all five (5) pages, including the last page

Draft





OMB Approval:
Expiration Date:

(2) Department of Labor Case Number from Acceptance Letter

$$\boxed{} - \boxed{}\boxed{}\boxed{}\boxed{}\boxed{}\boxed{} = \boxed{}\boxed{}\boxed{}\boxed{}\boxed{}\boxed{}$$
[illegible]



Employer Membership in an Association Registration Addendum

U.S. Department of Labor

Application for Temporary Agricultural
Labor Certification and H-2A Petition

ETA Form 9079-E

OMB Approval:
Expiration Date:

I. Employer's Information

(1) Full Legal Name of Employer

[illegible]

(2) Federal Employer I.D. Number (9 digits) (EIN from IRS)

		-							

							(3) Employer's Telephone Number

			-				/			

(4) Return FAX Number

				-				

(5) Contact Telephone Number (Optional)

			-				/				

(6) Employer's Address (Number / Street)(always use first line - use the second line when needed, otherwise leave it blank.)

[illegible]

City

[illegible]

State

Postal Code

II. Association's Information

(1) Association's Federal Employer I.D. Number (9 digits) (EIN from IRS)

		-							

(2) Name of Association

[illegible]

III. Authorization

I hereby authorize the above Association to act on my half on appropriate ETA-9079 applications.

(1) Responsible Official's Name - Family name on the first line, Given name then initial on the second line.

[illegible]

Title of Responsible Official

[illegible][illegible]

M	M

D	D

Y	Y	Y	Y

Employer's Signature -- *DO NOT* let signature extend beyond the box.



Listing of Members for an
Association Application
Addendum

U.S. Department of Labor
Application for Temporary Agricultural
Labor Certification and H-2A Petition



ETA Form 9079-L
OMB Approval:
Expiration Date:

I. Department of Labor Case Tracking Information

(1) Applicant's Federal Employer I.D. Number from Section A of ETA-9079 main form.

-

(2) Department of Labor Case Number from Acceptance Letter

- -

II. Member Information

Fill Only ☐ Add ☐ Remove ☐ Update ☐ the following members for this Application

(1) Member's EIN

-

(2) City or County of Work-Site

(3) H-2A Workers

(4) Work Hrs/Wk

(5) Worker Housing.

For the crop
activities listed
on the
ETA9079 main
form.

Crop A - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop B - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop C - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop D - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop E - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

(1) Member's EIN

-

(2) City or County of Work-Site

(3) H-2A Workers

(4) Work Hrs/Wk

(5) Worker Housing.

For the crop
activities listed
on the
ETA9079 main
form.

Crop A - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop B - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop C - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop D - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop E - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

(1) Member's EIN

-

(2) City or County of Work-Site

(3) H-2A Workers

(4) Work Hrs/Wk

(5) Worker Housing.

For the crop
activities listed
on the
ETA9079 main
form.

Crop A - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop B - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop C - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop D - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

Crop E - Proposed Minimum Guaranteed Wage

\$. PER ☐ Month ☐ Week ☐ Day ☐ Hour
Fill Only ONE Circle

FOR U.S. GOVERNMENT AGENCY USE ONLY: Fiscal Control Number

Draft



OMB Approval:
Expiration Date:



Federal Register

**Thursday,
July 13, 2000**

Part VI

Environmental Protection Agency

40 CFR Part 9 et al.

**Revisions to the Water Quality Planning
and Management Regulation and
Revisions to the National Pollutant
Discharge Elimination System Program in
Support of Revisions to the Water Quality
Planning and Management Regulation;
Final Rules**

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 9, 122, 123, 124, and 130**

[FRL-6733-2]

Revisions to the Water Quality Planning and Management Regulation and Revisions to the National Pollutant Discharge Elimination System Program in Support of Revisions to the Water Quality Planning and Management Regulation**AGENCY:** Environmental Protection Agency.**ACTION:** Final rule.

SUMMARY: Today's final rule revises and clarifies the Environmental Protection Agency's (EPA) current regulatory requirements for establishing Total Maximum Daily Loads (TMDLs) under the Clean Water Act (CWA) so that TMDLs can more effectively contribute to improving the nation's water quality. Clean water has been a national goal for many decades. While significant progress has been made, particularly in stemming pollution from factories and city sewage systems, major challenges remain. These challenges call for a focused effort to identify polluted waters and enlist all those who enjoy, use, or depend on them in the restoration effort. Today's action will establish an effective and flexible framework to move the country toward the goal of clean water for all Americans. It establishes a process for making decisions in a common sense, cost effective way on how best to restore polluted waterbodies. It is based on identifying and implementing necessary reductions in both point and nonpoint sources of pollutants as expeditiously as practicable. States, Territories, and authorized Tribes will develop more comprehensive lists of all waterbodies that do not attain and maintain water quality standards. States, Territories, and authorized Tribes will schedule, based on priority factors, the establishment of all necessary TMDLs over 10 years, with an allowance for another five years where necessary. The rule also specifies elements of approvable TMDLs, including implementation plans which contain lists of actions and expeditious schedules to reduce pollutant loadings. States, Territories, and authorized Tribes will provide the public with opportunities to comment on methodologies, lists, prioritized schedules, and TMDLs prior to submission to EPA. The rule lays out specific timeframes under which EPA will assure that lists of waters and

TMDLs are completed as scheduled, and necessary National Pollutant Discharge Elimination System (NPDES) permits are issued to implement TMDLs. The final rule explains EPA's discretionary authority to object to, and reissue if necessary, State-issued NPDES permits that have been administratively continued after expiration where there is a need for a change in the conditions of the permit to be consistent with water quality standards and established and approved TMDLs.

EPA believes that these regulations are necessary because the TMDL program which Congress mandated in 1972 has brought about insufficient improvement in water quality. EPA had been concerned about this lack of progress for some time when, in 1996, it established a Federal Advisory Committee. The Committee was asked to advise EPA on possible improvements to the program. After careful deliberations, the Committee recommended that EPA amend several aspects of the regulations.

EPA believes that these regulations will benefit human health and the environment by establishing clear goals for identification of impaired waterbodies and establishment of TMDLs. The regulations will also ensure that States, Territories and authorized Tribes give a higher priority to restoring waterbodies which have a greater potential to affect human health or threatened or endangered species thereby focusing the benefits of these regulations on the most pressing problems.

DATES: This regulation is not effective until 30 days after the date that Congress allows EPA to implement this regulation. EPA will publish notice of the effective date in the **Federal Register**. This action is considered issued for purposes of judicial review, as of 1:00 p.m. Eastern Daylight Time, on July 27, 2000 as provided in § 23.2.

ADDRESSES: The complete administrative records for the final rule have been established under docket numbers W-98-31 and W-99-04, and include supporting documentation as well as printed, paper versions of electronic comments. Copies of information in the record are available upon request. A reasonable fee may be charged for copying. The records are available for inspection and copying from 9 a.m. to 4 p.m., Monday through Friday, excluding legal holidays, at the Water Docket, EPA, East Tower Basement, 401 M Street, SW, Washington, DC. For access to docket materials, please call (202) 260-3027 to schedule an appointment.

FOR FURTHER INFORMATION CONTACT: Jim Pendergast, U.S. EPA, Office of Wetlands, Oceans and Watersheds (4503F), 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460, (202) 260-9549 for information pertaining to Part 130 of today's rule, or Kim Kramer, U.S. EPA, Office of Wastewater Management (4203), 1200 Pennsylvania Ave., N.W., Washington, D.C. 20460, (202) 401-4078, for information regarding Parts 122, 123, and 124.

SUPPLEMENTARY INFORMATION:**A. Authority**

Clean Water Act sections 106, 205(g), 205(j), 208, 301, 302, 303, 305, 308, 319, 402, 501, 502, and 603; 33 U.S.C. 1256, 1285(g), 1285(j), 1288, 1311, 1312, 1313, 1315, 1318, 1329, 1342, 1361, 1362, and 1373.

B. Table of Contents of This Preamble**I. Introduction****A. Background**

1. What are the water quality concerns addressed by this rule?
2. What are the current statutory authorities to support this final rule?
3. What is the regulatory background of today's action?
 - a. What are the current requirements?
 - b. What changes did EPA propose in August 1999?
 - c. What has EPA done to gather information and input as it developed this final rule?
- B. What are the significant issues in today's rule?
 1. What are EPA's objectives for today's rule?
 2. What are the key differences between the proposal and today's final rule?

II. Changes to Part 130

- A. What definitions are included in this final rule? (§ 130.2)
 1. What definitions are added or revised?
 2. Response to requests for new definitions.
- B. Who must comply with the requirements of subpart C? (§ 130.20)
- C. What is the purpose of subpart C? (§ 130.21)
- D. What water-quality related data and information must be assembled to develop the list of impaired waterbodies? (§ 130.22)
- E. How must the methodology for considering and evaluating existing and available water-quality related data and information to develop the list be documented? (§ 130.23)
- F. When must the methodology be provided to EPA? (§ 130.24)
- G. What is the scope of the list of impaired waterbodies? (§ 130.25)
- H. How do you apply your water quality standards antidegradation policy to the listing of impaired waterbodies? (§ 130.26)
- I. What is the format and content of the list? (§ 130.27)
- J. What must the prioritized schedule for submitting TMDLs to EPA contain? (§ 130.28)
- K. Can the list be modified? (§ 130.29)

- L. When must the list of impaired waterbodies be submitted to EPA and what will EPA do with it? (§ 130.30)
- M. Must TMDLs be established? (§ 130.31)
- N. What is a TMDL? (§ 130.32(a))
- O. What are the minimum elements of a TMDL? (§ 130.32(b))
- P. What are the requirements of the implementation plan? (§ 130.32(c))
- Q. What are the special requirements for Total Maximum Daily Thermal Loads? (§ 130.32(d))
- R. How must TMDLs take into account endangered and threatened species? (§ 130.32(e))
- S. How are TMDLs expressed? (§ 130.33)
- T. What actions must EPA take on TMDLs that are submitted for review? (§ 130.34)
- U. How will EPA assure that TMDLs are established? (§ 130.35)
- V. What public participation requirements apply to the lists and TMDLs? (§ 130.36)
- W. What is the effect of this rule on TMDLs established when the rule is first implemented? (§ 130.37)
- X. Continuing planning process (§ 130.50)
- Y. Water quality management plans (§ 130.51)
- Z. Petitions to EPA to establish TMDLs (§ 130.65)
- AA. Water quality monitoring and report (§§ 130.10 and 130.11)
- AB. Other sections (§§ 130.0, 130.1, 130.3, 130.7, 130.61, 130.62, 130.63, and 130.64)
- III. Changes to Parts 122, 123, and 124
 - A. Reasonable further progress toward attaining water quality standards in impaired waterbodies in the absence of a TMDL
 - 1. Background
 - 2. Requirements for new and significantly expanding dischargers
 - 3. EPA authority to reissue state-issued expired and administratively-continued NPDES Permits
 - B. New tools to ensure implementation of established TMDLs
 - 1. Background
 - 2. Designation of concentrated animal feeding operations
 - 3. Designation of concentrated aquatic animal production facilities
 - 4. Designation of point source storm water discharges associated with silvicultural operations
 - 5. EPA authority to reissue state-issued expired and administratively-continued NPDES Permits
- IV. Costs and benefits of the rule
- V. Regulatory requirements
 - A. Regulatory Flexibility Act (RFA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*
 - B. Regulatory Planning and Review, Executive Order 12866
 - C. Unfunded Mandates Reform Act
 - D. Paperwork Reduction Act
 - E. Federalism, Executive Order 13132
 - F. Consultation and Coordination with Indian Tribal Governments, Executive Order 13084
 - G. Protection of Children from Environmental Health Risks and Safety Risks, Executive Order 13045

- H. National Technology Transfer and Advancement Act
- I. Congressional Review Act

Entities Potentially Regulated by the Final Rule

State, Territorial or authorized Tribal Governments.

States, Territories and authorized Tribes.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in this table could also be regulated. To determine whether you are regulated by this action, you should carefully examine the applicability criteria in § 130.20. If you have questions regarding the applicability of this action to a particular entity, consult one of the persons listed in the **FOR FURTHER INFORMATION CONTACT** section.

Response to Comments

This preamble explains in detail the elements of the final TMDL regulations and the amendments which EPA is making to the NPDES program in order to support implementation of the TMDL program. EPA has made changes to its proposal in response to comments received on the proposed rules. EPA has evaluated all the significant comments it received including comments submitted after the close of the comment period and prepared a Response to Comment Document containing EPA's response to those comments. This document complements discussions in this preamble and is available for review in the Water Docket.

Before Reading This Preamble, You Should Read the Final Rule

I. Introduction

A. Background

1. What are the Water Quality Concerns Addressed by this Rule?

The CWA includes a number of programs aimed at restoring and maintaining water quality. These include national technology-based effluent limitation guidelines; national water quality criteria guidance; State, Territorial and authorized Tribal water quality standards; State, Territorial and authorized Tribal nonpoint source (NPS) management programs; funding provisions for municipal wastewater treatment facilities; State, Territorial and authorized Tribal water quality monitoring programs; and the NPDES permit program for point sources. These programs have produced significant and

widespread improvements in water quality over the last quarter-century, but many waterbodies still fail to attain or maintain water quality standards due to one or more pollutants.

The National Water Quality Inventory Report to Congress for 1998 indicates that of the 23 percent of the Nation's rivers and streams that have been assessed, 35 percent do not fully support water quality standards or uses and an additional 10 percent are threatened. Of the 32 percent of estuary waterbodies assessed, 44 percent are not fully supporting water quality standards or uses and an additional 9 percent are threatened. Of the 42 percent of lakes, ponds, and reservoirs assessed (not including the Great Lakes), 45 percent are not fully supporting water quality standards or uses and an additional 9 percent are threatened. The report also indicates that 90 percent of the Great Lakes shoreline miles have been assessed, and that 96 percent of these are not fully supporting water quality standards and an additional 2 percent are threatened. The report indicates that pollutants in rainwater runoff from urban and agricultural land are a leading source of impairment. Agriculture is the leading source of pollutants in assessed rivers and streams, contributing to 59 percent of the reported water quality problems and affecting about 170,000 river miles. Hydromodification is the second leading source of impairment, and urban runoff/storm sewers is the third major source, contributing respectively 20 percent and 12 percent of reported water quality problems. EPA recognizes that a large percentage of streams has not been assessed but believes that there is sufficient information in hand to warrant concern over those unassessed waters and the slow pace at which many waters are attaining water quality standards.

The 1998 section 303(d) lists of impaired waterbodies submitted by States and Territories provided additional information. The section 303(d) lists relied, in part, on information in the section 305(b) reports. The States and Territories identified over 20,000 individual waterbodies including river and stream segments, lakes, and estuaries that do not attain State water quality standards despite 28 years of pollution control efforts. These impaired waterbodies include approximately 300,000 miles of river and shoreline and approximately 5 million acres of lakes. Approximately 210 million people live within 10 miles of these waterbodies. State and local governments also reported that they

issued 2,506 fish advisories and closed 353 beaches in 1998.

EPA believes that a significant part of the response to these problems must be a more rigorous implementation of the TMDL program. EPA believes that today's rule will provide the tools for States, Territories and authorized Tribes to bring the assessment and restoration authorities provided by section 303(d) into greater use and result in significant improvements in the quality of the Nation's waterbodies.

2. What are the Current Statutory Authorities That Support This Final Rule?

The goal of establishing TMDLs is to assure that water quality standards are attained and maintained. Section 303(d) of the CWA which Congress enacted in 1972 requires States, Territories and authorized Tribes to identify and establish a priority ranking for waterbodies for which technology-based effluent limitations required by section 301 are not stringent enough to attain and maintain applicable water quality standards, establish TMDLs for the pollutants causing impairment in those waterbodies, and submit, from time to time, the list of impaired waterbodies and TMDLs to EPA. EPA must review and approve or disapprove lists and TMDLs within 30 days of the time they are submitted. If EPA disapproves a list or a TMDL, EPA must establish the list or TMDL. In addition, EPA and the courts have interpreted the statute as requiring EPA to establish lists and TMDLs when a State fails to do so. Furthermore, the requirement to identify and establish TMDLs for waterbodies exists regardless of whether the waterbody is impaired by point sources, nonpoint sources or a combination of both. *Pronsolino v. Marcus*, 2000 WL 356305 (N.D. Cal. March 30, 2000.)

Listing impaired waterbodies and establishing TMDLs for waterbodies impaired by pollutants from nonpoint sources does not mean any new or additional implementation authorities are created. Once a TMDL is established, existing State, Territorial and authorized Tribal programs, other Federal agencies' policies and procedures, as well as voluntary and incentive-based programs, are the basis for implementing the controls and reductions identified in TMDLs.

CWA Section 402 establishes a program, the NPDES Program, to regulate the "discharge of a pollutant," other than dredged or fill materials, from a "point source" into "waters of the United States." The CWA and NPDES regulations define a "discharge

of a pollutant," "point source," and "waters of the United States." The NPDES Program is administered at the federal level by EPA unless a State, Tribe or U.S. Territory assumes the program after receiving approval by the federal government. Under section 402, discharges of pollutants to waters of the United States are authorized by obtaining and complying with the terms of an NPDES permit. NPDES permits commonly contain numerical limits on the amounts of specified pollutants that may be discharged and specified best management practices (BMPs) designed to minimize water quality impacts. These numerical effluent limitations and BMPs or other non-numerical effluent limitations implement both technology-based and water quality-based requirements of the Act. Technology-based limitations represent the degree of control that can be achieved by point sources using various levels of pollution control technology. If necessary to achieve compliance with applicable water quality standards, NPDES permits must contain water quality-based limitations more stringent than the applicable technology-based standards.

3. What is the Regulatory Background of Today's Action?

a. What are the Current Requirements?

EPA issued regulations governing identification of impaired waterbodies and establishment of TMDLs, at § 130.7, in 1985 and revised them in 1992. These regulations provide that:

- State, Territorial and authorized Tribal lists must include those waters still requiring TMDLs because technology based effluent limitations required by the CWA or more stringent effluent limitations and other pollution controls (e.g., management measures) required by local, State, or Federal authority are not stringent enough to attain and maintain applicable water quality standards;
- State, Territorial and authorized Tribal lists must be submitted to EPA every two years, beginning in 1992, on April 1 of every even-numbered year;
- The priority ranking for listed waters must include an identification of the pollutant or pollutants causing or expected to cause the impairment and an identification of the waterbodies targeted for TMDL development in the next two years;
- States, Territories and authorized Tribes, in developing lists, must assemble and evaluate all existing and readily available water quality-related data and information;
- States, Territories and authorized Tribes must submit, with each list, the methodology used to develop the list and provide EPA with a rationale for any decision not to use any existing and readily available water quality-related data and information; and

- TMDLs must be established at levels necessary to implement applicable water quality standards with seasonal variations and a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

The regulations define a TMDL as a quantitative assessment of pollutants that cause water quality impairments. A TMDL specifies the amount of a particular pollutant that may be present in a waterbody, allocates allowable pollutant loads among sources, and provides the basis for attaining or maintaining water quality standards. TMDLs are established for waterbody and pollutant combinations for waterbodies impaired by point sources, nonpoint sources, or a combination of both point and nonpoint sources. Indian Tribes may be authorized to establish TMDLs for waterbodies within their jurisdiction. To date, however, no Tribe has sought or received CWA authority to establish TMDLs.

The NPDES regulations, in several provisions and under certain circumstances, allow the permitting authority and/or EPA to subject certain previously non-designated sources to NPDES program requirements. EPA established these jurisdictional regulations in 1973 when the Agency and the States focused permitting resources primarily on continuous discharges, for example, industrial and municipal sources. Also, in the early stages of CWA implementation, the Agency and the States focused on implementation of technology-based standards. At that time, EPA attempted to limit the scope of the NPDES permitting program to certain types of point sources. The D.C. Circuit rejected that attempt, however, and explained that EPA could not exempt point sources from the NPDES program. *NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). Although the Court rejected this attempt, it did recognize the Agency's discretion to define "point source" and "nonpoint source." The existing NPDES regulations identifying animal production and silvicultural sources represents an early attempt to do so.

Also, under the NPDES program regulations, a Regional Administrator may review and object to State-issued NPDES permits. The procedures by which a Regional Administrator may review and object to these permits are found in § 123.44. The existing objection authority, under section 402(d) of the Act, grants EPA 90 days within which to object to a proposed State permit that fails to meet the guidelines and requirements of the Act.

If a State fails to respond to an EPA objection within 90 days of objection, exclusive authority to issue the NPDES permit to that discharger passes to EPA.

b. What Changes Did EPA Propose in August 1999?

In 1996, the Office of Water determined that there was a need for a comprehensive evaluation of EPA's and State, Territorial and authorized Tribal implementation of section 303(d) requirements. EPA convened a committee under the Federal Advisory Committee Act (TMDL FACA committee) to undertake such an evaluation and make recommendations for improving implementation of the TMDL program, including recommendation for revised regulations and guidance. The TMDL FACA committee included 20 individuals with diverse backgrounds, including agriculture, forestry, environmental advocacy, industry, and State, local, and Tribal governments. On July 28, 1998, the committee submitted its final report to EPA which contained more than 100 consensus recommendations, a subset of which recommended regulatory changes. The TMDL FACA committee recommendations helped guide the development of the revisions which EPA proposed in August 1999.

In proposing revisions to the regulations governing TMDLs, EPA also relied upon the past experience of States and Territories. EPA's proposal recognized and responded to some of the issues raised by stakeholders regarding the effectiveness and consistency of the TMDL program. EPA also proposed changes intended to resolve some of the issues and concerns raised by litigation concerning the identification of impaired waterbodies and the establishment of TMDLs. Finally, EPA proposed changes to the NPDES permitting regulations to assist in the establishment and implementation of TMDLs and to better address point source discharges to waters not meeting water quality standards prior to establishment of a TMDL.

Key elements of the changes proposed in August, 1999 include:

- State, Territorial, and authorized Tribal section 303(d) listing methodologies would become more specific, subject to public review, and provided to EPA for review prior to submission of the list.
- States, Territories and authorized Tribes would develop a more comprehensive list of waterbodies impaired and threatened by pollution,

organize it into four parts, and submit it to EPA.

- States, Territories and authorized Tribes would establish TMDLs only for waterbodies on the first part of the list.
- States, Territories and authorized Tribes would keep waterbodies on the lists until water quality standards were achieved.
- States, Territories and authorized Tribes would establish and submit to EPA schedules to establish all TMDLs within 15 years of listing.
- States, Territories, and authorized Tribes would rank TMDLs into high, medium or low priority.
- TMDLs would include 10 specific elements, one of which is an implementation plan.
- States, Territories, and authorized Tribes would notify the public and give them the opportunity to comment on the methodology, lists, priority rankings, schedules, and TMDLs prior to submission to EPA.
- New and significantly expanded discharges subject to NPDES permits would need to obtain an offset for the increased discharge before being allowed to discharge the increase.
- Certain point source storm water discharges from silviculture would be required to seek a permit if necessary to implement a TMDL.
- EPA could designate certain animal feeding operations and aquatic animal production facilities as sources subject to NPDES permits in authorized States.
- EPA could object to expired and administratively continued State-issued NPDES permits.
- Regulatory language would codify requirements pertaining to citizens' rights to petition EPA.

c. What has EPA Done to Gather Information and Input as it Developed This Final Rule?

EPA published the proposed rule on August 23, 1999, and provided for an initial 60 day comment period, which was later extended to a total of 150 days. EPA received about 34,000 comments on the proposal comprised of about 30,500 postcards, 2,700 letters making one or two points, and 780 detailed comments addressing many issues. EPA has reviewed all these comments as part of the development of today's final rule.

EPA also engaged in an extensive outreach and information-sharing effort following the publication of the proposed rule. The Agency sponsored and participated in six public meetings nationwide, to better inform the public on the contents of the proposed rules, and to get informal feedback from the

public. These meetings took place in Denver, Los Angeles, Atlanta, Kansas City, Seattle, and Manchester, New Hampshire. In addition, EPA participated in numerous other meetings, conferences and information-sharing sessions to discuss the proposed rule and listen to alternative approaches to achieving the nation's clean water goals.

The Agency has had an ongoing dialogue with State and local officials and their national/regional organizations throughout the development of this rule. EPA has met with organizations representing State and local-elected officials including: the National Governors' Association, the Western Governors' Association, the National Conference of State Legislatures, the National Association of Counties, the National League of Cities and EPA's State and Local Advisory Group. Many discussion sessions were held with officials who administer State and local programs related to water quality, agriculture, forestry, and harbors. Discussions were held with such organizations as the Environmental Council of the States, the Association of State and Interstate Water Pollution Control Administrators, the Association of Municipal Sewerage Agencies, the Association of Municipal Water Agencies, the National Association of State Agricultural Departments, the National Association of State Foresters, the Western States Water Council, the Association of State Drinking Water Administrators, the National Association of Flood and Storm Water Management Agencies, the Interstate Conference on Water Policy, and the Western States Land Commissioners.

EPA met with groups representing business, industry, agriculture, and forestry interests, including the Electric Power Research Institute, the Utility Water Action Group, American Water Works Association, the American Forest and Paper Association, the Family Farm Alliance, the National Association of Conservation Districts, a number of State Farm Bureaus, corn and soybean grower organizations and forestry associations. EPA also met with environmental and citizen groups including the Natural Resources Defense Council, Sierra Club, Friends of the Earth and Earth Justice. EPA participated in numerous Congressional briefings and hearings held in Washington and in several field locations. The results of these meetings and discussions are reflected in today's rule.

B. What are the Significant Issues in Today's Rule?

1. What are EPA's Objectives for Today's Rule?

States, Territories, and authorized Tribes are essential in carrying out a successful program and EPA looks forward to working with them in developing this program. Further, we believe that, ultimately, any successful effort depends on a cooperative approach that pulls together the variety of entities and stakeholders involved in the watershed. EPA through this rulemaking seeks to provide a framework that facilitates this approach.

EPA received many comments regarding the overall purpose of the proposed rule. Many commenters expressed concerns that EPA was putting too much emphasis on TMDLs and ignoring other programs and initiatives under the CWA which are also aimed at restoring or maintaining water quality. A common theme through many comments was that the Agency should not attempt to force-fit clean up of every impairment through the TMDL process. EPA agrees with the commenters that for some waterbodies and watersheds, existing plans and agreements may accomplish much of what this rule intends. However, EPA believes that identifying waterbodies that are impaired and establishing TMDLs is both statutorily required and will help focus ongoing activities for more efficient attainment of water quality standards.

The CWA requires TMDLs for pollutants in impaired waterbodies if implementation of technology-based effluent limitations is not sufficient to attain water quality standards. Today's rule clarifies this concept to require that TMDLs be established for all pollutants in impaired waterbodies unless enforceable Federal, State, Territorial or authorized Tribal controls will result in attainment of water quality standards by the time the next list in the listing cycle is required.

EPA recognizes that watershed or other plans developed under other State, Territorial or authorized Tribal programs or by other Federal agencies, such as wet weather flow plans, Coastal Zone Management plans, or conservation plans administered by the Natural Resources Conservation Service, have the same goal as a TMDL. EPA believes that these other activities are crucial to the attainment of water quality standards either because they will result in attainment of water quality standards before a TMDL is established or because they are the basis for implementation of the controls required

by TMDLs. Thus, today's rule provides a role for the various programs aimed at improving water quality—both as an alternative to developing a TMDL in certain circumstances, and a means for implementing TMDLs.

Many commenters also perceived EPA's proposal as an attempt to supplant State, Territorial or authorized Tribal primacy. Today's rule preserves the primary responsibilities of States, Territories and authorized Tribes and clarifies EPA's responsibilities under the CWA. EPA believes that today's rule provides greater clarity regarding the requirements for States, Territories and authorized Tribes and EPA's own responsibilities for the TMDL program. EPA believes that today's rule establishes a framework for effective, cooperative efforts between State, Territorial, authorized Tribal governments, individuals, local governments and other Federal agencies.

EPA is also conscious of the need for adequate resources. EPA has sought to increase funding for development and implementation of TMDLs in both the FY 2001 Federal budget and prior budgets. In the FY 2001 Federal budget the Agency has requested an additional \$45 million in CWA Section 106 grants specifically for the TMDL program. In FY 2001, EPA requested \$250 million for section 319 nonpoint source grants, an increase of \$50 million (25%) over FY 2000. In addition, the FY 1999 and FY 2000 budgets of \$200 million per year for section 319 grants represented a doubling (100% increase) of the prior section 319 funding. To further support State nonpoint source implementation, EPA has proposed an FY2002 budget that gives States and Territories the option to reserve up to 19% of their Clean Water State Revolving Fund capitalization grants to provide grants for implementing nonpoint source and estuary management projects.

2. What Are the Key Differences Between the Proposal and Today's Final Rule?

This section summarizes the significant changes EPA has made in the rule adopted today compared to the proposed rule. A more detailed discussion of all the changes is included in the specific sections for these changes in this preamble.

a. Threatened waterbodies. EPA proposed that threatened waterbodies be listed on Part 1 of the list, meaning that TMDLs would have to be established for them as for impaired waters. After carefully considering comments, particularly the concerns raised by commenters regarding the technical

difficulties inherent in determining when water quality trends are declining and the difficulty in making listing decisions, EPA is not requiring that States, Territories or authorized Tribes list threatened waterbodies on the section 303(d) list or that TMDLs be prepared for these waterbodies. States, Territories and authorized Tribes retain, at their discretion, the option to list threatened waterbodies on their section 303(d) list and establish TMDLs for these waterbodies.

b. The four-part 303(d) list. EPA proposed that the section 303(d) list include all impaired waterbodies, sorted into four parts, and a priority ranking for those waterbodies with respect to establishing TMDLs. Part 1 of the list would include impaired waterbodies for which TMDLs would be required to be established within 15 years. Part 2 of the list would include waterbodies impaired by pollution that is not caused by a pollutant. TMDLs would not be required for these waterbodies. Part 3 of the list would include waterbodies for which TMDLs had been established but water quality standards not yet attained. Part 4 would include waterbodies for which technology-based controls or other enforceable controls would attain water quality standards by the next listing cycle. Today's final rule adds a clarification that if during the development of each list, a waterbody previously listed on Part 3 of the list has not made substantial progress towards attainment of water quality standards, it must be moved to Part 1 and a new TMDL must be established. Today's rule also allows States, Territories and authorized Tribes to submit their list in different formats. EPA will still approve all four parts of the list, but States, Territories and authorized Tribes may submit lists in any of three formats. Lists may be submitted to EPA as described in the proposal—that is, as one four-part list published by itself, as part of the section 305(b) water quality report, or with Part 1 submitted separately to EPA as a section 303(d) submission and Parts 2, 3 and 4 submitted to EPA as a section 303(d) component of the section 305(b) water quality report.

c. Inclusion of schedules in the section 303(d) list. EPA proposed that States, Territories and authorized Tribes should submit the list and priority rankings to EPA for approval, and should separately submit a schedule for establishing TMDLs which would not be subject to EPA approval. Today's rule requires States, Territories, and authorized Tribes to submit a prioritized schedule for establishing TMDLs for waterbodies listed on Part 1. Further, as

suggested by some commenters, the final regulations require that TMDL establishment be scheduled as expeditiously as practicable and within 10 years of July 10, 2000, or 10 years from the due date for the first list on which the waterbody appeared, whichever is later, rather than the 15 year period EPA proposed. However, the schedule can be extended for up to 5 years when a State, Territory, or authorized Tribe explains that despite expeditious action establishment of TMDLs within 10 years is not practicable.

d. Implementation plan. EPA proposed that TMDLs must contain an implementation plan as a required element for approval. Today's rule, like the proposal, requires an implementation plan as a mandatory element of an approvable TMDL, and includes substantial changes to the reasonable assurance and implementation plan requirements in response to the comments received. The implementation plan requirements differ depending on whether waterbodies are impaired only by point sources subject to an NPDES permit, only by other sources (including nonpoint sources), or by both. EPA is also adding specificity regarding when the NPDES permits implementing wasteload allocations must be issued. Finally EPA is establishing a goal of 5 years for implementing management measures or control actions to achieve load allocations, and a goal of 10 years for attaining water quality standards.

e. Reasonable assurance. EPA proposed that States, Territories and authorized Tribes provide reasonable assurance that the wasteload and load allocations reflected in TMDLs would be implemented. Today's final rule clarifies how reasonable assurance can be demonstrated for waterbodies impaired by all pollutant sources, and provides additional detail on how reasonable assurance can be demonstrated for nonpoint sources. These changes reflect and seek to address the uncertainties inherent in dealing with nonpoint pollutant sources and recognize the importance of voluntary and incentive-based programs. Finally, today's rule specifies how EPA will provide reasonable assurance when it establishes TMDLs.

f. The petition process. EPA proposed to codify requirements applicable to petitions which can be filed with the Administrator by citizens who believe that EPA has failed to comply with its TMDL responsibilities under the CWA. Today's rule does not include requirements codifying the petition process. EPA notes, however, that

eliminating the proposed petition process from the rule does not change the fact that any person is entitled, under the Administrative Procedure Act (APA), to petition EPA to take specific actions regarding identification of impaired waterbodies and establishment of TMDLs.

g. Offsets. EPA proposed to require new and significantly expanded discharges subject to the NPDES permit program to obtain an offset for their increased load before being allowed to discharge the increase. Today's rule does not include any requirement for an offset.

h. Silviculture, Animal Feeding Operations, and Aquatic Animal Production Facilities. EPA proposed to allow EPA and States to designate certain point source storm water discharges from silviculture as subject to the NPDES permitting program. EPA also proposed to allow EPA to designate certain animal feeding operations and aquatic animal production facilities as point sources in NPDES authorized states. EPA has decided to withdraw this proposal.

II. Changes to Part 130

This section explains in detail the elements of the final Part 130 TMDL regulations and how these regulations differ from the proposal. EPA has made several significant changes to the proposal, clarified other requirements, and rewritten and reorganized the regulatory language. Most of these changes have been made in response to comments received on the proposed rule.

A. What Definitions are Included in This Final Rule? (§ 130.2)

Today's final action revises the definitions of load (or loading), load allocation, wasteload allocation, and TMDL, and adds definitions for the terms pollutant, total maximum daily thermal load, impaired waterbody, thermal discharge, reasonable assurance, management measures, waterbody, and list. In addition, for reasons explained in detail later in this section EPA has decided not to promulgate definitions which were not proposed but were suggested by the commenters.

1. What Definitions are Added or Revised?

a. New Definition of Pollutant (§ 130.2(d))

What did EPA propose? On August 23, 1999, EPA proposed to add a definition for "pollutant" that was the same as the definition in the CWA at section 502(6). EPA also proposed to

clarify that, in EPA's view, the definition of pollutant would encompass drinking water contaminants that are regulated under section 1412 of the Safe Drinking Water Act and that may be discharged to waters of the U.S. that are the source water of one or more public water systems. EPA was proposing to clarify that drinking water contaminants that meet these criteria are pollutants as defined in the CWA.

What comments did EPA receive?

EPA received many comments on this proposed definition which are addressed fully in the Response to Comment Document included in the Docket. Most commenters offered suggestions as to which particular substances (particularly naturally occurring pollutants, FIFRA registered pesticides, and flow) may or may not be pollutants, and requested specific recognition of these substances in the definition. Others objected to inclusion of drinking water contaminants in the definition, believing that they were better addressed by the Safe Drinking Water Act requirements. In addition, EPA received several requests for more examples to help clarify the distinction between pollutants and pollution. Some commenters understood EPA to propose that "pollutant" includes non-point source pollution while others did not. Others gave examples of situations where they believed it would be impossible to decide whether a waterbody was impaired by pollution or a pollutant. Examples given included: biological impairment due to displacement of bedload sediment during high intermittent streamflow caused by increased impervious surface, and impairment due to low dissolved oxygen levels in hydropower releases.

What is EPA promulgating today?

EPA is promulgating a definition of pollutant that is identical to the definition in EPA's current NPDES regulations. That definition is identical to the CWA definition except that it excludes certain radioactive materials from the definition. *Train v. Colorado Public Int. Research Group*, 426 U.S. 1, 25 (1976) (Congress did not intend for materials governed by the Atomic Energy Act to be included in the category of pollutants subject to regulation by EPA under the CWA). In recognition that the CWA definition does not expressly discuss drinking water contaminants, EPA is not including a reference to drinking water contaminants in the final language. However, EPA interprets the CWA definition of pollutant to include, in most cases, drinking water contaminants that are regulated under

section 1412 of the Safe Drinking Water Act (SDWA). This interpretation is consistent with both the language and the intent of the CWA. First, drinking water contaminants fall within the meaning of one or more of the terms used by Congress to define pollutant. Second, the term "public water supplies" is listed under CWA section 303(c)(2)(A) as a potential beneficial use to be protected by water quality standards. EPA expects that virtually all drinking water contaminants that are regulated in the future will be encompassed by one of or more of the terms used to define pollutants.

EPA wishes to clarify the relationship between pollutants and pollution for purposes of section 303(d). Pollution, as defined by the CWA, and the current regulations is "the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of a waterbody." This is a broad term that encompasses many types of changes to a waterbody, including alterations to the character of a waterbody that do not result from the introduction of a specific pollutant or the presence of pollutants in a waterbody at a level that causes an impairment. In other words, all waterbodies which are impaired by human intervention suffer from some form of pollution. In some cases, the pollution is caused by the presence of a pollutant, and a TMDL is required. In other cases it is caused by activities other than the introduction of a pollutant.

The following are two examples of pollution caused by pollutants. The discharge of copper from an NPDES regulated facility is the introduction of a pollutant into a waterbody. To the extent that this pollutant alters the chemical or biological integrity of the waterbody, it is also an example of pollution. (Copper is not likely to cause an alteration to the water's physical integrity.) Similarly, landscape actions that result in the introduction of sediment into a waterbody constitute pollution when that sediment (which is a pollutant) results in an alteration of the chemical, physical, or biological integrity of the waterbody. TMDLs would have to be established for each of these waterbodies.

Degraded aquatic habitat is evidence of impairment which may be caused solely by channelization of a stream's bottom. In this case the waterbody would be considered impaired by pollution that is not a result of the introduction or presence of a pollutant. However, if the channelization also caused the bottom to become smothered by excessive sediment deposition, then

the waterbody impairment is caused by a pollutant (sediment) and a TMDL would be required.

Based on data contained in the 1998 section 303(d) lists, EPA believes that many waterbodies that fail to attain water quality standards, fail to do so because a specific substance or material, a pollutant, has been or is being introduced into the waterbody. EPA believes the vast majority of impairments are caused by the introduction of pollutants and does not anticipate large numbers of waterbodies to be identified as impaired only by pollution. Of the top 15 categories of impairment identified on the 1998 section 303(d) lists, 11 categories are directly or indirectly associated with pollutants: sediments, pathogens, nutrients, metals, low dissolved oxygen, temperature, pH, pesticides, mercury, organics, and ammonia. Together, these categories account for 77% of the total impairments listed. In comparison, three of the top 15 categories either are not associated with pollutants or the link to pollutants is generally unknown: habitat alterations, impaired biologic communities and flow alterations. These categories account for only 12% of the total number of listed impairments.

While TMDLs are not required to be established for waterbodies impaired by pollution but not a pollutant, they nonetheless remain waterbodies which fail to attain or maintain water quality standards. EPA believes that States, Territories and authorized Tribes should use approaches and institute actions other than TMDLs to begin the task of returning these waterbodies to full attainment of water quality standards. As explained later in the preamble, one of the reasons for including these waterbodies on Part 2 of the list is to ensure that they remain in the public's eye and are not simply ignored.

Another frequently asked question concerns pollutants that are "natural." Water quality standards often fail to distinguish between pollutants that are introduced into a waterbody as the result of some human activity and those that are present in a waterbody due to natural processes such as weathering of metals from geologic strata. Where a natural pollutant occurs along with an anthropogenic pollutant, they both must be accounted for within the TMDL so that the TMDL is established at a level that will implement the water quality standards. For example, cadmium originating from the natural weathering of a geologic outcrop, as well as cadmium from a mine tailings pond, must be accounted for in the wasteload allocation of a TMDL to ensure that the

wasteload allocation is properly set to achieve water quality standards. EPA recognizes that there may be instances where the introduction of natural substances alone may cause the waterbody to exceed the water quality standards unless the standard contains an exception for addressing such situations. In those circumstances, EPA encourages States, Territories, and authorized Tribes to revise their water quality standards to reflect and recognize the presence and effect of substances that occur naturally.

EPA does not believe that flow, or lack of flow, is a pollutant as defined by CWA Section 502(6). Some commenters have urged EPA to revise the proposed regulations to require TMDLs for all forms of pollution, including hydromodification, which reduce the amount of water flowing through a river or stream. They argue that since low flow can lead to non-attainment of water quality standards, *e.g.*, use as a fishery, waterbodies impacted by low flow should be listed on Part 1 and have TMDLs established for them. While EPA believes that waterbodies which do not attain and maintain water quality standards solely because of low flow must be identified on Part 2 of a State's section 303(d) list, it does not believe section 303(d)(1)(C) requires that States must establish TMDLs for such waters. This is because EPA interprets section 303(d)(1)(C) to require that TMDLs be established for "pollutants" and does not believe "low flow" is a pollutant. Section 303(d)(1)(C) provides that States shall establish TMDLs "for those pollutants" which the Administrator identifies as suitable for such calculation. In 1978, EPA said that all pollutants under proper technical permit conditions were suitable for TMDL calculations. However, low flow is not a pollutant. It is not one of the items specifically mentioned in the list of pollutants Congress included at section 502(6) of the CWA. Nor does it fit within the meaning of any of those terms.

Instead, low flow is a condition of a waterbody (*i.e.*, a reduced volume of water) that when man-made or man-induced would be categorized under the CWA as pollution, provided it altered the physical, biological and radiological integrity of the water. Many forms of human activity, including the introduction of pollutants, can cause water pollution. Not all pollution-causing activities, however, must be analyzed and allocated in a TMDL. Section 303(d) is a mechanism that requires an accounting and allocation of pollutants introduced into impaired waters (whether from point or nonpoint

sources). If low flow in a river, even if man-induced, exacerbates or amplifies the impairing effect of a pollutant in that river by increasing its concentration, that factor is to be accounted for and dealt with in the TMDL by calculating and allocating the total pollutant load in light of, among other things, seasonal variations in flow. However, where no pollutant is identified as causing an exceedance of water quality standards, EPA does not believe the CWA requires a TMDL to be established.

The Supreme Court's decision in *PUD. No 1 of Jefferson County et al. v. Washington Dept. of Ecology et al.*, 511 U.S. 700 (1994), does not compel a different result. In that case a city and local utility district wanted to build a dam on the Dosewallips river in Washington State. The project would divert water from the river to run the dam's turbines and then return the water to the river below the dam. To protect salmon populations in the river, the state imposed a minimum flow requirement as part of its CWA section 401 certification of the project. The Court determined that compliance with section 303(c) water quality standards is a proper function of a section 401 certificate. Accordingly, the Court concluded that pursuant to section 401, the state may require the dam project to maintain minimum stream flow necessary to protect the river's designed use as salmon habitat.

The Supreme Court in *Jefferson County* did not interpret section 303(d) and did not hold that TMDLs had to be established for flow-impacted waters. The Court did reject petitioner's claim that the CWA is only concerned with water "quality" and does not allow the regulation of water "quantity." Like EPA, it recognized that water quantity may be closely related to water quality and that reduced stream flow may constitute "pollution" under the Act. However, in holding that section 401 certification applied to dam projects as a whole—including pollution-causing water withdrawals—and not just discharges of pollutants, the Court did not decide that a section 303(d) TMDL must be established for low flow-impacted waterbody. This is because *Jefferson County* did not decide that low flow was a pollutant. Under section 303(d) it is pollutants, not pollution, for which TMDLs must be established.

However, EPA recognizes that there will be cases where flow or lack thereof will enhance the ability of a pollutant to impair a waterbody. EPA has provided for this eventuality by requiring that States, Territories and authorized Tribes consider seasonal variations, including

flow, when establishing TMDLs. (See discussion at § 130.32(b)(9).)

Also, EPA declines at this time to define "chemical wastes" as that term appears in the definition of "pollutant" to exclude pesticides designated for aquatic uses. EPA recognizes that the requirements of section 303(d) and this rule may lead to waterbodies being listed due to the presence of pesticides registered under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) because water quality standards for that chemical are exceeded. EPA will continue to evaluate the interface between its regulatory responsibilities under FIFRA and the CWA.

Note: EPA erroneously listed "pollution" as a proposed new definition in the preamble to the proposal. In fact, the definition of pollution is included in the current rules and has been revised by simply adding a citation of the CWA section defining that term.

b. Revised Definition of Loading (§ 130.2(e))

What did EPA propose? EPA proposed to make a grammatical revision to the definition of "load or loading" by using the words "loading of pollutant" to clarify that loading is the introduction of a pollutant whether man-made or naturally-occurring rather than as a parenthetical explanation of what is man-caused loading. EPA did not consider this change substantive and did not discuss it in the preamble to the proposed rule.

What comments did EPA receive? Some commenters expressed concern about perceived inconsistencies between (1) the proposed definition of loading and the expression of a TMDL at proposed § 130.34 and (2) between this definition and the proposed definition of a TMDL at § 130.2(h)(2). Other commenters requested revisions to clarify that the load describes when the water quality standard is attained, that the definition does not apply to nonpoint sources, or that ambient temperature increases are not a load. Another commenter suggested that EPA include the definition of load capacity included in the current requirements which EPA did not include in the proposal.

What is EPA promulgating today? EPA has carefully considered these comments but is promulgating this definition as proposed. EPA does not believe that there are inconsistencies between the definition and the manner in which TMDLs may be expressed pursuant to § 130.33. EPA does not interpret the final rule to require that TMDLs be always expressed as the load or load reduction of the pollutant causing the impairment. The final rule

at § 130.33(b)(4) preserves the flexibility to express the TMDL as a quantitative expression of a modification to a characteristic of the waterbody that results in a certain load or load reduction. Similarly, EPA does not believe there are inconsistencies between the proposed definition of load as a substance or matter introduced in a waterbody and the proposed definition of a TMDL at § 130.2(h)(2) which would have required identification and quantification of the load "that may be present" in the waterbody. TMDLs are generally established using the principle of mass balance, which is the core principle of water quality modeling. The mass of a pollutant in a waterbody is a function of the mass introduced into the waterbody and the mass that flows out of the waterbody. The same principle applies for thermal energy.

EPA sees no inconsistency between describing loading as an introduction of a substance or matter into a waterbody and requiring identification of the pollutant load present within the waterbody for the purpose of establishing TMDLs. The characterization of a mass of material as a load into, or a load within, a waterbody will depend in some instances on how the State, Territory, or authorized Tribe decides to frame the TMDL.

EPA is not revising the definition of load to suggest that the load describes when the water quality standard is attained. The definition of "load or loading" merely refers to the quantity of matter or thermal energy introduced into a waterbody; it is not intended to include an interpretation of the environmental consequence of that load. It is the calculation of the TMDL and the resulting allocations which establish the loading targets necessary to achieve water quality standards.

EPA is not revising the definition of load or loading to exclude nonpoint sources. As noted above, EPA believes that section 303(d) applies to all sources including nonpoint sources, and that all sources are considered when allocations needed to attain or maintain water quality standards are established. EPA has consistently required the inclusion of pollutants from nonpoint sources in estimates of loading. By defining "load allocations" which pertain to nonpoint sources as "best estimate of loadings," the language of the current regulations clearly demonstrates that EPA intended for pollutants from nonpoint sources to be included in the definition of load and loading. Therefore, EPA believes it is simply a continuation of its policy to

consider the definition of loads to apply to nonpoint sources.

Similarly, EPA is not revising the definition of load or loading to exclude increases in temperature due to solar input. EPA does not believe that the source of a load should disqualify it from being a load. What needs to be done to mitigate heat load from solar input will be addressed by a State, Territory, or authorized Tribe when it establishes the TMDL.

Finally, EPA is not including the definition of load capacity contained in the existing regulations. EPA proposed to delete the definition of "load capacity" because retaining a separate definition of load capacity would only add confusion as to whether a TMDL consisted merely of the load capacity or the ten elements of the TMDL. The loading capacity is found as element three in the eleven elements of the TMDL. EPA continues to believe that retaining a separate definition of load capacity would only add confusion as to whether a TMDL consisted merely of the load capacity or the ten elements of the TMDL promulgated in today's regulation.

c. Revised Definition of Load Allocation (§ 130.2(f))

What did EPA propose? EPA proposed to simplify the existing definition of "load allocation" by defining it as simply the part of the total load in a TMDL that is allocated to nonpoint sources, including atmospheric deposition, or natural background sources, as opposed to wasteload allocation to point sources. In proposing this change, EPA moved the substantive requirement of how a load allocation is determined from the definition of load allocation to the description of a TMDL in proposed § 130.33(b).

What comments did EPA receive? EPA received a large number of comments with regard to its definition of load allocations, covering a range of issues. Again, many commenters asserted that EPA did not have the statutory authority to address pollutant loadings from nonpoint sources because Congress intended the TMDL provisions of the CWA to apply only to waterbodies impaired by point sources or waterbodies where control of point sources alone would result in attainment of water quality standards.

In contrast, many commenters supported the inclusion of pollutant loadings from nonpoint sources in the TMDL program. A frequently-cited reason for the need for such an approach was the commenters' belief that existing nonpoint source programs

had so far failed to adequately address nonpoint source pollution. Numerous commenters urged EPA to require quantitative estimates of pollutant loadings from nonpoint sources, while acknowledging that doing so would be more difficult than for point sources.

Some commenters suggested that EPA retain the existing definition of load allocation, along with the definitions of wasteload allocation, loading capacity, and TMDL. These commenters believed that the current definitions provide more clarity as to how loadings are defined and allocated than did the proposed definitions.

Other commenters suggested that the definition of load allocation should not include specific reference to atmospheric deposition or natural background. These commenters contended that the technical uncertainties in linking atmospheric deposition sources to water quality and the lack of Clean Air Act authority to control atmospheric loadings would make it difficult to calculate and implement load allocations. Furthermore, the commenters contended that natural background cannot be reduced and therefore should not be part of the load allocation.

Several comments called for including point sources not covered by the NPDES permit program (such as certain types of storm water sources) under the load allocation portion of the TMDL, rather than the wasteload allocation portion.

What is EPA promulgating today? In response to comments, EPA is clarifying that pollutants from storm water runoff not regulated under NPDES must be accounted for in the load allocation. EPA is also clarifying that pollutants from other sources, such as groundwater, air deposition or background pollutants from upstream sources must be accounted for in the load allocation.

For the reasons discussed earlier in today's preamble, EPA continues to believe that the CWA requires TMDLs to consider loadings from nonpoint sources. For these reasons, EPA rejects the suggestions that EPA delete the definition of load allocation, and consider the TMDL to consist only of wasteload allocations for point sources regulated by NPDES permits. EPA also continues to believe that load allocations must reflect contributions from atmospheric deposition. Where these loads exist, they contribute to the overall load of a pollutant within a waterbody and must be accounted for in the TMDL. Otherwise, the sum of load and wasteload allocations will exceed the amount necessary for the waterbody

to attain water quality standards. For these reason and the reasons expressed in the Response to Comment Document, EPA believes that load allocations must include pollutant loads from all sources not already reflected in the wasteload allocations.

EPA believes that, at a minimum, it is possible to determine the total of aggregated loadings from air deposition to a particular waterbody. As a result, EPA expects that States, Territories and authorized Tribes will initially develop load allocations based on nationwide reductions expected as a result of programs developed under the Clean Air Act, and any State-required reductions in emission from local sources. As techniques improve to quantify the relative contributions of different sources, EPA expects that States, Territories and authorized Tribes will more specifically identify air sources and the expected reduction from these sources.

EPA does not consider a loading to surface water from groundwater to necessarily be part of the background loading. The background loading in a TMDL is generally either the loading from upstream of the waterbody for which the TMDL is being established, or else is a loading to the waterbody that originates from natural, not anthropogenic, sources. Pollutants entering a waterbody from groundwater can originate from either natural or anthropogenic sources. For example, the chlorides in groundwater that seep into a waterbody can originate from the geological rock formations or from brine seeping from oil production wells. In either case, the load allocation will address these loadings as part of the load allocation.

EPA recognizes that by moving some of the details from the current definition of load allocation into the TMDL regulatory requirements of § 130.32, it has shortened the definition of load allocation in the current rule. EPA believes this is appropriate because the new § 130.32 provides sufficient additional information about the nature of a load allocation (and a wasteload allocation). EPA believes it is better to include this information in one place, and has selected to do so in § 130.32.

d. Revised Definition of Wasteload Allocation (§ 130.2(g))

What did EPA propose? EPA proposed to simplify the existing definition of "wasteload allocation" by defining it as simply the part of the total load in a TMDL that is allocated to a point source. In proposing this change, EPA moved the substantive requirement of how a wasteload allocation is

determined into the description of a TMDL in proposed § 130.33(b).

What comments did EPA receive? Some commenters said that wasteload allocations should include only loads from point sources covered by the NPDES permit program, but not include loads from point sources not covered by NPDES, such as some types of storm water. Other commenters indicated that all point sources should be included in the wasteload allocation, regardless of their status with regard to NPDES.

A significant number of commenters said EPA should retain language in the existing definition which states that wasteload allocations are a form of effluent limits. One commenter noted that wasteload allocations should be defined as allocated to individual, classes or groups of sources.

What is EPA promulgating today? Today's rule clarifies that only point sources subject to an NPDES permit need to be included in the wasteload allocation. All other sources of a pollutant, be they point source or nonpoint sources, are included in the load allocation. In 1985, when EPA published the definition contained in the existing regulations, all point source discharges were subject to an NPDES permit. The Water Quality Act of 1987, however, provided that not all storm water discharges from point sources were subject to NPDES permits. As a result, today some storm water discharges through point sources are not subject to NPDES requirements. Generally, these are storm water discharges that do not fall into the eleven categories of storm water associated with industrial activities or that are below the threshold of the storm water phase II regulations. To continue this approach, EPA is clarifying that wasteload allocations apply only to point source discharges which are or can be subject to an NPDES permit.

Also, EPA is clarifying that for waterbodies impaired by both point and nonpoint sources, anticipated load reductions from nonpoint sources may be taken into account in calculating the wasteload allocation. EPA received a number of comments stating that in such cases implementation of the TMDL may proceed on different schedules for point and nonpoint sources and supporting the recognition in the final rule of a such a phased approach to implementation of TMDLs (*i.e.* "phased TMDLs"). EPA interprets the term "phased TMDLs" to describe TMDLs where the wasteload allocations are based on expected reductions from sources other than those regulated by NPDES permits. A phased TMDL includes wasteload allocations that are

based on those expected load allocations and includes a monitoring plan to verify the load reductions. See Guidance for Water Quality-Based Decisions: The TMDL process, EPA 440/4-91/001. EPA considers that the combination of requirements for reasonable assurance and the implementation plan in today's rule provide the structure for phased TMDLs. The definition of reasonable assurance provides the basis by which a State, Territory, or authorized Tribe can demonstrate that the load allocations in the TMDL are likely to occur. The implementation plan also requires that the TMDL establish a schedule or timetable which includes a monitoring or modeling plan to measure the effectiveness of point and nonpoint source control measures. Such a plan would include data collection, the assessment for water quality standards attainment, and, if needed, additional predictive modeling.

EPA recognizes it is difficult to ensure with precision that implementing nonpoint source controls will achieve expected load reductions. For example, management measures for nonpoint sources may not perform according to expectations to achieve expected pollutant load reductions despite best efforts. EPA believes that an important part of the phased approach, as discussed above, is the recognition that ultimate success in achieving water quality standards for nonpoint sources may depend upon an iterative approach. States, Territories and authorized Tribes may determine to what extent nonpoint source management measures are meeting the performance expectations on which they are based and implement improved management measures, designs or operations and maintenance procedures. Today's rule at § 130.32(c)(2)(v) provides for interim, measurable milestones for determining whether management measures or other action controls are being implemented, and a process for implementing stronger and more effective management measures if necessary. EPA recognizes that this type of approach might involve very long time-frames before water quality standards are eventually realized. EPA also expects that information on actual performance of management measures may lead to questions concerning the appropriateness of the water quality standards and that, in some cases, States, Territories and authorized Tribes may initiate use attainability analyses to determine the appropriate use and, possibly, revise the use on the basis of

the information gathered during implementation phase of the TMDL.

EPA is deleting the sentence in the current definition that defines a wasteload allocation as a type of water quality based effluent limitation. EPA acknowledges that water quality-based effluent limitations that derive from a TMDL are based on the TMDL wasteload allocation, but does not believe that wasteload allocations serve as water quality based effluent limits. EPA explained this in its 1991 "Technical Support Guidance for Water Quality-based Toxics Control." Wasteload allocations reflect the mass load of a pollutant that allows a waterbody to attain water quality standards based on the averaging period of the water quality standard. For example, a wasteload allocation based on attaining the 4-day average water quality criterion for copper reflects a 4-day mass load. Effluent limitations reflect periods established by NPDES regulations: generally weekly and monthly limits for publicly owned treatment works and daily and monthly limits for other facilities (see § 122.45(d)) and therefore are not the strict equivalent of a wasteload allocation.

e. Revised Definition of TMDL (§ 130.2(h))

What did EPA propose? EPA proposed to define a "TMDL" as a written plan and analysis established to ensure that an impaired waterbody attains and maintains water quality standards in the event of reasonably foreseeable increases in pollutant loads. Under the proposed revisions, a TMDL would also have had to include ten basic elements, which were described in § 130.33(b) and are listed in section I.A.3.b. of this preamble. EPA's proposal was meant to amplify the existing regulatory definition that a TMDL is the sum of load and wasteload allocations and a margin of safety, taking into consideration seasonal variations.

What comments did EPA receive? EPA received numerous comments regarding its proposed changes to the definition of TMDLs. Specific comments regarding the ten proposed elements of a TMDL are addressed later in the discussion of § 130.32(b) of today's rule. Some commenters expressed concerns that the proposed definition expanded the concept of a TMDL beyond that mandated by section 303(d). Additional commenters suggested that section 303(d) requires TMDLs only for point sources, and suggested that the TMDL definition reflect this. Others interpreted the proposed definition as going beyond the statutory concept of a

TMDL as simply a calculation of the total load necessary to attain and maintain water quality standards. Further comments suggested that the proposed definition was too vague. All these commenters recommended that the existing definition be retained.

Some commenters supported the proposed definition and agreed that it was consistent with section 303(d). These commenters suggested that EPA clarify how the ten elements of the TMDL achieve the statutory concept, *i.e.*, quantify the sum of load and wasteload allocations with a margin of safety and take into consideration seasonal variations.

Further comments expressed concern that the proposed definition required a separate TMDL analysis for each pollutant causing an impairment and for each waterbody. Several commenters believed EPA has no authority to require TMDLs to address growth and recommended that references to growth be stricken from the definition.

What is EPA promulgating today?

Today's rule modifies the proposal in a number of ways. EPA is adding the word "quantitative" to the final definition at § 130.2(f) to clarify that the TMDL must contain a quantified plan for allocating pollutant loads to attain and maintain water quality standards. EPA is also clarifying that a TMDL must assure that water quality standards are attained and maintained throughout the waterbody and in all seasons of the year. EPA believes this revision clarifies that the TMDL quantifies how water quality standards will be attained and maintained. As proposed and promulgated, the total effect of all the elements of the TMDL require a quantification of the sum of load and wasteload allocations, along with a margin of safety and consideration of seasonal variations, and EPA believes that the definition in the final rule is consistent with section 303(d). Also, EPA has reorganized the provisions of two of the elements and split one, such that there are now eleven elements of a TMDL; this change is discussed in the preamble discussion of § 130.32(b).

EPA declines to use the existing regulatory definition of TMDL as suggested by many comments for several reasons. Based on its experience in reviewing and approving TMDLs, EPA continues to believe that the TMDL elements in the final rule definition specify in appropriate detail the information EPA considers necessary to quantify loadings and determine whether the loadings, once implemented, would result in attainment of water quality standards in the waterbody. They will also provide

EPA with an element missing from the current regulations, *i.e.*, assurance that the TMDL will in fact be implemented. EPA believes that this information will allow the Agency to make timely and appropriate decisions on TMDLs submitted for review. It will also provide certainty to States, Territories and authorized Tribes on what an approvable TMDL is. Furthermore, as previously discussed in today's preamble, section 303(d) applies to both point sources and nonpoint sources.

EPA is deleting the reference to reasonable foreseeable increases in pollutant loads from the proposed introductory paragraph in the definition, because these increases are addressed in the element of the TMDL that pertains to increases in pollutant loading. EPA addresses other comments and concerns about how TMDLs consider increases in pollutant loads in the Response to Comments document and in today's preamble discussion about § 130.32(b).

Finally, in the promulgated definition, EPA is clarifying that it considers a TMDL to apply to one pollutant in a waterbody. However, this does not mean that EPA requires a separate data collection, data analysis, or report for each TMDL. Instead, EPA encourages States, Territories, and authorized Tribes to establish TMDLs on a coordinated basis for a group of waterbodies within a watershed, and that a single analysis can be conducted for several pollutants, instead of for only a single pollutant. EPA does not construe the new definition of waterbody at § 130.2(q) to limit the ability of States, Territories and authorized Tribes to establish TMDLs on a watershed basis. In fact, EPA encourages coordinating the establishment of TMDLs on a watershed basis. Also, EPA did not intend to require that States, Territories, and authorized Tribes conduct a separate TMDL analysis for each pollutant in a waterbody or watershed. EPA wants to provide States, Territories and authorized Tribes the flexibility to develop and focus their TMDLs as appropriate, *i.e.*, to address single or multiple impairments in a waterbody, in part of a waterbody, or in multiple waterbodies.

f. New Definition of TMDTL (§ 130.2(i))

EPA is promulgating a definition of the term "total maximum daily thermal load" or TMDTL to help promote clarity with respect to the requirements which apply to TMDTLs. A TMDTL is a TMDL for a waterbody impaired by thermal discharge(s). In general, the same requirements for an approvable TMDL

also apply to TMDTLs, since they are a subset of TMDLs. However, waterbodies with a thermal discharge will be evaluated for listing based on whether the waterbody is supporting a balanced, indigenous population of shellfish, fish, and wildlife. If such waters are listed, they will receive a TMDTL which must be calculated to assure protection and propagation of such a population.

g. New Definition of Impaired Waterbody (§ 130.2(j))

What did EPA propose? EPA proposed a definition of "impaired waterbody" to define precisely waterbodies which should be considered as not attaining water quality standards and proposed to include within that definition waterbodies impaired by unknown causes.

What comments did EPA receive? Many commenters objected to that part of the definition which required them to account for waterbodies impaired by unknown causes. They believed that the concept was too vague and too broad. They were concerned that some would argue that certain waterbodies should be deemed impaired when there was no evidence of impairment.

What is EPA promulgating today? In response to the comments, EPA is making a change to the proposed definition to clarify its intent regarding waterbodies impaired by unknown causes. EPA does not intend for States, Territories, and authorized Tribes to list waterbodies in the absence of any information demonstrating an impairment. Rather, by proposing to require listing of impaired waters even if the pollutant causing the impairment is unknown, EPA wanted to ensure that lack of information regarding the specific pollutant would not be a reason for not listing an impaired water. After consideration of the comments received, EPA has decided to modify the proposed provision. In situations where the specific pollutant is unknown, but there is information showing impairment, such information tends to consist of biological information (*e.g.*, information showing a water is not supporting a designated or existing aquatic life habitat use). Therefore, EPA is replacing the reference to unknown causes of impairments in the proposal with a provision requiring that waterbodies be considered impaired (and thus listed) when biological information indicates that they do not attain and maintain water quality standards. Prior to developing a TMDL for such waters, the State, Territory, or authorized Tribe would need to identify the particular pollutant causing the

impairment. EPA is aware that in past lists, some States, Territories, and authorized Tribes have identified broad categories of pollutants, such as metals or nutrients, as the cause of impairments. Under today's regulation, the only situation in which the State may identify the pollutant as unknown until such time that the TMDL is developed is for waters where the only information demonstrating impairment is biological information. EPA is developing guidance to assist States, Territories, and authorized Tribes to identify the causes of a biological impairment. See draft "Stressor Identification Guidance", April 28, 2000. Otherwise, EPA expects that States will be able to identify the particular metal, nutrient, or other pollutant causing the impairment.

EPA is also modifying the definition of impaired waterbody to include waters that fail to attain and maintain water quality standards. EPA is using the phrase "attain and maintain" to mean that the waterbody must consistently continue to meet water quality standards throughout the waterbody in order to be considered not impaired. Any failure to meet an applicable standard would mean that the waterbody should be listed and a TMDL should be developed if it is listed on Part 1. The use of the phrase "attain and maintain" can be distinguished from the proposed requirement to list threatened waters, which is not included in today's action. Threatened waters are those that are meeting standards, but exhibit a declining trend in water quality such that they would likely exceed standards in the future. Such waters are not required to be included on the section 303(d) list though States can do so. By waters that do not attain and maintain standards, EPA intends to ensure that States, Territories, and authorized Tribes list waters that may occasionally meet an applicable standard, but fail to consistently do so. As in the proposal, the Agency is including in the promulgated definition language from section 303(d)(1)(B) which establishes the standard for considering a waterbody impaired by thermal discharges, *i.e.*, the waterbody does not have or maintain a balanced indigenous population of shellfish, fish and wildlife. As discussed in the preamble to the proposed rule (64 FR 46021-46022, August 23, 1999) and later in today's preamble, EPA interprets section 303(d) to require TMDLs only for waterbodies impaired by pollutants.

Finally, EPA believes that the term impaired waterbodies is a plain language definition of the pre-existing regulatory term water quality limited

segment which derived from the CWA. EPA interprets section 303(d) as pertaining to parts of or complete waterbodies that do not attain and maintain water quality standards. For these waterbodies technology-based controls are insufficient to attain water quality standards and water quality-based controls are required, *i.e.*, they are water-quality limited. Also in today's rule, EPA defines waterbody to include one or multiple segments of rivers, lakes, estuaries, etc. Thus, EPA believes that the term "impaired waterbodies" is analogous to the term water-quality limited segment and more understandable to the general public.

h. New Definition of Management Measures (§ 130.2 (m))

What did EPA propose? EPA did not propose a definition for "management measures." Instead, the proposed regulations used the term Best Management Practices (BMPs), a definition of which was carried over in the proposal from the current requirements.

What comments did EPA receive? Commenters pointed out that the definition of BMPs in the current regulations refers only to nonpoint sources, and they suggested that it should be revised to refer to all sources to which BMPs could be applied. These would include some point sources such as certain storm water discharges. Commenters also were concerned that the reference to BMPs as being selected by an agency would limit the applicability of certain BMPs in the context of establishing TMDLs.

What is EPA promulgating today? EPA agrees with the commenters that it intended the term BMPs in the proposal to include the management of sources other than nonpoint sources. However, rather than modify the pre-existing definition of BMP to accomplish that result, which could have unforeseen impacts on other Agency programs which use this term, EPA is including a definition of "management measures" in today's regulation. This term and definition retain those concepts in the current definition of BMPs which are applicable to TMDLs but eliminate the references to nonpoint sources and selection by an agency. EPA believes the definition of "management measure" is a logical outgrowth of the proposed definition of "BMP" and a reasonable response to the above-referenced comments.

i. New Definition of Thermal Discharge (§ 130.2(o))

What did EPA propose? EPA proposed adding the definition of

"thermal discharge" to clarify the meaning of the term for the purpose of identifying impaired waterbodies and establishing Total Maximum Daily Thermal Loads (TMDTLs) pursuant to section 303(d). EPA proposed to define the term as "the discharge of heat from a point source." EPA believed that the definition was important since waterbodies impaired by thermal discharge are subject to section 303(d) listing and TMDTL requirements, and furthermore, the test for measuring successful implementation is different than for other pollutants.

What comments did EPA receive? EPA received several comments on this definition. Some comments requested clarification of whether EPA meant discharge of heat from all point sources. Other comments suggested that the definition be revised to include nonpoint sources of heat.

What is EPA promulgating today? EPA is promulgating the proposed definition with a minor change to clarify that it applies to only those point sources "that are required to have NPDES permits." EPA provided detailed explanations in the preamble to the proposal regarding its interpretation of the statute as it pertains to inclusion of thermal discharges in the TMDL program. (64 FR 46017 August 23, 1999). As discussed in the preamble to the proposed rule, EPA believes the CWA reference to "balanced, indigenous population of shellfish, fish and wildlife" refers only to those discharges subject to sections 301 and 306, which relate to point sources subject to NPDES permits. Therefore EPA is not expanding the definition of thermal discharge to include nonpoint sources. EPA acknowledges that nonpoint sources and other sources not subject to NPDES permits can introduce heat into a waterbody. However, for reasons discussed in the preamble to the proposed rule, EPA believes that the CWA requires that TMDLs rather than TMDTLs be established for these waterbodies if they are impaired solely by these sources and that they must attain water quality standards, and not just a balanced, indigenous population of shellfish, fish and wildlife.

j. New Definition of Reasonable Assurance (§ 130.2(p))

What did EPA propose? EPA proposed to define "reasonable assurance" as a demonstration that wasteload allocations and load allocations in a TMDL would be implemented. EPA proposed that each TMDL provide reasonable assurance that allocations contained in a TMDL would, in fact, be implemented to attain

and maintain water quality standards in the waterbody. EPA incorporated the term in proposed § 130.33(b)(10)(iii) dealing with TMDL implementation plans to emphasize that implementation of the allocations in TMDLs is critical to the ultimate attainment of standards in impaired waterbodies across the country.

What comments did EPA receive?

EPA received a number of comments generally opposing the concept of reasonable assurance. Some commenters believe that EPA does not have the authority to require States, Territories or authorized Tribes to demonstrate reasonable assurance, and that the definition of reasonable assurance was too prescriptive. EPA also received comments generally in support of the reasonable assurance provision, noting that it is important to have assurance that implementation will occur and that water quality standards will be met.

EPA received many comments on specific aspects of the proposed definition of reasonable assurance. A major theme was that the proposed definition did not recognize that State, Territorial and authorized Tribal nonpoint source programs are largely voluntary. Furthermore, many commenters noted that States may have limited regulatory authority to address nonpoint sources, and perceived the definition of reasonable assurance as forcing States to adopt regulatory controls on nonpoint sources. Many commenters urged that voluntary, incentive-based programs should be acceptable as reasonable assurance. Conversely, a number of commenters believed that regulatory controls for nonpoint sources were necessary to provide reasonable assurance, or that, in order to provide reasonable assurance, implementation plans needed to be enforceable. A few commenters suggested that States, Territories and authorized Tribes need to have regulatory authority to control pollutants from nonpoint sources in the event that voluntary programs do not succeed.

Numerous commenters expressed concern about the funding component of reasonable assurance. A frequently-cited concern was that States would not be able to guarantee full funding to implement the TMDL at the time a TMDL was established. Some commenters also believed that the funding provision was not well-defined, and that, when reviewing TMDLs, EPA would not be able to evaluate whether the State had demonstrated "adequate funding." Others noted that States, Territories and authorized Tribes lack adequate funding and staff to establish

and implement TMDLs and that EPA needs to ensure adequate funding through the section and other programs.

EPA received some comments regarding the ability of existing State and Federal authorities and programs to satisfy the reasonable assurance provision. Some commenters suggested that approval of a State, Territorial or authorized Tribal nonpoint source program or nonpoint source management plan should by itself, constitute reasonable assurance. Other commenters disagreed and said that reference to existing programs by itself is not adequate, and that control actions assuring TMDL implementation must be specific to the source and the waterbody. Some commenters urged flexibility in allowing for a variety of implementation mechanisms to satisfy reasonable assurance such as other Federal and State forest and land management programs. Several comments pointed out that it would be difficult to provide reasonable assurance, given the challenge of aligning multiple State and Federal agencies, and multiple watershed groups.

Some commenters suggested that EPA needs to better define what it means that procedures and mechanisms relating to nonpoint sources of a pollutant must be implemented expeditiously, or specify a particular timeframe for their implementation. A few commenters believed that EPA was not in a position to evaluate what constitutes expeditious, and that the term should be eliminated.

A few commenters questioned EPA's authority to provide reasonable assurance when it establishes a TMDL for nonpoint sources. Some also questioned EPA's authority to condition section 319 grant funds as a way of providing reasonable assurance. Conversely, a few commenters supported EPA's full use of its authorities to implement TMDLs, or to condition section 319 funds, as necessary.

What is EPA promulgating today?

Today's rule contains a revised definition of reasonable assurance. Reasonable assurance continues to mean a demonstration that TMDLs will be implemented through regulatory or voluntary actions, by Federal, State or local governments, authorized Tribes or individuals.

Reasonable assurance is a demonstration that a TMDL's implementation plan will indeed be implemented. (See § 130.32(c).) EPA believes that it has the authority to require the demonstration of reasonable assurance as part of the implementation

plan. Section 303(d) requires that a TMDL be established at a level necessary to implement water quality standards and requires EPA to review and either approve or disapprove the TMDL. CWA section 501(a) also authorizes EPA to adopt regulations as necessary to implement the Act. To approve a TMDL, EPA believes it is necessary to determine whether a TMDL is in fact established at a level necessary to attain water quality standards. For EPA to determine that the TMDL will implement water quality standards, there must be a demonstration in the TMDL of reasonable assurance that the TMDL's load and wasteload allocations will be implemented. Otherwise, the allocations presented in a TMDL lack a necessary link to anticipated attainment of water quality standards.

Reasonable Assurance for Point Sources for Which an NPDES Permit is Required

Reasonable assurance for point sources for which an NPDES permit is required means that States, Territories and authorized Tribes must identify procedures that will ensure that permits will be modified, issued or reissued as expeditiously as practicable to incorporate effluent limits consistent with the wasteload allocations. For these demonstrations of reasonable assurance, the phrase "as expeditiously as practicable" means in general that the permitting authority, either an authorized State, Territory, or Tribe, or EPA, will issue the permit as follows. For facilities receiving a permit for the first time, "as expeditiously as practicable" means that the permitting authority must issue the permit that implements the wasteload allocation before the facility begins to discharge. Under EPA's current NPDES rules, a facility may only discharge pollutants from point sources into waters of the United States as authorized by an NPDES permit (§ 122.1). New facilities must receive their permit before they can lawfully discharge pollutants. Also, current NPDES regulations require that NPDES effluent limitations be consistent with the applicable wasteload allocation in an approved TMDL (§ 122.44(d)(1)(vii)(B)). Therefore, EPA believes that its interpretation of "as expeditiously as practicable" for facilities receiving their first permit is consistent with the current practice of the NPDES permit program. For facilities currently permitted, "as expeditiously as practicable" means that the permitting authority will reissue the permit as soon as it can after the permit expires, taking into account factors such as available permitting resources, staff and budget constraints, other competing

priorities, and watershed efficiencies. Alternatively, the permitting authority, may choose to modify the permit prior to expiration in accordance with the permitting authority's modification requirements.

The phrase "as expeditiously as practicable" adds a time element to the word "expeditiously", which was used in the proposal. The dictionary definition of "expeditiously" is fast or rapidly. EPA received comments about "how fast is fast," and whether any factor governed how quickly EPA expected a permitting authority to issue or reissue NPDES permits. EPA intended that permitting authorities would not delay their normal issuance or reissuance of permits and would modify the permits when they contained a reopener provision allowing modification of the permit conditions on the basis of new information. EPA is using the phrase "as expeditiously as practicable" in the final rule to clarify further what EPA means by the word "expeditiously" used in the proposal. This clarification should allow permit authorities to schedule permit issuance and reissuance actions consistent with the relevant factors discussed above.

Reasonable Assurance for Sources for Which an NPDES Permit is Not Required

For all other sources, including nonpoint sources, storm water sources for which an NPDES permit is not required, atmospheric deposition, groundwater and background sources, reasonable assurance means that actions implementing the load allocations meet a four-part test. The control actions or management measures must be (1) specific to the pollutant and waterbody for which the TMDL is being established, (2) implemented as expeditiously as practicable, (3) accomplished through reliable delivery mechanisms, and (4) supported by adequate funding. For these sources, each TMDL must meet each one of these tests prior to EPA approval.

(1) *Specific to the pollutant and waterbody.* The first part of the four part test for reasonable assurance is that the management measure or control be specific to the pollutant and waterbody. By this, EPA means that the State, Territory, or authorized Tribe knows of, and can point to, information showing that the management measure relied upon to achieve the reduction in the loading can reduce that pollutant. By "specific," EPA does not intend that States, Territories or authorized Tribes collect new or additional site-specific information, but rather that they provide EPA existing data that relates to the

specific waterbody and pollutant. For example, a State may rely on a program that installs buffer strips to demonstrate reasonable assurance. In this example, the State would point to National Resource Conservation Service information showing that buffer strips are effective in mitigating erosion and thus can reduce loadings of the specific pollutant, *i.e.*, sediment. Also, the State would need to show which waterbodies within the watershed would receive buffer strips and explain the characteristic of these buffer strips. In this way, the State may fulfill the requirements of this part of the four part test. For atmospheric deposition, where the controls will result from Clean Air Act regulations, reference to current or anticipated Clean Air Act regulations should explain how those regulations relate to the specific pollutant of concern.

(2) *As expeditiously as practicable.* EPA intended that States, Territories, and authorized Tribes would implement management measures as quickly as they reasonably could in light of other water quality needs. For the reasons discussed above, EPA is using the phrase "as expeditiously as practicable" in the final rule to clarify the word "expeditiously" as used in the proposal. EPA expects that States, Territories, and authorized Tribes will make nonpoint source controls implementing a TMDL for which there are no point sources subject to NPDES permits a high priority for nonpoint source program funding. Scheduling of nonpoint source controls is also discussed in section II.P. of this preamble. For atmospheric deposition, adoption of Clean Air Act regulations and implementation of those regulations pursuant to the provisions of the Clean Air Act would satisfy the reasonable assurance requirement that implementation will occur as expeditiously as practicable.

(3) *Reliable delivery mechanisms.* EPA did not include the concept of "reliable delivery mechanism" in the proposed definition of reasonable assurance. EPA did discuss this concept in the preamble discussion of the definition. (64 FR 46033, August 23, 1999). Reliable delivery mechanism means the programmatic and administrative means by which the management measures and control actions will be implemented and monitored. Several comments expressed concern that the preamble discussion was not reflected in the rule language, and suggested that this preamble phrase should be included in the definition. EPA was persuaded by the comments that it should do this.

EPA is also adding the word "effective" to modify "reliable delivery mechanism." EPA believes that this concept is a logical outgrowth of the preamble to the proposed rule. There, EPA discussed that voluntary and incentive-based programs may be used to demonstrate reasonable assurance. It goes without saying that these programs must be "effective" in order to provide reasonable assurance. Nevertheless, to avoid confusion, EPA decided to be clear and add the word "effective" to the final rule.

Some existing nonpoint source related programs may also be reliable and effective delivery mechanisms specific to the waterbody and pollutant for purposes of providing reasonable assurance. Programs, procedures or authorities including State, Territorial or authorized Tribal programs approved under section 319 of the CWA or existing conservation or water quality protection programs administered by the United States Department of Agriculture which have demonstrated success in delivering water quality improvements in the past may be reliable delivery mechanisms for the purpose of § 130.2(p). State, Territories and authorized Tribes will need to explain how these programs will be implemented in the specific impaired waterbody and how they address the pollutant causing the impairment. For atmospheric deposition, implementation of the Clean Air Act regulatory program could provide the necessary reliable delivery mechanism.

(4) *Adequate funding.* Finally, today's rule clarifies what EPA considers to be "adequate funding" for the purpose of demonstrating reasonable assurance. In response to comments, EPA is including in the final rule the funding language from the proposed rule preamble, and providing a more detailed discussion of this term below. (64 FR 46033 to 46034, August 23, 1999). EPA believes that adequate funding means that existing water quality funds have been allocated to implement load allocations to the fullest extent practicable and in a manner consistent with the effective operation of the clean water program in the State, Territory, or authorized Tribe. EPA believes that implementing TMDLs is a central part of water quality management. At the same time EPA recognizes that effective water quality programs are comprised of many different activities which must be carried out concurrently. It would make no sense to fund only TMDL activities and eliminate other important activities. For atmospheric deposition, where controls will be required by Clean Air Act regulations, the process for adoption

and implementation of those regulations should satisfy the requirement for adequate funding.

Today's rule requires that States, Territories and authorized Tribes identify adequate clean water program funding to implement load allocations. Clean water program funding includes Federal funding through the CWA and some related Federal, State, Territorial or authorized Tribal funding. In the event that funding is not currently adequate to implement the TMDL, EPA may approve the TMDL if the State, Territory, or authorized Tribe provides an explanation of when adequate funds will be available and a schedule by which these funds will be obtained and used to implement the TMDL. EPA believes that such a schedule identifying when load allocations will be implemented as funding becomes available is necessary to provide reasonable assurance that load allocations will be achieved where adequate funding is not currently available. As indicated in implementation plans provisions, such a schedule must assure that implementation will be as expeditious as practicable (*i.e.*, within 5 years when practicable) for waterbodies impaired only by sources which are not subject to NPDES permits, including nonpoint sources.

Use of Existing Programs

EPA believes that existing nonpoint source programs can provide the suite of control actions and management measures for States to rely on when meeting the reasonable assurance test. Examples of voluntary and incentive-based actions or existing programs include State, Territorial or authorized Tribal programs to audit implementation of agricultural management measures and memoranda of understanding between State, Territorial and authorized Tribal governments and organizations that represent categories, subcategories or individual sources which assure implementation and effectiveness of management measures.

A State, Territory, or authorized Tribe may need to consider other programs to address pollutants introduced in a waterbody by atmospheric deposition or groundwater. For example, the State, Territory, or authorized Tribe could rely on scheduled reductions in atmospheric sources under the Clean Air Act or similar State authority. Likewise, it could rely on reduced groundwater loadings as a result of remedial actions under the Resource Conservation and Recovery Act (RCRA) or similar State authority. If these programs cannot

provide reasonable assurance that the pollutant loads will be reduced, the load reduction will have to be assigned to other sources.

Generally, a State, Territory, or authorized Tribe will demonstrate reasonable assurance for the part of the load allocation that addresses the loading of pollutants contributed by background sources by quantifying the loading so that it can be included in the calculation of the total loading in a waterbody. In these situations, this background loading would be presumed to be constant and load reductions will be assigned to other sources. However, if a State, Territory, or authorized Tribe expects that the background loadings will decrease as a result of some action and is relying on this decrease in the calculation of wasteload and load allocations, then the State, Territory, or authorized Tribe will need to apply the four-part test to demonstrate the reasonable assurance for this expected reduction.

The test of reasonable assurance in today's rule is not met simply by having programs, authorities or voluntary measures described in the definition of reasonable assurance in place. In order for such programs, authorities or measures to provide reasonable assurance each one of the four parts of the test must be satisfied. For example, if a State offers a particular voluntary program approved under section 319 as proof of reasonable assurance, EPA will review the program information to see whether it specifically addresses the waterbody/pollutant of concern, includes actions that will be implemented as expeditiously as practicable, will be accomplished through a reliable delivery mechanism with a good track record of success and meet the adequate funding test.

Reasonable Assurance When EPA Establishes TMDLs

In some cases, EPA will have to disapprove a State's TMDL and establish the TMDL. When establishing a TMDL, EPA will also have to provide reasonable assurance as required by §§ 130.32(c) and 130.2(p). In providing reasonable assurance, EPA may rely on various statutory or regulatory authorities to meet the four-part test which applies to load allocations for sources not subject to an NPDES permit. EPA cannot, of course, require States, Territories or authorized Tribes to use their own statutory or regulatory authorities to provide reasonable assurance for EPA. EPA may, however, condition some or all CWA grants to the fullest extent practicable and in a manner consistent with the effective

operation of other CWA programs in order to meet the adequate funding part of the four-part reasonable assurance test. Such action would by itself serve to satisfy that part of the reasonable assurance test when EPA establishes a TMDL. For example, EPA may condition section 319 grants such that States can only use some or all of these funds to implement management measures in watersheds where EPA has established a TMDL that includes load reductions for nonpoint sources. Similarly, EPA may condition section 106 grants to States such that some of the funds for monitoring can only be used to support the monitoring specified in TMDL implementation plans. EPA may also use its voluntary, incentive-based programs, such as section 104(b)(3) demonstration grants for watershed restoration, to ensure that management measures are funded and implemented. EPA may provide reasonable assurance for wasteload allocations by issuing NPDES permits within the time frames prescribed by § 130.32(c)(1)(ii) where EPA is the permitting authority, or by objecting to expired State-issued permits so that new permits will be issued to implement wasteload allocations from approved TMDLs.

By requiring such a demonstration of reasonable assurance before it may approve or establish a TMDL, EPA does not intend to create a mandatory duty or legal obligation that either the State, Territory, authorized Tribe or EPA implement those actions identified as providing reasonable assurance. The reasonable assurance demonstration is a "snapshot-in-time" identification of those voluntary and regulatory actions that the State, Territory, authorized Tribe or EPA intends to take to ensure that the nonpoint source load allocations assigned in the TMDL will be realized. If such demonstration is deemed satisfactory at the time the TMDL is being reviewed or developed by EPA, the TMDL may be approved or established. If in the future, the State, Territory, authorized Tribe or EPA determines that the TMDL is not being implemented, or that the implementation plan needs to be revised, the State, Territory, authorized Tribe or EPA may take action, as appropriate under existing State, Territorial, Tribal or Federal legal authority, to effect implementation or revise the TMDL. Nothing in this rule, however, creates in EPA or the States new legal authority beyond that provided by existing State, Territorial, Tribal or Federal law to implement load allocations for nonpoint sources or

creates for EPA, States, Territories or authorized Tribes a mandatory duty to do so.

k. New Definition of Waterbody (§ 130.2(q))

What did EPA propose? EPA proposed a definition of the new term “waterbody” to codify EPA’s interpretation of the term for the purposes of TMDLs. The proposed definition would have provided States, Territories, and authorized Tribes more flexibility than the current regulation which refers to segments and would have allowed States, Territories, and authorized Tribes to tailor the geographical size of the watershed for which the TMDL was being established to match the pollutants and nature of impairment.

What comments did EPA receive? EPA received a number of comments on this definition. Most commenters suggested that the definition exclude ephemeral streams and wetlands. These commenters expressed concern over the application of water quality standards to these waterbodies, and thus suggested that TMDLs should not be established for them. Other comments expressed concern that the definition would prevent establishment of a TMDL for one segment of a river.

What is EPA promulgating today? After review of comments, EPA is promulgating the proposed definition with two minor changes. First, EPA is revising the proposed language to recognize that waterbodies can be made up of one or more segments of rivers, streams, lakes, wetlands, coastal waters or ocean waters. EPA did not intend to require that a TMDL consider the full geographic extent of a waterbody. Rather EPA intended to give States, Territories and authorized Tribes the flexibility to establish TMDLs for one or more segments. Second, EPA is adding a recommendation to the rule that the use of segments should be consistent with the use of segments in a State’s water quality standards. EPA is making this recommendation to help promote consistency between how TMDLs are developed and how water quality standards are expressed.

EPA does not believe that the nature of a waterbody, such as an ephemeral stream or a wetland, and the challenge that nature may pose to establishing a TMDL, should preclude it from being defined as a waterbody. EPA believes that this is a water quality standard issue and that the appropriate forum for resolving questions about water quality standards is in the development of the standards themselves, and not in the

application of the standards in a TMDL context.

1. New Definition of List (§ 130.2(v))

What did EPA propose? EPA proposed to include a new definition to refer to the four elements of the list and the prioritized schedule. EPA proposed this revision to expedite reference to the four elements and schedule within the rule.

What comments did EPA receive? EPA received no substantial comments unique to this definition. Some commenters did offer suggestions on what are acceptable elements of a list; these comments are addressed in parts of today’s preamble that address these elements.

What is EPA promulgating today? EPA is revising the proposed definition of “list of impaired waterbodies” to make it consistent with other provisions of the final rule. First, EPA is clarifying that the list consists of all four parts of the required submission. This is to ensure that there is no confusion over whether certain parts of the list that may be submitted along with the State’s section 305(b) report are in fact part of the section 303(d) list. In addition, the definition states that Part 1 of the list includes both waterbodies identified for TMDL development and the prioritized schedule for those waterbodies. This revision makes the definition consistent with the requirement to submit the prioritized schedule as part of the list itself, subject to EPA approval or disapproval, rather than as a separate document with the list submission that EPA will review but not take action on.

2. Response to Requests for New Definitions

What did EPA propose? EPA’s proposal of August 23, 1999, requested comments on all aspects of adding new definitions.

What comments did EPA receive? EPA received comments suggesting that EPA add several definitions for terms used in the proposed rule or discussed in comments which requested additions to the requirements of the final rule.

What is EPA promulgating today? EPA has decided not to add other definitions to § 130.2. EPA is not adding a definition of “balanced indigenous population of fish, shellfish, and wildlife.” There is an existing regulatory definition of the term “balanced indigenous population” in § 125.70 that, although it explicitly applies only to the regulations implementing section 316(a), provides the Agency’s interpretation of this term for purposes of identifying impaired waterbodies and

establishing TMDLs pursuant to section 303(d).

EPA is not adding a definition of “watershed.” The term is not used within the final rule to trigger a regulatory provision, and thus does not require definition. EPA prefers to allow States, Territories, and authorized Tribes the flexibility to define a watershed within the context of their own programs. However, EPA encourages the use of the hydrologic unit codes for watersheds defined by the U.S. Geologic Survey since they are a uniform system of watershed identification that will clearly identify to other States, Territories, Tribes, EPA and the public the boundaries of watersheds defined by the States in the context of their water quality programs.

EPA is not including a specific definition in the final rule for “trading” and thus declines to add trading-related definitions for “real,” “quantifiable” or “surplus” as suggested by some comments as being necessary if EPA included regulatory provisions for trading.

EPA is not adding a definition of “existing and readily available,” “man-made or man-induced,” “point source,” “nonpoint source,” and “waters of the contiguous zone.” This final rule at § 130.22(b) already provides a definition of existing and readily available water-quality related data and information by enumerating particular categories of water-quality related data and information that must be considered. The regulations clearly state that this list is not exhaustive, but rather is intended to identify specific kinds of water quality-related data and information that will be considered existing and readily available, in addition to water-quality related data and information in other relevant categories that are not explicitly listed in the regulations. EPA does not believe it can accurately identify each and every type of water-quality related data and information that should be considered in every state’s listing process, in light of the broad variety of relevant water-quality related data and information that is and will be available. Therefore, it is appropriate to list specific categories that are likely to exist for every state, and leave it to the States, Territories, and authorized Tribes to collect and evaluate other relevant information.

The CWA itself uses the term “man-made or man-induced” within the statutory definition of pollution; EPA believes this term is very clear and needs no further clarification. The CWA already defines “point source” and EPA does not believe that today’s rule needs to reiterate this definition. EPA

interprets “nonpoint source” to apply to all sources that do not meet the statutory definition of a point source. Finally, the CWA at section 502(a) already defines the term “contiguous zone” and EPA does not believe that it needs to reiterate this definition in today’s final rule.

EPA disagrees that it should add a definition of “sensitive aquatic species.” This term was used in the proposal merely to indicate a factor that States, Territories and authorized Tribes should consider when establishing priorities for TMDLs. Since this is a discretionary practice in the final rule, EPA believes that it need not define the term.

EPA also disagrees that it should add a definition of “seasonal variations.” This term originates in CWA section 303(d)(1)(C). EPA believes it means seasonal variation in environmental conditions which affect a waterbody’s character, e.g., variations in a waterbody’s temperature, flow rate, or dissolved oxygen level. EPA does not believe the term needs a separate regulatory definition. Further, § 130.32(b)(9) provides sufficient explanation of what is to be included in the assessment of seasonal variation.

EPA disagrees that it should add a definition of “comprehensive watershed management plan.” This term is not used in the final rule, and thus does not require definition.

EPA disagrees that it should add a definition of “natural sources/causes” or “ephemeral stream.” EPA believes these terms are best defined in State, Territorial and authorized Tribe’s water quality standards. The term “natural sources/causes” was suggested to clarify how a TMDL would address impairments caused by natural sources or causes. EPA believes this question is best addressed when a State, Territory, or authorized Tribe decides the appropriate water quality criteria for that waterbody. The term “ephemeral stream” was suggested to identify a type of waterbody for which special water quality standards would be necessary. Again, EPA believes this question is best addressed when a State, Territory, or authorized Tribe decides the appropriate water quality criteria for that waterbody.

B. Who Must Comply With the Requirements of Subpart C? (§ 130.20)

What did EPA propose? EPA’s proposal included a list of entities which would be subject to the subpart C regulations. The proposal defined the term “you” to pertain to States, Territories, and authorized Tribes. The proposal also stated that portions of subpart C apply to EPA.

What comments did EPA receive?

EPA received only a few of comments on this section. These comments expressed concern that EPA was only subject to unspecified portions of subpart C, and recommended that EPA should be subject to the same requirements as are States, Territories, and authorized Tribes.

What is EPA promulgating today?

EPA declines to further clarify this section. Its purpose is to explain that the term “you” as used in a rule written in plain English applies to States, Territories and authorized Tribes. As to the parts of the rule that apply to EPA, EPA considers that §§ 130.22, 130.23, 130.25, 130.26, 130.27, 130.28, 130.29, 130.31, 130.32, 130.33, 130.36, and 130.37 apply to EPA when EPA establishes lists or TMDLs. These are the same substantive requirements that apply to States, Territories, and authorized Tribes.

Other sections of subpart C pertain to EPA’s review and approval or disapproval of lists and TMDLs. These sections are specifically identified in the titles for the sections.

C. What is the Purpose of Subpart C? (§ 130.21)

EPA proposed to include this section in the regulations to give the reader an overall summary of the requirements included in §§ 130.22 through 130.37 of Subpart C. EPA received many comments regarding the purpose of its proposal. These comments are all addressed in other parts of this preamble or in the Response to Comments Document. For the sake of clarity, this section has been slightly expanded in today’s rule to reflect decisions made on the various requirements which are explained in detail following sections of the preamble. In addition, the section clearly lays out the actions which EPA will undertake in the absence of approvable actions by a State, Territory, or authorized Tribe. Finally, this section is reorganized to group together requirements for States, Territories, and authorized Tribes, and those for EPA.

D. What Water-Quality Related Data and Information Must be Assembled To Develop the List of Impaired Waterbodies? (§ 130.22)

What did EPA propose? In § 130.22 of the proposal, EPA included a listing of the sources of water-quality related data and information which a State should consider in order to develop its list of impaired waterbodies. Generally, EPA proposed to retain the requirements of current § 130.7(b)(5) with one significant addition. EPA proposed at

§ 130.22(b)(4) that States, Territories and authorized Tribes should consider the information included in the Drinking Water Source assessments mandated by the Safe Drinking Water Act. EPA intended that the data obtained from these sources would then be analyzed using the State’s methodology developed under proposed § 130.23.

What comments did EPA receive?

EPA received a significant number of comments concerning both this section and proposed § 130.23. Some commenters specifically addressed the list of data sources proposed in § 130.22. Their comments are addressed in this section. EPA also received many comments dealing with the issues of data quality, types of data which should be considered as existing and readily available, and the use of monitored vs. modeled or evaluated data. Some commenters raised these issues in the context of § 130.22, others in the context of § 130.23. For the sake of clarity EPA is addressing these issues in the discussion of § 130.23.

As far as the list of sources, a significant number of commenters took exception to inclusion of the source water assessments while others supported it. Some commenters suggested that source water assessments were not appropriate sources of data because they are likely to be desk-top short-term qualitative documents containing no actual data, and suggested that sanitary surveys would be better sources of data. Others believed that EPA should clarify that ground water assessments should not be used for listing decisions. Other commenters suggested either additions or deletions from the list.

What is EPA promulgating today?

After careful consideration of these comments, EPA is promulgating this section as proposed. The Agency appreciates that there are other sources of data available and does not intend the list to be exclusive. States must consider other types of water quality-related data and information that are existing and readily available. On the other hand, EPA does not expect the States, Territories and authorized Tribes to use data contained in the listed documents, including source water or groundwater assessments, in an indiscriminate fashion. The expressed purpose of § 130.23 is to document the decision process the States, Territories and authorized Tribes will use to consider how data from these and any other existing and readily available sources will be used in making listing decisions. Thus, States, Territories, and authorized Tribes must consider all existing and readily available water quality-related

data and information in the listing process, but may decide not to use certain such data or information as a basis for listing waters. These decisions will be explained in the state's methodology, discussed below, so that the public and EPA will have an opportunity to provide input on the decision process.

E. How Must the Methodology for Considering and Evaluating Existing and Available Water-Quality Related Data and Information to Develop the List be Documented? (§ 130.23)

What did EPA propose? Under the current regulations, States, Territories and authorized Tribes must submit to EPA documentation justifying their decisions to list or not list waterbodies at the same time they submit the list. EPA proposed to decouple the two requirements to provide for early input from stakeholders and EPA on this decision-making process. EPA's rationale was that resolving methodology issues early in the process would lead to better, more readily approvable lists. EPA proposed to require that States, Territories, and authorized Tribes develop a methodology covering all aspects of how existing and readily available data and information would be used to identify waterbodies as impaired, assign priorities and develop a schedule for establishing TMDLs.

What comments did EPA receive? EPA received a significant number of comments concerning the use of all existing and readily available data as a basis for listing and delisting impaired waters. Many commenters strongly advocated the use of data from all sources, with or without QA/QC documentation. These commenters were concerned that setting data quality requirements too high would result in a less than comprehensive assessment of all waters, and therefore dramatically limit or underestimate the identification and listing of impaired waters. They pointed out that listing and TMDL establishment is an iterative process, and that if necessary, States, Territories and authorized Tribes could collect supplemental data to confirm or make adjustments to their initial listing decisions. Numerous commenters suggested that data should not be used for the basis of listing and delisting unless it met rigorous QA/QC requirements, and was collected and processed with documented and scientifically valid protocols. Several commenters supported the establishment of prescribed QA/QC data quality guidelines in order to assure that

all data met a minimum level of technical credibility.

Numerous commenters suggested that EPA specify in detail the contents of an adequate assessment methodology. In this approach, EPA would establish requirements for sampling design, data collection, and data analysis and interpretation. Other commenters objected to such a "one size fits all" approach, and believed that the format and contents of the methodology should be left to States, Territories and authorized Tribes.

Several commenters expressed concerns over the proposed requirement that there be a separate public participation process in the development of the methodology, while others asked for more specific public participation requirements which would mandate involvement of certain stakeholders. Several commenters also suggested that the methodology be adopted through rulemaking. Some commenters asked that the final methodology be made available to the public.

A number of commenters expressed concern over the adequacy of current monitoring programs to characterize and evaluate their waters in a comprehensive manner, regardless of how restrictive the States, Territories and authorized Tribes are in the use of existing and readily available data and information. They pointed out that State, Territorial and authorized Tribal monitoring programs needed to expand their spatial and temporal coverage, monitor for additional parameters, and rapidly incorporate biological and habitat quality indicators.

Finally, some commenters suggested that the methodology needed to consider how to resolve disagreements involving waterbodies that crossed Territorial and all Tribal boundaries.

What is EPA promulgating today? EPA is making several changes to the proposed language to conform with decisions explained elsewhere in this preamble. These changes reflect the decision that the section 303(d) list include four Parts, and for Part 1, the prioritized schedule for establishing TMDLs. Also, in recognition of the fact that EPA will be reviewing and commenting on, but not approving or disapproving, the methodology, EPA has revised the regulatory text to say that States, Territories, and authorized Tribes "should", rather than must, include certain elements in the methodology.

EPA is retaining the proposed requirement that there be a separate public participation process in the development of the methodology. EPA

recognizes the cost savings of combining the public participation of the methodology with that of the list. However, EPA believes there is a significant benefit to the public to have reviewed the methodology before the public reviews the list of impaired waters. EPA is also adding language to encourage States, Territories and authorized Tribes to provide direct notification of the availability of the draft methodology to persons who submit a written request. This change conforms with changes made to § 130.36 and makes all public notice requirements contained in the final rule consistent. EPA believes it is reasonable to expect States to provide direct notification to such parties, and that it will not be burdensome. Public participation is essential to ensuring accurate, comprehensive lists, and providing persons with sufficient interest in the process to request notification in writing is a fairly simple way to further ensure that all interested parties receive notice of the availability of the draft methodology. EPA notes that States need not respond to such requests by providing copies of the methodology itself, but rather may simply notify the requesting parties that the methodology is available for public review and comment. EPA also agrees with the comment that the public should have access to the final methodology and is adding language to this effect. Today's final rule does not specify how States, Territories, and authorized Tribes are to make the methodology available. EPA expects that they will use their existing practices for doing so. EPA is requiring that the final methodology be made available to the public.

EPA also agrees with the commenter's concerns regarding State, Territorial and authorized Tribal monitoring protocols. The final regulations specify that the methodology should describe procedures that States, Territories and authorized Tribes will use to collect ambient water quality information. EPA believes this is reasonable and appropriate to provide as part of the methodology since this information will likely be critical in listing waterbodies as well as determining whether waterbodies are meeting standards and may be removed from the list. It is important for the public to be informed of the data collection methods the State, Territory, or authorized Tribe intends to use, and to have an opportunity to comment on such methods. EPA believes this process will serve to minimize concerns that would otherwise be raised later, when the State, Territory, or authorized Tribe lists

or removes waters based on data it has collected through its ambient water quality data collection programs.

EPA supports the collection and use of high quality data in decision making. EPA's grant regulations require that when grantee projects, such as State and Territorial water quality work using CWA section 106 funds, involve environmentally-related measurement or data generation, the grantee shall implement quality assurance practices that produce data of quality adequate to meet the project objectives. 40 CFR 31.45. Because regulations already require quality assurance practices, EPA declines to duplicate these requirements in today's rule. EPA has published guidance which governs EPA's own data collection activities and references quality assurance/quality control guidances for others. See "Policy and Program Requirements to Implement the Mandatory Quality Assurance Program", EPA Order 5360.1, April 3, 1984, as revised July 16, 1998.

Similarly, EPA recognizes the concern that quality assurance practices could be set at so high a level as to preclude consideration of most environmental water-quality related data. For this reason, EPA is committing in the final rule to comment about a State's, Territory's or authorized Tribe's assessment methodology. This will allow EPA to express concerns about the assessment methodology, including whether the State, Territory, or authorized Tribe inappropriately included or excluded water-quality related data. In addition, EPA will consider this when EPA reviews the list of impaired waters.

The final rule at § 130.23(e)(2) now provides that the State, Territory, or authorized Tribe should develop a process for resolving disagreements with other jurisdictions involving waterbodies crossed by Territorial and Tribal boundaries, in addition to the State and authorized Tribal boundaries discussed in the proposal. EPA is adding Territories to this provision because, under section 303(d), Territories are considered in the same way as States. EPA is adding Tribes that are not authorized to administer section 303(d) to this provision because, in part, Tribes without section 303(d) authorization may have authorization under section 303(d) for water quality standards, and a resolution of disputes over how to interpret and use water quality standards becomes relevant.

EPA also declines to specify in the final rule the detailed contents of an adequate assessment methodology. EPA believes that States, Territories, and authorized Tribes need the flexibility to

tailor their assessment methodology to their monitoring programs and the waterbodies within their jurisdiction and that methods change over time. To assist States, Territories and authorized Tribes, EPA is, however, developing guidance on this subject which will include key elements of monitoring programs, monitoring design for achieving comprehensive coverage of assessments, and decision criteria for determining impairments. This guidance will be available to the States, Territories, and authorized Tribes in 2000, unless delayed by the TMDL rider.

EPA recognizes the concerns expressed by commenters over the adequacy of current monitoring programs to characterize and evaluate their waters in a comprehensive manner. EPA continues to work with States, Territories, and other stakeholders to increase the quality and comprehensiveness of water quality monitoring and assessment programs. This is achieved through data sharing and development of consistent monitoring designs and assessment criteria. EPA provides technical assistance, guidance and resources for monitoring design and implementation. EPA and its partners in States, Territories, Tribes and other Federal agencies are developing a consolidated assessment methodology that will provide a consistent approach for characterizing water quality.

F. When Must the Methodology be Provided to EPA? (§ 130.24)

What did EPA propose? EPA envisioned the methodology as an evolving document which States, Territories and authorized Tribes would revise as appropriate at some time during the listing cycle. EPA proposed that States, Territories and authorized Tribes would submit their first final methodology to EPA no later than January 31, 2000, and no later than January 31 of every year preceding the year when a list would be due, but noted in the preamble that the first date was subject to change based on the date when these regulations would be promulgated. EPA also proposed that it would review the listing methodology and provide comments to the State, Territory, or authorized Tribe. EPA proposed to consider the methodology in its approval or disapproval of the section 303(d) list and explained in the preamble to the proposal that it was considering using the way in which EPA's comments on the draft methodology were addressed as a factor in approving or disapproving the list.

What comments did EPA receive? Commenters expressed differing opinions on how frequently the methodology should be submitted. Some advocated a one time submission, with updates as needed. Others suggested that the methodology be submitted with each list. There was a diverse set of comments concerning the role of EPA in formally approving the methodology. Some commenters strongly endorsed a formal approval/disapproval of the methodology as part of EPA's action on the submitted list. Some commenters believed that EPA had no role in reviewing or approving the methodology. They believed that it was strictly a State, Territorial and authorized Tribal responsibility to establish and implement data collection and assessment protocols. Numerous commenters strongly advocated that EPA only provide advice, comment and technical guidance to States, Territories and authorized Tribes.

What is EPA promulgating today? EPA continues to believe that the methodology will be an evolving document; therefore, the final rule requires that it be provided to EPA during every listing cycle. However, EPA recognizes that not all aspects of the methodology may change during any given cycle, and the final rule provides that only revised portions of the methodology need be provided. EPA will already have the previous list's methodology, and will have provided comments on the unchanged portions during prior list cycles. Therefore, EPA's comments will likely focus on any changed portions of the methodology. However, the State, Territory, or authorized Tribe must make available to the public for comment the entire methodology, including portions unchanged from prior listing cycles. EPA expects the State, Territory, or authorized Tribe to address in its final methodology comments from the public on all aspects of the methodology, including those that were not changed.

As was proposed, the final rule requires that the methodology and updates to the methodology be provided to EPA at least once per four-year listing cycle. EPA's rationale for choosing a four year list submittal cycle is explained later in this preamble. Except for the first listing cycle pursuant to these regulations, States, Territories and authorized Tribes must provide the methodology no later than two years prior to the due date of the list. This time provides sufficient time for States, Territories and authorized Tribes to collect water-quality related data for the next section 303(d) list consistent with

their most recent assessment methodology. This schedule is compressed for the first list because EPA agrees with the commenters who expressed an urgency in seeing these regulations implemented. The methodology for the first list required to be submitted under today's regulations is due no later than November 1, 2001, five months before the list is due, unless the rider is in effect through that date. EPA believes this date strikes a balance between the competing concerns of allowing States, Territories and authorized Tribes sufficient time to develop a methodology (including providing an opportunity for the public to comment) consistent with today's regulations, and having state lists submitted under today's regulations without undue delay. States, Territories and authorized Tribes will have nine months to develop the methodology and submit it to EPA. EPA will review the methodology and provide comments within 60 days (by July 1, 2001). Thus, the State, Territory, or authorized Tribe will have nine months from the time it receives EPA's comments on its methodology to develop and submit its section 303(d) list.

EPA will not formally approve or disapprove the methodology but provide comments to help the State, Territory, or authorized Tribe develop appropriate methodologies for listing decisions so that the ultimate goal of § 130.23—approvable lists—is achieved. Thus, EPA's review of and comments on State, Territory, or authorized Tribe methodologies will focus on whether the methodology will result in an adequate review of all existing and readily available water quality-related information, whether the factors that will be used to make listing and removal decisions are reasonable, whether the process for evaluating different kinds of water-quality related data and information is sufficient, whether the process for resolving jurisdictional disagreements is sufficient, whether the process for developing a prioritized schedule is reasonable and consistent with the requirements of the CWA and EPA's regulations, and whether the State, Territory, or authorized Tribe has adequately responded to comments from the public on its draft methodology.

In its review of the State's, Territory's or authorized Tribe's list submission, EPA will consider whether the State, Territory, or authorized Tribe adequately addressed EPA's comments on its final methodology. In some cases, the failure to address such comments may result in a disapproval or partial disapproval of the state's list

submission. For example, if EPA concludes that the state's methodology fails to adequately consider certain kinds of relevant water-quality related data and information, but this deficiency is not corrected in the final list submission, EPA may disapprove the list if it determines that this deficiency resulted in the state's failure to include certain waterbodies required to be listed. Therefore, EPA is in the final regulation committing to provide comments to States, Territories and authorized Tribes within 60 days of receiving the methodology. This should give States, Territories and authorized Tribes sufficient time to make necessary adjustments in their methodology to submit an approvable list to EPA.

EPA is also revising the proposed language to require in the final rule that States, Territories and authorized Tribes provide to EPA a summary of public comments they received on their final methodology and of their response to significant comments. EPA believes that it can better provide informed comments on State, Territory, and authorized Tribe methodologies if it knows what comments they received. Also, EPA believes it needs this information to assist in its review and approval or disapproval of the lists of impaired waterbodies in order to understand issues raised by members of the public and how they were addressed in the listing process.

In the event that the effective date of today's rule is later than May 1, 2001, States, Territories, and authorized Tribes are not required to develop the methodology for the year 2002 list under the requirements of this regulation. Instead, States, Territories, and authorized Tribes will need to provide a methodology under the previous regulation. See Section V.5 of the preamble.

G. What is the Scope of the List of Impaired Waterbodies? (§ 130.25)

What did EPA propose? EPA proposed to eliminate the term "water quality-limited segments still requiring TMDLs" from the regulations and to broaden the scope of the list. EPA proposed requiring States, Territories and authorized Tribes to list all impaired or threatened waterbodies, regardless of whether the waterbody was expected to attain water quality standards following the application of technology-based controls required by section 301 and 306 of the CWA, more stringent effluent limitations, or other required pollution controls.

EPA proposed that States, Territories and authorized Tribes would list all waterbodies impaired or threatened by

pollutants, by pollution, by atmospheric deposition, and by unknown pollutants. EPA proposed that these waterbodies be listed regardless of the source of the impairment: point source, nonpoint source or a combination of both. EPA's rationale for this proposed section was to provide a list that served as a comprehensive public accounting of impaired and threatened waterbodies and provided all stakeholders with an ongoing record of success in attaining water quality standards as TMDLs were completed and implemented.

What comments did EPA receive?

EPA received a significant number of comments suggesting that threatened waterbodies not be included on the section 303(d) lists. These commenters stated that the section 303(d) list was expressly for waterbodies not meeting water quality standards—not waterbodies currently meeting water quality standards even if they exhibited a declining trend in water quality. Several commenters supported the inclusion of threatened waters on the section 303(d) list. They asserted that protective pollution control efforts would prevent further deterioration of these waters, and prevent them from becoming "formally" impaired. Many commenters suggested that threatened waters not be listed, but be tracked and reported elsewhere. Some commenters expressed concern that EPA had not yet provided sufficient guidance on how to define a declining trend, and that radically different approaches would be employed by the States. In general the States were very concerned with the workload that requirement might entail, in light of what they believed to be a more expansive definition of a TMDL.

A significant number of commenters suggested that only waters impaired by an identified pollutant should be required to be listed, and that waters impaired by pollution, where no pollutant could be identified, should not be listed. It was their view that the section 303(d) list was intended to identify waterbodies for which TMDLs for a pollutant or pollutants were to be established. Numerous commenters supported the required listing of waterbodies impaired by pollution. It was their position that the inclusion of pollution impairments was a more comprehensive reporting of the status of the nation's waterbodies, and allowed States, Territories and authorized Tribes to target pollution control actions more effectively.

Several commenters objected to the use of drinking water standards as a basis for listing impaired waterbodies because they believed that MCLs are developed for protecting drinking water

at the tap and are wholly inappropriate for use as a standard to define ambient water quality impairments.

EPA received numerous comments suggesting that the requirement to list waterbodies impaired or threatened by an unknown pollutant be eliminated. Some commenters believe that this language was so wide-open as to lead members of the public to request that waterbodies be listed in the absence of any information even indicating an impairment. Many commenters were concerned that listing for an impairment without identifying a pollutant could have significant adverse regulatory implications. Several commenters were concerned that in many cases of biological impairment, the pollutant could never be identified. Other commenters supported listing waterbodies where the pollutant was unidentified. They endorsed the strategy to first list the waterbody, and then attempt to identify the pollutant as a first step in establishing the TMDL.

Several commenters strongly challenged EPA's authority to require the listing of waterbodies impaired by nonpoint source pollution. It was their interpretation of section 303(d) that the text "waterbodies for which effluent limitations required by section 301(b)(1)(A) and (B), and are not stringent enough to implement any water quality standard," applies expressly only to point sources, and, therefore, exempts waters impaired by nonpoint sources alone. Many commenters were concerned that the inclusion of nonpoint source only waters would greatly expand the number of waters listed, and because of excessive resource demands, reduce the effectiveness of dealing with point source impairments. Other commenters supported the requirement to list waters impaired only by nonpoint sources. In general, these commenters suggested that waters be listed regardless of the cause of the impairment—point source, nonpoint source or both.

A significant number of commenters suggested that EPA should not require the listing of waterbodies threatened by atmospheric deposition. Several of these commenters challenged EPA's statutory authority under the CWA to require that waters impaired by atmospheric deposition be listed. A number of these commenters suggested that the Clean Air Act was a more appropriate vehicle for addressing the effects and controls of air sources of pollutants. Many commenters stated that it was technically infeasible to link and estimate the significance of the atmospheric contribution of a pollutant, and that adequate technical tools to

establish TMDLs for pollutants contributed by air deposition did not yet exist. Several commenters supported the listing of waterbodies impaired or threatened by atmospheric sources of pollutants. These commenters stated that the source of the impairment was irrelevant as to whether a waterbody should or should not be listed.

What is EPA promulgating today?

EPA is making two significant changes to the proposed language. First, EPA is not requiring that States Territories or authorized Tribes, include threatened waters. However, EPA is encouraging States, Territories and authorized Tribes to include on the list those waterbodies which they anticipate will become impaired before the next listing cycle.

Waterbodies which exhibit a declining trend in water quality at the time a list is being developed such that water quality standards will likely be exceeded by the time of the next list submission are not required to be listed under the final rule. However, EPA expects that such waters will either exceed standards at the next listing cycle if the declining trend continues as expected and must then be listed or will attain standards by that time if the declining trend is reversed. Thus, a State, Territory, or authorized Tribe still has an incentive to adopt controls that address threatened waterbodies so that listing and TMDL development can ultimately be avoided. Moreover, if declining trends are not reversed, it is likely that the waterbody will be required to be included in the next list and scheduled for TMDL development if included on Part 1. For this reason, TMDL development will not be delayed more than four years compared to the proposed approach for requiring listing of threatened waters.

Alternatively, a State, Territory, or authorized Tribe could decide to list a threatened waterbody on the section 303(d) list, schedule a TMDL if the impairment was caused by a pollutant, and proceed with establishing the TMDL. If a State, Territory, or authorized Tribe chooses to do so, this TMDL will be subject to the requirements of subpart C, that is, the TMDL must be submitted to EPA for review, and EPA's approval or disapproval and establishment of a TMDL will be based on the requirements of subpart C. In addition, as required by § 130.35(a), EPA must establish a TMDL for any waterbody that a State, Territory, or authorized Tribe lists and does not make substantial progress in establishing the TMDL as compared to its approved schedule. The decision to include threatened waters or not is left entirely

to the discretion of States, Territories, and authorized Tribes. EPA will not use grant conditions or other mechanisms to influence this decision.

Second, EPA is clarifying that in order for a waterbody to be listed in the absence of information regarding the presence of a pollutant, there has to be some biological information, (e.g. not supporting a designated or existing habitat use) supporting the impairment finding.

EPA is declining to make any of the changes suggested by the commenters pertaining to the scope of the list of impaired waterbodies as described by § 130.25. Most of the comments suggesting that the scope of the list should be narrowed based their rationale on their interpretation of the CWA and EPA's authority under section 303(d). As stated in section I.A.2. of this preamble, EPA believes that the CWA does require that States, Territories, or authorized Tribes list waters impaired regardless of the source, except for the statutory exception for those waters where the installation of technology-based treatment will attain and maintain water quality standards. Accordingly, today's rule provides more examples of the types of sources, including atmospheric deposition and ground water, that may cause impairments requiring placement of the waterbody on the section 303(d) list.

EPA continues to believe that there are merits in ensuring that the States, Territories and authorized Tribes have a complete accounting of impaired waterbodies and that the public should be able to have access to the list. As EPA explained in the preamble to the proposed regulations, there should be a close relationship between the information that States, Territories, or authorized Tribes used to develop the section 305(b) list and the information used to establish the section 303(d) list. Indeed, one requirement of § 130.22 is that States, Territories, or authorized Tribes evaluate and consider their most recent section 305(b) report in developing their section 303(d) lists of impaired waterbodies. Therefore EPA does not believe that requiring the more complete section 303(d) list imposes an undue burden on the States, Territories, or authorized Tribes because they are using water-quality related data and information that they have in hand and may have already evaluated for their section 305(b) report. In addition, as discussed later in this preamble, EPA is providing States, Territories and authorized Tribes with significant flexibility in the way they can provide the list to EPA which will further alleviate this burden.

Today's rule at § 130.25(a) also recognizes that the existing and readily available water-quality related data and information used by States, Territories and authorized Tribes for environmentally-related measurement or data generation must include appropriate quality assurance and quality control. EPA's grant regulations require that when grantee projects, such as State and Territorial water quality work using CWA section 106 funds, involve environmentally-related measurement or data generation, the grantee shall implement quality assurance practices that produce data of quality adequate to meet the project objectives. 40 CFR 31.45. Similarly, any monitoring or analysis activities undertaken by a Tribe with EPA funds must be performed in accordance with quality assurance/quality control practices. (§ 130.10). Therefore, EPA believes that it is consistent with the current requirements for how States, Territories and authorized Tribes consider data to recognize that the existing and ready available data and information must include appropriate quality assurance and quality control.

H. How do you Apply Your Water Quality Standards Antidegradation Policy to the Listing of Impaired Waterbodies? (§ 130.26)

What did EPA propose? EPA proposed to clarify how State, Territorial and authorized Tribal antidegradation policies should be used in identifying and listing impaired and threatened waterbodies under section 303(d). As described in the preamble to the proposed rule, antidegradation policies and associated implementation procedures are an essential part of State, Territorial and authorized Tribal water quality standards and are required under Part 131. The preamble further described the relationship between the section 303(d) listing requirements and antidegradation policies. EPA proposed requiring that any decline in water quality for Outstanding National Resource Waters (ONRWs) waterbodies would represent an impairment, and that such waterbodies should be identified and listed. EPA also proposed requiring identification and listing of unimpaired waterbodies as threatened when trend data and information indicated that a designated use would not be maintained and protected by the time of the next listing cycle. For all waterbodies, EPA proposed requiring identification and listing of waterbodies as impaired where the designated use, or a more protective existing use, was not maintained. An existing use is a use actually attained in the waterbody on or

after November 28, 1975 (when the Water Quality Standards regulations were published), whether or not the use is included in the Water Quality Standard. See § 131.3(e). EPA also proposed listing such waterbodies as threatened when trend data indicated the designated use, or a more protective existing use, would no longer be attained at the end of the next listing cycle.

What comments did EPA receive?

EPA received a number of comments specific to the use of antidegradation policies in identifying and listing threatened and impaired waterbodies. Many commenters disagreed that the definition of water quality standards in the CWA and Part 131 includes an antidegradation policy, thereby asserting that EPA does not have the authority to impose such policy on States and that antidegradation policies cannot serve as a basis for listings under section 303(d). Other commenters asserted that antidegradation policies, while part of water quality standards, are intended to apply only to waters that already attain water quality standards and thus antidegradation policies should not be considered when identifying and listing impaired waterbodies. Several commenters believed that ONRW waterbodies should not be listed as impaired based on a measurable change in water quality since there was no exceedance of a water quality standard; others asserted it was illogical since a decline in water quality could be temporary. Several commenters believed that EPA should remove the protection of existing uses from the water quality standards regulation. Several commenters believed that EPA should not require listing of threatened waters on the basis of a decline in water quality in unimpaired waterbodies, since EPA explicitly allows for a lowering of these waters' quality to accommodate important social and economic development. Finally, many commenters asserted that EPA lacks the statutory authority to require listing of threatened waters.

What is EPA promulgating today?

After carefully considering the comments received on the use of State, Territorial and authorized Tribal antidegradation policies in identifying and listing impaired and threatened waterbodies, EPA is promulgating the following requirements. First, ONRW waterbodies are impaired and must be listed when the water quality of such waterbodies has declined. Second, any waterbody not maintaining a designated use or more protective existing use is impaired and must be listed. Consistent with the decision not to require listing

of threatened waterbodies, EPA is not including in the final rule the proposed provision requiring listing of unimpaired waterbodies that are determined to be threatened based on adverse trend data and information.

EPA rejects the assertion made by many commenters that antidegradation policies are not part of water quality standards and that EPA lacks the authority to promulgate such policies for States, Territories or authorized Tribes. As described in the preamble to the proposed rule, antidegradation policies are a required element of State, Territorial and authorized Tribal water quality standards. The preamble to the Advance Notice of Proposed Rulemaking to the Water Quality Standards Regulation discusses at length both the statutory and regulatory basis for these longstanding requirements. (63 FR 36779–36787, July 7, 1998). Further, EPA has in the past, and may in the future, promulgate replacement Federal water quality standards when State, Territorial or authorized Tribal water quality standards do not include an antidegradation policy which provides protection of water quality consistent with the Federal antidegradation policy at § 131.12. (§ 131.32, 61 FR 64816 December 9, 1996). Quite simply, antidegradation policies are part of water quality standards.

EPA also rejects commenters' assertions that antidegradation policies should not be considered when identifying and listing impaired waterbodies because they apply only to waters that already attain water quality standards. As discussed in the preamble to the proposed rule, § 131.12(a)(1) requires that existing uses and the water quality necessary to protect them be maintained and protected. This is the fundamental level of water quality protection, applicable to all waters of the U.S., established by the Federal antidegradation policy. While existing uses and designated uses may be equivalent, this is not always the case. (63 FR 36751, July 7, 1998). For example, a waterbody may be designated as a warm water fishery, but in reality be supporting a cold-water fishery, a more protective existing use. While the cold-water fishery has not yet been adopted as the designated use, as the existing use it must be maintained and protected. The intent of § 131.12(a)(1) is to ensure that the more protective existing use is maintained and protected. In this example if the cold-water fishery is an existing use and is impaired prior to its adoption as the designated use in the water quality standards, such impairment is a failure to meet an

existing use and the water must be listed. Therefore, EPA believes that waterbodies which are not maintaining designated uses or more protective existing uses are impaired and must be listed under section 303(d).

EPA rejects the suggestion to remove protection of existing uses. To the extent this comment is related to the water quality standards regulations, it is outside the scope of today's action. EPA recognizes the inherent challenges associated with identifying and protecting existing uses. However, EPA has long-standing requirements for the protection of existing uses—prohibiting the removal of existing uses and requiring the adoption of designated uses consistent with existing uses. The existing requirement that water quality necessary to protect existing uses be maintained and protected will ensure that past or present water quality, at a minimum, will be maintained and protected. Requiring listing of waterbodies that are not maintaining designated uses or more protective existing uses as impaired is not only consistent with these longstanding requirements, but further clarifies and strengthens the protection of existing uses.

EPA disagrees that degradation of the ONRW waterbody does not constitute an exceedance of a water quality standard. Section 131.12(a)(3) establishes the highest level of protection for waterbodies by prohibiting the lowering of water quality. Thus, the level of water quality present at the time a waterbody is classified as a ONRW water, even that which exceeds the threshold for designated use attainment, must be maintained and protected. The only exception to this prohibition, as discussed in the preamble to the water quality standards regulation (54 FR 54100, November 8, 1983), is for activities that result in short-term and temporary changes. EPA guidance has not defined short-term or temporary, but views these terms as limiting water quality degradation for weeks or months, not years, with the intent of limiting degradation to the shortest possible time. For an ONRW waterbody the applicable standard is the prohibition on lowering of water quality. Therefore, EPA believes that when degradation to a waterbody classified as an ONRW occurs (beyond that which is short-term and temporary), such waterbody is impaired and must be listed under section 303(d). EPA acknowledges that an ONRW waterbody may have very high water quality which far exceeds the threshold required for

attainment of its designated use. However, the level of protection established by Tier 3 is intended to maintain that level of water quality into the future. EPA notes that classification of any individual waterbody as an ONRW is solely at the discretion of the State, Territory, or authorized Tribe.

I. What is the Format and Content of the List? (§ 130.27)

What did EPA propose? EPA's proposal at § 130.27 would have established a specific format and content for States, Territories, and authorized Tribes to follow, which organized the types of waterbodies included on the list and clearly identified which waterbodies would require the establishment of TMDLs. The proposed rule would have required that a list consist of four parts:

Part 1—Waterbodies impaired or threatened by one or more pollutants or unknown causes for which TMDLs would be required.

Part 2—Waterbodies impaired or threatened by pollution for which TMDLs would not be required.

Part 3—Waterbodies for which EPA has approved or established a TMDL and water quality standards have not yet been attained.

Part 4—Waterbodies that are impaired, but for which implementation of technology-based or other enforceable controls are expected to result in attainment of water quality standards by the next listing cycle. A TMDL would not be required for waterbodies on this part of the list.

EPA explained its belief that these four parts were necessary because the list no longer would include only waterbodies for which TMDLs were required. EPA wanted to ensure that the public and stakeholders would be aware of the different regulatory treatment afforded waterbodies depending on the basis of their inclusion on the various parts of the list.

EPA also specifically requested comments on the advisability of identifying specific situations where the proposed technical conditions for establishment of TMDLs are not met, what those situations might be and whether EPA should include waters impaired by pollutants in such circumstances on a separate part of the list. These comments are addressed fully in the Response to Comments Document and in section II.M. of this preamble.

What comments did EPA receive? EPA received many comments on the proposed format and content. In general, the same commenters who opposed the

broader scope of the list also opposed the four parts proposed in § 130.27 for the same reasons—lack of statutory authority and burden for the States. These commenters suggested that EPA maintain the current regulation requiring a one part list of waterbodies impaired by a pollutant or pollutants, and for which a TMDL is required.

Some commenters who supported the proposed broader scope of the list also supported the four part list of impaired waterbodies. However, many commenters opposed the establishment of the Part 4 component of the four-part list. Some opposed it because they believed that all waterbodies impaired by a pollutant, for which a TMDL has not been established, should be listed on Part 1. Others opposed it, because they believed that the States should not have to list impaired waterbodies where a pollution control mechanism was being implemented.

Several commenters supported the establishment of the Part 4 component, but did not agree that only enforceable controls should be determinative for inclusion of waterbodies on Part 4. Many of these commenters stated that voluntary measures, including community-based initiatives and incentive-based measures should also qualify a waterbody for inclusion on Part 4.

EPA received numerous comments concerning the proposed requirement that a waterbody on Part 4 must attain water quality standards by the next listing cycle, or be moved to Part 1. They expressed the view that one listing cycle might not be a sufficient amount of time to achieve water quality standards, and that as long as reasonable progress towards attainment was being made, the waterbody should remain on Part 4. In contrast, several commenters supported the proposed requirements, based on their belief that one listing cycle should be sufficient to determine whether other controls were adequate to attain water quality standards.

A number of commenters were concerned about the implications of EPA's proposal to require the listing of waterbodies where impairment was caused by an unknown pollutant on Part 1. They were concerned that States would list waterbodies for broad and unspecified reasons, which would hinder the establishment of a TMDL.

Some commenters advocated tracking impaired waterbodies that met the

definition of EPA's proposed Parts 2, 3, and 4 by way of other existing reporting mechanisms (e.g., the section 305(b) report). These commenters expressed support for identifying impaired waterbodies for any reason, but expressed a preference that section 303(d) be used only to address those waterbodies for which a TMDL is required.

What is EPA promulgating today?

After analyzing all the comments received, EPA is making a number of significant changes to the proposed language but is retaining the concept that the list must be divided into four parts. EPA believes that the distinctions provided by the four parts are important to address some of the concerns expressed by commenters that the list would be confusing to the public and could lead some to believe that TMDLs were required for every waterbody on the section 303(d) list. EPA also believes that each part is important for different reasons. Parts 1, 3 and 4 will provide valuable information regarding the progress made by waterbodies impaired by pollutants. Progress in establishing TMDLs can be tracked by following the movement of waterbodies from Part 1 to Part 3 of the list. Effectiveness of control measures should result in waterbodies removed from Part 3 or Part 4 and from the list altogether. If control measures are effective, very few waterbodies should move from Part 4 to Part 1 or from Part 3 back to Part 1; the final regulations clarify circumstances which would warrant such changes. Part 2 helps ensure that stakeholders are aware of the extent to which waterbodies in a State, Territory, or authorized Tribe are impaired by pollution. In addition, if States, Territories or authorized Tribes decide to list the waterbodies which they anticipate will become impaired before the next listing cycle, and such waterbodies are included on Part 1, they must also include them in the prioritized schedule for TMDL establishment.

Today's final rule also requires that Part 3 waterbodies be moved to Part 1 of the list if a State, Territory, or authorized Tribe, or EPA determines that the waterbodies are not showing substantial progress towards attainment of standards. This review could be part of the analysis conducted by a State, Territory, or authorized Tribe for its section 303(d) list submittal. If a State, Territory, or authorized Tribe, or EPA determines that such progress is not occurring, then the State, Territory, or authorized Tribe must include the waterbody on Part 1 on the next section 303(d) list and revise the schedule to identify when the new TMDL will be

established. This provision is consistent with EPA's proposal that TMDL implementation plans contain a description of when TMDLs must be revised, and is intended to ensure that such revisions will occur as envisioned by the implementation plan, and when otherwise appropriate. Thus, as part of their consideration of existing and readily available water quality-related data and information, States, Territories, and authorized Tribes must also consider any such data and information regarding Part 3 waterbodies and their progress towards attainment of standards. If, in that review, there is data or information that shows substantial progress is not being made, the waterbody must be moved to Part 1.

This provision is particularly important for waterbodies with TMDLs established prior to the effective date of today's rule or under the pre-existing regulations within 18 months of publication of today's rule because these TMDLs are not required to include implementation plans. Therefore, if there is data or information available to the State, Territory, or authorized Tribe that shows such waterbodies are not making substantial progress towards attainment of standards, the State, Territory, or authorized Tribe must include the waterbody on Part 1 and schedule a new TMDL. The new TMDL should be better able to achieve water quality standards, since it will be required to contain an implementation plan that meets the requirements of § 130.32(c).

EPA will use the TMDL implementation plan to assess whether the waterbodies on Part 3 of the list exhibit substantial progress towards attainment of water quality standards. As required by § 130.32(c), each TMDL established in accordance with today's rule will include a monitoring and/or modeling plan and criteria to determine whether substantial progress toward attaining water quality standards is not occurring and the TMDL needs to be revised. EPA will use the modeling and monitoring information and criteria to assess progress. For TMDLs established prior to the effective date of today's rule or prior to the end of the transition period described in § 130.37, EPA and the State may consider information from section 305(b) reports and other available water quality information along with information on implementation of wasteload and load allocations to determine whether the waterbody is making substantial progress. In this review, EPA will also consider the pollutant controlled by the TMDL and the size and expected

response of the waterbody to changed loads.

The final rule requires that waterbodies that are expected to attain and maintain water quality standards by the next listing cycle through implementation of technology-based effluent limits or other enforceable controls (best practicable control technology and secondary treatment) be listed on Part 4 of the list. EPA believes that there is a benefit to the public of knowing that these waterbodies, though currently impaired, are expected to attain and maintain water quality standards once the technology-based requirements are implemented.

EPA continues to believe that impaired waterbodies can only be placed on Part 4 of the list (1) if they are subject to technology-based requirements of the CWA or other enforceable controls, and (2) for one listing cycle. Part 4 of the list can be construed as an exception to the requirement that TMDLs must be established for all waterbodies impaired by a pollutant or pollutants. Therefore EPA believes that it is appropriate to limit the scope and duration of this exception. Although EPA strongly supports the use of voluntary programs to resolve many impairment situations, EPA believes that enforceable controls will simplify the States, Territories and authorized Tribes' task of demonstrating that water quality standards will be attained within the relatively short period between listing cycles. Similarly EPA believes that a clear cut endpoint to this exception is necessary to ensure that the enforceable controls are sufficient to attain water quality standards.

EPA disagrees with commenters who stated that EPA lacks authority to require listing of impaired waters under the Clean Water Act. EPA's analysis is described in the preamble to the proposed rule. 64 FR 46020-23, August 23, 1999. In particular, EPA disagrees with the reading of section 303(d)(1)(A) as limited to waters that may need water quality-based effluent limitations, *i.e.*, only waters that are not meeting standards due to point source discharges. First, EPA disagrees that the use of the word "effluent limitations" in section 303(d) requires a reading of this section as limited to waters with sources that have effluent limitations. Rather, the term "effluent limitation" must be read in the context of the rest of section 303(d). Read in that context, EPA believes that Congress intended to exclude from listing only those waters where such limits are sufficient to implement standards, but did not mandate excluding any other categories

of waters. In the absence of plain language mandating such an exclusion, EPA believes that a reasonable interpretation of section 303(d), consistent with the broader goals of the Act, is that all other waters can be required to be listed, since all are waters where effluent limits are insufficient to implement standards.

In addition, there is no other indication in the statutory language that section 303(d)(1)(A) only requires listing of waters that require water quality-based effluent limitations. In fact, such limitations are to be established under a different section of the Act (section 302(a)), which is not mentioned in section 303(d). Moreover, EPA disagrees that the legislative history referenced by one commenter supports a different interpretation. The commenter notes that the legislative history of section 303(d) reveals a clear Congressional intent to provide a mechanism for establishing water quality effluent limitations. However, the commenter points to a statement in the legislative history that describes the section 302 process for establishment of water quality-related effluent limitations for a single point source or a group of point sources, not listing of waters under section 303(d). The legislative history simply describes the basis on which more stringent effluent limitations will be set (*i.e.*, the reduction needed to make the total load of the discharges from municipal and industrial sources consistent with water quality standards) under section 302(a), and does not support the proposition that only waters that need water quality-based effluent limitations should be listed under section 303(d). See H.R. 92-911 at 105-106, March 11, 1972.

EPA also believes its interpretation of section 303(d) is a different situation than the interpretation of section 211(k)(6) of the Clean Air Act addressed in *American Petroleum Institute v. EPA*, 198 F.3d. 275 (D.C. Cir. 2000). In that case, the court struck down EPA's interpretation of the phrase "marginal, moderate, serious, or severe" ozone nonattainment areas in the Clean Air Act to include other areas not classified as marginal, moderate, serious, or severe. In today's action, EPA is not interpreting a statutory phrase intended to circumscribe the limits of the availability of a regulatory option, as it was in the regulation at issue in the *API* case (in that case, the ability to opt-into the federal reformulated gasoline program). Rather, EPA is interpreting the language of section 303(d) to identify the universe of waterbodies that Congress clearly intended not be listed, and believes that universe consists of

only one category of waters—those for which effluent limitations required by sections 301(b)(1)(A) and (B) are sufficient to implement standards. This is not a situation where Congress "makes an explicit provision for apples, oranges, and bananas," and therefore was "unlikely to have meant grapefruit." *Id.* at 278, citations omitted. Rather, it is a situation where Congress identified only a particular category to be excluded, and remained silent on what should be included. In light of the Act's silence on the waters that must be listed, EPA believes a reasonable interpretation is to require all waters not meeting standards to be listed. This ensures that such waters will have TMDLs developed if appropriate, and will otherwise have their water quality problems identified, tracked, and addressed.

Under this interpretation, each part of the list is authorized to be required by the Act, since none of the categories include waters expressly excluded by Congress. First, Part 1 includes those waters that are not meeting standards in spite of required effluent limitations, due to pollutants. Second, Part 2 also includes waters that are not meeting standards in spite of required effluent limitations, due to pollution where there is no pollutant causing or contributing to the impairment. Third, Part 3 includes waters that are not meeting standards in spite of required effluent limitations, where a TMDL has been completed. Fourth, Part 4 includes waters that are not meeting standards in spite of required effluent limitations, due to pollutants, where TMDL development need not be immediately scheduled because required controls on point and/or nonpoint sources are expected to result in achievement of standards by the next listing cycle. Thus, none of these categories include waters expressly excluded by Congress in Section 303(d), and all include waters not meeting standards. In light of the overall goals of the Act, EPA believes it is appropriate to require these waters to be listed to help ensure that they will ultimately meet standards.

EPA also disagrees that it lacks statutory authority in particular for requiring listing of Part 2 waters. Some commenters who opposed this provision argue that the reference to "pollution" in the second sentence of section 303(d)(1)(A) refers to the consequence of introducing pollutants rather than requiring the listing of waterbodies impaired by pollution. EPA disagrees, and believes that its interpretation of the statutory language is a reasonable one. EPA also notes that it is not relying solely on the presence

of the word "pollution" in the second sentence of section 303(d)(1)(A) to support its authority to require listing of Part 2 waters. EPA's analysis of section 303(d) to authorize listing of waters beyond those requiring water quality-based effluent limitations is described above. The presence of the word "pollution" is simply additional indication that Congress did not intend to exclude Part 2 waters from the listing requirement, and provides further support for EPA's authority to require them to be listed. EPA believes that its interpretation of the presence of the word "pollution" is reasonable and more consistent with the goals of the Act than commenters' interpretation.

Finally, some commenters misconstrue statements EPA made in the proposal. The commenters state that the proposal recognizes that the reach of the section 303(d) list is co-extensive with the waters requiring TMDLs, based on a statement in the proposal regarding development of TMDLs for waters with nonpoint sources of pollutants. However, this statement was made to explain that there is no express exclusion of nonpoint source waters from section 303(d)(1)(A), and therefore such waters are not automatically excluded from the requirement to develop TMDLs. EPA's statement in the proposal was made to explain why TMDLs are required for nonpoint source pollutants, and was not an assertion that only waters that need TMDLs may be listed. In fact, EPA also states clearly in the proposal that its interpretation of the listing obligation is not limited to only those waters needing TMDLs. See 64 FR 46022 ("While EPA interprets section 303(d) to require identification of all waters not meeting water quality standards * * * EPA interprets section 303(d) to require that TMDLs only be established where a waterbody is impaired or threatened by a pollutant.")

The final regulations also clarify that when biological information indicates that waterbodies are impaired but the pollutant is unknown, these waterbodies should be placed on Part 1 of the list unless data and information clearly indicate that pollution, not a pollutant, is the cause of the impairment.

Waterbodies may be removed from Part 1 in several ways. If a TMDL is established and approved by EPA, the waterbody may be moved to Part 3 of the list for the pollutant the TMDL addresses. In the absence of a TMDL, if new data or information shows that the waterbody is meeting the applicable water quality standard for a particular pollutant, the waterbody may be

removed from the section 303(d) list for that pollutant.

EPA agrees with the commenters who suggested that information on Parts 2, 3 and 4 could be submitted as part of the section 305(b) report. The final regulations provide States, Territories and authorized Tribes with the flexibility to submit their list in any of three ways: as a stand alone list, as a clearly identified component of the section 305(b) report or in two sections: Part 1 as a stand alone list with Parts 2, 3 and 4 clearly identified in the section 305(b) report. Regardless of which format the States choose, the information must be consistent with the requirements of §§ 130.22, 130.25, 130.26, 130.27, 130.28, and 130.29. EPA will review and approve or disapprove all four parts of the list. When States, Territories or authorized Tribes elect to submit all or part of their list as a component of the section 305(b) report, it is only the information required by §§ 130.27 and 130.28 that is considered to be part of the section 303(d) submittal. EPA recognizes that the section 305(b) report includes information other than that required by §§ 130.27 and 130.28; this additional information is not considered as part of the section 303(d) list.

No matter which reporting format a State, Territory, or authorized Tribe chooses, EPA will take action on the entire list (*i.e.*, all four parts). These two options are included for the sole purpose of providing flexibility to those States that wish to coordinate their section 305(b) reports with their section 303(d) lists. While joint reporting of the section 305(b) report and the section 303(d) list is not required, coordination of the two reports provides benefits for States, Territories, and authorized Tribes willing to use this option. These benefits include eliminating possible redundancy in monitoring, assessing, and reporting on the condition of water quality for two related CWA requirements. They also include using limited monitoring resources more efficiently which may free resources to increase the numbers of waterbodies assessed and improve the quality of the data collected. Under the regulations, the most recent section 305(b) report is considered to be existing and readily available information that a State, Territory, or authorized Tribe must consider in assembling the section 303(d) lists and the methodology must describe how the section 305(b) report will be considered in the listing process. EPA notes that, even under the two options for the list format that allow for full or partial consolidation with the section 305(b) report submission, the

regulations do not require that all waters identified as not meeting standards on the section 305(b) report be included on the section 303(d) list.

Finally, EPA is making a minor change to the proposed language of § 130.27(c) which would have required EPA and States to agree on the georeferencing system used to identify the geographic location of the impaired waterbodies. The final regulations require that States use either the National Hydrography Database or subsequent revisions, which is the system used by EPA and the U.S. Geological Survey or a compatible system.

J. What Must the Prioritized Schedule for Submitting TMDLs to EPA Contain? (§ 130.28)

What did EPA propose? In the proposal, EPA included proposed § 130.28 dealing with how States should prioritize the impaired waterbodies on Part 1 of their list and proposed § 130.31 which would have required States to provide to EPA a schedule depicting when TMDLs would be developed. Both the priority rankings and the schedule would have had to be submitted to EPA at the same time as the list but EPA proposed to only approve the list and priority ranking, not the schedule.

In § 130.28 EPA proposed that States, Territories, and authorized Tribes would assign either a high, medium or low priority to each waterbody and pollutant combination on Part 1 of the list. The proposal would have required States, Territories and authorized Tribes to consider in their priority ranking the two factors listed in section 303(d)(1) of the CWA, and the severity of the impairment and the designated use of the waterbody, and also listed a number of proposed optional factors. EPA further proposed that a high priority would have to be assigned to impaired waterbodies designated for use as public drinking water supplies, where the impairment was contributing to a violation of an Maximum Contaminant Level (MCL), and for waterbodies supporting a species listed as endangered or threatened under section 4 of the Endangered Species Act, unless the State, Territory, or authorized Tribe could demonstrate that the impairment did not affect the listed species. The proposal would have required States, Territories, and authorized Tribes to provide EPA with an explanation of how they had used the ranking factors in determining their priorities.

Section 130.31 of the proposal would have eliminated the current requirement that the listing submission include a list of the waterbody/pollutant

combinations scheduled for TMDL development in the next two years. Instead, EPA proposed that States, Territories, and authorized Tribes be required to submit with Part 1 of their list comprehensive schedules for establishing TMDLs for all waterbody/pollutant combinations on Part 1 of their list as expeditiously as practicable and no later than 15 years after the initial listing with a reasonably paced workload and generally in accordance with their priority rankings. EPA also proposed to recommend, but not require, that TMDLs for high priority waterbody/pollutant combinations be established first.

What comments did EPA receive? EPA received a significant number of comments specific to the proposed priority ranking requirements. Several comments supported EPA's proposal, others, however, objected to this provision, for one of two reasons. Some comments said EPA should give States the flexibility to prioritize their waterbody/pollutant combinations anyway they choose. Others objected to this provision because of their opinion that a high, medium and low priority ranking was insufficiently precise.

There were a wide variety of comments with regard to the factors that should be employed in priority rankings of waterbody/pollutant combinations. Some comments said that only the two factors cited in section 303(d)(1) of the CWA—severity of impairment and uses of the waterbody—should be considered. Other comments said these two factors alone were too narrow to provide an adequate basis for ranking, and called for a variety of other factors to be considered. Some said that certain factors listed in EPA's proposed regulation—*aesthetic, cultural, historic*—should not be considered at all in priority ranking because they were not related to the goals and objectives of the CWA.

EPA received comments offering a variety of views on the issue of whether or not to specify certain factors that would automatically put a waterbody/pollutant combination in the high priority category. Some supported this concept in general, while other comments opposed it. Numerous comments objected to one or both of the two factors listed in EPA's proposal—*presence of threatened or endangered species or contribution to a violation of an MCL in a waterbody designated for public water supply use*. The most frequently expressed concern about the endangered species factor was the need to prove a negative (*i.e.* a pollutant is not harming the listed species). The most common criticism of the public

water supply ranking factor was that the EPA proposal seemed to be applying the Safe Drinking Water Act MCL in the raw water supply, rather than at the tap. Some comments, however, indicated that it was imperative to consider such situations as high priority, regardless of other, possibly mitigating, factors. Further comments suggested additional factors that should merit automatic high priority ranking for a waterbody/pollutant combination—waterbodies for which fish consumption advisories had been issued were mentioned several times in this regard.

EPA received numerous comments on the issue of schedules for TMDL establishment. Some comments supported retaining the existing regulatory requirement. Some comments said States should not have to provide any schedule for TMDL establishment while others supported the proposal. Several comments said that schedules laid out under a State's rotating basin/watershed approach, rather than priorities put forth in the proposal, should be the primary determinant of the schedule for TMDL development. Commenters were split on the issue of EPA review and approval of the schedule. A substantial number of comments said States should not get locked into the comprehensive 15 year schedules they would initially submit, and should be able to modify the schedules over time, to adjust to new information and changing circumstances. Some comments said that after the initial listing of a waterbody and pollutant combination, 15 years was a reasonable maximum time for TMDL establishment. On the other hand, quite a few comments said 15 years was far too long a period and recommended considerably shorter timelines for TMDL establishment. Still others said that 15 years might not be enough time for establishing certain types of TMDLs, particularly ones involving high degrees of complexity or difficult-to-address issues such as air deposition or legacy pollutants.

What is EPA promulgating today?

Having considered the comments received on the proposal's provisions on priority ranking (§ 130.28) and scheduling (§ 130.31), EPA is promulgating a rule that requires States, Territories and authorized Tribes to develop and submit a prioritized schedule. This approach combines the two proposed provisions into one, § 130.28 of today's rule, entitled "What must your prioritized schedule for submitting TMDLs to EPA contain?" EPA is not promulgating the proposed requirement that waterbody/pollutant combinations be categorized into high,

medium, and low priorities. Rather, today's rule requires that Part 1 of the list include a prioritized schedule for establishing TMDLs on Part 1 of the list. This change recognizes the close connection between prioritizing and scheduling waterbodies for TMDL development. Schedules are considered part of the list and subject to EPA review and approval.

Section 303(d) requires States to "establish a priority ranking" for the waters it identifies on the list, taking into account the severity of the pollution and the uses to be made of such waters, and to develop TMDLs "in accordance with the priority ranking." To implement this provision, EPA is requiring States, Territories and authorized Tribes to develop a schedule for TMDL establishment that identifies when each TMDL will be completed. In developing the schedule, States, Territories and authorized Tribes will need to decide which TMDLs are higher priority than others, taking into account the statutory factors identified above, as well as other relevant factors described in the regulations. EPA is not requiring States, Territories or authorized Tribes to specifically identify each TMDL as high, medium or low priority, since the scheduling process will require that each TMDL be ranked in priority order by date of development rather than by categorization as high, medium or low priority. The statute does not prescribe a particular method of establishing a priority ranking, and EPA believes that prioritizing by developing a schedule is a reasonable, efficient way to do this.

In particular, the schedule is preferable to simply requiring that waterbodies be categorized as high, medium or low priority, since it identifies a specific time frame within which the public can expect each TMDL to be developed, and thus better enables public participation in TMDL development because citizens can anticipate when work will happen on a particular TMDL that is of interest to them. Categorization would not necessarily inform the public when specific TMDLs are to be developed, but rather simply identifies which TMDLs the State, Territory, or authorized Tribe believes should be done first. In addition, requiring a prioritized schedule rather than categorization plus a schedule eliminates a step in the process that EPA believes is unnecessary and adds little value to the list. Once a schedule is developed, whether a State, Territory, or authorized Tribe believes a particular TMDL is of high, medium or low priority is unimportant and the relative priority of each TMDL will be apparent based on

whether it is to be developed early or late in the schedule. The public will be able to comment on the time frame in which the State, Territory, or authorized Tribe intends to develop each TMDL. In this way the schedule provides the public better information on the State's, Territory's, or authorized Tribe's priority ranking for TMDL development than simply identifying waterbodies as high, medium, or low priority. Requiring a prioritized schedule eliminates the need for such categorization.

In today's rule, EPA is modifying the proposed regulations to require that the prioritized schedule for TMDL development be submitted as part of the section 303(d) list for EPA approval or disapproval. This approach is consistent with section 303(d) of the Act, which requires States, Territories, and authorized Tribes to both identify waters and establish a priority ranking for the identified waters as the first step in the process that is ultimately intended to result in the attainment of water quality standards. While the Act does not explicitly require EPA to approve or disapprove the priority ranking as part of the list submission, EPA believes that doing so is a reasonable exercise of its discretion to ensure that the goals of section 303(d) are achieved, consistent with EPA's authority under section 501(a) to adopt regulations necessary to carry out its functions under the Act. The priority ranking, embodied in the prioritized schedule required by today's regulations, is an essential step between the identification of waters and the development of TMDLs for waters that need them. The prioritized schedule ensures that TMDLs are developed at a reasonable, even pace and that the statutory factors (severity of pollution and uses to be made of the waters) are considered in deciding when particular TMDLs will be developed. Thus, because of the critical importance of the prioritized schedule in the overall section 303(d) process, EPA believes it needs to ensure that a State's, Territory's, or authorized Tribe's schedules are reasonable and consistent with the Act by reviewing and approving or disapproving the schedules as part of the list submissions, and establishing schedules in the event of a disapproval or a failure by the State, Territory, or authorized Tribe to do so.

For the sake of clarity the following discussion follows the structure of 130.28.

Expeditious Schedules (§ 130.28(b))

EPA is revising the proposal to require that establishment of TMDLs be evenly paced and as expeditious as practicable. In addition, States should schedule TMDLs no later than 10 years from July 11, 2000 or the initial listing date, whichever ever is later. The rule also provides that the schedule for specific TMDLs can be extended for an additional 5 years if a State, Territory, or authorized Tribe explains to EPA that the shorter schedule is not practicable.

EPA is shortening the proposed 15-year schedule to a requirement that the schedule be as expeditious as practicable and evenly paced, and that it should generally not extend beyond 10 years. As pointed out by many commenters, a ten year schedule is consistent with current EPA policy. See "New Policies for Establishing and Implementing Total Maximum Daily Loads," August 8, 1997. As stated in the 1997 policy memorandum, EPA was to work with States to help schedule TMDL establishment within 13 years, *i.e.*, by 2010. EPA believes that some States, Territories, or authorized Tribes can complete the TMDL development within 10 years, as evidenced by some current State schedules and by increased resources devoted to TMDL programs in many States as well as available through increased Federal funding. Currently, 46 States are developing TMDLs based on schedules of 13 years or less, 20 of which are developing TMDLs based on a 10-year schedule. Further, EPA believes that making this change is reasonable since the regulations also provide that the schedule can be extended up to an additional 5 years for a total of 15 years if the State, Territory, or authorized Tribe explains that it needs the additional time to complete the task.

A State, Territory, or authorized Tribe would need to explain why a 10-year schedule is not practicable. For example, a State, Territory, or authorized Tribe could show that, despite working expeditiously, given the number of TMDLs that are required, they will require more than 10 years to complete all TMDLs. The State, Territory, or authorized Tribe could also show that the complexity of one or more TMDLs might require more time to collect information to quantify loadings from sources or to secure commitments for loading reductions for sources outside the State, Territory, or authorized Tribe. In these cases, the State, Territory, or authorized Tribe may schedule some TMDLs within an additional five years.

By changing "reasonably paced" to "evenly paced", EPA intends that States, Territories, and authorized Tribes must schedule TMDL development in a way that reflects a generally even pace in establishing TMDLs over the length of the schedule. EPA recognizes that States, Territories and authorized Tribes will have valid reasons for establishing more TMDLs in some years and fewer TMDLs in other years. This may occur due to the varying degree of complexity and efficiencies which pertain to TMDL development in different watersheds in a State, Territory, or authorized Tribe. However, the general trend and pace of TMDL establishment across the schedule, after allowing for understandable year-to-year variation, should, with some exceptions, be generally even. While current schedules appropriately account for the ramp-up period needed for monitoring and other preliminary activities, EPA believes by April 2002 (when new schedules are required) that States, Territories, and authorized Tribes should be in a position to schedule TMDL development on a more even pace. Of course, application of this general requirement must account for additional time that may be needed to develop particularly complex or data-intensive TMDLs. In those cases, establishment of a smaller number of TMDLs may be justified. Similarly, the number of TMDLs may be larger in a year in which a State, Territory, or authorized Tribe concentrates on waterbodies for which a substantial amount of information has already been gathered.

The proposed approach, which would have required TMDLs to be established as expeditiously as practicable but no later than 15 years from the time the waterbodies were listed on Part 1, could have led to the unintended result that TMDLs for waterbodies included on Part 4 would be delayed if the waterbody was later moved to Part 1. EPA believes that TMDLs for waters included on Part 4, where enforceable controls ultimately fail to result in attainment of standard by the next listing cycle, should not be unnecessarily delayed. The addition of a Part 4 of the list was not intended to encourage or allow for such delay. In addition, it is reasonable to expect TMDLs for such waterbodies to be developed within 10 years (or up to 15 years, for certain TMDLs, as described above) of initial listing on any part of the list, since States, Territories, or authorized Tribes will be keeping track of progress on Part 4 waters to determine how well the enforceable

controls are working and should be able to use this information to develop TMDLs for such waters well within the timeframe required by today's regulations.

The final rule also clarifies that the provision that States, Territories, and authorized Tribes should generally schedule all TMDLs no later than 10 years (with a possible 5 year extension) from the later of July 11, 2000 or the date of initial listing of the waterbody/pollutant combination on a section 303(d) list applies to waterbodies on a section 303(d) list prior to today's action. Thus, TMDLs for waterbodies that appeared on a section 303(d) list prior to today's action would need to be established no later than July 11, 2010, unless the schedule is extended as described above. This avoids unreasonably short deadlines for TMDL establishment for States, Territories, and authorized Tribes which happened to have listed a substantial portion of their impaired waters well before the promulgation of this rule. EPA believes it is appropriate to use the July 11, 2000 (*i.e.*, the date of signature of today's action) as the baseline date for the 10-year schedule provision since States, Territories, or authorized Tribes have not been, until now, required by regulation to identify schedules for TMDL development other than specifying TMDLs that will be developed in the next 2 years. While States, Territories, or authorized Tribes should have schedules at this time in response to a request from EPA ("New Policies for Establishing and Implementing Total Maximum Daily Loads," August 8, 1997), in light of the new requirements in today's rule, States, Territories, or authorized Tribes should have an opportunity to reassess their TMDL development obligations and develop an appropriate schedule. Requiring TMDLs to be scheduled 10 years from the original listing could penalize States who had established comprehensive lists by 1992 by allowing them less time to complete TMDLs than those States, Territories, or authorized Tribes that more recently developed more comprehensive lists.

Identification of TMDLs to be Established (§ 130.28(c))

Today's rule provides more specificity regarding the minimum level of detail required in schedules for establishment of TMDLs than did the proposal. Today's rule requires States, Territories, and authorized Tribes to indicate in their schedule which specific TMDLs will be completed in each year of the schedule. EPA has chosen to require scheduling of TMDLs in year blocks to

provide sufficient detail to allow all those involved in TMDL development to plan for the workload involved at various points in time. States, Territories, and authorized Tribes can change the order of TMDL establishment within any year period without consulting with EPA or seeking EPA approval. EPA will approve schedules if they reflect the priority factors and timeframes outlined in the rule. The schedules must also demonstrate that establishment of TMDLs is as expeditious as practicable and evenly paced over the duration of the schedule.

EPA realizes that it is possible that States, Territories, and authorized Tribes will not be able to meet even this less precise schedule for each and every TMDL they must establish, and expects that States, Territories, and authorized Tribes will need to avail themselves of the opportunity to adjust schedules for TMDL establishment to reflect new information and other changing circumstances, and that such adjustments will be reflected in each subsequent list submitted on April 1 every fourth year. As long as States, Territories, and authorized Tribes establish each TMDL on Part 1 of their list as expeditiously as practicable and the revised list reflects even pacing of the overall TMDL establishment task, within the timeframes specified in the regulations, taking the required factors into account, EPA will approve such schedule modifications without requiring that the entire schedule be revised.

When a State, Territory, or authorized Tribe must develop multiple TMDLs within a watershed, EPA encourages the State, Territory, or authorized Tribe to schedule the TMDLs to be established at roughly the same time. This coordinated approach makes use of any efficiencies in coordinating monitoring, water quality analyses, implementation and public participation. It also helps integrate the establishment of TMDLs with the use of rotating basin or watershed approaches for restoring water quality. EPA is encouraging States, Territories and authorized Tribes to use a coordinated approach by making it one of the factors that may be considered and by including in the final rule language that explicitly recommends that States, Territories and authorized Tribes use this approach.

Priority Factors (§ 130.28(d), (e) (f))

The final rule incorporates the prioritizing scheme of the proposal into the final requirements for a prioritized list. The final rule retains the concept that the statutory factors of severity of

impairment and designated use of the waterbody should form the basis for prioritizing waterbodies. In addition, the final rule requires States, Territories, and authorized Tribes to consider drinking water uses and presence of a threatened or endangered species as higher priorities. However, the final rule does not require that an impairment at a public drinking water supply or the presence of threatened or endangered species be an automatic high priority for TMDL establishment. Rather, the State, Territory, or authorized Tribe may give waterbodies with these two factors present a lower priority (*i.e.*, a later date for TMDL development) if the State, Territory, or authorized Tribe explains why this is appropriate. As another example, biological information might be available to allow a State, Territory, or authorized Tribe to show that other factors are the stressors to the threatened or endangered species.

Also, EPA is not including in today's rule the proposed language that strongly encouraged States, Territories, and authorized Tribes to establish all TMDLs for high priority waterbody/pollutant combinations before completing TMDLs for medium or low priority combinations. These provisions have become moot because today's final rule does not include a requirement for ranking each waterbody/pollutant combination as either high, medium or low priority. Rather, a date must be specified for TMDL development for each waterbody/pollutant combination on Part 1. Thus, rather than grouping each TMDL into one of 3 categories of priority States will rank each TMDL according to the most appropriate time frame for its establishment taking into account the factors described in this section. EPA believes that the prioritized schedules submitted by States, Territories and authorized Tribes, along with the explanations of how various factors were utilized in the development of such schedules, will serve the same purpose as the provisions it eliminated.

K. Can the List be Modified? (§ 130.29)

What did EPA propose? EPA proposed at § 130.29 to adopt the FACA Committee's recommendations that waterbodies should remain listed until water quality standards were attained, and that a previously listed impaired or threatened waterbody could be removed from the list at the time of the next list only when new data or information indicated that the waterbody has attained water quality standards.

What comments did EPA receive? Many commenters supported the regulations as proposed. Several

commenters strongly encouraged EPA to allow for immediate removal of waterbodies that met the de-listing requirement (*i.e.* in the interim period between listing cycles) especially if the Agency decided to promulgate a four or five year cycle for the listing requirement. This reflected a concern that waterbodies that were not impaired would remain on the lists for several years, leaving the public with an incorrect impression about the condition of the waterbody. There was also a fear that States, Territories, and authorized Tribes would elect to, or be forced to, move ahead with development of TMDLs for such waters, even though they were no longer needed. A number of commenters suggested that the information requirements for removing a waterbody from the section 303(d) list should be no more rigorous than the requirements for listing a waterbody. Other commenters suggested that States, Territories, and authorized Tribes should be able to add some waterbodies between the times when the full lists are required. Commenters also asked that the regulations specify that the methodology and public participation requirements should apply to delisting. Finally, several commenters reiterated that waterbodies should not be removed from the section 303(d) list just because a point or nonpoint source control measure was implemented but had to remain listed until water quality standards were met.

What is EPA promulgating today? EPA generally agrees with the comments it received on this section. EPA agrees that States should be able to remove waterbodies from a list at times other than those when full lists must be submitted to EPA. This is consistent with section 303(d) which requires States, Territories, and authorized Tribes to submit lists of waters "from time to time." EPA has previously interpreted section 303(d) to allow removal of waterbodies that attain water quality standards at times other than when they make their biennial list submissions. See "Guidance for 1994 Section 303(d) Lists," November 26, 1993. By extension, EPA believes that the same flexibility should be provided for adding waterbodies to the list. Therefore EPA has reshaped this section in the final regulation to cover modifications of the list (*i.e.* listings, delistings and changes to the prioritized schedules). These provisions regarding modifications to the list at times other than required list submissions do not alter what is permitted under the pre-existing regulations. EPA is simply

adding regulatory language to clarify that States may modify their lists at times other than required submissions and to clarify the procedure for doing so. EPA is maintaining the proposed requirements that waterbodies must remain on the list until water quality standards are attained.

EPA is also adding a § 130.29(e) which specifies that changes to the schedule for TMDLs which the State, Territory, or authorized Tribe make must be considered a modification of the list if they involve rescheduling establishment of a TMDL from one year to another. Changes to the list are subject to EPA review and approval/disapproval. EPA notes that these modifications to the list may be time consuming and expects that States, Territories, and authorized Tribes will use these provisions no more than once a year, mostly to remove waterbodies which have attained water quality standards from the list.

EPA is adopting regulatory language to clarify the specific requirements that apply when a State, Territory, or authorized Tribe modifies its list in between required list submissions. First, the regulations provide that the scope of public notice and opportunity for comment on the modification shall be limited to the waterbodies and issues raised by the modification. For example, if the State, Territory, or authorized Tribe develops a draft list modification that removes certain waterbodies based on new information collected since the prior list submission, the public notice and the opportunity for comments would be limited to those particular waters and the water-quality related data the State, Territory, or authorized Tribe believes warrants removal from the list. Neither the State, Territory, or authorized Tribe nor EPA would be obligated to address comments on the remainder of the list or other unrelated waters. As another example, if the State, Territory, or authorized Tribe proposes to add or remove certain waterbodies based on a change to the methodology used in the prior list, the public notice and opportunity for comments would be limited to such change and to any waterbodies affected by it. Neither the State, Territory, or authorized Tribe nor EPA would be obligated to address comments on other aspects of the methodology or other unaffected waters.

When submitting list modifications, the same provisions apply to removal of waterbodies as for required list submissions. A State, Territory, or authorized Tribe may remove a listed waterbody only if new water-quality related data or information indicates it is attaining and maintaining applicable

water quality standards. A State, Territory, or authorized Tribe may add a waterbody to the list if there is data or information showing it is impaired. When developing a list modification, the State, Territory, or authorized Tribe must satisfy the same public process requirements that apply to required list submissions—the State, Territory, or authorized Tribe must provide adequate notice to the public of the draft list modification, must provide at least 60 days for public comments on the modification, and must address relevant comments in its submission of the modification to EPA.

However, EPA is not requiring prior submission of a methodology for each list modification. Because the methodology is generally required to be submitted at least two years before required list submissions (after allowing the public an opportunity to comment), EPA believes it would be overly burdensome to require submission of the methodology for each list modification, and would undercut the purpose of the modification provision, *i.e.*, to allow States, Territories and authorized Tribes to more easily make appropriate changes in their lists in between required submissions. Thus, States, Territories and authorized Tribes are not required to submit a methodology for the modification prior to the submission of the modification. EPA expects that in most cases the State, Territory, or authorized Tribe will use the same methodology used in the most recent required list submission for modifications. However, where the modification includes a change to the methodology, EPA expects that the modification provided to EPA will identify and explain such change so that EPA can consider it in its review of and action on the modification. In addition, when providing public notice of a modification that includes a change to the pre-existing methodology, the State, Territory, or authorized Tribe would need to identify and explain such change to the public since it would be the basis for resulting additions to or removals from the list.

EPA is including a provision in the regulations clarifying that a State's, Territory's, or authorized Tribe's revisions to their prioritized schedules must be considered modifications to the list and submitted to EPA as such. This is consistent with the definition of the list to include both the identification of waters and pollutants and the prioritized schedule for TMDL development. Revisions to the schedule would include moving any TMDL from any one-year period to another, and must be based on new information in

accordance with the priority ranking. Thus, for example, a State, Territory, or authorized Tribe may receive new information regarding newly found sources of pollutants in a particular year and may decide on that basis to move certain TMDLs earlier or later in the schedule. Similarly, the State, Territory, or authorized Tribe may become aware that water-quality related data relevant to development of a particular TMDL will be available earlier than expected, and may therefore decide to move that TMDL earlier in the schedule. In either case, the State, Territory, or authorized Tribe must constrain the modification such that it establishes at least the same number of TMDLs in the first four year period. This requirement serves to ensure that the State, Territory, or authorized Tribe establish TMDLs at an even pace. EPA will review revisions to the schedule to determine if they are consistent with the regulatory provisions governing development of the prioritized schedule, and will approve or disapprove them as appropriate.

Some waterbodies are listed by States, Territories, and authorized Tribes for multiple impairments. When a State, Territory, or authorized Tribe has new water-quality related data or information showing that a waterbody attains water quality standards, it may be for only some of the pollutants causing the impairment. In this instance, the States, Territories, and authorized Tribes may remove only those pollutants from the list that no longer cause impairment, but cannot remove the waterbody itself until it has new water-quality related data or information showing that the waterbody attains water quality standards for all the impairments that caused the listing.

EPA interprets "new water-quality related data or information" to include new water quality data or water quality modeling information that supplements water quality data. EPA also interprets "new data or information" to include such instances as when the State, Territory, and authorized Tribe has revised the applicable water quality standard consistent with Part 131, EPA has approved that standard, and existing water quality data shows that the waterbody attains the new water quality standard. EPA also interprets "new data or information" to include where the State, Territory, and authorized Tribe can show that the existing data actually showed that the water quality standards were attained and that the waterbody was listed in error due to a transcription, typographical, or some other clerical error. Therefore, "new" is not limited to data or information

collected after listing. The intent of the new requirement is to ensure that listed waterbodies (or pollutants) are not removed in the absence of data or information indicating attainment of water quality standards.

EPA does not interpret "new data or information" to allow removal of a waterbody (or pollutant) in instances where a State, Territory, and authorized Tribe disputes the quality of the information or reinterprets the same information that it previously used to list a water on the section 303(d) list and concludes the data or information did not support a finding of impairment. EPA is not suggesting that States, Territories, and authorized Tribes use poor quality data to support listing waterbodies on the section 303(d) list. Rather, in the absence of data or information supporting a determination that a waterbody is attaining water quality standards, a waterbody should not be removed from the list. The one exception that would allow removal would be a waterbody that was listed incorrectly. EPA recognized this possible situation in the August 23, 1999, proposal. (64 FR 46024, August 23, 1999). EPA intended this to cover situations where a water was listed due to an error such as a transcription or typographical error, not a re-evaluation of data on which the waterbody was originally listed. EPA will consider State, Territories and authorized Tribes methodologies in approving or disapproving lists but it is not obliged to approve decisions simply because they are consistent with the methodologies.

Finally, EPA is adding § 130.29(g) to allow EPA to modify a list consistent with the provisions of paragraph (c), (d), and (e) of this section. As described in today's preamble, EPA at times may be required to establish a TMDL. In the course of developing the TMDL, EPA may find new information that shows that the waterbody should not be listed on Part 1 of the list and a TMDL is not necessary. For example, EPA could find that, based on new data or information, the waterbody is attaining and maintaining the applicable water quality standards. This is the criterion that allows a State, Territory, or authorized Tribe to remove the waterbody/pollutant combination from the list. In this situation, the waterbody is not required to be listed and no TMDL is required. EPA could also find that, for waterbodies listed on the basis of biological information, the cause of the impairment is not a pollutant or pollutants, but rather some attribute of pollution. In this situation, the

waterbody belongs on Part 2 of the list and no TMDL is required.

In examples such as these, there is no merit in developing a TMDL; yet in the absence of this new provision, the requirements of today's rule would have EPA establish the TMDL. For this reason, EPA believes it should have the same authority to modify a section 303(d) list to remove a waterbody/pollutant combination, in accordance with the same requirements that pertain to States, Territories, and authorized Tribes.

L. When Must the List of Impaired Waterbodies be Submitted to EPA and What Will EPA do With it? (§ 130.30)

What did EPA propose? EPA proposed that States, Territories, and approved Tribes would be required to submit their list of threatened and impaired waterbodies and the priority rankings of waterbody and pollutant combinations to EPA by October 1 at regular intervals. EPA noted that it was considering ranges of two, four or five years, for these intervals beginning with the year 2000. EPA proposed to maintain the current requirement that EPA review and either approve or disapprove a submitted list within 30 days of receipt. EPA also proposed to require States, Territories, and authorized Tribes to incorporate approved lists of impaired waterbodies in Water Quality Management Plans. Finally, EPA proposed to codify in the regulations its authority to establish lists for States, Territories, or authorized Tribes which do not.

What comments did EPA receive? The issue of how frequently States, Territories, and authorized Tribes should submit lists of impaired waters, priority rankings and schedules, was the subject of numerous comments. Regarding the frequency of submission of lists, priority rankings and schedules for TMDL establishment, five years was the most commonly supported period, with four years getting a large number of supporters. Retaining the current two year cycle also received a substantial amount of support.

Those supporting a longer listing cycle (more than two years) provided a variety of reasons for their position. A large number of commenters believed that a two year cycle forced States, Territories, and authorized Tribes to spend too much time preparing listing reports, thereby diverting limited resources away from developing and implementing TMDLs. Nearly as many commenters indicated that a longer cycle would enable States, Territories, and authorized Tribes to do a better job of assembling and interpreting data

regarding the condition of waterbodies. Others observed that it is unusual for the condition of a waterbody to change measurably in just two years, and having to prepare a report saying "no change" was not a wise use of resources. Some commenters thought that longer cycles would encourage efforts to implement pollution controls and thereby prevent waters from going on the list (or at least Part 1) in the first place.

Those supporting a five-year cycle noted the correlation with the five year term of NPDES permits and the five-year cycle employed by most States that have adopted the watershed/rotating basin approach. Those supporting a four-year schedule noted that this would correspond to every second section 305(b) report submitted by States, Territories, and authorized Tribes. On the other hand, some supporters of longer cycles called for establishment of interim milestones such as water quality monitoring or source identification, during the cycle, to ensure adequate funding and budgeting by States, Territories, and authorized Tribes.

Those supporting retention of the current two-year cycle offered a number of reasons in support of their position. Numerous commenters feared that longer listing cycles would serve to delay the date by which TMDLs were established for some waterbodies, which in turn would delay the date on which water quality standards were attained. For example, commenters were worried that lengthening the listing cycle would result in more waterbodies being placed on Part 4 of the list, and such waterbodies staying on Part 4 longer, yet ultimately failing to meet water quality standards by the next listing cycle, and still needing TMDLs. Quite a few comments said the public needed more frequent, not less frequent, reports on which waters were impaired.

Comments were split with regard to whether April 1 or October 1 of the "listing year" should be the deadline for submission of the section 303(d) lists. Those favoring April 1 believed that having concurrent deadlines for the section 305(b) reports and the section 303(d) lists would reduce duplication of effort on the part of States, Territories, and authorized Tribes. Those favoring October 1 believed that it would be beneficial to have several months after the due date for the section 305(b) report to perform additional analysis needed for completing the section 303(d) report. EPA also received comments recommending against incorporation of approved lists of impaired waters in Water Quality Management Plans. These comments

expressed concern about the volume of information included in these plans.

What is EPA promulgating today?

EPA is today promulgating the requirement that States, Territories, and authorized Tribes submit their lists of impaired waters including prioritized schedules by April 1 of every fourth year, starting in 2002.

EPA decided upon a longer listing cycle because of the reduction in reporting burdens, opportunity for more complete data gathering and analysis, and greater likelihood of observing changes in the condition of waters between listings. Concerns about improperly-listed waters later found to be meeting standards remaining on lists for nearly four years have been addressed by clarifying that there is an opportunity for States, Territories, and authorized Tribes to make modifications to their list as provided by § 130.29 discussed above.

EPA believes that the public will receive adequate updates regarding the condition of the nation's waters through the biennial section 305(b) reports that States, Territories, and authorized Tribes must submit according to the CWA. Though EPA recognizes that in the future, some TMDLs may be established a couple years later than would have been the case with a two-year listing cycle because they will be listed every four years rather than every two years, this decision has no impact on TMDLs already listed which must be established on the schedule required by today's rule.

EPA has selected a four-year listing cycle, as opposed to a five-year cycle because it believes that coordination between section 303(d) lists and section 305(b) reports provides significant efficiencies. States, Territories, and authorized Tribes will continue to be able to make use of their section 305(b) reports when they develop their section 303(d) lists. There should still be ample opportunity to coordinate between the section 303(d) listing process and the monitoring and implementation activities performed as part of a five-year watershed/rotating basin strategy. In a five-year watershed or rotating basin strategy, a State, Territory, or authorized Tribe identifies a process of collecting information, assessing the information, determining the watershed-wide loading requirements, and implementing those requirements. At any time during this five-year cycle, a State, Territory, or authorized Tribe can develop a list of impaired waterbodies for its jurisdiction based on the existing and readily available information it has collected. The State, Territory, or authorized Tribe can then develop a

schedule for TMDLs that is in synchronization with the anticipated development of watershed-wide requirements in its five-year rotating basin plan. In this way, a State, Territory, or authorized Tribe can continue to address pollution problems in a five-year rotating basin cycle while fulfilling its obligations to develop lists of impaired waterbodies every four years.

After careful consideration of the comments and other relevant factors, EPA has decided that April 1 would be the best deadline for submission of the section 303(d) list. Since today's promulgation provides the opportunity for combining the section 303(d) list and the section 305(b) report, it seems logical to make the deadline for both of these reports fall on the same day of the year. By requiring section 303(d) lists to be submitted every four years, rather than every two years as previously required, EPA intends to provide States, Territories, and authorized Tribes with ample time to analyze data specifically relevant to section 303(d) listing, and therefore, does not believe that having the section 303(d) list due on the same day of the year as the section 305(b) report will pose additional burdens. In addition, this date is the same date as under the pre-existing rules (§ 130.7).

EPA has decided to retain the proposed requirement that States, Territories, and authorized Tribes incorporate the approved lists of impaired waterbodies in the Water Quality Management Plans. EPA recognizes the volume of information that the lists will include. Nevertheless, EPA believes the public needs to be able to find the lists of impaired waterbodies, and the Water Quality Management Plans is a logical place to find this information. A State, Territory, or authorized Tribe can satisfy this requirement by either incorporating the actual list on waters with the other parts of the Water Quality Management Plan, or by incorporating the list by reference. Furthermore, as stated in § 130.51(b), the Water Quality Management Plans are used to direct implementation. By requiring that the approved lists of impaired waterbodies are incorporated into the Water Quality Management Plans, EPA believes this is an efficient connection between the targets for implementation (impaired waters) and the implementation procedures. This is particularly useful for the Part 2 waterbodies where States, Territories, and authorized Tribes will need to incorporate in the Water Quality Management Plan implementation procedures to address pollution not associated with pollutants. Finally, EPA

interprets section 303(d) as requiring that States, Territories, and authorized Tribes include the lists into their Water Quality Management Plans.

When a State, Territory, or authorized Tribe submits a list or modification to a list to EPA, EPA will approve it if it meets the applicable requirements. EPA will consider public comment on the list and may modify the list to assure that it complies with the regulations of Part 130. If a State, Territory, or authorized Tribe does not submit a list on time EPA will use its authority to establish the list for the State, Territory, or authorized Tribe. In response to comments, EPA has clarified which sections of subpart C it will use in reviewing the lists, and what actions EPA is obligated to take in its decisions. Therefore, the final rule uses the word "must" to represent EPA's statutory obligations to either approve or disapprove and establish a section 303(d) list of impaired waterbodies, and to establish a list for any State, Territory, or authorized Tribe that does not do so by April 1 of every fourth year.

Finally, EPA includes a statement in today's rule that EPA may establish a list of waterbodies that do not attain and maintain Federal water quality standards. EPA recognizes that there are some impaired waterbodies outside the jurisdiction of States, Territories, and authorized Tribes. Where EPA has established Federal water quality standards for these waters, EPA believes it clearly has the authority to list impaired waterbodies. These waterbodies are generally inside Indian Country where the Tribe is not authorized to implement section 303(d) or in Federal ocean waters.

M. Must TMDLs be Established?
(§ 130.31)

What did EPA propose? EPA proposed that TMDLs be established for all waterbody and pollutant combinations listed on Part 1 of the list, but did not propose to require TMDLs for waterbody and pollutant combinations listed on Parts 2, 3, or 4 of the list. In addition, EPA proposed that States, Territories, and authorized Tribes establish TMDLs in accordance with the priority rankings required by proposed § 130.28. Finally, EPA proposed allowing States, Territories and authorized Tribes to establish TMDLs in a different order than provided by the most recently submitted schedule as long as the TMDLs were established in a manner consistent with the overall requirements of proposed § 130.31(a)(1) through (a)(3). EPA explained that it was planning to

consider the extent to which a State, Territory, or authorized Tribe had not or was not likely to meet its schedule for establishing TMDLs when making a decision to step in and establish TMDLs for the State, Territory, or authorized Tribe. (64 FR 46037, August 23, 1999).

What comments did EPA receive?

EPA received many comments specific to this section. Some commenters reiterated their concerns about the four-part list. Other commenters pointed to inconsistencies between proposed §§ 130.32(b), 130.32(c), and 130.31(a)(3) and the need for more flexibility to establish TMDLs out of the planned sequence. Some commenters expressed the view that EPA should allow States to use existing programs that achieve the same results as a TMDL instead of requiring a TMDL for all Part 1 waterbodies. Other commenters inquired as to the requirements for "informational TMDLs" under section 303(d)(3).

EPA also received many comments regarding the issues of pollutants which might not be suitable for TMDL calculations. A number of commenters put forth the position that TMDLs were appropriate for all situations, and that EPA should not allow exemptions for technically complex impairments under any circumstances. EPA received a number of comments suggesting that the establishment of TMDLs for certain impairments resulting from atmospheric deposition (e.g. mercury and nitrogen) was not feasible because of a lack of appropriate technical tools (e.g. data, models), and therefore, EPA should exempt these waterbodies from the list. Similarly, several commenters stated that TMDLs for extremely difficult to solve problems (e.g. contaminated sediments) should also be exempt from TMDL establishment, or at least deferred until such time that the tools and data were available. Other commenters expressed a position that EPA had failed to meet its statutory duty under 304(a)(2)(D) to provide guidance on how to determine for which pollutants technical conditions exist to establish a TMDL. Therefore, these commenters felt that the States, Territories and authorized Tribes should be given maximum deference to make this determination for themselves, especially for toxics. A number of commenters suggested that a new part 5 of the list be established to accommodate impairments where the technical conditions were such that TMDLs could not be established until advances in data and models were made. A number of comments suggested that EPA should include the statutory language that recognizes that some

pollutants may not be suitable for TMDL calculations. Some comments made specific recommendations that EPA should now determine that flow, biological criteria, temperature, sediment, any interpretation of narrative criteria, whole effluent toxicity, sediment toxicity, legacy pollutants, any pollutant originating from nonpoint sources or atmospheric deposition, mercury, and any pollutant found in an ephemeral stream are not suitable for TMDL calculation. A few comments suggested that TMDLs should be required for stream flow for legal and policy reasons.

What is EPA promulgating today?

Based on its analysis of the many comments received on this section, EPA has made four changes to the proposed rule language. First, EPA is requiring in final § 130.31(a) that States, Territories, and authorized Tribes submit the TMDLs they establish to EPA. EPA made this change because although § 130.35 of the proposed rule addressed EPA's review of TMDLs submitted by States, Territories, and authorized Tribes, the proposed rule did not include a specific requirement that States, Territories, and authorized Tribes submit their established TMDLs to EPA.

Second, the final rule separates the requirement that States, Territories, and authorized Tribes establish TMDLs for waterbodies on Part 1 of the list from the statement that TMDLs are not required for waterbodies on Parts 2, 3, or 4. EPA believes this provides additional clarity as to which waterbodies require TMDLs.

Third, EPA is not promulgating the proposed requirement that States, Territories, and authorized Tribes establish TMDLs in accordance with their priority rankings. Instead EPA is requiring that States establish TMDLs in accordance with their approved schedule. EPA has changed the focus in the final rule from the priority ranking to the approved schedule because it has decided to equate a State's prioritization scheme with its schedule for establishing TMDLs for all waterbodies on Part 1 of the list. This is a reasonable interpretation and integration of sections 303(d)(1)(A) and 303(d)(1)(C). EPA believes it would be unreasonable for a State's TMDL schedule to differ significantly from its prioritization of waterbodies under section 303(d)(1)(A) and therefore believes its modification of the proposal in the final rule to require that TMDLs be established in accordance with a State's approved schedule is a logical outgrowth of the proposal.

Fourth, EPA is not promulgating the proposed allowance for States, Territories, and authorized Tribes to establish TMDLs in a different sequence than in their schedule. However, EPA recognizes that States, Territories, and authorized Tribes need the flexibility to adjust the order in which they establish TMDLs if newer information causes a lower priority TMDL to become of higher priority before the time of the next section 303(d) list submittal. The structure of § 130.28(c) provides States, Territories, and authorized Tribes with the flexibility to shift work within each twelve-month block of the schedule without seeking EPA approval. EPA believes that the public should have the opportunity to participate in decisions regarding more significant changes in the sequence by which TMDLs are established. Therefore, EPA expects that States, Territories, and authorized Tribes will use the provisions of § 130.29, which includes public participation, to make modifications to their schedules for TMDL establishment beyond those described above.

EPA does not agree as suggested by comments that it should allow States, Territories, and authorized Tribes to use other existing programs in lieu of establishing a TMDL for impaired waterbodies. The requirements of the CWA are very clear that TMDLs are required for all waterbodies impaired by a pollutant(s) where the technology-based requirements of the Act cannot ensure attainment of water quality standards. EPA recognizes that there are many Federal and State programs and mechanisms available to address impaired waterbodies, and EPA encourages States, Territories, authorized Tribes, and citizens to use them. However, EPA does not believe it can ignore the clear requirement of section 303(d) of the CWA that States, Territories, and authorized Tribes identify impaired waters on a section 303(d) list and develop TMDLs for these waters. To the extent that States, Territories, and authorized Tribes use other programs and mechanisms to achieve water quality standards prior to the establishment of a TMDL, those mechanisms can provide a basis for the State, Territory, or authorized Tribe to remove a waterbody from the section 303(d) list. Also, EPA anticipates that States, Territories, and authorized Tribes will rely on their various existing water quality-related programs and authorities as a means to implement TMDLs.

EPA acknowledges the comments on specific situations for which EPA should determine in this rulemaking that certain pollutants are not suitable

for TMDL calculation. EPA acknowledges that the CWA only requires TMDLs for those pollutants that EPA has determined are suitable for calculation of TMDLs. EPA made the determination on December 28, 1978 (43 FR 60662) that all pollutants were suitable for TMDL calculation under the proper technical conditions. This 1978 finding is not part of today's rulemaking and although neither the determination nor this rulemaking foreclose any reconsideration at a later date for a specific pollutant, EPA is not making any changes to the determination in these regulations. EPA notes that this determination applies only to pollutants and not to all parameters used by EPA, States, Territories, or authorized Tribes to measure environmental health.

EPA rejects a suggestion that TMDLs are unsuitable for calculation when either (1) suitable data cannot be collected to accurately quantify levels of the pollutant of concern, or (2) the water quality assessment methodology for that pollutant has not developed sufficiently to enable defensible determinations of wasteload allocations and load allocations that are likely to eliminate the impairment. EPA believes that the first condition is more a matter of resources than a technical limitation for developing TMDLs. Indeed, under this suggestion, all TMDLs would be unsuitable for calculation in the absence of data, and thus there would be no motivation to collect the necessary data. EPA believes the second condition is too subjective a test, and that the best forum for making this decision is during the public review of a TMDL.

For whole effluent toxicity (WET), EPA recognizes that its own guidance states that chronic whole effluent toxicity measurements are not additive while one primary principle for calculating TMDLs is that mass is additive. EPA also previously declined to apply whole effluent toxicity to the TMDL provisions of Part 132. However, EPA does not believe that these previous guidances and statements mean that whole effluent toxicity is unsuitable for TMDL calculations in all instances. Rather, EPA believes that TMDL calculations for chronic whole effluent toxicity in situations of multiple discharges should be performed on the pollutant(s) causing the toxicity. In these situations, EPA believes the first logical step of analysis is to conduct an ambient toxicity identification evaluation to identify the pollutants causing the toxicity, as suggested by comments. EPA has developed guidance to assist States, Territories, authorized Tribes, and other interested parties in determining the

pollutant(s) causing WET. See "Toxicity Identification Evaluations: Characterization of Chronically Toxic Effluents, Phase I," EPA/600/6-91-005F, 1992; "Methods for Aquatic Toxicity Identification Evaluations: Phase II Toxicity Identification Procedures for Samples Exhibiting Acute and Chronic Toxicity," EPA/600/R-92-080, 1993; "Methods for Aquatic Toxicity Identification Evaluations: Phase III Toxicity Confirmation Procedures for Samples Exhibiting Acute and Chronic Toxicity," EPA/600/R-92-081, 1993; "Marine Toxicity Identification Evaluation (TIR) Guidance Document, Phase I," EPA/600/R-96/054, 1996.

Where a TMDL is being established for only one source of the chronic whole effluent toxicity endpoint, there is no addition of different loadings involved and the TMDL calculations are identical to NPDES calculations. Where there are multiple sources of the acute whole effluent toxicity endpoint, EPA's guidance considers acute toxicity to be additive. See the "Technical Support Document for Water Quality-Based Toxics Control," EPA/505/2-90-001, 1991, at page 24. In these instances, EPA considers TMDL calculations are suitable because acute whole effluent toxicity exhibits additive characteristics.

EPA considers sediment toxicity to be a property of sediments resulting from the discharge of pollutants from multiple sources that were once in the water column and later settled into the sediments. Like chronic WET from multiple discharges, EPA believes that the TMDL calculations of sediment toxicity should be performed on the pollutants causing the toxicity. In these situations, EPA believes the first logical step of analysis is to conduct an ambient toxicity identification evaluation to identify the pollutants causing the toxicity, as suggested by comments. EPA has developed guidance to assist States, Territories, authorized Tribes, and other interested parties in determining the pollutant(s) causing sediment toxicity. See "Sediment Toxicity Identification Evaluation: Phase I (Characterization), Phase II (Identification), and Phase III (Confirmation) Modifications of Effluent Procedures", EPA/600/6-91/007, EPA, 1991.

In addition, EPA was asked in comments to clarify that TMDLs are suitable for addressing impairments caused by urban wet weather sources. EPA recognizes the additional complexity in collecting data and conducting the analyses for pollutant problems related to these sources, but believes that these issues can be addressed by States, Territories and

authorized Tribes by providing more time to establish the TMDL in the schedule.

EPA does not consider flow to be a pollutant, and therefore the final rule does not require TMDLs for flow. However, EPA recognizes that there will be cases where flow or lack thereof will contribute to impairment by a pollutant. In some cases the requirement that States, Territories and authorized Tribes consider seasonal variations including flow when establishing TMDLs will result in States, Territories and authorized Tribes having to consider the effect of low and high flow on water quality. In addition anthropogenic changes may contribute to the presence of a pollutant. For example, flow withdrawals or diversions may remove water that once diluted pollutants in the stream or cause the in-stream temperature to rise. Another example is high flow which degrades the aquatic habitat through excessive sedimentation. In these instances, the final rule requires the State, Territory, or authorized Tribe to develop a TMDL for the pollutant (including heat) which is causing the water to exceed the water quality standards. The State, Territory, or authorized Tribe will have to identify in the implementation plan the approach it intends to use to bring the waterbody into compliance with water quality standards. When implementing a TMDL, the State, Territory, or authorized Tribe may find it necessary to address the non-discharge causes of elevated pollutants, including low flow. In these instances, the TMDL allocations will directly address the excessive loading of the pollutant and the implementation plan will indirectly address the pollution problems.

EPA recognizes that the proposal did not include the current regulatory requirements at § 130.7(e) which codify the statutory provisions of section 303(d)(3), which addresses "informational TMDLs." This section of the Act provides that States can at their discretion, establish TMDLs for waterbodies which are not impaired. These "informational TMDLs" which contain the load necessary to attain water quality standards with seasonal variations and a margin of safety are not subject to EPA review and approval and EPA does not believe regulatory language is needed to address them.

N. What is a TMDL? (§ 130.32(a))

What did EPA propose? EPA proposed new § 130.33(a), renumbered § 130.32(a) in today's final rule, to mirror the proposed definition of a TMDL, and to recognize that TMDLs provide the opportunity for comparing

relative contributions of pollutants from all sources and considering economic and technical trade-offs between point and nonpoint sources.

What comments did EPA receive?

EPA received numerous comments on this subsection. Many echoed comments submitted on the definition of a TMDL. Some recommended that this section restate in the same words the definition of a TMDL. EPA received a number of comments concerning the ability of TMDLs to accommodate trade-offs between point and nonpoint sources. Many of these comments addressed the general topic of watershed-based effluent trading (as distinguished from comments specific to the offset provision set forth in the proposed NPDES companion rule). The majority of these comments supported the concept of "trading" in general, though most did not specify which of the numerous models of water pollutant trading they specifically endorsed. Reasons given for supporting the concept of trading included: (1) Ability to achieve water quality goals in the most cost-effective manner; (2) potential for achieving water quality goals sooner than otherwise would be the case; and (3) ability to go beyond (do better than) stated water quality goals/standards. Several comments called upon EPA to include language in the rule itself making it clear that "trading" was allowed as a component of a TMDL implementation plan.

On the other hand, some comments, though expressing support for the broad concept of "trading," urged EPA to proceed carefully with approval of individual trading programs, citing concerns about loss of accountability for point sources and reductions in opportunities for public participation in decisions regarding pollutant discharges from individual point sources.

EPA received many other comments regarding how loads are allocated between sources. Some comments suggested that EPA require that States, Territories, and authorized Tribes conduct specified analyses related to allocations. Other comments suggested that EPA require that allocations credit sources with pollutant reductions already achieved or require reductions in proportion to the existing loadings. Further comments suggested that all sources of loads must fairly share in load reductions, regardless of their size or relative contribution. In contrast, some comments stated that EPA has no authority to specify any allocation methodology or conditions, and that the allocation process is solely the authority of the State, Territory, or authorized Tribe. EPA received suggestions that

EPA provide more examples of allocation methods in guidance.

Finally, a number of commenters have said that EPA should not have said that TMDLs should be set at levels that will "attain and maintain" water quality standards, and that in the final rule, EPA should not couple the two words.

What is EPA promulgating today?

EPA is promulgating this subsection with revisions to make the first and second sentence match the first and second sentences in the definition of a TMDL. These revisions are described in today's preamble in the discussion of the TMDL definition.

Though EPA continues to support efforts by States, Territories, and authorized Tribes, as well as various stakeholders, to identify the most cost-effective means of achieving water quality standards through development and implementation of TMDLs, EPA does not believe it is necessary to provide specific regulatory language specifying how trading should occur. EPA has articulated its support for the trading concept in an "Effluent Trading in Watersheds Policy Statement," January 1996, and a "Draft Framework for Watershed-Based Trading," May 1996, and provided funding and technical support for a number of individual watershed trading projects, and continues to interact with those developing and implementing such projects.

EPA's position has been, and continues to be, that States, Territories, and authorized Tribes may employ in TMDLs any kind of system or policy for allocating pollutant loadings among sources, as long as the resulting allocations will lead to attainment and maintenance of water quality standards. Among the permissible allocation options are ones by which a source of pollutants would provide compensation to another source, in exchange for which the second source would accept a lower allocation, thereby offsetting a higher allocation for the first source. EPA encourages States, Territories and authorized Tribes to bring together stakeholders potentially affected by and interested in a planned TMDL to work together to explore ways in which a variety of allocation arrangements can be considered in selecting a scheme for a TMDL and reflected in the TMDL implementation plan.

EPA also declines to require that States, Territories or authorized Tribes conduct any specific prescribed analyses as part of their decision to allocate loads to point and nonpoint sources. Similarly, EPA declines to require that allocations credit sources with pollutant reductions already

achieved, require reductions in proportion to the existing loadings, consider the ability to pay or treatment capacity or where reductions are the easiest to achieve, or require that all sources of loads must fairly share in load reductions, regardless of their size or relative contribution. EPA believes that the decision on how to identify the most cost-effective or equitable means of allocating loadings is best handled by the State, Territory, or authorized Tribe, when the State, Territory, or authorized Tribe establishes the TMDL. Therefore, EPA is not prescribing certain allocation methodologies for States, Territories, or authorized Tribes in this rule. Today's final rule requires that the wasteload and load allocations, when implemented together, will result in the attainment and maintenance of the water quality standard(s) applicable to the pollutant for which the TMDL is being established. EPA's review of the allocations will focus on whether they attain and maintain the water quality standards.

EPA believes the allocation methodology should create a technically feasible and reasonably fair division of the allowable load among sources. Understanding the relationship between pollutant loads and the condition of the waterbody is the basis for evaluating alternative allocation strategies. If there is a range of allocation strategies that could be implemented, EPA encourages the State, Territory, or authorized Tribe to consider various allocation options. This allows for a more rigorous evaluation and decision making process by the stakeholders and regulators. Ideally, States, Territories and authorized Tribes could bring together stakeholders potentially affected by and interested in a TMDL to work together to reach consensus on allocations that are believed by the stakeholders to be effective and equitable.

Pollutant reductions can be allocated among sources in numerous ways (see "Technical Support Document for Water Quality-based Toxics Control," EPA/505/2-90-001, 1991, Chapter 4.) States, Territories, and authorized Tribes may consider several factors, including technical and programmatic feasibility to reduce specific loads, cost-effectiveness, relative or proportional source contributions, ability of small entities to pay for pollutant load reductions, equity based on previous commitments to load reductions, and the likelihood of implementation, to develop the most effective allocation strategy. EPA encourages States, Territories, and authorized Tribes to consider these factors when they allocate loads.

When EPA establishes a TMDL, EPA will seek advice from the applicable State, Territory, or authorized Tribe as to which allocation methodology it prefers that EPA use. As a general approach, EPA intends to use the same allocation methodology that the State, Territory, or authorized Tribe uses for TMDLs it establishes. However, if EPA is not able to establish reasonable assurance of implementation of needed pollution control measures, EPA will revise the pollutant reduction allocation as needed. EPA recognizes the benefit of guidance on the merits of various allocation methodologies, and intends to publish this guidance within a year following promulgation of today's rule for use by States, Territories, and authorized Tribes.

EPA believes the phrase "attain and maintain" is consistent with the language in CWA section 303(d)(1)(C) that requires that TMDLs be established at a level necessary to implement water quality standards. EPA interprets the term "implement" to include not just choosing a load necessary to attain the appropriate water quality standard at a given moment in time, *i.e.*, the date the TMDL is established, but also choosing a load that will ensure that the appropriate water quality standard is implemented over time. For that reason, EPA believes it has the authority to use the phrase "attain and maintain" and has modified the proposed rule in a number of places consistent with this belief.

O. What are the Minimum Elements of a TMDL? (§ 130.32(b))

EPA proposed in § 130.33(b), renumbered as § 130.32(b) in today's rule, that a TMDL include ten minimum elements. The final rule, for reasons explained later, includes eleven elements. Ten of these are discussed in this section. The issues raised by commenters regarding the eleventh element, *i.e.*, the implementation plan, and changes resulting from these comments are discussed in Section II.P. of this preamble. EPA is promulgating its proposal that TMDLs include all the elements. EPA recognizes that TMDLs for waterbodies with only NPDES-regulated point sources contributing the pollutant impairing the waterbody would not require a load allocation. In this situation, the TMDL could include a load allocation of zero. Similarly, TMDLs for waterbodies with only sources which are not subject to NPDES permits contributing the pollutant impairing the waterbody would not require a wasteload allocation. In this situation, the TMDL could include a wasteload allocation of zero.

1. Waterbody Name and Geographic Location

What did EPA propose? EPA proposed in § 130.33(b)(1) that the TMDL include the information provided on the section 303(d) list regarding the name and geographic location of the waterbody for which the TMDL was established, as well as the name and geographic location of upstream waterbodies which contributed a significant amount of the pollutant for which the TMDL was established.

What comments did EPA receive? EPA received very few comments regarding this proposed requirement. Some commenters were concerned that the requirement to identify upstream sources of pollutants meant that controls would have to be established for these sources.

What is EPA promulgating today? EPA is promulgating this section as proposed but now renumbered as § 130.32(b)(1). The Agency believes that it is important to identify upstream contributors of a pollutant for which a TMDL is being established because, as clarified in today's regulations at § 130.32(b)(4), this pollutant load must be accounted for in the TMDL as background loading. EPA recognizes that, due to limited information, a State, Territory, or authorized Tribe may not be able to identify a specific upstream waterbody as being the source of pollutants that flow into the segment of the waterbody for which the TMDL is being established. EPA expects that the State, Territory, or authorized Tribe will only identify specific sources of that pollutant upstream of the segment for which the TMDL is being established to the extent those sources are known.

2. Identification and Quantification of the Pollutant Load, and Deviation From Loads

What did EPA propose? In proposed § 130.33(b)(2), and (3), EPA proposed that States, Territories and authorized Tribes identify the pollutant for which a TMDL was established, quantify the load of the pollutant which may be present in the waterbody and not cause an exceedance of a water quality standard, and identify the difference between that amount and the current loading.

What comments did EPA receive? EPA received few comments on these proposed sections. Commenters mostly requested technical clarifications on how to calculate pollutant loads. Other comments requested that the rule require disclosure of which water quality standards apply to a TMDL, and

assurance that background loadings are accounted for in the TMDL.

What is EPA promulgating today? EPA is slightly reorganizing these sections to separate the requirements for identification of the pollutant, now contained in § 130.32(b)(2), from the quantification of the pollutant load necessary to attain water quality standards in § 130.32(b)(3) and the quantification of the deviation between current loading and that necessary to attain and maintain water quality standards in § 130.32(b)(4). EPA believes that this separation better clarifies the elements of the TMDL. This also results in there being 11 elements of the TMDL, because two requirements are reorganized into three requirements.

In addition, as suggested by comments, EPA is adding the requirement to consider pollutant loads from upstream sources as part of the background. EPA recognizes that the TMDL serves as a mechanism for accounting for the total load of a pollutant in a waterbody. In the TMDL, all pollutant loads need to be accounted for to ensure that when the total load is allocated, the sum of the allocations does not exceed the water quality standard. Without identifying loads from upstream sources as background loads, the allocation process is likely to over-allocate loadings to point and nonpoint sources, thus leading to an exceedance of the water quality standard.

EPA does not interpret quantification of loads as always requiring the direct monitoring of sources of pollutant loads or the pollutant load within a waterbody. States, Territories, and authorized Tribes have the flexibility to use any methodology that develops a number that expresses the pollutant load. Direct monitoring is one way, but there are others. For example, States, Territories, and authorized Tribes may use water quality modeling techniques, either empirical or deterministic, to quantify the load. They may use correlation methodologies to relate non-pollutant metrics to pollutant loads. In general, the State, Territory, or authorized Tribe needs to use a procedure by which it can develop a number that characterizes the load.

Also, as suggested by comments, EPA is clarifying that the applicable water quality standard must be identified along with the pollutant for which a TMDL is being established. EPA agrees that the public should have access to this information when they review and comment on a proposed TMDL because the water quality standard is the basis for the TMDL.

3. Source Categories

What did EPA propose? EPA proposed in § 130.33(b)(4) that a TMDL should include an identification of the source of the pollutant with as much precision as feasible, *i.e.*, individual or categorical, in accordance with the definitions of load allocation and wasteload allocations.

What comments did EPA receive? Many commenters repeated either their support or opposition to including nonpoint sources in the TMDL process. Several comments expressed support for identification of all sources, and suggested EPA encourage States, Territories, and authorized Tribes to identify all sources of a pollutant. Others repeated their concerns regarding designation of certain animal feeding operations and silviculture activities as point sources. These comments are addressed elsewhere in today's preamble.

What is EPA promulgating today? EPA is promulgating the proposed language with minor editorial modifications at § 130.32(b)(5) of today's rule. For reasons discussed previously in today's preamble, EPA believes that the requirement to identify and establish TMDLs for waterbodies exists regardless of whether the waterbody is impaired by point sources, nonpoint sources or a combination of both. *Pronsolino v. Marcus*, 2000 WL 356305 (N.D. Cal. March 30, 2000.) Therefore, EPA declines to revise the proposed requirement to exclude identification of nonpoint sources that contribute the pollutant causing an impairment.

4. Wasteload Allocation

What did EPA propose? EPA proposed that an individual wasteload allocation be assigned to each point source covered by the NPDES permit program, with two exceptions. First, EPA proposed that one waste load could be allocated to a category or subcategory of sources within a waterbody subject to a general permit under the NPDES program. Similarly, EPA proposed that pollutant loads from permitted facilities that did not need to be reduced in order to achieve water quality standards could be grouped into one category or subcategory, or considered as part of background loads.

EPA also proposed to require States, Territories, and authorized Tribes to provide technical analysis demonstrating that wasteload allocations, when implemented, would result in attainment and maintenance of water quality standards in the waterbody.

What comments did EPA receive? EPA received a wide variety of

comments on the provisions in proposed § 130.33 dealing with wasteload allocations. (Other comments regarding the definition of "wasteload allocations" are addressed elsewhere in this preamble.)

The proposal that one wasteload allocation could be developed for all point sources subject to a general NPDES permit drew substantial and widely varied response. Some commenters endorsed this notion, saying it would reduce administrative burdens on States, Territories and authorized Tribes. On the other hand, there were a number of comments objecting to this provision. These commenters questioned the feasibility of estimating the total loading from all point sources covered by a general permit, particularly permits which do not require the sources wishing to be covered to send a Notice of Intent to the NPDES authority.

Commenters also opposed grouping all sources for which no load reduction was required. They questioned how EPA could ensure that dischargers included under a wasteload allocation, or bundled under the allocation to background, did not increase their loadings of the pollutant above levels discharged at the time of TMDL establishment.

A number of comments called upon EPA to require that States, Territories, and authorized Tribes directly notify any pollutant source potentially affected by the allocations in a proposed TMDL that had been published for public review and comment.

What is EPA promulgating today? After consideration of all comments received, EPA is promulgating a provision that is very similar to the one proposed. The one key change is aimed at clarifying that, for waterbodies affected by both nonpoint and point sources of the pollutant of concern, implementation of the wasteload allocation alone is not always expected to result in attainment of water quality standards. Rather, today's rule specifies that States, Territories, and authorized Tribes should submit, along with the wasteload allocation, supporting technical analyses demonstrating that wasteload allocations, when implemented in conjunction with necessary load allocations, will result in the attainment and maintenance of water quality standards in the waterbody.

As with the proposed rule, today's promulgation states that point sources subject to individual NPDES permits must be given individual wasteload allocations, except those that would not need to reduce their loadings. Point

sources subject to individual NPDES permits that, according to the terms of the wasteload allocation for the waterbody into which they discharge, would not need to decrease their pollutant loadings, may be included within a single wasteload allocation for a category or subcategory of sources. Individual NPDES permits for point sources included in such categories or subcategories should have effluent limits (or other permit provisions) for the pollutant being addressed in the TMDL, ensuring that the permittee would not increase its discharge of that pollutant beyond the level it was assessed as discharging in calculating the TMDL's wasteload allocation for that category or subcategory of sources. In these instances, the current NPDES permit provides the regulatory control to prevent these sources of pollutants from increasing their pollutant loads.

Today's rule allows for wasteload allocations to be allotted to a category of sources seeking coverage under a general permit, *i.e.*, all sources seeking coverage under a general permit that are located on the waterbody for which the TMDL is established could be covered under one wasteload allocation (§ 130.32(b)(6)). General permits, like individual permits, must include effluent limits or conditions that are consistent with the assumptions and requirements of the wasteload allocation. Today's rule requires that the implementation plan identify the category of point sources subject to the TMDL which are regulated by a general permit and specify the general permit that applies or will apply to the sources (§ 130.32(c)(1)(i)). Today's rule also requires that the implementation plan identify the wasteload allocation that will be the basis for the effluent limitations (which may be in the form of Best Management Practices defined for NPDES at § 122.2) in the NPDES permit "that will be issued, reissued, or revised." *Id.*

Existing NPDES regulations require the permitting authority to develop water quality-based effluent limits that derive from and comply with all applicable water quality standards. These regulations also require that water quality-based effluent limits be consistent with the assumptions and requirements of any available wasteload allocation prepared by the State and approved by EPA pursuant to § 130.7 (see § 122.44(d)(1)(vii)(B)). Therefore, when an existing permit expires, upon reissuance of that permit, the permitting authority will evaluate whether the effluent limitations or conditions within the permit are consistent with the wasteload allocation in an applicable

TMDL. If not, the permitting authority must ensure the reissued permit includes effluent limitations that are consistent with the wasteload allocation. In the case of storm water permits, the effluent limitations may include best management practices that evidence shows are consistent with the wasteload allocation.

Where a State is establishing a TMDL and that State is authorized to administer general permits under the NPDES program, the State has the discretion and flexibility to determine whether to issue separate general or individual permits to implement the wasteload allocation or whether to revise or reissue a general permit to implement the wasteload allocation. A separate general permit would be specific to the waterbody for which the TMDL is established and may include a different set of conditions and requirements that would be designed or tailored to implement the applicable wasteload allocation under the TMDL. A State may also choose to revise the existing general permit to include additional conditions or effluent limitations applicable to those sources or categories of sources, consistent with the wasteload allocation. EPA believes that a new general permit (e.g. a storm water general permit) that includes best management practices, rather than numerical limitations on the mass or concentration of pollutants in the discharge, is adequate for the purposes of ensuring implementation of a wasteload allocation.

When a State is establishing a TMDL but that State is not authorized to administer general permits under the NPDES program, the State and EPA would work together to address how the applicable national general permit would be "issued, reissued or revised" to implement the wasteload allocations applicable to the category of sources subject to a TMDL covered by the general permit. EPA would also have the discretion and flexibility to determine whether to issue a separate general permit to implement the wasteload allocation, whether to issue an individual permit, or whether to revise or reissue the general permit to implement the wasteload allocation. This discretion and flexibility would also be available to EPA where the Agency is establishing a TMDL for a State that is not authorized to administer general permits under the NPDES program. In addition, where EPA is establishing a TMDL for a State and that State is authorized to administer general permits under the NPDES program, EPA, in developing the implementation plan, would need to

work with the State to determine how the State-issued general permits would be "issued, reissued or revised" to implement the applicable wasteload allocation under the TMDL.

As would have been the case with the proposed rule, when EPA approves a TMDL, it will also be approving the component wasteload allocations and load allocations. EPA's review of wasteload allocations and corresponding load allocations will be aided by the supporting technical analyses demonstrating that implementation of wasteload allocations and load allocations (where applicable) is feasible and will result in attainment of water quality standards. EPA's review will also include a review of the sources of information that the State, Territory, or authorized Tribe cites in support of its technical analysis.

5. Load Allocation

What did EPA propose? The proposed rule required States, Territories, and authorized Tribes to assign individual load allocations to specific nonpoint sources (including air deposition and natural background) unless doing so would be impossible. In cases where it was not possible to assign individual load allocations, specific nonpoint sources could be grouped together into categories or subcategories. Each category or subcategory would be given a load allocation. In addition, where load reductions are not needed from certain sources, the load allocation for those sources could be grouped into one aggregate load allocation.

The proposal also required States, Territories, and authorized Tribes to provide technical analysis demonstrating that load allocations, when implemented, would result in attainment and maintenance of water quality standards.

What comments did EPA receive? EPA received a large number of comments with regard to load allocations, covering a range of issues. A number of these comments are also relevant to the proposed definition of "load allocation" at § 130.2(f), and are summarized in the discussion of that provision.

The proposal to allow States, Territories, and authorized Tribes to aggregate a number of individual nonpoint sources into a category or subcategory for which just one wasteload allocation would be required, received both favorable and unfavorable comments. Several commenters specifically objected to the language requiring States, Territories, and authorized Tribes to calculate individual load allocations for specific

nonpoint sources if doing so were "possible" and encouraged EPA to use the word "feasible" or "practical" instead.

The issue of possible inequities in the allocation of allowable loads among sources of the pollutant for which a TMDL was being developed was the subject of a significant number of comments. A number of commenters expressed the fear that because of a lack of Federal regulatory authority (and often, State authority as well), States, Territories, and authorized Tribes would likely give relatively generous allocations to nonpoint sources, thereby requiring disproportionately large reductions by point sources. Some of those expressing this concern urged EPA to require that allocations of loadings be done "proportional to current loadings" from various sources. On the other hand, some called upon EPA and States, Territories, and authorized Tribes to take "achievability and assurance" of loadings reductions into account when doing allocations of loadings and indicated this meant that greater responsibility for loadings reductions would be assigned to sources either subject to enforcement or very likely to actually achieve reductions for other reasons.

What is EPA promulgating today? The provision of § 130.32 addressing load allocations that is being promulgated today is very similar to the proposed rule. A few changes have been made in response to comments. First, the provision was revised to be consistent with revisions to the definition of "load allocation" that were previously discussed in today's preamble. Second, based on comments, the condition to trigger developing separate load allocations was changed from "possible" to "feasible." EPA believes that a feasibility standard is better for making this decision. Developing a separate load allocation for a source may be possible but not feasible. In some instances, the loadings from nonpoint sources can only be feasibly quantified on an aggregate basis. EPA does not intend States, Territories, or authorized Tribes to expend additional effort to develop separate load allocations if not feasible, and thus has made this change to the final rule.

6. Margin of Safety

What did EPA propose? EPA proposed in § 130.33(b)(7) to specify how States, Territories and authorized Tribes could satisfy the statutory requirement that TMDLs include a margin of safety. EPA proposed that the requirement could be satisfied either by expressing the margin of safety as

unallocated assimilative capacity, *i.e.*, demonstrating that the pollutant loading would be less than the assimilative capacity of the waterbody, or demonstrating that conservative assumptions had been built into the calculations of the wasteload and load allocations.

What comments did EPA receive? EPA received many comments asking for specific criteria to calculate the margin of safety while others suggested that EPA should keep this requirement as flexible as possible. Some commenters pointed out that water quality standards already account for scientific uncertainties. Some commenters suggested that the margin of safety should increase as uncertainties in the quality of the data used to establish the load and wasteload allocations increase.

What is EPA promulgating today? EPA believes that the margin of safety required by the section 303(d)(1)(C) for establishment of TMDLs allows for consideration of more factors than the scientific uncertainty included in the development of water quality standards and must also account for analytical uncertainties associated with all the calculations required to establish a TMDL. Nothing in the statute indicates that these factors are exclusive to all others in interpreting what margin of safety means. EPA has clarified this requirement at § 130.32(b)(8) in the final rule by explicitly stating that the margin of safety must appropriately account for uncertainty, including those associated with pollutant loads, water quality modeling, and monitoring. EPA has also clarified how the margin of safety could be expressed. EPA agrees with the commenters that the calculation of margin of safety is complex and that guidance addressing a variety of situations, including reliability of the data need to be developed. EPA is planning to issue such guidance soon after this rule is promulgated.

EPA does not believe that the margin of safety is addressed by how the water quality standards account for scientific uncertainties. CWA section 303(d) requires that TMDLs implement the applicable water quality standard. EPA interprets the margin of safety requirement of the CWA to address the relationship of the TMDL to the water quality standard, and not how the standard itself addresses uncertainties.

7. Consideration of Seasonal Variations

What did EPA propose? EPA proposed in § 130.33(b)(8) to codify the statutory requirement that TMDLs must account for seasonal variations and to require States, Territories and

authorized Tribes to also consider other environmental factors which could affect the water quality impact of the pollutant for which a TMDL was established.

What comments did EPA receive? EPA received considerable support for this requirement. Many commenters pointed out that the amount of flow in a waterbody could have significant impact on the level of a pollutant and that EPA should require TMDLs to account for low flow as well as wet weather flow and storm water events. Other commenters however, construed this proposed requirement as an interference with States' water rights and allocation processes. Finally, many commenters did not agree that water quality standards must be attained in all seasons or during unusual events such as major storms.

What is EPA promulgating today? EPA is promulgating this requirement at § 130.32(b)(9) with a few changes. EPA agrees with the commenters that the level of flow in a waterbody can affect whether or not a waterbody attains and maintains water quality standards; therefore, EPA is specifically requiring that flow levels be taken into consideration as part of seasonal variations. By including this language, EPA is not intending that States, Territories or authorized Tribes make changes to established water allocations or water rights. Instead, EPA intends for the pollutant load allocation to take into account the impact of flows on the water quality of the impaired waterbody. EPA also believes that TMDLs must be established so that water quality standards are attained and maintained in all seasons and all flows. This includes consideration of storm conditions where storms or storm water runoff contribute the pollutants causing the impairment to the waterbody. EPA believes that this is the very reason consideration of seasonal variations is included in the statutory language, and EPA is adding language in the final rule to clarify this point. EPA's intent is that TMDLs must account for normal variations in seasonal conditions for environmental factors such as flow, precipitation or temperature, and not necessarily account for extreme unusual conditions such as 100-year storms or hurricanes.

States, Territories, and authorized Tribes can address seasonal variations in many different ways. One way is to use water quality modeling techniques, such as continuous or dynamic modeling, that directly consider variations in environmental conditions. Another way is to conservatively identify a suite of environmental

conditions that represent the worse conditions experienced in the waterbody, and thus lead to identifying a load that is protective of all conditions. Yet another way is to establish TMDLs for each season or month that are representative of the environmental conditions in those seasons or months. Because there are different ways of addressing seasonal variations in environmental conditions such that water quality standards are met as required, EPA believes that it is more appropriate to address the details of this analysis in guidance rather than in today's rule.

8. Allowance for Increases in Pollutant Loads

What did EPA propose? EPA proposed at § 130.33(b)(9) that TMDLs include an allowance for future growth to account for reasonably foreseeable increases in pollutant loads. EPA included this provision to meet the statutory mandate that water quality standards must be attained and maintained. EPA believed that, absent such an allowance, it would be difficult to demonstrate maintenance of the standards. EPA explained in the preamble that it intended for the allowance to be based on existing and readily available data at the time the TMDL was established.

What comments did EPA receive? Many commenters pointed out that decisions about future growth were the province of local governments. They opposed the proposed language because they construed it as a requirement to control growth. Others were concerned that allowance for future growth would render TMDLs more stringent than necessary and unfairly place a burden on current dischargers.

What is EPA promulgating today? EPA is promulgating this requirement at § 130.32(b)(10) but is modifying the proposed language to clarify that the intent of this provision is not to control growth but to ensure that TMDLs take into account potential increases in loadings regardless of their cause. EPA believes accounting for any such potential increases is a necessary step in setting loads at a level necessary to implement standards and accordingly is authorized by § 303(d)(1)(c). If a State, Territory, or authorized Tribe does not anticipate increased loadings in a TMDL, it may satisfy this element by indicating it does not expect there to be such increases and providing a brief explanation why. Moreover, if the State, Territory, or authorized Tribe does not anticipate future increased loadings, it may find itself needing quickly to revise the TMDL to accommodate new

discharges. On the other hand, if a State, Territory, or authorized Tribe includes an allocation for increases in pollutant loads, then any new loading or increase in pollutant loading that occurs will be addressed by that allocation without requiring that the TMDL be revised. EPA does not intend that, if a State, Territory, or authorized Tribe decides to specifically provide an allocation for increased pollutant loadings in a TMDL, it needs to identify the types of facilities or activities that would receive that allocation. Instead, EPA expects that the allowance for increased pollutant loadings would be an aggregate amount that could be applied to any future increase in loads. The specific decisions as to how to allocate that aggregate allowance for increased loads to new facilities or activities are best made by the State, Territory, and authorized Tribe along with local governments.

P. What Are the Requirements of the Implementation Plan (§ 130.32(c))?

What did EPA propose? EPA proposed that each TMDL include, as a minimum element required for approval, an implementation plan. The implementation plan as proposed contained eight minimum elements: (1) Intended control actions; (2) a time line; (3) reasonable assurance that wasteload and load allocations will be achieved; (4) legal authority; (5) time required to attain water quality standards; (6) monitoring plan; (7) milestones for attaining water quality standards; and (8) TMDL revision procedures. The proposal would have required States, Territories and authorized Tribes to submit implementation plans to show how each TMDL was to be implemented. The proposal recognized that it would be more effective and supportive of watershed approaches to have implementation plans that show how all TMDLs for a particular pollutant or a number of pollutants in particular basins, would be implemented. EPA specified that it would not approve a TMDL without an adequate implementation plan. The proposal linked the adequacy of the implementation plan to a determination by EPA that there was reasonable assurance that implementation would occur. If EPA could not approve the TMDL, EPA would have to establish the TMDL which would include an implementation plan and provide reasonable assurance.

What comments did EPA receive?

EPA received numerous comments on the proposed implementation plan requirement. A few commenters supported the requirement as proposed. Many commenters opposed the

requirement altogether. Among commenters who supported the requirement many questioned EPA's authority to require implementation plans as mandatory parts of TMDLs under the authority of section 303(d). These commenters suggested that EPA should continue to require implementation plans as part of a State's water quality management plan even if it meant promulgating amendments to the regulations at § 130.51 to make the plans enforceable. Some commenters opposed implementation plans because they believe they would considerably slow establishment of TMDLs. Others expressed concerns that the proposal was too inflexible and would lead to federal regulations of non point sources. Some commenters argued that separating the implementation plan from TMDL establishment would lead to more scientifically defensible TMDLs and that approved TMDLs would provide a clear goal and the impetus for better interaction between stakeholders in designing implementation plans. Some commenters supported the requirement for implementation plans but raised questions concerning the specific proposed elements of the implementation plan requirement, especially in regard to nonpoint sources.

What is EPA promulgating today?

Today's rule at § 130.32(c) retains the requirement for implementation plans as required elements of TMDLs. As discussed in the August 23, 1999 preamble (64 FR 46032–46035), EPA believes that it has the authority to require implementation plans because section 303(d) requires that TMDLs be established at a level necessary to implement water quality standards. Today's rule establishes that one way EPA can determine whether a TMDL is approved at a level necessary to implement applicable water quality standards is to require an implementation plan. In addition, EPA believes that implementation plans provide the basis for demonstrating that water quality standards will be attained and maintained through pollution controls other than controls over point source discharges subject to an NPDES permit.

EPA believes that implementation of TMDLs is the most important aspect of today's rule. Without implementation, TMDLs are merely paper plans to attain water quality standards. The implementation plan requirement assures that the Nations' remaining water quality problems will actually be addressed by appropriate actions identified in the implementation plans submitted as part of the TMDLs.

Today's rule acknowledges that implementation plans will differ depending upon the type of sources causing the impairments in a particular waterbody. Therefore the final rule makes it clear that the purpose of the implementation plan is to describe, at a level of detail appropriate to the circumstances, actions necessary to implement the TMDL. Implementation plans are not meant to be lengthy or complex. They must however contain sufficient detail so that EPA and the public can determine whether the actions proposed in the plan can actually eliminate the impairment and whether there is reasonable assurance that they will occur and when.

The requirements of the implementation plan are now identified separately for waterbodies impaired (1) only by point sources required to have an NPDES permit, (2) only by sources other than those required to have an NPDES permit including nonpoint sources, or (3) by a combination of both point sources required to have an NPDES permit and other sources including nonpoint sources. Although the requirements are identified separately, they provide common information on what sources will be expected to reduce loadings, how these reductions will be accomplished, when these reductions will occur, and how the results will be measured.

Some elements of implementation plans are common to all sources: A schedule for implementation actions, the date by which the implementation plan will attain water quality standards, a modeling and/or monitoring plan and a description of interim, measurable milestones and criteria to be used to determine progress towards attaining water quality standards and when the TMDL needs to be revised. These provisions were included in the proposed rule, and except for one change discussed below, are unchanged in the final rule except for formatting changes.

In the final rule, EPA is making a small revision to the proposed language regarding the time to attain water quality standards. The proposal would have required "an estimate" of the time necessary to attain water quality standards. The final rule requires that the implementation plan must include "the date" by which the waterbody will attain water quality standards. EPA believes the phrasing of the final rule is a logical outgrowth of the proposal and a clearer description of what is intended—the "date" when the State, Territory, or authorized Tribe believes water quality standards will be attained.

Implementation Plans for Point Sources for Which an NPDES Permit is Required

For waterbodies impaired by only point sources subject to an NPDES permit, the implementation plan is expected to rely primarily on the NPDES permit(s) that will be issued, reissued or revised so their effluent limit(s) will be consistent with the wasteload allocations in the TMDL. The plan will identify which facilities are required to have permit limits that are consistent with the wasteload allocation, identify the limits to be incorporated into the permits, and identify the schedule by which the permits will be issued, reissued, or modified. EPA's expectation of when these permits will be issued, and EPA's commitment to ensure the proper and timely issuance of these permits, is described in the preamble discussion about EPA's objection to State-issued expired and administratively continued permits.

Implementation Plans for Sources for Which an NPDES Permit is Not Required

For waterbodies impaired only by sources other than those subject to an NPDES permit, including nonpoint sources, the implementation plans are required to contain several different elements. The plans for these waterbodies must identify the source categories, subcategories or individual sources that are expected to implement load allocations. These implementation plans must also include a description of specific regulatory or voluntary actions, including management measures or controls that State, Territorial, authorized Tribal or local governments and individuals will implement that provide reasonable assurance that load reductions will be achieved, and the schedule by which these measures are expected to be implemented.

EPA recognizes that nonpoint source problems are different from point source problems and that implementation plans for nonpoint sources must reflect the higher natural variability and relative imprecision of nonpoint sources in relation to point sources. EPA expects that implementation of load allocations will depend primarily upon recognized nonpoint source control activities. These actions are often those already undertaken in States, Territories and authorized Tribes to carry out programs and activities approved under CWA section 319, as well as those under the requirements of the Coastal Zone Act Reauthorization Amendments and the cooperative conservation and water quality programs carried out by the

United States Department of Agriculture (USDA). These ongoing activities are expected to provide the foundation for nonpoint source implementation plans. EPA expects that nonpoint source implementation activities will rely upon management measures and that implementation plans will reflect performance expectations of these measures over time. In the case of nonpoint source impaired waterbodies, the detail and level of certainty that water quality standards will be attained through these management measures may be different from that for waterbodies impaired only by point sources.

EPA is also clarifying in § 130.32(c)(2)(iii) that implementation plans for other than point sources (primarily nonpoint sources) must include a schedule for implementing management measures or other controls in a TMDL within five years when implementation within that period is practicable. In response to comments, EPA has added a target date of five years for implementation of management measures and other controls where it is practicable to do so. The proposal required that implementation plans include a timeline, including interim milestones, for implementing control actions and/or management measures. The final rule requires this timeline be in the form of a schedule for implementing the control actions and/or management measures as well as a description of the interim milestones for determining whether the management measures and/or control actions are being implemented.

EPA added the five-year target in response to comments that there needed to be some target or goal for implementing the control actions and/or management measures. EPA never intended that implementation of the control actions and/or management measures would be open ended. The proposal included the requirement for milestones for implementation. The five-year target for implementation represents the Agency's expectation that, where practicable, the management measures and/or control actions should be implemented within five years. This is a logical outgrowth of the proposal that the implementation plan include an estimate of the time required to attain and maintain water quality standards and reasonable response to comments received. EPA expects that the public believes that the TMDL will be quickly implemented following its establishment. If implementation requires more than five years, EPA believes that the public is entitled to an

explanation as to why five years is not practicable.

The final rule recognizes that the schedule may provide for more than five years. Where a State, Territory, or authorized Tribe determines that five years is not practicable, it must explain the basis for its determination. In determining whether it can implement management measures within five years, the State, Territory, or authorized Tribe may consider, but is not limited to, such factors as technical feasibility of installing controls and measures or changing practices within five years, competing program priorities in providing necessary funding and/or necessary technical assistance, and time to work with members of the affected community. The analysis of practicability in this provision is not intended to add a new requirement beyond the requirement to establish reasonable assurance that management measures and/or control actions will be implemented as expeditiously as practicable. It recognizes that if it is practicable to implement controls and measures within five years, they should be implemented within five years. EPA recognizes that even if controls and measures are implemented within five years, it reasonably would be expected to take additional time for the actions and measures to achieve their intended results and for load allocations to be met.

In general, EPA believes that, barring resource constraints or other impediments that make expeditious implementation impracticable, TMDLs can be implemented within five years of completion of the implementation plan. In the typical situation, the types of management measures that will be used to implement the TMDL will consist of a set of well-established practices that are commonly practiced within the affected industries and can be implemented within a five-year time frame.

For example, to address soil erosion, well-established practices such as those that were used by USDA to implement the conservation compliance program on highly erodible cropland within the statutorily required five-year implementation period of 1985-1990 would typically be used. To address the impact of grazing upon water quality, typical approaches would include a USDA "conservation management system" or other similar range management plan to reduce cattle's access to the stream (e.g., by providing alternative supplies of water, shade, and salt away from the stream; hardening the limited access points to the stream; and using fencing where necessary), and

to employ effective grazing rotation strategies that will ensure both that upland areas remain both productive and that soil erosion is reduced.

Similarly, the primary practices to be used to implement measures to address silvicultural nonpoint sources include road maintenance practices to reduce runoff and streamside management practices that will assure that sufficient protection is provided to provide adequate shade and erosion control in streamside management zones. For urban runoff, typical measures will include prevention techniques such as erosion and sediment control in new developments (which are required by new NPDES regulations for all developments larger than one acre); continued treatment of post-development runoff through a variety of urban best management practices, protection and restoration of riparian areas; and techniques to treat runoff in developed areas.

These and other nonpoint source measures can generally be implemented within five years from the time that it has been determined through a TMDL implementation plan that they will be needed to achieve water quality standards. EPA recognizes that in some situations, a five-year implementation period may prove to be impracticable. This situation is most likely to arise in some heavily developed areas where existing infrastructure limits the availability of effective technical approaches to very sophisticated and expensive treatment options. For this reason, the rule states that TMDLs should generally be implemented within a five-year period but allows for the State to make appropriate exceptions to the general five-year implementation period to address situations where the implementation plan cannot practicably be implemented within five years.

Implementation Plans for Blended Sources

For waterbodies impaired by both point sources required to have an NPDES permit and other sources, including nonpoint sources, implementation plans are required to include all of the elements applicable to these sources. In addition, implementation plans for waterbodies impaired by both types of sources must include a description of the extent to which wasteload allocations reflect the expected achievement of load allocations. EPA encourages implementation plans that reflect tradeoffs between wasteload and load allocations. A particular wasteload allocation may be set which anticipates

that a load allocation will achieve a certain reduction in nonpoint source loadings. As long as the wasteload and load allocations together will achieve the TMDL, the TMDL is approvable. EPA does not expect that load allocations will actually be achieved before a corresponding wasteload allocation is established but the implementation plan must demonstrate the reasonable assurance that the practices will achieve the load reductions.

In the final rule at § 130.32(c)(4), EPA has clarified that implementation plans for all impaired waterbodies must be based on a "goal" of attaining and maintaining the applicable water quality standards "as expeditiously as practicable." EPA believes this new section is a logical outgrowth of its proposal that implementation plans include "an estimate of the time required to attain and maintain water quality standards and discussion of the basis for that estimate."

In response to comments, EPA is providing greater clarity in the final rule by identifying the goal that States, Territories and authorized Tribes should be striving to achieve in their implementation plans, *i.e.*, attaining and maintaining water quality standards as expeditiously as practicable. EPA has not expressed its sense of an appropriate time within which to attain water quality standards in the form of a rigid regulatory requirement. Instead, the goal of attaining water quality standards as expeditiously as practicable mirrors the provision in the reasonable assurance definition that TMDLs be implemented as expeditiously as practicable. The definition of reasonable assurance provides the criteria for determining if the TMDL is being implemented within 10 years whenever practicable. The provision in § 130.32(c)(4) is not intended to establish a test for TMDL approval that is different from the requirement to establish reasonable assurance. Attaining standards as expeditiously as practicable is stated in the rule as a goal whose achievement States should strive for as they develop their implementation plans.

The "practicability" of meeting standards within 10 years may be influenced by a wide variety of factors, such as the degree of water quality impairment, the time required to install controls or change practices, the time for such actions to have in-stream effects on water quality, the costs to implement such actions, and time to work with members of the affected community. EPA recognizes that there is a significant amount of uncertainty regarding how quickly implementation

measures, once installed, will be effective in achieving water quality standards. In some cases, particularly water impaired by point sources where implementation will be accomplished through NPDES modifications, water quality standards may be achieved within months or a few years. For waterbodies impaired by nonpoint sources, where implementation involves significant habitat restoration or reforestation, water quality standards may not be met for decades.

Accordingly, EPA has selected 10 years as a reasonable point between these extremes. If a State, Territory, or authorized Tribe expects that it will take longer than 10 years to achieve water quality standards it must explain why attainment within 10 years is not practicable.

In reviewing State, Territory, and authorized Tribe implementation plans, and particularly those components whose flexibility is conditioned upon a finding of "reasonableness" or "practicability", EPA is not required to, and does not intend to, engage in a detailed effort at second-guessing the judgment of a State, Territory, or authorized Tribe as to whether these conditions are met. Instead, EPA will review the State's, Territory's, or authorized Tribe's submission to determine whether the State, Territory, and authorized Tribe has provided a demonstration of "reasonableness" or "practicability", where such is required. If so, that will be the end of the inquiry. A State's, Territory's, or authorized Tribe's demonstration need not be extremely detailed to pass scrutiny. For example, it would be sufficient to demonstrate that the five-year implementation schedule requirement of § 130.32(c)(2)(iii) is not practicable by stating that section 319 grant money and other sources of funds to implement the relevant management measures will not be available until year six because the next five years worth of funds are already earmarked for other TMDL implementation.

Q. Total Maximum Daily Thermal Load (§ 130.32(d))

What did EPA propose? EPA proposed § 130.33(c) to restate the existing requirements at § 130.7(c)(2) in plain English format. This subsection requires that States, Territories, and authorized Tribes develop total maximum daily thermal loads (TMDTLs) for thermal discharges from point sources into thermally impaired waterbodies.

What comments did EPA receive? EPA received numerous comments on this subsection. Several comments

suggested that the balanced indigenous population (BIP) of shellfish, fish and wildlife standard should be used for both point and nonpoint sources, instead of just point sources. These commenters expressed the belief that Congress intended section 303(d)(1)(D) to apply to all discharges of heat and not just point sources. Other commenters suggested that this subsection was unnecessary, as these discharges are already regulated through NPDES permits. These commenters expressed a belief that most NPDES facilities discharging heat are already regulated based on a BIP standard, and that a thermal TMDL would not result in any greater reductions in heat discharged into the waterbody. One comment suggested that the subsection should recognize that calculations to determine the total maximum daily heat input should be focused on the waterbodies identified on the section 303(d) list as being impaired by point source thermal discharges.

What is EPA promulgating today? EPA is promulgating § 130.32(d) with three revisions. First, EPA is deleting the phrase “from point sources” because this phrase is redundant. Earlier in today’s preamble, EPA explained that its definition of “thermal discharge” is limited to a point source discharge of heat. Thus, the phrase “from point sources” that modifies the phrase “thermal discharges” in § 130.32(d) is redundant. Second, EPA made the revision suggested by comments to clarify that the TMDTL calculations apply to waterbodies that are listed as impaired by thermal discharges. Third, EPA is clarifying that TMDTLs must meet the requirements of § 130.32(b) and (c). EPA recognizes that the proposal was unclear regarding whether the elements of a TMDL also apply to TMDTLs. EPA intended that they do. Moreover, the purpose of § 130.32(d) is to explain that TMDTLs are designed to achieve a balanced indigenous population of shellfish, fish, and wildlife instead of attaining the water quality criterion for temperature.

EPA declines to apply the BIP standard to TMDLs established for waterbodies impaired only by nonpoint sources of thermal loading. As discussed in the preamble to the proposed rule, EPA believes that section 303(d)(1)(B) and (D) applies the BIP standard only to thermal discharges from point sources. (64 FR 46017, August 23, 1999).

EPA also rejects the suggestions that § 130.32(d) be deleted because thermal discharges are already regulated through NPDES permits. Not all NPDES regulated discharges have permits that

contain effluent limits for heat. For some discharges on thermally impaired waterbodies there may, therefore, be a need to develop thermal TMDLs to address for the first time impairments by thermal discharges. EPA recognizes that, where an NPDES regulated facility has obtained a section 316(a) variance from thermal water quality standards, the facility already is required to discharge at a level based on a BIP standard. However, this is no different than the situation where a point source discharging nitrogen is also regulated by an NPDES permit with effluent limitations based on the applicable water quality standard. Section 303(d) requires TMDLs and TMDTLs in both situations.

R. How Must TMDLs Take Into Account Endangered and Threatened Species (§ 130.32(e))

What did EPA propose? EPA proposed to include language at § 130.33(e) to explain that TMDLs must not be likely to jeopardize the continued existence of an endangered or threatened species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of its designated critical habitat. In practice, EPA believes it would be highly unlikely TMDL activities could jeopardize listed species, since the TMDL program will result in substantial improvements in water quality, to the benefit of all water-dependent species.

What comments did EPA receive? A number of commenters opposed EPA’s proposal. Grounds for these objections include allegations that EPA lacks authority to impose such a requirement, and that EPA is attempting to shift the burden of compliance with the Endangered Species Act away from EPA and to the States.

What is EPA promulgating today? EPA is promulgating this section as proposed. Today’s rule provides a framework for the public, States, Territories and authorized Tribes and other Federal agencies to recognize and account for the effects of lists and TMDLs on endangered species.

The CWA provides ample authority for EPA to include this requirement. This requirement is consistent with the goals of restoring and maintaining the biological integrity of the nation’s waters and protection of fish, shellfish and wildlife. See CWA section 101(a). Furthermore, the CWA requires that TMDLs be established at a level necessary to implement applicable water quality standards, and that standards consider propagation of fish and wildlife. See CWA sections

303(d)(1)(C) and 303(c)(2)(A). This is adequate authority to include a regulatory requirement designed to protect endangered or threatened species. See *American Iron & Steel Institute v. EPA*, 115 F.3d 979, 1003 (D.C. Cir. 1997). Although EPA does intend to require State, Territory, or authorized Tribe TMDL submissions to adhere to this provision, it is not EPA’s intent to divest itself of any duty to comply with the ESA. Where the ESA imposes duties upon EPA, the Agency intends to comply with those requirements.

S. How are TMDLs Expressed? (§ 130.33)

What did EPA propose? EPA proposed at § 130.34 specific requirements regarding how TMDLs may be expressed. First, EPA clarified that all TMDLs must contain an expression of the pollutant load or load reduction necessary to assure that the waterbody will attain and maintain water quality standards. This includes aquatic and riparian habitats, and biological, channel, geomorphological, or other appropriate conditions that represent attainment or maintenance of the water quality standard. In these instances, the TMDL will contain the wasteload and load allocations necessary to maintain these conditions.

EPA also proposed that States, Territories, and authorized Tribes may use one of four approaches when expressing a TMDL. First, the TMDL could be expressed as the pollutant load that ensures that the waterbody does not exceed water quality standards. Second, the TMDL could be expressed as the pollutant load reduction that attains or maintains water quality standards. Third, the TMDL could be expressed as the pollutant load or load reduction that attains or maintains aquatic, riparian, biological, channel, or geomorphological measures so that water quality standards are attained and maintained. Fourth, the TMDL could be expressed as the pollutant load or load reduction that results from modifying a characteristic of the waterbody such that water quality standards are attained or maintained. EPA made this proposal to allow States, Territories, and authorized Tribes to express TMDLs in terms that are appropriate to the characteristics of the waterbody and pollutant combination. Finally, EPA proposed that TMDLs may, where appropriate, be expressed in other than daily terms, e.g., weekly, monthly, seasonal, or annual, as needed, to ensure that the TMDL attains and maintains water quality standards. EPA made this proposal because EPA has found through the practice of

establishing TMDLs that for some pollutants and their applicable standards the concept of a "daily" load is simply not a technically appropriate way of expressing a TMDL in a manner necessary to implement water quality standards. In the preamble, EPA provided examples of three situations where a seasonal or average loading was more appropriate than a daily loading. (64 FR 46031, August 23, 1999). EPA believes that allowing flexibility in expressing the TMDL to reflect the environmental realities of the pollutant and waterbody better allows TMDLs to achieve the Congressional goal of establishing TMDLs at a "level necessary to implement the applicable water quality standards."

What comments did EPA receive?

EPA received many comments specific to this section. Most comments focused on the legal and technical issues pertaining to expressing TMDLs as other than a daily load. Some comments expressed support for the flexibility to express TMDLs as daily, monthly, seasonal, or annual loads where appropriate, and believed this would allow TMDLs to better address nonpoint sources. Many comments expressed concerns that use of other than daily loads would allow for excessive loadings over short time periods. When averaged with periods of no loading, these short-term loads could cause the water quality standard to be exceeded. A number of comments stated that only daily loads are permissible under the CWA, including for nonpoint source loads. Other comments expressed the view that the need to use any expression other than a daily value is an indication that the pollutant is not suitable for TMDL calculations.

Some comments expressed concern that proposed § 130.34 implied that a TMDL was no longer a quantitative expression of the load necessary to attain water quality standards. Other comments expressed confusion whether the language of § 130.34(b) allowed TMDLs to be expressed as load reductions or not. A number of comments expressed concern that, because TMDLs are now required to be quantitative expressions of loads or load reductions, this removes the current flexibility to express TMDLs as measures of water quality improvement that do not directly express the load reductions. These comments supported retaining the current rule language.

Some comments expressed support for TMDLs addressing riparian and aquatic habitat, and biological, channel, geomorphological, or other appropriate conditions. Other comments expressed doubt that TMDLs could quantify the

relationships between pollutant loads and these expressions of water quality standards. Further comments expressed the belief that TMDLs should only address numeric (and not narrative) criteria in water quality standards.

What is EPA promulgating today?

Based on its analysis of the many comments received on this section, EPA is making the following changes to the proposed rule language. First, EPA is revising proposed § 130.34(a) to add the word "quantitative" to modify the phrase "expression of the pollutant load." EPA is making this change to respond to the concerns that the TMDL was no longer a quantification of the load necessary to attain water quality standards. As explained in the preambles to both the proposed and final rules, the purpose of the TMDL is to attain and maintain water quality standards, and the purpose of the wasteload and load allocations is to identify the loadings needed to attain and maintain these standards. EPA agrees there should be no confusion as to this requirement, and thus is making this change to the final rule.

Second, EPA is changing the word "represent" to "result in" in proposed § 130.34(a). EPA made this change based on concerns expressed in comments that loadings or loading reductions do not represent water quality standards but rather result in the attaining and maintaining of water quality standards. EPA agrees with the commenters that the words "represent" is imprecise.

Third, EPA is not promulgating the language of proposed § 130.34(b) that recognized that both the pollutant load and load reductions may be expressed as other than a daily value as appropriate to the characteristics of the waterbody and pollutant. This language allowed TMDLs to be expressed as monthly, seasonal, and annual averages as appropriate to the characteristics of the waterbody. EPA has decided not to include this provision in the final rule because EPA is concerned that it could be used to justify some TMDLs that do not in fact attain and maintain water quality standards in all seasons and for all flows. Instead, EPA is retaining a sentence it promulgated in the 1985 rule in the definition of a TMDL that speaks to how a TMDL can be expressed. That sentence says that TMDLs may be expressed " * * * in terms of either mass per time, toxicity, or other appropriate measure." EPA continues to believe that in some situations, it is reasonable to authorize TMDLs that are expressed in other than daily terms. As discussed in the August 1999 preamble, to conclude otherwise could frustrate the Congressional goal of establishing

TMDLs at a level necessary to implement the applicable water quality standards. EPA disagrees with the comments asserting that only daily loads are permissible under the CWA. (64 FR 46031, August 23, 1999). The CWA does not define a TMDL. Nor does the Act specify how a TMDL may or should be expressed. Consequently, the Act does not mandate that a TMDL be expressed as a daily load, and does not require EPA to disapprove TMDLs expressed as daily loads. Rather, this matter is left to EPA's discretion because where a statute is silent on a specific issue, EPA's interpretive regulations are entitled to controlling weight. EPA's previous regulations at § 130.2(i) and current regulations at § 130.33(b)(5) expressly provide that a TMDL may be expressed in terms of either mass per time, toxicity, or other appropriate measure. Furthermore, EPA interprets its regulations to permit TMDLs to be expressed in terms other than daily loads as long as compliance with the applicable water quality standard is assured.

EPA acknowledges the concern that use of other than daily loads could allow for excessive loadings over short time periods that, when averaged with periods of no loading, might satisfy the wasteload and load allocations, but would cause the water quality standard to be exceeded. However, EPA continues to believe that there are situations where other than a daily load is appropriate to ensure that water quality standards are attained and maintained. Where other than a daily load is necessary to address relevant factors, such as the variability of nonpoint sources, the averaging period of the water quality standard or the physical size and hydraulic nature of the waterbody, EPA expects that the State, Territory, or authorized Tribe will use the most appropriate expression of the load amenable to those characteristics. To help ensure that this flexibility is appropriately used, EPA, in its review of the TMDL, will look for an explanation by the State, Territory, or authorized Tribe as to the reasons why it is appropriate to express the TMDL in terms other than a daily load. The TMDL documentation will need to show that the resulting allocations are sufficient to eliminate the impairment, addressing all aspects of the water quality standard and the adverse effects of the pollutant in question. For example, the documentation would discuss, where appropriate, the difference between acute short-term impacts during storm flows and long-term effects of the pollutants in the

system over time, or the difference between short-term changes in water column concentrations and the long-term impacts of pollutant concentrations in sediments and biota. If a TMDL for a particular pollutant contained an expression other than a daily load, and the situation indicated that expressing the TMDL as a daily load is a necessity to attain and maintain water quality standards, EPA would disapprove the TMDL as insufficient to attain and maintain water quality standards.

EPA does not interpret the final rule to require that TMDLs always be expressed as the load or load reduction of the pollutant causing the impairment. The final rule at § 130.32(b)(5) preserves the flexibility to express the TMDL as a quantitative expression of a modification to a characteristic of the waterbody that results in a certain load or load reduction. In these situations, the TMDL is required to identify the pollutant load present in the waterbody (§ 130.32(b)(3)) and the deviation from that load necessary to attain and maintain water quality standards (§ 130.32(b)(4)). However, the allocations and implementation plan monitoring measures could be expressed in terms of a surrogate measure of the necessary load reduction. In these situations, the relationship between a surrogate measure and the pollutant load should be clearly described in the TMDL documentation. For example, a TMDL that addresses exceedances of temperature criteria because of a denuded riparian corridor is ultimately expressed in terms of heat units, *e.g.*, BTU or calories per day, over time. However, the environmental measure that might be most appropriate for implementation plan monitoring purposes is temperature (degrees); for implementation plan management measures it might be miles or acres of riparian zone restored. These surrogate measures must correlate to their ability to reflect a reduction of heat load and decrease in water temperature. In this example, the TMDL documentation would calculate the total heat load that achieves either the temperature water quality standard, or a balanced, indigenous population of fish, shellfish and wildlife, whichever standard is applicable for the waterbody. The TMDL would then show how that heat load would be achieved by a quantified increase in forestation (the appropriate surrogate measure) designed to increase shading of the waterbody. In this way, the environmental measures of ambient temperature and riparian characteristics

are quantitatively related to the thermal load expressed in the TMDL.

Other comments expressed doubt that TMDLs could quantify the relationships between pollutant loads and expressions of aquatic or riparian habitat health, and biological, channel, geomorphological, or other appropriate conditions in water quality standards. EPA recognizes there are many causes of elevated pollutants in surface waterbodies. Some situations do not involve a discharge of pollutants, but nevertheless affect the amount of a pollutant load in the waterbody. In these instances, the final rule language requires the State, Territory, or authorized Tribe to develop a TMDL for whatever pollutant (including heat) that causes the waterbody to exceed the water quality standard. For example, where the impairment of an aquatic habitat is caused by excessive sediment as a result of landslides or bank erosion, EPA expects that the TMDL would be established for the pollutant sediment. Another example is where an aquatic habitat is stressed by excessive temperature as a result of a denuded riparian habitat. In this instance, EPA expects the TMDL would be established for the pollutant heat. EPA has developed guidance on how to address impairments due to sediment, which was the most frequent cause of impairment mentioned in the States' 1998 section 303(d) lists. See "Protocol for Developing Sediment TMDLs," EPA 841-B-99-004, October 1999.

EPA declines changing the proposal to provide in the final rule that TMDLs need address only impairments of numeric criteria in water quality standards. EPA's long standing policy has been that narrative criteria apply to all designated uses at all flows and are a necessary component of State water quality standards. See section 303(c)(2)(A) of the CWA; and the Water Quality Standards Handbook, EPA-823-B-94-005a, August 1994, page 3-24. Narrative criteria descriptively accomplish what numeric criteria account for quantitatively. Narrative criteria are descriptions of the conditions of the waterbody necessary to attain and maintain its designated use, while numeric criteria are values expressed as levels, concentrations, toxicity units or other measures which quantitatively define the permissible level of protection. Thus, narrative water quality criteria establish the basic foundation for attainment of designated uses while numeric water quality criteria provide a specific quantitative translation of the necessary level of protection. In short, numeric criteria are specific, quantified expressions of the

narrative criteria. States, Territories and authorized Tribes adopt translator procedures by which to derive a quantified numeric interpretation of the narrative criterion. Such procedures must be scientifically defensible, and are also subject to EPA review and approval. EPA recognizes that narrative water quality criteria are not expressed as numbers and thus are not directly amenable to TMDL calculations. However, as expressed in EPA guidance, a State, Territory, authorized Tribe, or EPA can quantify narrative criteria for use on regulatory actions. See "Technical Support Document for Water Quality-based Toxics Control," EPA/505/2-90/001, March 1991; § 122.44(d)(1); "Guidance for Water-Quality-based Decisions: The TMDL Process," EPA 440-4-91-001, 1991; § 132 Appendix F Procedure 3 [which speaks to "values" which are that rule's equivalent to quantifications of narrative criteria]. Therefore, EPA continues to believe that TMDLs can be calculated based on narrative criteria where those criteria can be quantified.

CWA section 303 directs States, with oversight by EPA, to adopt water quality standards to protect the public health and welfare, enhance the quality of water and serve the purposes of the CWA. Under section 303, States, Territories, and authorized Tribes are required to develop water quality standards for waters of the United States within the State. Section 303(c) provides that water quality standards shall include the designated use or uses to be made of the water. EPA regulations implementing section 303(c) are published at Part 131. Under these rules, the minimum elements that must be included in a State's water quality standards include use designations for all water bodies in the State, water quality criteria sufficient to protect those use designations, and an antidegradation policy. Section 131.10 requires States and authorized Tribes to adopt appropriate uses to be achieved and protected. In no case can they adopt waste transport or assimilation as a use for any waters. EPA has in the past, and may in the future, promulgate designated uses for State waters where such action is necessary to meet the requirements of the CWA and the implementing federal regulations.

EPA's policy is that, because designated or existing uses of a waterbody are part of the water quality standards, they are also an appropriate basis for determining an impairment of that waterbody. All of the water quality protections established by the CWA follow from the waterbody's use—established, protected and maintained

under the authorities of section 303(c) of the CWA. Thus, designated uses establish the fundamental basis for determining whether the water quality standards of a waterbody are attained.

In certain circumstances it is possible that water quality criteria can be met, and the designated uses still not achieved. For example, factors such as food web structure, the concentration of dissolved organic carbon in the ambient water, and accumulations in the sediment may effect uptake of mercury into fish flesh on a site specific basis. In these circumstances, EPA recommends States, Territories, and authorized Tribes translate the applicable narrative criteria on a site specific basis, or adopt site specific numeric criteria, to protect designated uses. However, ultimately, the final determination of whether the water quality standard is attained is made by determining the attainment of the designated use.

T. What Actions Must EPA Take on TMDLs That are Submitted for Review? (§ 130.34)

What did EPA propose? In proposed § 130.35, EPA included several minor changes to its current regulatory submission and approval requirements for TMDLs to clarify how the approval process would work. The proposal provided that EPA would only approve a TMDL submission that included all required minimum elements. The proposal would have continued the requirements of the current regulations that when EPA establishes a TMDL, it would send it to the State, Territory, or authorized Tribe for incorporation into the water quality management plan. EPA also proposed to continue the requirements of the current regulations that, when EPA establishes a TMDL, it requests public comment on the TMDL for at least 30 days following its establishment. The proposal also would have added new requirements regarding how EPA would provide public notice and revise TMDLs it establishes based on the public comment it receives.

What comments did EPA receive? EPA received comments regarding the criteria it will use to review TMDLs. Some comments suggested that EPA's review should focus only on whether the TMDL included all required elements, and that EPA must approve any TMDL received if it contained all elements. In contrast, other comments suggested that EPA should review the elements for their consistency with the substantive requirements of this subpart, including whether the TMDL is set at a level sufficient to attain and maintain water quality standards. Further comments again expressed

belief that the CWA only allows EPA to review the total load calculated for a waterbody and nothing else. (Today's preamble discusses this issue in section II.A.1.e.)

EPA also received comments about the timing of its actions. Many comments requested an automatic approval of TMDLs if EPA does not act to approve or disapprove the TMDLs within 30 days, or fails to send the State, Territory, or authorized Tribe comments on the TMDL. These comments expressed concern that EPA will not be able to take timely action on all TMDLs and that the new rules will make EPA's review take even longer.

EPA also received comments about its process for disapproving and establishing TMDLs. Several comments expressed concern that the proposal did not commit EPA to take action as required by the CWA. These comments suggested that EPA use the word "must" or "shall" where ever the section spoke to statutory obligations. Many comments requested that EPA provide an appeal process, public hearing, or consultation with States, Territories and authorized Tribes on disapproved TMDLs. Other comments requested that EPA explain to States, Territories and authorized Tribes and the public why it disapproved any TMDL. These comments generally expressed concern that EPA might make arbitrary decisions to disapprove TMDLs. Some comments expressed the view that EPA must follow the same public notice process as States, Territories and authorized Tribes when EPA establishes a TMDL.

EPA also received comments about the adoption of TMDLs into water quality management plans. Some comments requested that EPA establish a deadline by which States, Territories, and authorized Tribes must adopt TMDLs into their plans. Other comments expressed a belief that a TMDL is not effective until after a State, Territory, or authorized Tribe adopts it into its water quality management plan.

What is EPA promulgating today? Based on its analysis of the many comments received, EPA has revised this section, now numbered as § 130.34. First, EPA is deleting proposed paragraph § 130.35(a) because it was duplicative of the requirements of proposed paragraph § 130.35(b). Section § 130.35(a) would have required that EPA approve TMDLs that included the elements identified in proposed § 130.33(b), whereas proposed § 130.35(b) would have required that EPA approve TMDLs that met the requirements of proposed §§ 130.32, 130.33, and 130.34, i.e., established in accordance with the schedule, including

the elements required by § 130.33(b) and appropriately expressed. EPA agrees with commenters that the review criterion in proposed § 130.35(a) was included within proposed § 130.35(b). Therefore, EPA is not including the language for proposed § 130.35(a) in the final rule.

The final regulations at § 130.34(a) provide that EPA will approve TMDLs if they are established for the appropriate waterbody/pollutant combination as required by § 130.31, include all elements prescribed by § 130.32, and are expressed in accordance with § 130.33. EPA will disapprove any TMDL submitted by a State, Territory, or authorized Tribe that does not include all elements of § 130.32(b) or fulfill the substantive requirements of §§ 130.31, 130.32, and 130.33. EPA will work with States, Territories, and authorized Tribes, including providing comments on TMDLs submitted to it in draft form, to help ensure that the TMDLs that EPA receives are approvable. EPA considers all elements of § 130.32(b) and the substantive requirements of §§ 130.31, 130.32, and 130.33 as necessary for determining whether a TMDL, when implemented, will attain and maintain water quality standards.

EPA declines to provide that TMDLs shall be deemed automatically fully or conditionally approved at the end of the 30-day review period if EPA has not acted. EPA acknowledges commenters' concerns regarding the timeliness of EPA's TMDL approval actions. However, an automatic full or conditional approval of a State's, Territory's or authorized Tribe's TMDL submission upon expiration of the 30-day review period is not consistent with section 303 of the CWA. Section 303(d) requires EPA to approve or disapprove a submitted TMDL. EPA has the responsibility to determine that submitted TMDLs fulfill the requirements of the CWA and these implementing regulations. EPA declines to adopt an approach which would result in automatic approval actions when EPA has not evaluated the sufficiency of the TMDL with respect to the requirements of section 303(d). As previously discussed, EPA expects to share comments and information with States, Territories and authorized Tribes on draft TMDLs submitted to EPA for informal review. EPA believes that such information sharing will help assure approvable TMDLs and will enable EPA to complete its review within the 30-day statutory time frame.

As requested by comments, EPA is clarifying what actions EPA is obligated to take in its decisions. Therefore, the

final rule uses the word “must” to represent EPA’s statutory obligations to either approve or disapprove and establish a TMDL. The final rule also uses the word “must” with regards to EPA’s public notice requirements when EPA disapproves and establishes a TMDL.

EPA declines to establish in the final rule an appeal or consultation process for States, Territories, and authorized Tribes when EPA disapproves their TMDLs. Because section 303(d) only allows EPA 30 days to establish a replacement TMDL after EPA disapproves one, EPA does not have sufficient time to allow for an appeal or consultation process. Also, the 30-day period for EPA to issue an order establishing a TMDL and the minimum 30-day public comment period on the TMDL allows time during which the State and EPA can consult on the new TMDL. If during that time, the State decided to adopt and EPA approved a TMDL meeting EPA’s objectives, EPA would withdraw its TMDL. As previously discussed, EPA expects that sharing information with States, Territories, and authorized Tribes on TMDLs being drafted will help EPA and States, Territories, and authorized Tribes resolve differences over TMDLs before they are submitted.

EPA agrees that it needs to describe in the administrative record of its TMDL disapproval decisions the reasons for the disapproval and make that information available to States, Territories, authorized Tribes, and interested parties. EPA’s public notice requirements at Part 25 describe the process by which EPA generally makes information available and receives public comment. As described later in the preamble, EPA patterned the TMDL public notice requirements on its own Part 25 requirements. EPA also declines to establish a deadline by which States, Territories, and authorized Tribes must adopt TMDLs into their water quality management plans. The CWA does not provide for or require such a deadline. EPA does not believe it is necessary to require adoption of TMDLs in the State’s, Territory’s or authorized Tribe’s plan on a specified schedule once EPA approves or establishes it. A TMDL may be used as a basis for NPDES permits and other implementation actions once EPA approves or establishes it and before it is incorporated into the Water Quality Management Plan. States, Territories and authorized Tribes have different legal requirements for revising their Plans to incorporate TMDLs. EPA believes there is no compelling reason to require States, Territories, and authorized Tribes to revise their

individual requirements solely to assure incorporation of all TMDLs into Water Quality Management Plans by a certain federally-prescribed date.

EPA is also adding § 130.34(b) and (c) to clarify how EPA will provide reasonable assurance when EPA establishes a TMDL. EPA will use its authority to condition CWA grants to the fullest extent practicable and in a manner consistent with the effective operation of clean water programs. For example, EPA may condition section 319 grants such that the funds can only be used to implement management measures in watersheds where EPA has established a TMDL that includes load reductions for nonpoint sources. Similarly, EPA may condition section 106 grants such that the funds for monitoring can only be used to support the monitoring specified in TMDL implementation plans. EPA may also use its voluntary, incentive-based programs to ensure that management measures are funded and implemented. EPA believes this authority to condition grants will generally be the sole or primary basis by which it will demonstrate reasonable assurance for the implementation of load allocations. EPA will also encourage States, Territories, and authorized Tribes to use their own statutory and regulatory authorities. EPA cannot, however, require States, Territories or authorized Tribes to use their statutory and regulatory authorities.

Where necessary, EPA will make use of its other statutory and regulatory authorities to provide reasonable assurance. EPA recognizes that its CWA regulatory authority is primarily limited to the NPDES permit program for point sources. In some cases, EPA may use authorities under section 504 of the CWA to address an “imminent and substantial endangerment to human health or welfare.”

U. How Will EPA Assure That TMDLs Are Established? (§ 130.35)

What did EPA propose? EPA proposed in § 130.36 to codify its authority to establish TMDLs if the State, Territory, or authorized Tribe so requests, or if EPA determines that a State, Territory, or authorized Tribe has not or is not likely to establish TMDLs in accordance with their schedules, or if EPA determines it should establish TMDLs for interstate or boundary waterbodies. EPA made this proposal for a number of reasons. EPA explained that it may be necessary for EPA to establish TMDLs if interstate or international issues and coordination needs require EPA to assume a

leadership role. 64 FR 46037, August 23, 1999.

EPA explained in the preamble that it anticipates that a decision to step in and establish TMDLs would be “rare and based on case specific decisions.” Finally, EPA explained that it may have to exercise its authority to establish TMDLs where the State, Territory, or authorized Tribe requests this support from EPA. As discussed in the preamble, EPA recognizes that this authority to establish TMDLs absent a prior disapproval is not expressly stated in section 303(d). However, EPA explained that such authority is clearly implied in the CWA, is a reasonable interpretation of the Act, has been required of EPA by the courts, and is necessary to accomplish the purposes of the Act. 64 FR 46037, August 23, 1999.

What comments did EPA receive?

EPA received comments about the conditions under which EPA proposed to establish TMDLs. Some comments expressed a belief that EPA must step in when a State, Territory, or authorized Tribe is likely not to or does not establish TMDLs according to its schedule. Others were concerned about the phrase “likely not to” and suggested that EPA establish TMDLs only after a State, Territory, or authorized Tribe fails to do so. Further comments expressed the belief that EPA has no authority to establish TMDLs outside of a disapproval except when a State requests EPA to do so.

EPA received comments about the conditions under which EPA would establish a TMDL for interstate waterbodies. Some comments supported the proposal. Others believed that EPA must establish interstate TMDLs on behalf of the States. Further comments expressed the view that this authority is limited to situations where EPA determines that States, Territories and authorized Tribes are not making progress in establishing TMDLs. More comments expressed the view that this authority is limited to situations where States, Territories and authorized Tribes or interstate commissions ask EPA to establish TMDLs. A few comments rejected EPA’s suggested option to require States, Territories and authorized Tribes jointly to develop interstate TMDLs. Others suggested that EPA’s role is to coordinate with States, Territories and authorized Tribes on interstate TMDLs and not establish them for States, Territories and authorized Tribes.

What is EPA promulgating today? In § 130.36 of the proposal, EPA proposed to codify its authority to establish TMDLs for waterbodies on Part 1 of a list under certain circumstances,

including if EPA determined that a State, Territory, or authorized Tribe had not or was not likely to establish TMDLs consistent with its schedule. In response to comments and to better ensure that TMDLs will be established, EPA has added a new § 130.35 to the final rule which codifies steps EPA will take to implement its authority under section 303(d) to assure that TMDLs are established for listed waters. In addition to “working with” States, Territories, and authorized Tribes to assure establishment in accordance with approved schedules, EPA will ensure that TMDLs are established for States, Territories, and authorized Tribes if they have not made “substantial progress” in establishing TMDLs in accordance with their “approved schedule.” A discussion of what EPA means by “substantial progress” and a more detailed discussion of EPA’s schedule for acting if States, Territories, and authorized Tribes fail to demonstrate “substantial progress” appears below.

As requested by comments, EPA is clarifying that it is obligated to ensure that States, Territories, and authorized Tribes establish TMDLs in accordance with their approved schedules. EPA believes the requirements it is placing on itself to act in § 130.35 are both consistent with CWA section 303(d) as it has been interpreted by a number of courts and a logical outgrowth of the proposal. They are a logical outgrowth in that, in the proposal, EPA clearly noticed its intent to exercise its authority under section 303(d) to step in and establish TMDLs when it determines a State was not likely to do so. In the final rule, EPA is simply clarifying and expanding upon that concept and stating under what specific conditions and upon what schedule EPA will do that. EPA’s decision to codify the circumstances under which it will ensure that TMDLs are established is also consistent with the decisions of a number of courts which have interpreted CWA section 303(d) as placing upon EPA a duty to establish TMDLs where a State, Territory, or authorized Tribe has failed to do so, or in the words of the courts, where a State has made a “constructive submission” of no TMDLs.

EPA is also identifying two ways by which it will assure that all TMDLs are established as planned for in the schedule for TMDLs. First, EPA must work with the State, Territory, or authorized Tribe in establishing TMDLs. EPA may do this by providing technical or financial assistance consistent with EPA’s abilities and resources, or by establishing certain TMDLs upon the

request of the State, Territory, or authorized Tribe. Where a State, Territory, or authorized Tribe has not made substantial progress on establishing a TMDL in accordance with its approved schedule, EPA must ensure that the TMDL is established. EPA does not expect to invoke this authority frequently. Based on its experience to date under court-ordered schedules, EPA believes that the States, Territories, and authorized Tribes will be able to establish most of their TMDLs according to the dates in their schedules.

Today’s final rule also explains how EPA will determine if a State, Territory, or authorized Tribe has made substantial progress in establishing a TMDL. Under § 130.28(c), States, Territories, and authorized Tribes will specify which TMDLs they intend to establish in each one year period. If a State, Territory, or authorized Tribe has not established the TMDL by the end of the one year period within which the TMDL was scheduled to be established, it has not made “substantial progress” as described in today’s rule. At this point, EPA must ensure that the TMDL is established within two years. In a case where EPA develops a TMDL, the Agency expects to publish the TMDL within 2 years. In rare instances, where there is a compelling need for additional time, the Administrator may extend the 2 year period by up to an additional 2 years. The Administrator must publish a description of a decision to provide an extension in the **Federal Register**. If the State, Territory, or authorized Tribe establishes the “missed” TMDL before EPA establishes it pursuant to this section, EPA must review and either approve or disapprove that TMDL pursuant to section 303(d), and if approved at that time its obligation to establish the TMDL expires. EPA will also look at the stage of development of a TMDL in comparison to the schedule in determining if a State, Territory, or authorized Tribe is making substantial progress. Where the State, Territory, or authorized Tribe is close to completing the TMDL at the time called for by the schedule, EPA will interpret this as substantial progress.

As discussed in the August 1999 preamble, EPA has the authority to establish TMDLs even when it has not disapproved a State, Territorial, or authorized Tribal submission. 64 FR 46037–46038, August 23, 1999. EPA recognizes the merit, in some instances, for it to take the lead in establishing TMDLs for interstate and boundary waterbodies and expects to exercise this authority primarily for interstate waterbodies. For this reason, EPA is including in the final rule a provision

allowing EPA the discretion to establish TMDLs for interstate or boundary waters. Boundary waters are those rivers, streams and lakes which form part of the boundary between States, Territories and Indian Country. These waters present special problems because, in many instances, the waterbody is governed by two or more potentially differing sets of water quality standards. Similar problems may be present for interstate water which—rather than forming a jurisdictional boundary—flow out of one jurisdiction and into another. In exercising this authority, EPA will encourage States, Territories and authorized Tribes to take the lead in developing TMDLs for such waterbodies because EPA interprets the CWA as giving States, Territories and authorized Tribes the lead responsibility for doing so. EPA also strongly encourages States, Territories and authorized Tribes to work with interstate river basin and other commissions, where appropriate, when establishing TMDLs for interstate or boundary waters. These commissions are uniquely positioned, by virtue of their multi-state membership and technical expertise, to assist EPA and the States in establishing TMDLs for such waters.

EPA anticipates at least two instances in which it might need to exercise its authority to establish interstate and boundary water TMDLs. The first is when the States, Territories and authorized Tribes have not made substantial progress in establishing interstate and boundary water TMDLs according to their schedules. The second is where individual adjacent State schedules are so different with respect to interstate or boundary waters that they may defeat the ability of the States, Territories and authorized Tribes to work together to establish an interstate or boundary water TMDL. EPA believes the final rule language should allow EPA the flexibility to establish TMDLs for interstate and boundary waters under such circumstances. Finally, EPA is not including in the final rule a requirement that States, Territories and authorized Tribes work together jointly to establish TMDLs on interstate waters. Instead, EPA will continue to serve as a facilitator to help States, Territories and authorized Tribes establish interstate TMDLs, and EPA will use its authority when necessary to ensure that interstate TMDLs are established.

EPA is also adding a statement at § 130.35(b)(2) that EPA may establish TMDLs for waterbodies to implement Federal water quality standards. As previously discussed in today’s

preamble, EPA recognizes that there are some impaired waterbodies outside the jurisdiction of States, Territories, and authorized Tribes. Where EPA has established Federal water quality standards for these waterbodies, such as waterbodies located on tribal lands where the Tribe has yet to be authorized under section 303, EPA believes it has the authority to also establish TMDLs for the reasons given above.

V. What Public Participation Requirements Apply to the Lists and TMDLs? (§ 130.36)

What did EPA propose? EPA proposed a number of specific requirements for public participation. EPA proposed to require that States, Territories and authorized Tribes provide the public with at least 30 days to review and comment on all aspects of the list, the priority ranking, the schedule for developing TMDLs, and the TMDLs themselves prior to their submission to EPA. EPA also proposed that, at the time States, Territories, and authorized Tribes submit their list, schedule or TMDLs to EPA, they provide EPA with a written summary of any public comments received during the public comment period and their response to such comments. In addition, EPA proposed to require States, Territories, and authorized Tribes to send, at the time of public notice, copies of lists, priority rankings, TMDL schedules and TMDLs to the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (the Services), where appropriate (e.g., coastal areas). The proposal also provided that, if requested, EPA would send this information to the Services on behalf of the State, Territory, or authorized Tribe.

As proposed, the rule also encouraged States, Territories, and authorized Tribes to establish processes with both Services to provide for the early identification and resolution of threatened and endangered species issues as they may relate to lists of impaired waterbodies, priority rankings, schedules, and TMDLs. The proposal also would have required States, Territories, and authorized Tribes to consider any comments received from the Services prior to the submission of their lists of impaired or threatened waterbodies, priority rankings, schedules, and TMDLs to EPA. EPA proposed these provisions to help ensure timely input from the wildlife agencies as lists and TMDLs are being developed.

What comments did EPA receive? EPA received a number of comments specific to the public participation process. Most comments supported the

inclusion of public participation requirements. Many comments, however, stated that a 30-day period was too short. A number of comments suggested that the public comment period should be 60 days or longer to facilitate better understanding of the complex issues related to lists and TMDLs. Some commenters recommended specific requirements for the purpose of ensuring notice to interested parties and incorporation of their comments on listing and TMDL decisions. Most comments which addressed this issue recommended that EPA pattern the public notice requirement after those for NPDES permits. Specifically, commenters asked that States, Territories and authorized Tribes be required to establish and maintain mailing lists. Other commenters recommended that EPA be subject to the same public participation requirements as proposed for States, Territories, and authorized Tribes. Further comments suggested that any action to remove a waterbody from a section 303(d) list be subject to the same public participation process as the listing of a waterbody. Many comments objected to the detailed requirements governing how States, Territories and authorized Tribes should address comments they receive and the amount of information about those comments, including responses, they should supply to EPA. Commenters also expressed concern that the proposal gave special notice consideration to the Services, and thus seemed to transfer EPA's obligations under the Endangered Species Act to States, Territories, and authorized Tribes.

What is EPA promulgating today? After carefully considering the comments received on the public participation requirements, EPA is today promulgating the requirements as proposed with a few changes. EPA is making conforming changes throughout the section to reflect the fact, as discussed earlier, that the list of impaired waterbodies includes a prioritized schedule for establishing TMDLs.

The final rule maintains the requirement for a minimum 30-day comment period on lists and TMDLs. EPA recognizes that decisions on lists and TMDLs can sometimes benefit from a significant amount of technical information and analysis related to decisions on lists, rankings, schedules, and TMDLs. States, Territories and authorized Tribes may in such circumstances find a need to allow for longer than 30-day comment periods on lists and TMDLs. However, the rule as proposed and promulgated today

specifies 30 days as the minimum comment period. In some instances, particularly where the issues and analyses related to a TMDL are not complex, States, Territories, and authorized Tribes should find that a 30-day comment period is adequate. The final rule, however, gives States, Territories, and authorized Tribes the flexibility to increase their comment periods as appropriate.

EPA is also adding language in the final rule also to encourage States, Territories, and authorized Tribes to notify directly those parties who submit a written request for notification. EPA received a number of comments suggesting that direct notification be a requirement in the same way that authorized State NPDES programs are required to directly notify parties that request such notice. EPA does not believe that establishment of TMDLs is entirely comparable to issuance of an NPDES permit for notice purposes (e.g. the number of potentially affected parties may be much larger for a TMDL). EPA however, is including in the final regulation a recommendation that States, Territories and authorized Tribes provide direct notification to parties that request it.

EPA is not including in this section of the final rule public participation requirements for EPA. Today's final rule at § 130.34 includes public participation requirements for EPA regarding disapproval and establishment of TMDLs. In addition, EPA's rules at Part 25 already provide general public participation guidance and requirements for EPA, which include notice to parties that request notice, publication of notice in a newspaper of general circulation, and response to significant comments.

EPA recognizes the importance of public participation on all aspects of section 303(d) decisions, including decisions to remove a waterbody/pollutant combination from the section 303(d) list. EPA has added provisions in the final rule at § 130.29(a) to require that all actions to add or remove waterbodies from the list follow the public participation requirements. In this way, the public is kept informed as to the nature and reasons for any changes to the section 303(d) list.

EPA agrees with the comments which suggested that the proposal was too detailed regarding how States, Territories and authorized Tribes should respond to comments. As suggested by some comments, EPA has reviewed the rules pertaining to NPDES permitting and EPA's rules at Part 25 and has simplified the response to comments requirements for the final rule. The final

rule now requires a response to "all significant comments" instead of "all comments," as proposed. The final rule no longer includes specific requirements as to what is to be included in the response to comments document. EPA believes this change will allow States, Territories, and authorized Tribes the flexibility they need when addressing public comments. EPA's public participation rules for rulemaking and permitting at Part 25 require EPA to respond to significant comments and to include at a minimum, a summary of public views, significant comments, criticisms and suggestions, and set forth the Agency's specific responses in terms of modification of the proposed action or an explanation for rejection of proposals made by the public (§ 25.8). EPA is persuaded by the comments that States, Territories and authorized Tribes should not be held to a higher standard than EPA. Pursuant to the final rule, States, Territories and authorized Tribes need only consider significant comments and indicate how they were addressed in the final action or why they were not addressed.

The rule recognizes that the Fish and Wildlife Service and the National Marine Fisheries Service have an interest in a State's, Territory's or authorized Tribe's list and TMDLs. By including the provisions of § 130.36(c), EPA is not giving the Services greater opportunity to receive information or to comment than is afforded anyone else. Nor is EPA attempting to transfer its obligations under the Endangered Species Act to States, Territories or authorized Tribes. The provisions of § 130.36(c)(1) require States, Territories, and authorized Tribes to provide the Services with copies of lists, including prioritized schedules and TMDLs. However, under the public participation requirements of § 130.36(a), any interested party may also request similar access to this information by making a written request to the State for direct notification. EPA is promulgating § 130.36(c)(1) because the Services have expressed to EPA an interest in reviewing section 303(d) lists and TMDLs. In recognition of the potential burdens on the States which such information sharing might impose, EPA agreed it would undertake this information sharing responsibility with the Services if requested by a State, Territory, or authorized Tribe.

The provisions of § 130.36(c)(2) encourage, but do not require, States, Territories, and authorized Tribes to engage the Services in a dialogue related to Endangered Species Act concerns. EPA believes that it can reduce the

number of times it may need to disapprove a list or TMDL based on endangered species concerns if the States, Territories, and authorized Tribes communicate with the Services early in the process of developing lists and TMDLs. For this reason, EPA is including in the final rule a recommendation that States, Territories and authorized Tribes establish processes with the Services that will provide for the early identification and resolution of their concerns as they relate to lists and TMDLs. States, Territories and authorized Tribes are not required to establish such a process, but may find it advantageous to do so.

Section 130.36(c)(3) requires States, Territories, and authorized Tribes to consider comments from the Services and EPA in the same way that § 130.36(b) requires States, Territories, and authorized Tribes to provide a response to significant comments and an explanation of how those comments were addressed in the final action or why they were not addressed. Section 130.36(c)(3) does not require States, Territories, and authorized Tribes to agree with or adopt comments or recommendations from EPA and the Services; however, it does require an explanation of how these comments were considered in the final decision. This is the standard set by § 130.36(b) for all comments received by a State, Territory, or authorized Tribe.

The provisions of § 130.36(d) recognize that EPA will consider the comments of the Services when EPA reviews lists and TMDLs. EPA does not believe that this provision provides the Services with any greater access to the decision maker than other commenters. Rather, this provision alerts States, Territories, and authorized Tribes that EPA will consider the comments of the Services and how those comments were addressed.

W. What is the Effect of This Rule on TMDLs Established When the Rule is First Implemented? (§ 130.37)

What did EPA propose? EPA proposed a transitional period for implementing the TMDL requirements of the new rule. Specifically, EPA proposed that it would approve any TMDL submitted to it for review within 12 months of the final rule's effective date if it met either the pre-promulgation requirements in § 130.7 or the post-promulgation requirements in §§ 130.31, 130.32 and 130.33. EPA also proposed that when EPA establishes TMDLs within 12 months of the rule's effective date, EPA would use either the § 130.7 requirements or the new requirements in proposed §§ 130.31,

130.32 and 130.33. EPA proposed this transitional period to give States, Territories, authorized Tribes and EPA the security of knowing they could develop TMDLs prior to promulgation of the new rules without them later being determined inadequate as a result of the adoption of the new rule. In this way, States, Territories, authorized Tribes and EPA would not delay work towards establishing TMDLs until after the final rule was published. Also, EPA requested comment on whether the new TMDL requirements would affect the ability of States, Territories, or authorized Tribes to establish TMDLs on a schedule consistent with consent decree or settlement agreement schedules, and if so, how to address the issue.

What comments did EPA receive?

EPA received a number of comments specific to the transitional period and actions EPA should take to facilitate establishing TMDLs in accordance with schedules in consent decrees and settlement agreements. Most comments supported the transitional period and many supported a period longer than 12 months. Some comments requested that some TMDLs be developed under the current requirements for "good cause." Two comments suggested no transitional period, with one suggesting that States, Territories, and authorized Tribes be allowed to submit implementation plans no more than six months after submitting the other parts of the TMDL. EPA also received comments suggesting that EPA must establish TMDLs using either the current or new rules during the transitional period, and that EPA should work to establish TMDLs quickly using the new rules. Finally, EPA received some comments suggesting that all schedules should be revised because of these new regulations.

What is EPA promulgating today?

After carefully considering the comments received on the transitional period, EPA is today promulgating a transition period for the new elements of TMDLs lasting 18 months from the date of publication of this rule in the **Federal Register** or nine months from the effective date of this rule, whichever is later. EPA recognizes the concerns voiced in many comments about the challenge of now drafting an implementation plan for a TMDL already nearing completion, and the benefit of including stakeholders in implementation decisions at the beginning of the TMDL development process in order to better integrate the implementation strategies with the allocation of loads. Most States, Territories and authorized Tribes, as

well as State associations, supported a transitional period of up to 18 months. Of the comments suggesting more than 18 months, only one provided a reason, *i.e.*, the average TMDL requires 24 months to complete. EPA does not believe States need to begin implementation plans at the onset of TMDL development. One comment describes the first 18 months of TMDL development to consist of collecting data, developing models, and conducting the analysis. EPA believes that at least the first six months of this work, especially data collection and modeling, can be conducted before approaching stakeholders to start developing the implementation plan. For this reason, EPA is including a transitional period of 18 months in the final rule unless the rule's effective date is delayed, in which case the transition period will be 9 months from the rule's effective date.

EPA rejects the suggestion not to allow a transitional period based on the commenter's belief that implementation plans could be quickly developed, or that States, Territories, and authorized Tribes have had sufficient notice to begin developing these plans in anticipation of the new regulatory requirements. EPA does not believe that the mere fact that implementation plans were part of the proposal would by itself have caused States, Territories, or authorized Tribes reasonably to believe that the final rule would necessarily require submission of an implementation plan with the rest of the TMDL. EPA received many comments, some from States, Territories and authorized Tribes, contesting the legal authority to require States, Territories, and authorized Tribes to submit implementation plans as part of the TMDL. (This issue was discussed previously in today's preamble.) EPA believes these comments illustrate that many States, Territories, and authorized Tribes have waited to see the final rule before beginning to develop these plans.

EPA also rejects the suggestion not to provide a transitional period but rather to defer submittal of implementation plans up to six months following submittal of the rest of the TMDL. As discussed in today's preamble, EPA considers the implementation plan to be an integral part of the TMDL that is reviewed by EPA under section 303(d). Under today's rule EPA cannot approve the TMDL if it does not contain all the required elements, including an implementation plan. Therefore, the suggestion to defer submission of such plans to a later date would only further delay TMDL approvals, which is what EPA is attempting to prevent.

Today's rule also revises the proposed language regarding EPA's establishment of a TMDL during the transition. EPA proposed at § 130.38(b) that it may establish TMDLs using either approach, *i.e.*, the pre-promulgation or post-promulgation requirements. Some commenters misconstrued this language as a statement by EPA that it may choose not to establish TMDLs even if required to do so by court order or the statute. To eliminate confusion on this issue, EPA is using the word "will" instead of "may" in the final regulations. It is EPA's intention to use the new regulations as soon as possible. However, EPA recognizes that it may need to establish a TMDL where a State, Territory, or authorized Tribe has not, and to do so, EPA may need as much time as a State, Territory, or authorized Tribe to develop an implementation plan.

In particular instances, before the end of the transition period, where a schedule in a consent decree or settlement agreement would make it impossible to establish TMDLs with an implementation plan under the schedule, EPA would consider approaching the Plaintiffs to request an extension of the schedule so that TMDLs could be established using the new requirements. EPA expects that by the end of the transition period, States, Territories, and authorized Tribes will have established procedures for integrating implementation plan into TMDLs. EPA's expectation is that the transition period should greatly reduce the need for EPA to establish TMDLs pursuant to the existing consent decrees and settlement agreements.

X. Continuing Planning Process (§ 130.50)

What did EPA propose? EPA proposed to make only minor changes to the continuing planning process (CPP) requirements currently found at § 130.5. The proposal renumbered the section as § 130.50 and revised the current regulatory requirements to clarify that States, Territories and authorized Tribes have discretion to go beyond the mandatory plan elements set out in the regulation and also include other processes, such as watershed-based planning and implementation. The proposal also makes clear that a CPP need not be a single document but may be a compendium of many different State, Territorial and authorized Tribal planning documents. Finally, the proposal made conforming changes to citations to sections that are renumbered by the proposal.

What comments did EPA receive? EPA received a number of comments

specific to this section. Three comments supported the proposal. One comment expressed concern that the proposed change required that the CPP be a document. A number of other comments suggested additional revisions to the existing CPP requirements.

What is EPA promulgating today? Based on its analysis of the comments received on this section, EPA is making one change to § 130.50(b) of the proposed rule. EPA is changing the final rule to recognize that the CPP need not be a single document. EPA acknowledges that the CPP is a process often described in numerous documents, rather than being a single document. EPA believes the revision in the final rule removes the confusion expressed over this. EPA declines to make the other requested changes for the reasons expressed in the Response to Comments Document.

Y. Water Quality Management Plans (§ 130.51)

What did EPA propose? EPA proposed to make only minor changes to the water quality management plan requirements currently found at § 130.6. EPA proposed to renumber the section as § 130.51 and to revise the current regulatory requirements to clarify that updates to water quality management plans should incorporate approved TMDLs and generally have a watershed focus. In addition, EPA rewrote proposed § 130.51(a) in plain English format.

What comments did EPA receive? EPA received a number of comments specific to this section. In most instances, only one commenter suggested a specific revision or addition. In four instances, multiple commenters made the same or similar comment. Two comments supported the proposal. Two comments suggested that § 130.51(a) retain the references to sections 208, 303, and 305 of the CWA that were in the existing rule. Two comments requested a change to or clarification of the part of the rule dealing with nonpoint source regulatory programs. Three commenters requested revisions to the existing rule language to clarify what a nonpoint source is. Another comment suggested that EPA recognize the link between the State Revolving Fund (SRF) and § 130.51(f).

What is EPA promulgating today? Based on its analysis of the comments received on this section, EPA is making three changes to § 130.51(a) of the proposed rule. First, EPA is reinstating the reference to CWA section 208 and 303(e) in the sentence describing the initial water quality management plan. Second, EPA is reinstating the reference

to CWA section 305(b) reports in the sentence describing what the annual planning should include. These references were in the existing regulation. EPA agrees that these references describe the authority and context for the water quality management plan, and wishes to maintain continuity between the requirements for water quality management plans prior to and after today's final rule. Third, EPA is adding a sentence to § 130.51(f) to recognize the link between the SRF and Water Quality Management Plans. This is a requirement of CWA section 603(f) that had not yet been incorporated into Part 130.

EPA does not interpret the revision of § 130.51(a) to require all States, Territories, and authorized Tribes to rewrite their initial water quality management plan. Again, the purpose of the revision is to clarify that updates to water quality management plans should incorporate approved TMDLs and generally have a watershed focus. Also, EPA does not interpret this revision to be a change in focus of the water quality management plan or CPP. EPA interprets the phrase "focus on priority issues and geographical areas" to mean essentially the same as the phrase "shall be based upon water quality problems identified in the latest section 305(b) reports." The section 305(b) reports generally identify priority water quality issues in geographical areas.

EPA declines to make other requested changes to the water quality management plan for the reasons stated below and in the Response to Comments document. EPA declines to require that States, Territories, and authorized Tribes adopt regulatory programs for nonpoint sources. The final rule continues the existing rule requirements that States, Territories, and authorized Tribes develop regulatory programs if they find it necessary. EPA also declines to revise § 130.51(c)(4)(iii) to further clarify what a nonpoint source is. EPA acknowledges that some residual waste, agriculture and silviculture, mines, construction, and urban storm water activities are considered point sources and are subject to NPDES permits. At the same time, some are not. EPA interprets § 130.51(c)(4) to apply only to activities that are not required to have an NPDES permit. Because EPA has referenced these sources in the context of "nonpoint source management and control," EPA believes that it is reasonable for others to make the same interpretation.

Z. Petitions to EPA to Establish TMDLs (§ 130.65)

What did EPA propose? EPA proposed to codify specific requirements to formalize a petition process for the public to request that EPA step in and perform duties imposed on States, Territories and authorized Tribes by section 303(d) when they fail to perform these duties. This petition process has been available to the public under the authority of the Administrative Procedure Act, but has seldom been used in the context of section 303(d). EPA made this proposal to increase public awareness of this procedure for requesting EPA action.

What comments did EPA receive? EPA received a number of comments specific to the petition process. Very few comments were fully supportive. Most comments argued that EPA should drop the provision entirely. Many comments expressed a concern that EPA was trying to impose this procedure as a mandatory first step before a party could bring a judicial action against EPA, and saw the petition process as an administrative barrier which would delay the party's right of redress. Other comments expressed concern that the petition process provided EPA a way to by-pass or undermine State authority and suggested that the final rule require petitioners to exhaust all State administrative remedies prior to petitioning EPA. Finally, other comments saw the petition provision as a way to exclude stakeholders from dialogue on TMDLs.

What is EPA promulgating today? Based on its analysis of the many comments received on this section, EPA is not including the petition provision in the final regulations. EPA continues to believe that a petition process would present the advantages outlined in the proposal at 64 FR 46040-46041, August 23, 1999. However, this opportunity is already available to the public as a matter of law. See 5 U.S.C. section 555(b). EPA does not believe it needs to provide specific regulatory requirements relating to a petition process.

EPA recognizes the concerns expressed in comments, and believes it has responded to these comments by not promulgating any specific provision for a TMDL petition. Many commenters misconstrued EPA's intent as creating an administrative process that either delays a party's right of judicial redress or excludes most stakeholders, including States, Territories and authorized Tribes, from a dialogue on TMDLs. These were not EPA's intentions. On the contrary, EPA believed the petition process provided a

more expeditious way of resolving a party's concerns than the judicial process. Given the misunderstanding on the purpose and use of the petition process, EPA is not providing a specific petition process for TMDLs in the regulations. However, section 555(b) of the Administrative Procedure Act does allow any party to petition EPA to take action regarding lists and TMDLs, despite the absence of a specific TMDL petition process in Part 130.

AA. Water Quality Monitoring and Report (§ 130.10 and 130.11)

What did EPA propose? EPA proposed three minor changes to these sections. First, EPA proposed to identify the current EPA quality assurance guidance referred to in § 130.10(a). Second, EPA added source water assessments to the list of uses for data collected by State, Territorial, or authorized Tribal water quality monitoring in § 130.10(b). Finally, EPA proposed to revise § 130.11(a) to recommend that water quality problems identified in a section 305(b) report should be used in source water assessments.

What comments did EPA receive? EPA received many comments on these sections. Most of the comments suggested EPA adopt regulatory requirements to improve monitoring. These comments called for EPA to define the elements of an adequate monitoring program and provide both incentives and penalties to ensure that States monitor all waters of the State. Commenters also suggested EPA improve coordination among the many entities that monitor water quality. Comments on the water quality inventory report point out that this report is a state's comprehensive accounting of water quality, including healthy, threatened and impaired waters. Some commenters cited the need to improve these reports by requiring States monitor all waters of the State. Other suggested improvements include better analysis of the costs and benefits of achieving the goals of the CWA. A number of commenters expressed concern that EPA's proposed regulation makes the section 303(d) list a comprehensive accounting of State water quality which is redundant with the section 305(b) report. Some commenters suggested the water quality inventory report and the section 303(d) list should be consolidated, while others recommended they be kept distinct.

What is EPA promulgating today? EPA is promulgating these section as proposed with one change. EPA is moving the reference to the current

quality assurance guidance to a note. EPA made this change to facilitate including references to any future updates to this guidance.

EPA declines to make other changes to these sections as suggested by comments. EPA did not propose any regulatory requirements for monitoring or reporting, and believes that it would need to propose any such requirements before promulgating requirements.

AB. Other Sections (§§ 130.0, 130.1, 130.3, 130.7, 130.61, 130.62, 130.63, and 130.64)

What did EPA propose? EPA's August 23, 1999 recodification included sections of existing regulations for which EPA did not propose changes or request comment. These were included in the proposal to show how they would be reformatted in Part 130. 64 FR 46015, August 23, 1999. EPA explicitly identified the following sections as unchanged in the proposal: §§ 130.0, 130.1, 130.60, 130.61, 130.62, 130.63, and 130.64. EPA did propose a conforming change to § 130.64 to reflect that the citation for a TMDL had moved from § 130.7. EPA also proposed to delete § 130.3 and 130.61(d), and replace § 130.7 with the new requirements of subpart C. EPA believed § 130.3 duplicates the definition of "water quality standard" found in Part 131. EPA also believes that § 130.61(d) is obsolete because it pertains to a one-time data submittal under section 304(l) that was completed almost a decade ago.

What comments did EPA receive? EPA received no substantive comments on the sections that were proposed to be deleted. EPA received many comments on other sections, especially § 130.62, and § 130.63. Most comments did not suggest revisions to the final rule, but rather offered suggestions on how EPA could improve implementation of the TMDL program. The comments that suggested revisions were diverse and covered many themes. Other comments suggested specifically recognizing coastal nonpoint source programs, Federal land management, and the Great Lakes Water Quality Guidance in the regulations. Other comments offered suggestions on regulatory language related to improving the participation of indigenous people in all aspects of water quality planning and implementation. Finally, EPA received a comment that the language of § 130.61(b)(2) was inconsistent with the provisions proposed for lists of waterbodies, priority rankings, and schedules of TMDLs.

What is EPA promulgating today? With the exception of §§ 130.7 and 130.61, EPA is promulgating these

sections as proposed. EPA did not propose revisions to §§ 130.0, 130.1, 130.60, 130.61, 130.62, 130.63, and 130.64 except for a conforming citation in § 130.64, nor did EPA request comment on these sections. Instead, EPA included these sections solely to illustrate the reformatting of Part 130 that results from writing the TMDL regulations in plain English format. Thus, EPA believes any comment on these sections is beyond the scope of the proposed rulemaking and declines to make changes as a result of comments. EPA will try to be mindful of any comments received on these sections when and if it does any further rulemaking on Part 130.

EPA's proposed §§ 130.20 through 130.37 replace the requirements of § 130.7. However, for the period of 18 months from publication or nine months from the effective date of today's rule, whichever occurs later, § 130.37 allows States, Territories, authorized Tribes, and EPA to establish TMDLs consistent with either the requirements of §§ 130.31 through 130.33 of today's rule or § 130.7 from the previous rule. States, Territories, and authorized Tribes will need to be able to find the requirements of § 130.7(c), which contains the TMDL requirements, until they are no longer needed. For this reason, today's rule removes § 130.7 except for paragraph (c), and revises paragraph (c) to refer to the listing requirements of today's rule.

With respect to § 130.61, EPA found during the development of the final rule that § 130.61(b)(2), which requires identification of water-quality limited waters requiring TMDLs, and of waters targeted for TMDL development within the next two years, is inconsistent with both the proposed and final requirements for listing waterbodies. Therefore, EPA is deleting the requirements of § 130.61(b)(2) and reserving this paragraph. EPA believes that without this change, the Part 130 regulations would include two conflicting requirements causing confusion over what the regulations require. EPA believes this change is technical in nature and a logical outgrowth of EPA's proposal. EPA recognizes that it is making this change without soliciting public comment on this specific change. However, EPA did solicit comment on §§ 130.25 through 130.30, which are the technical and procedural requirements for section 303(d) lists of impaired waterbodies. Based on those comments, EPA promulgated the final rule for those sections. EPA expects that, had it solicited comments on whether it should revise § 130.61(b)(2) to conform

with the information in §§ 130.25 through 130.30, the comments would have been supportive. Therefore, EPA believes that there is good cause under Administrative Procedure Act section 555(b)(3)(B) not to provide notice on this change because it is unnecessary to do so. Furthermore, EPA believes it is contrary to the public interest to expend the resources to solicit comment on eliminating an inconsistency in its rules when to do so is unnecessary. Therefore, consistent with the "good cause" provision of Administrative Procedure Act section 553(b)(3)(B), EPA believes it has good cause to delete and reserve § 130.61(b)(2) without proposing that change.

III. Changes to Parts 122, 123, and 124

A. Reasonable Further Progress Toward Attaining Water Quality Standards in Impaired Waterbodies in the Absence of a TMDL

1. Background

On August 23, 1999, EPA proposed revisions to the National Pollutant Discharge Elimination System (NPDES) Program and the Federal Antidegradation Policy in support of the revisions to the Water Quality Planning and Management regulations. These proposed revisions included new requirements and explicit authority to achieve reasonable further progress toward the attainment of water quality standards in impaired waterbodies in the absence of an EPA approved or established TMDL. EPA proposed a new requirement under the Federal antidegradation policy and proposed to revise the NPDES permitting regulations to implement that requirement. The proposed antidegradation requirement applied to all large new dischargers and existing dischargers undergoing a significant expansion proposing to discharge, to an impaired waterbody, the pollutant(s) for which the waterbody was impaired. The proposal stated that these dischargers would be required to achieve reasonable further progress toward the attainment of water quality standards in the waterbody to which they proposed to discharge. To achieve reasonable further progress, the proposal required these dischargers to obtain an offset of their new or increased loading of the pollutant(s) for which the waterbody was impaired. To obtain an offset, these dischargers would need to secure reductions from another existing source(s) discharging the pollutant(s) of concern into the same waterbody. The net effect of this offset would be a reduction in the loading of the pollutant of concern in the waterbody. Thus, reasonable further

progress toward the attainment of water quality standards in the waterbody would be achieved.

Also to achieve reasonable further progress in the absence of an EPA approved or established TMDL, EPA proposed explicit language describing the Regional Administrator's discretionary authority to review, object to, and reissue, if necessary, State-issued permits that are "administratively continued" after expiration. The proposal stated that this authority would be available when an expired permit authorizes a discharge into an impaired waterbody and the existing permit limits need to be revised. These permits were referred to as "environmentally-significant permits." The two situations in which EPA proposed to invoke this authority were when an expired permit contains effluent limitations or conditions inconsistent with water quality standards or inconsistent with an established TMDL. In the absence of a TMDL, invoking this authority would allow the Regional Administrator to review, object to, and reissue, if necessary, expired permits inconsistent with water quality standards to ensure that those permits contain adequate water quality-based effluent limitations. Permits that contain adequate water quality-based effluent limitations would, in turn, be consistent with water quality standards and, thus, reasonable further progress toward the attainment of water quality standards would be achieved. See section III.B.5. below for a discussion of where this authority could be invoked to ensure that an expired permit is consistent with an established TMDL.

2. Requirements for New and Significantly Expanding Dischargers

What did EPA propose? EPA proposed a new requirement under the Federal antidegradation policy and proposed revisions to the NPDES permitting regulations to implement that requirement, to achieve reasonable further progress toward the attainment of water quality standards in impaired waters in the absence of an EPA approved or established TMDL. EPA proposed these new requirements in response to the TMDL FACA recommendation that EPA actively encourage and support stakeholders stabilizing and enhancing water quality in impaired waterbodies before a TMDL is in place. Both EPA and the FACA recognized the significant time lag that could exist between the initial listing of a waterbody under CWA section 303(d) and the actual completion and approval of a TMDL. (See "Report of the Federal

Advisory Committee on the Total Maximum Daily Load (TMDL) Program", EPA 100-R-98-006, July 1998.) As discussed in the preamble to the proposed rule, EPA believes that progress toward the section 101(a) goals of the CWA should occur even in the interim period between the initial listing of a waterbody under CWA Section 303(d) and the actual completion, approval and implementation of a TMDL. EPA therefore proposed to require that certain dischargers, located on an impaired waterbody discharging the pollutant for which the waterbody is impaired, achieve "reasonable further progress" toward the attainment of water quality standards.

The NPDES dischargers required to achieve reasonable further progress included a subset of dischargers proposing to discharge new loadings of a pollutant of concern to an impaired waterbody. This subset of dischargers included all large new dischargers and existing dischargers undergoing a significant expansion. EPA proposed revisions to the definition of a "new discharger" at § 122.2 as well as proposed a new definition of an "existing discharger" and what constitutes a "significant expansion" of an existing discharger. These proposed definitions were revised or added with the intent of defining the subset of dischargers subject to the proposed offset requirement.

EPA believed that the best way for these dischargers to achieve reasonable further progress was through an offset mechanism. The proposed offset mechanism would have required these dischargers to offset any new or increased loading of the pollutant of concern to an impaired waterbody by obtaining or securing reductions in the loading of the same pollutant from an existing source(s) located on the same waterbody. EPA stated that an offset of at least one and one half to one would generally be appropriate as a means of ensuring reasonable further progress. The proposal also specified several additional requirements for implementing offsets through NPDES permits. These revisions to the NPDES permitting regulations were designed to ensure that the offset and resulting reductions would be realized and, therefore, reasonable further progress would be achieved. The Agency believed that reasonable further progress toward meeting the applicable water quality standard would be achieved through this mechanism because the total load of the pollutant(s) to the impaired waterbody would be reduced.

The proposal also would have required the permitting authority to include, in the fact sheet for the permit (required under § 124.8), an explanation of how and why any limitations and/or requirements were derived to satisfy an offset requirement. Where fact sheets are not required, EPA proposed that similar information be included in the statement of basis for the permit (required under § 124.7).

To emphasize the importance of State antidegradation policies, including the proposed offset requirement, EPA proposed to include the phrase "State antidegradation provisions" in its water quality-based permitting regulations at § 122.44(d)(1). Section 122.44 contains the requirements for establishing limitations, standards and other permit conditions in NPDES permits necessary to ensure that NPDES permits are protective of water quality standards. The purpose of including this phrase was clarifying only and was not intended to create a substantive change. Including this phrase in these provisions was intended to give added notice and clarification to the longstanding requirement at § 131.12 that States, at a minimum, include in their water quality standards an antidegradation policy consistent with the Federal antidegradation policy, and identify their methods and procedures for implementing that policy.

What comments did EPA receive? The following summarizes certain major comments the Agency received on the proposal requiring large new and significantly expanding existing dischargers located on impaired waterbodies to obtain offsets of their new pollutant loads. There was widespread concern that the proposal to require offsets was virtually impossible to implement and environmental efficacy on a national scale would have therefore been unlikely. Many commenters noted that a one-size-fits-all approach was infeasible due to the differences between the types of sources subject to the offset requirement, the differences in the nature of the discharges from the sources subject to the offset requirement, and the differences in the types of NPDES permitting used for sources subject to the offset requirement. A significant number of commenters also expressed concern regarding the requirement that the offset be achieved on or before a source could begin discharging as well as the distinct likelihood that there might be no source in the waterbody from which an offset could be obtained. They pointed out that this would cause significant delay in the operation or construction of their business and

possibly even prevent them from operating at all.

Several commenters stated that the offset provision, as proposed, would be particularly difficult to implement with respect to wet weather sources. With respect to storm water, commenters expressed that it would be difficult to predict the contents and/or flow of storm water runoff because wet weather events vary in terms of frequency and duration of rainfall as well as other uncontrollable factors (e.g., the use of copper brake pads, leaking oil pans on cars) that contribute to the contents and/or flow of storm water runoff. Similar concerns were raised with respect to obtaining offsets from nonpoint sources. Commenters stated that pollution reductions would be difficult to measure or quantify due to the variability in flow, pollutants and loading. They also noted the difficulty in demonstrating the impact or level of reductions achieved by nonpoint source control measures or BMPs. The Agency also received many comments that claimed that the offset provisions, as proposed, would have an adverse effect on trading. For point source to nonpoint source trades, commenters asserted that the offset provision would provide a disincentive for point sources to trade because they would be held liable for a nonpoint source's failure to achieve the requisite reductions.

Commenters expressed concern over the implications the offset requirement would have on the use of general permits. Many stated that offsets could not be implemented through general permits. Although the Agency did not propose an approach to implement offsets for dischargers that seek coverage under general permits, many commenters were concerned that the offset requirement, as proposed, would have caused a large number of dischargers to seek coverage under individual permits instead of general permits. Commenters also noted that they would experience considerable delays in their operations and increased costs if they had to seek coverage under an individual permit.

A significant number of commenters stated that the proposal to require offsets established an inequitable allocation of responsibility between large and small dischargers and was, thus, inconsistent with the goals of the CWA. Many asserted that the proposal to require offsets conflicted with and impeded the TMDL program thereby delaying the attainment of water quality standards. Some commenters also asserted that the proposal to allow new discharges and require offsets would have undercut the ability to interpret

§ 122.4(i) as requiring an absolute prohibition on new discharges to impaired waters. Finally, while many commenters agreed that there should be reasonable further progress toward improving water quality in the period before a TMDL is approved or established, they asserted that the proposed offset requirements would undercut State primacy in determining what actions are necessary to attain water quality standards.

The Agency also received several comments on the proposed definitions for existing, new and significantly expanding dischargers. The Agency proposed these definitions for the sole purpose of implementing the offset provision. Many commenters suggested that these definitions were "confusing and unworkable." Most commenters were concerned that the definitions were not consistent with existing definitions for related and separate programs. Some commenters also stated that the definition describing significant expansion was not scientifically based. For example, the definition did not specify whether the 20% increase in loadings was related to concentration or mass.

What is EPA promulgating today? After considering comments received and upon further analysis of what the Agency proposed, EPA is not promulgating the revisions to the Federal antidegradation policy and NPDES regulations that would require certain dischargers to achieve reasonable further progress toward the attainment of water quality standards by obtaining an offset of their new or increased pollutant loads (hereafter "the offset requirement"). EPA continues to believe, however, that further degradation of already impaired waterbodies should be prevented and that progress toward the attainment of water quality standards should be made in the interim period between the identification of an impaired waterbody and the establishment of a TMDL. EPA does not believe it is necessary to amend the antidegradation regulations to explicitly include such a requirement because EPA has concluded that the offset requirement, as proposed, is not the best mechanism to achieve progress in impaired waters in the absence of a TMDL. The Agency based this conclusion on several considerations.

Subsequent to the proposal, EPA gained additional insight into current practices for deriving water quality-based effluent limits for sources located on impaired waters and discharging the pollutant(s) for which the waterbody is impaired. EPA found a wide range of practices for deriving such limits with

respect to both new dischargers and existing dischargers. The Agency believes that there is considerable room for improvement in establishing water quality-based effluent limits for all dischargers (new dischargers being permitted for the first time and expanding and existing dischargers undergoing permit reissuance) discharging pollutant(s) of concern to an impaired waterbody (emphasis added). EPA therefore concluded that its existing regulations, implemented consistently at the time of permit issuance, would provide greater progress toward the attainment of water quality standards in impaired waters than through the proposed offset requirement.

As proposed, the offset requirement (in addition to existing regulatory requirements) would be very difficult to apply and only affect a small subset of dischargers. Thus, the likelihood of achieving additional progress toward attaining water quality standards for a significant number of impaired waterbodies through the offset provision, in the aggregate, would be quite small. EPA further believes that expanding the application of the requirement to additional dischargers, as some commenters suggested, would still not have significant environmental benefit for the reasons discussed below.

Many commenters pointed out, and upon further analysis EPA agrees, that the proposed offset requirement, a one-size fits all method for specifying reasonable further progress, is simply unworkable. As proposed, it would have been extremely difficult for a majority of the sources within the very small subset of sources to which it would have applied, to implement an offset requirement (e.g., those sources with intermittent discharges or discharges only as a result of storm events and those regulated through general permits by best management practices (BMPs)). Calculating what constitutes a one and one half to one offset for sources with intermittent discharges would have often been extremely subjective. Likewise, as proposed, it would have been difficult or infeasible to implement the offset requirement with respect to dischargers that seek NPDES permit coverage under a general permit. Typically, general permits do not contain numeric water quality-based effluent limitations (WQBELs); they contain BMPs designed to ensure protection of water quality standards. It would have been difficult or infeasible to quantify, and thereafter implement, a one and one half to one offset from a source whose water quality impacts are controlled solely by BMPs.

EPA also concluded that the additional environmental benefits from the offset requirement, in many cases, would have been minimal at best, even if expanded to cover additional dischargers as some commenters suggested. The offset requirement would have been a requirement over and above the requirements under current NPDES permitting regulations at §§ 122.44(d)(1)(vii) and 122.4(i). Section 122.44(d)(1)(vii) requires permits to include, where necessary, effluent limits that derive from and comply with water quality standards. Section 122.4(i) prohibits the issuance of permits to a new source or a new discharger if the discharge will cause or contribute to a violation of water quality standards. For those dischargers who would have been subject to the offset requirement, consistent implementation of §§ 122.44(d)(1)(vii) and 122.4(i) following existing EPA guidance would result in permits, if issued, containing limits and conditions for the pollutant(s) of concern that derive from and comply with applicable water quality standards. These limits and conditions are water quality-based effluent limits and, if derived in compliance with existing regulations, ensure that the discharge will not cause or contribute to a violation of water quality standards. These limits would define the amount of the pollutant(s) in the discharger's effluent that could not be exceeded. In most cases, where a discharge is to an impaired water, this amount (the water quality-based effluent limit) would be quite small. Using either a numeric criterion or a quantitative translation of a narrative criterion, the limits would be calculated to ensure that the discharger did not cause or contribute to an excursion of that criterion in the receiving water. Also, a permitting authority may determine that this limit must reflect an overall reduction in pollutant loading to the waterbody in order to ensure that the discharge does not cause or contribute to a violation of water quality standards. Thus, where existing regulations for water quality-based permitting are appropriately implemented, the additional offset that EPA proposed to require of such dischargers (150% of the water quality-based effluent limit), in most cases, would not have had a significant effect on ambient water quality. Given this and the fact that applying the offset to many types of discharges would be extremely difficult or even infeasible, as discussed above, EPA concluded that the net environmental benefits from the offset requirement would be insignificant.

Although EPA is not promulgating regulations containing the offset requirement, EPA expects to achieve progress toward the attainment of water quality standards in impaired waters in the absence of a TMDL. EPA believes that progress toward the attainment of water quality standards prior to a TMDL would be achieved through consistent implementation of EPA's existing regulatory authorities.

EPA's current water quality-based permitting regulations and accompanying guidance apply not only to new and expanding dischargers, but to all dischargers. These regulations require that NPDES permits have conditions as necessary to achieve water quality standards established under section 303(c) of the CWA.

§ 122.44(d)(1). The permitting authority must therefore determine whether a discharge causes, has reasonable potential to cause, or contributes to an in-stream excursion above the applicable water quality standard. In making this determination, the permitting authority must "account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and, where appropriate, the dilution of the effluent in the receiving water."

§ 122.44(d)(1)(ii). Where water quality-based effluent limits are needed, the regulations are designed to ensure that those limits derive from and comply with water quality standards and, therefore, ensure that dischargers subject to such limits will not cause or contribute to the violation of water quality standards. §§ 122.44(d)(1)(vii) and 122.4(i).

EPA has developed guidance for applying the water quality-based permitting regulations. The "Technical Support Document for Water Quality-Based Toxics Control" (TSD) U.S. EPA, EPA/505/2-90-001, March 1991 and the Water Quality Guidance for the Great Lakes System (60 FR 15366, March 23, 1995) (hereafter "Great Lakes Guidance") include procedures for making the determination of whether a discharge causes, has reasonable potential to cause, or contributes to an in-stream excursion above the applicable water quality criteria (the "reasonable potential analysis"). These procedures also present options for developing wasteload allocations (the basis for effluent limits) which ensure that a discharge does not cause or contribute to the nonattainment of applicable water quality standards. Thus, while both are primarily focused on toxics, and the

Great Lakes Guidance applies to the Great Lakes, both serve as practical guides for developing effluent limits to ensure compliance with both §§ 122.44(d) and 122.4(i).

As mentioned above, the Agency found various interpretations and implementation methods for applying the water quality-based permitting regulations and the Agency's accompanying guidance. For example, EPA found varied consideration of other source contributions and background concentrations in the receiving water when determining the need for water quality-based effluent limits and setting water quality-based effluent limits for pollutants of concern in compliance with § 122.44(d). EPA notes it has a longstanding interpretation of § 122.44(d) regarding consideration of source contributions and background concentrations, as presented in the TSD since 1991.

EPA notes that the TSD references using background concentration when calculating wasteload allocations. For example, on p. 97, the TSD states, "Traditional single-value or two-value steady-state wasteload allocation models calculate wasteload allocations at critical conditions, which are usually combinations of worst-case assumptions of flow, effluent, and environmental effects. For example, a steady-state model for ammonia considers the maximum effluent discharge to occur on the day of lowest river flow, *highest upstream concentration*, highest pH, and highest temperature" (emphasis added). Also, it is particularly noteworthy that every case example in the TSD uses an ambient background concentration value of the pollutant of concern when determining reasonable potential and calculating wasteload allocations and effluent limits.

An assessment of the ambient background concentration in the receiving water is *the* element of the reasonable potential analysis presented in the TSD that represents the nonattained condition of waters not meeting water quality standards because they are exceeding water quality criteria. This element of the reasonable potential analysis is necessary to account for existing controls on point and nonpoint sources of pollution and available dilution as required by § 122.44(d)(1)(ii). Failure to use a background value would result in evaluating the discharge to the nonattained water as if the water were actually attaining its water quality standards. Simply put, use of valid, verifiable ambient background values is imperative to technically sound effluent characterization and analysis of the

need for water quality-based effluent limits.

Furthermore, where there is valid, verifiable background data indicating existing impairment of a waterbody, such data must be taken into consideration when developing water quality-based effluent limits for a discharge to an impaired water. EPA is aware that some permitting authorities, when calculating wasteload allocations that are the basis for water quality-based effluent limits, have, on occasion, made the assumption that background concentrations of the pollutant(s) of concern are zero, even in view of valid and verifiable background data, and have proceeded to allocate all of a waterbody's assimilative capacity to one or more point sources. Such an assumption is inconsistent with NPDES regulations requiring that water quality-based effluent limits derive from and comply with water quality standards (§ 122.44(d)(1)(vii)), and longstanding Agency guidance and policy on complying with the regulations.

Once again, EPA notes that the TSD indicates the need to consider background concentrations of the pollutant(s) of concern when developing wasteload allocations and water quality-based effluent limits. Where valid, verifiable data and information that are representative of ambient conditions indicate that the waterbody is not attaining water quality standards, there is no basis for permitting a discharge to an impaired water as if the waterbody were not impaired. Where such data are available, the permitting authority has no alternative but to use those data when calculating wasteload allocations and effluent limits. For discharges to an impaired water where ambient pollutant concentration is the cause of impairment, including background pollutant concentrations in all permit limit calculations will result in water quality-based effluent limits based on a wasteload allocation that attains the applicable criteria or a lower pollutant concentration in the effluent (*i.e.*, "criteria end of pipe" or better). Of course, a permitting authority may have new or additional data about the ambient water quality, presented by the discharger or collected by the permitting authority itself. Those additional data would allow for a more site-specific evaluation of the need for water quality-based effluent limits and of the calculation of wasteload allocations and effluent limits than was perhaps possible when a decision was made to list the waterbody on the section 303(d) list.

EPA recognizes the need for further clarification to authorities implementing

the NPDES program of existing NPDES regulations and guidance on water quality-based permitting. In addition, further guidance is needed to ensure that permitting authorities adequately protect designated uses through complete consideration of both applicable narrative and numeric criteria when developing effluent limits that derive from and comply with all applicable water quality standards (§ 122.44(d)(1)(vii)). Narrative water quality criteria establish the basic foundation for attainment of designated uses, while numeric water quality criteria provide a specific quantitative translation of the necessary level of protection.

In some situations, there are no numeric criteria for a pollutant of concern or the permitting authority may determine that the existing numeric criteria are not designed to address an important endpoint of concern. When numeric criteria are developed, it is not possible to anticipate all pollutants or endpoints or derive some types of criteria that will apply generally across the Nation's waters or all of the waters of a State or Tribe. Often there are not sufficient data to develop site-specific numeric water quality criteria at the time of water quality standards adoption. Recognizing these situations, standards setting authorities adopt narrative criteria to ensure full protection of designated uses. Narrative criteria can descriptively accomplish what numeric criteria, in many cases, cannot account for quantitatively at the time water quality standards are adopted. For example, fish contamination as a result of site-specific bioaccumulation or algal blooms from nutrient over enrichment may impair a designated use, but may not be sufficiently addressed by adopted numeric water quality criteria. Applicable narrative criteria, however, can often be translated into a quantitative measurement that will protect a specific endpoint from a specific pollutant not accounted for by the applicable numeric criteria.

The NPDES regulations at § 122.44(d)(1)(v) and (vi) are particularly instructive to permitting authorities developing water quality-based effluent limits from narrative water quality criteria in order to meet the requirement that such limits derive from and comply with all applicable water quality standards. The NPDES regulations require that if a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion of an applicable narrative criterion, the permit must contain effluent limits for whole effluent toxicity. Whole effluent

toxicity limits are not necessary, however, if the permitting authority demonstrates that chemical-specific effluent limits for the effluent are sufficient to attain and maintain applicable numeric *and narrative* water quality standards (emphasis added). The regulations describe how to develop water quality-based effluent limits for a specific pollutant in this situation. The permitting authority must develop effluent limits based on one of the following options: (1) use a calculated numeric water quality criterion that the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use [This criterion may be derived using a criterion proposed by the standards setting authority or an explicit policy or regulation interpreting the authority's narrative criterion, supplemented with other relevant information]; (2) on a case-by-case basis, use EPA's water quality criteria, published under Section 304(a) of the Clean Water Act, supplemented where necessary by other relevant information; or (3) under certain conditions, use an indicator parameter for the pollutant of concern.

EPA understands that permitting authorities will take a variety of approaches to interpreting designated uses and the criteria necessary to protect those uses, characterizing effluent quality, and deriving wasteload allocations and permit limits. EPA believes, however, that permitting authorities do not always quantitatively translate applicable narrative criteria, nor do they always apply the most stringent permit limit when both numeric criteria and numeric interpretations of narrative criteria are available and applicable. The NPDES regulations require permitting authorities to evaluate the reasonable potential for an effluent to cause or contribute to an excursion of *both numeric and narrative criteria* in order to evaluate whether the underlying designated use will be maintained and protected and, where necessary, derive water quality-based effluent limitations from those criteria. Where there is uncertainty about what numeric value should be used that represents either the numeric or narrative water quality criterion (the water quality value on which the effluent characterization must be based), EPA believes this uncertainty must be resolved before a permit is issued. EPA believes that, instead of resolving this uncertainty, some permitting authorities may be issuing permits with inadequate permit limits

that do not conform to the water quality-based permitting regulations.

EPA believes that further clarification and additional guidance on interpreting and implementing the water quality-based permitting regulations are needed. Rather than promulgating a new regulatory requirement that is difficult to apply and offers potentially little environmental benefit over adequate implementation of current NPDES regulations, the Agency believes that improved implementation of the current regulatory program will yield better and more significant progress in attaining and maintaining water quality standards nationwide. The Agency, therefore, is intending to achieve more consistent implementation of existing NPDES regulations and guidance. EPA intends to provide further guidance to clarify the Agency's recommendations for methods and procedures for developing water quality-based effluent limits for sources discharging a pollutant of concern to an impaired waterbody in the absence of a TMDL. EPA expects that this guidance will address approaches to deriving permit limits both in situations where there are applicable numeric criteria that address the cause of impairment and situations where there are no applicable numeric criteria that address the cause of impairment.

In summary, EPA believes that ensuring adequate and consistent implementation of existing water quality-based permitting regulations for all dischargers located on impaired waterbodies will lead to substantial improvement in the quality of the Nation's waters. EPA notes that the TMDL, once established, may include waste load allocations that may result in the need for permit limits to change.

Definitions

EPA is not promulgating the proposed revisions to the definition of a "new discharger" (§ 122.2) as well as the proposed new definition for an "existing discharger" and what constitutes a "significant expansion" of an existing discharger. EPA is not promulgating these proposed definitions because it is not promulgating the proposed offset requirement. These proposed definitions were revised or added with the intent of defining the subset of dischargers subject to the proposed offset requirement.

Fact Sheet and Statement of Basis

EPA is not promulgating revisions to the regulatory provisions on fact sheets (§ 124.56) or revisions to the regulatory provisions on statement of basis (§ 124.7) as proposed. EPA proposed

changes to these provisions to clarify that the permit writer must provide all information necessary to explain the derivation of permit conditions. In particular, these proposed changes were designed to capture, in the record of the permit, the rationale for and derivation of the proposed offset requirement. Because EPA is not promulgating the offset requirement, the proposed changes regarding fact sheets and statements of basis are unnecessary. EPA continues to believe, however, that it is important to clarify the type of information that a permit writer must provide to explain the basis for and derivation of permit limits and conditions. In light of the scope of today's rule, the Agency believes that providing an adequate explanation is particularly important for permits that authorize discharges to impaired waters both prior to and after the establishment of a TMDL. EPA is therefore establishing such clarifications to the fact sheet regulations at § 124.8 and to the statement of basis regulations at § 124.7.

Section 124.8 requires that a fact sheet be prepared for certain permits identified under that section. Section 124.7 requires EPA to prepare a statement of basis for every draft permit for which a fact sheet is not prepared. The purpose of including a fact sheet or a statement of basis with the permit is to provide a mechanism that helps the permittee and any other interested party understand how and why limits, conditions, and/or requirements in the accompanying NPDES permit were derived. This information also helps the permittee and other interested parties participate in the decision-making on what will be included in the final permit; an explanation of how and why these measures were derived enables the public to participate in the final decision.

Today's rule clarifies what data and information must be placed in the fact sheet and statement of basis for permits authorizing discharges to impaired waters. Specifically, the clarifications to the fact sheet and statement of basis regulations concern information which must be provided when a permit is developed for the discharge of a pollutant into a water which is impaired for that pollutant. Where a fact sheet or statement of basis is required, the Agency believes the records for such permits must contain a full explanation of the basis for water quality-based limits including those for a pollutant(s) for which a waterbody is impaired. Specifically, the fact sheet or statement of basis must contain: (1) In cases where a TMDL has not been established for an impaired waterbody, an explanation of

how permit limits and/or conditions were derived for all pollutants in the discharger's effluent for which the waterbody is impaired; and (2) in cases where a TMDL has been established for an impaired waterbody, any TMDL that has been established for a pollutant contained in the discharger's effluent; the applicable wasteload allocation derived for the pollutant under the TMDL for that discharger; and an explanation of how permit limits for the pollutant of concern were derived as well as how those limits are consistent with the applicable wasteload allocation.

EPA interprets its existing regulations to require this information already. Specifically, § 124.8(b)(4) requires the fact sheet to include "a brief summary of the basis for the draft permit conditions * * *." Section 124.7 requires the statement of basis to "briefly describe the derivation of the conditions of the draft permit and the reasons for them * * *." Also, § 122.44(d)(1)(vii)(B) requires the permitting authority to ensure that "effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to § 130.7." Evidence of this longstanding interpretation is found in EPA's "Technical Support Document for Water Quality-based Toxics Control" where the Agency refers to the fact sheet regulations at § 124.56 and states that "the wasteload allocations along with the required long-term average and coefficient of variation used and the calculations deriving them must be included or referenced in the fact sheet. The permit limit derivation method used must also be explained in the permit documentation." (EPA/505/2-90-001, March 1991, p.110). By revising these regulations to include today's clarifications, the Agency is merely emphasizing the importance of providing data and information for permit limits and conditions contained in permits authorizing discharges to impaired waters both prior to and after the establishment of a TMDL. Making this concept completely explicit in the regulations will help to clarify EPA's previous intent behind these provisions and ensure consistency in fact sheets and statements of basis accompanying permits for discharges into impaired waters. In addition, these clarifications to the existing regulations are consistent with the provisions in the proposal requiring fact sheets and statements of

basis to include an explanation for the basis of any offset obtained in an impaired water.

Adding these clarifications also improves the ability to track whether permits requiring a fact sheet or statement of basis contain limits that derive from and comply with applicable water quality standards as well as whether the limits are consistent with an applicable TMDL. EPA intends to track information in order to monitor and report progress nationally on permitting in impaired waters. The Agency believes tracking this information supports the purposes and goals of the CWA, to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The Administrator also bears a statutory responsibility under CWA section 303(d) to ensure timely establishment of TMDLs and an obligation under CWA section 301(b)(1)(C) to ensure that permits include water quality-based effluent limits as necessary to meet water quality standards. Tracking these data will help to ensure that needed water quality-based effluent limits are placed in all permits requiring them prior to a TMDL. It will also help to ensure that TMDLs, once established, are in fact, implemented.

Revisions to the Water Quality-based Permitting Regulations

Although EPA is not promulgating the offset requirement, the Agency still believes emphasis should be placed on State antidegradation policies as part of a State's water quality standards. EPA, therefore, is promulgating the clarifying change to the water quality-based permitting regulations by adding the phrase "State antidegradation provisions" to section § 122.44(d)(1).

3. EPA Authority to Reissue Expired and Administratively-Continued NPDES Permits Issued by Authorized States

What did EPA propose? Under the NPDES program regulations, a Regional Administrator may review and object to an NPDES permit that an authorized State proposes to issue. The procedures by which a Regional Administrator may review and object to these permits are found in § 123.44. EPA proposed a new mechanism by which a Regional Administrator could trigger these procedures for two purposes. EPA proposed to grant the Regional Administrator the discretion to trigger these procedures to (1) achieve reasonable further progress toward the attainment of water quality standards in impaired waters in the absence of a TMDL; and (2) ensure that established

TMDLs are, in fact, implemented. This proposed discretionary authority would be available to the Regional Administrator to achieve these goals by using the procedures in § 123.44 to address a subset of existing expired State-issued NPDES permits. This authority could be exercised when an NPDES permit that has been administratively-continued after expiration authorizes a discharge to a waterbody that does not attain and maintain water quality standards where there is a need for a change in the existing permit limits to be protective of water quality standards. In the preamble to the proposal, these permits were referred to as "environmentally-significant permits."

To achieve reasonable further progress toward the attainment of water quality standards in impaired waters in the absence of a TMDL, proposed § 123.44(k) would give EPA the discretion to treat a subset of environmentally-significant State-issued permits that are administratively-continued after expiration as the State's submission of a permit for EPA review under § 123.44. This subset of permits includes those permits that authorize discharges of a pollutant(s) of concern (*i.e.*, a pollutant(s) for which the waterbody is impaired) to a waterbody that does not attain and maintain water quality standards for those pollutants and for which EPA has not established or approved a TMDL. EPA proposed that this authority be available to the Agency where there is a need for a change in the existing permit limits. Specifically, this authority could be invoked where there is a need to include more adequate and protective water quality-based effluent limits in order to ensure that such limits derive from and comply with applicable water quality standards. See § 122.44(d)(1)(vii).

EPA proposed to assert the Agency's discretion to exercise the authority to use these procedures for a State-issued permit that meets the conditions above, where that permit has been expired and administratively-continued for more than 90 days, and where the State has failed to reissue that permit. The Agency's NPDES regulations require that an existing permittee submit a new permit application at least 180 days before an existing permit expires (§ 122.21(d)(2)). When a permittee has submitted a timely and complete application for renewal, but the State Director fails to act on the permittee's application before the existing permit expires, States' laws often provide that the existing permit continues in effect by operation of law. The permit remains

in effect by operation of law until the State takes final action on the permittee's application (until the State makes a final decision to grant or deny a new permit). This is often referred to as "administrative continuance." These State laws, like the corresponding provisions in § 122.6 and the Federal Administrative Procedure Act at 5 U.S.C. 558(c), aim to protect a permittee who has submitted a timely and complete application for renewal. Such State laws protect a permittee from losing its authorization to discharge simply because the permit-issuing authority has not issued a new permit before the existing permit expires.

In some cases, administrative continuance of expired permits provides States with flexibility to prioritize their action without significant adverse impacts on receiving waters. However, administrative continuance also may lead to inappropriate delays in reissuing permits that need revision to comply with current requirements. State administrative-continuance laws typically allow an expired permit to remain administratively-continued indefinitely. Therefore, a lengthy administrative continuance of a permit for a discharge into an impaired waterbody can significantly delay the implementation of needed water quality-based effluent limitations. Under EPA's existing regulations, no mechanism currently exists by which to invoke the Agency's permit review and objection authority to address this situation. The proposed authority and the procedures to invoke this authority would provide that procedural mechanism.

The proposal provided that if, after notice, the State failed to submit to EPA a draft or proposed permit for a discharge into an impaired waterbody within 90 days following the permit expiration date, the Regional Administrator could treat the expired and administratively-continued permit as the State's submission of a draft or proposed permit for EPA review under § 123.44. For EPA to exercise this discretionary review authority, EPA would give the State and the discharger 90-days notice of its intent to treat the administrative-continuance as the reissuance of a permit containing the same terms as the permit that had expired. EPA could provide this notice at any time following the 90-day period after permit expiration. EPA's use of this new mechanism would be discretionary.

Once the environmentally-significant, administratively-continued permit was subject to review under § 123.44 procedures, EPA would be able to comment on, object to, or recommend

changes to the permit. If the State, under § 123.44(a), submitted a draft or proposed permit for EPA review at any time before authority to issue the permit passed to EPA under § 123.44(h), EPA would withdraw its notice of intent to assume permitting authority. At that point, existing rules on EPA objection to State-issued permits would govern. Therefore, EPA could take any appropriate action, including transmission of comments on or possible objection to the new draft or proposed permit submitted by the State. Furthermore, EPA's ability to invoke this authority would continue until the State issues the final permit. In other words, if a State submits a draft or proposed permit that EPA believes resolves all of the concerns under the objection but fails to issue the final permit, EPA could invoke this authority again and object to the original (expired and administratively-continued) permit.

In the proposal, the Agency stressed that the new review mechanism would be used only in those circumstances where other means of working with the State to reissue the permit failed. At any time during this process, the State is encouraged to explain to EPA the reasons for not reissuing the expired permit. The Agency will carefully consider any such explanation before proceeding with these objection procedures. Similarly, the Agency would not expect to depend heavily upon the proposed mechanism in States whose administrative continuance laws operate for limited periods of time.

As noted in the preamble to the proposed rule, § 123.44(k) would apply only to those expired, State-issued permits for which a timely and complete application for renewal has been submitted to the State, and for which State law has provided for continuation of the expired permit. The new provision would not apply to unpermitted discharges. Existing authority allows the Agency to institute judicial or administrative actions against unpermitted dischargers for discharging without a permit, even if they have submitted an application to the State and the State has not issued the permit.

EPA recognized in the preamble to the proposed rule that many administratively-continued permits for discharges into impaired waters have not been reissued and that the Agency expects to exercise its discretion to use this authority only in very rare instances and only with respect to environmentally-significant permits. The Agency intends to use its discretion under this provision as one way to help ensure that these permits will be issued

in a timely manner to support the fulfillment of the CWA goals to ensure that water quality standards are maintained and protected.

EPA's authority to make these changes to its regulations was discussed at length in the proposal. EPA restates the most important elements of that discussion here. Section 301(b)(1)(C) of the Act directs EPA and the States to include water quality-based effluent limitations in NPDES permits that will enable the waterbody to meet the applicable water quality standards. Also, CWA section 501(a) allows the Agency to promulgate a regulation to implement CWA section 402(b)(1)(B) and EPA's authority in CWA section 402(d) to prevent a State from avoiding (or postponing by lengthy administrative continuance), what otherwise would be required by reissuance. The Agency bears an obligation under CWA section 402(c)(2) to ensure that State programs and State-issued permits comply with the requirements of the Act including section 402(b)(1)(B). NPDES permits may not be issued for periods exceeding five years (CWA section 402(b)(1)) and should be reviewed and revised in a timely fashion to ensure compliance with the CWA and applicable regulations.

What comments did EPA receive? The following summarizes the major comments received on the proposed authority for EPA to review, object to, and reissue, if necessary, a State-issued NPDES permit that has been administratively-continued after expiration. The majority of comments received on this proposed provision asserted that EPA does not have the statutory authority under the CWA to amend the NPDES regulations to permit the Agency to review, object to, and reissue State-issued NPDES permits that have been administratively-continued. Many of these commenters stated that Congress intended authorized States to have complete authority to administer the NPDES program and that EPA should not undermine any portion of that authority. Some commenters asserted that the only statutorily-authorized mechanism EPA has to address State-issued, administratively-continued permits is to withdraw the approval of a State's NPDES program.

Several commenters expressed their concern that EPA does not have the resources to effectively take on this additional regulatory responsibility. To support this argument, these commenters cited EPA's current permit backlog. Many also asserted that EPA does not have the expertise to do a better job than the State. These

commenters argued that State agencies have a much closer relationship with their NPDES permittees and would, therefore, have a better understanding of all aspects of the permits and necessary requirements.

A number of commenters strongly supported this proposed change to the NPDES regulations. Some commenters expressed their belief that EPA already has the authority to review any and all NPDES permits. These commenters argued that EPA has an obligation under the CWA to ensure that all State programs and State-issued permits comply with the requirements of the Act. Some expressed their belief that the proposed regulatory language limits EPA's review of expired permits by allowing this authority to be invoked only for those expired permits authorizing discharges to waters that do not attain and maintain water quality standards. These commenters suggested that the authority be broadened to allow for review of all State-issued permits that have been administratively-continued after expiration. Several commenters also expressed their belief that this authority should be mandatory rather than discretionary, *i.e.*, EPA should be required to review, and reissue, if necessary, all administratively-continued permits. These commenters asserted that delaying review results in unlawful continued approval of permits authorizing discharges in violation of water quality standards and established TMDLs.

Some commenters expressed procedural concerns regarding the proposed provision. Many asserted that this proposed authority constituted a "second veto" authority because the Agency already had the chance to object to the permit after the State's notification of its intent to issue the original NPDES permit. Others suggested extending the period for States to Act after EPA notice from 90 days to two years. These commenters argued that this time is necessary to resolve all permitting issues, including the very complex process of incorporating the applicable wasteload allocations that are derived under a TMDL. Some recommended that EPA only allow this authority in waters that do not attain and maintain water quality standards where a TMDL has been established.

What is EPA promulgating today?

After considering all of the comments EPA received on the proposed mechanism and considering further the purpose of the underlying authority, EPA is today promulgating the

regulations proposed at § 123.44(k) except as explained later in today's preamble. The Regional Administrator will generally have the discretionary authority to review, object to, and reissue, if necessary, environmentally-significant State-issued NPDES permits that have been administratively-continued after expiration. An environmentally-significant permit authorizes a discharge to a waterbody that does not attain and maintain water quality standards where there is a need for a change in the existing permit limits to be protective of water quality standards.

The availability of this authority is important for permits that authorize discharges of pollutant(s) of concern to waterbodies in the absence of an EPA approved or established TMDL. In particular, the availability of this authority, under these circumstances, is important for permits that do not contain limits and/or conditions that derive from and comply with water quality standards. Again, the Agency expects to use this authority only in rare instances as States will continue to have the primary role in administering the NPDES program. The Agency believes that this mechanism advances the goals of the CWA, to attain and maintain water quality standards. The Agency further believes that this authority is necessary to facilitate the fulfillment of EPA's statutory responsibility to include water quality-based effluent limitations in NPDES permits that meet the applicable water quality standards. (CWA section 301(b)(1)(C)).

In response to comments opposing this provision, EPA does not believe that Congress intended authorized States to have unfettered discretion with regard to NPDES permitting after authorization. Congress expressed its clear intent regarding State-issued NPDES permits in the specific text of CWA sections 402(b)(1)(B) and (c)(2) and today's rule improves implementation of those provisions. EPA action on this provision of today's rule does not undermine State authority, but rather enhances the authority and responsibility of authorized States to the extent that a discharger with an expired permit may affirmatively seek action from the State (compared to the status quo where the discharger with an expired permit has no incentive to seek action from the State).

B. New Tools To Ensure Implementation of TMDLs

1. Background

In addition to ensuring reasonable further progress toward the attainment of water quality standards prior to an

EPA approved or established TMDL (described above), EPA proposed revisions that included new tools to ensure implementation of EPA approved or established TMDLs. EPA proposed explicit language describing the authority of EPA and States with approved NPDES programs to designate certain currently unregulated sources as discharges requiring NPDES permits. These sources would have included certain animal feeding operations, aquatic animal production facilities and silvicultural operations. The proposal stated that EPA could invoke this authority when necessary to provide reasonable assurance that an EPA approved or established TMDL would be implemented with respect to the particular source to be designated. Moreover, EPA proposed that it could invoke this authority when necessary to provide reasonable assurance that the designated source would achieve its allocated load reductions under the TMDL.

EPA also proposed explicit language describing the Agency's discretionary authority to review, object to, and reissue, if necessary, State-issued permits that are "administratively-continued" after expiration, authorizing discharges into waters that do not attain and maintain water quality standards with an EPA approved or established TMDL. EPA proposed that it could exercise this authority when necessary to ensure that those permits are consistent with applicable wasteload allocations under a TMDL.

What comments did EPA receive? The following summarizes the major comments received on the proposed new tools to ensure that established TMDLs are implemented. Several comments expressed support for EPA's authority to designate certain animal feeding operations (AFOs), aquatic animal production facilities (AAPFs), and silvicultural activities as subject to the NPDES program. Conversely, several commenters expressed their concern that additional prescriptive, command and control requirements would be counterproductive, impede economic sustainability, and stall progress already made at the local level. Some commenters added that the proposed rule would alienate the partners and cooperators with whom working relationships should be fostered. These commenters asserted that water quality improvements could instead be achieved by good locally lead, incentive-based programs, and voluntary best management practices. Some commenters noted that voluntary programs, including the CWA section 319 program, were inadequately funded

and that additional resources directed to these programs would be more effective in achieving water quality goals than through additional regulatory mechanisms.

Many comments stated that nonpoint source pollution derived from agricultural and silvicultural activities should not be regulated. Several comments stated that Congress did not intend to regulate AFOs or silviculture activities under the Clean Water Act or subsequent amendments. EPA also received many comments regarding whether EPA has the authority to designate sources in NPDES-authorized States. These commenters expressed their belief that the proposal was designed to extract from States more rigorous (i.e. enforceable) "reasonable assurances" that nonpoint source load allocations will be met.

Some comments noted that the determination regarding whether or not to permit an AFO, AAPF, or silviculture activity should be based upon whether or not the operation or activity met the statutory definition of a point source rather than on case-by-case determinations. Several comments specifically addressed the definition of "point source" and emphasized that any discernible, confined and discrete conveyance falls within that definition and, therefore, all operations with such conveyances should be regulated as point sources. Other comments that addressed this same issue asserted that only those operations with a discrete, confined and discernible conveyance fall within the definition of point source and only those can thus be permitted.

The Agency received comments asserting that requiring permits on a case-by-case basis violates the due process rights of the permittee since there are no clear standards to apply and no hearing rights provided to challenge abusive decision-making regarding NPDES permitting. The comments further noted that permit decisions should be based upon fixed rules rather than on-the-spot decisions by Federal employees.

2. Designation of concentrated animal feeding operations (CAFOs)

What Did EPA Propose? EPA proposed changes to the NPDES regulations regarding the designation of concentrated animal feeding operations (CAFOs). EPA proposed explicit language describing the Agency's authority, in States with approved NPDES programs, to designate animal feeding operations (AFOs) as CAFOs. Once designated, these sources would be subject to NPDES program requirements. This designation authority, like the authority of NPDES-

authorized States and EPA in unauthorized States, would be discretionary. The proposed authority was limited to instances when EPA establishes a TMDL and determines designation is necessary to provide reasonable assurance that the TMDL will be implemented. If the Agency chose to invoke this authority, it would do so on a case-by-case basis and only in those instances where other means of working with the State were not successful.

The NPDES regulations for CAFOs first define the term "animal feeding operation" (AFO) and then the term "concentrated animal feeding operation" (CAFO). An operation must first be an AFO before it can be defined or designated as a CAFO. The term "animal feeding operation" is defined in EPA regulations as a "lot or facility" where animals "have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12 month period and crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility" See § 122.23.

Once a facility meets the AFO definition, its size, determined by the total numbers of animals confined, is a fundamental factor in determining whether it is a CAFO. The animal livestock industry is diverse and includes a number of different types of animals that are kept and raised in confined situations. To define these various livestock sectors, EPA regulations established the concept of an "animal unit" (AU) (Part 122 Appendix B). An AU varies according to animal type. One animal is not necessarily equal to one AU. The regulations assign a multiplication factor for each livestock type, except poultry.

An AFO is a CAFO either if it meets the regulatory definition of a CAFO or it is designated as a CAFO on a case-by-case basis. An AFO is defined as a CAFO where more than 1,000 AUs (as defined by the existing regulation) are confined at a facility. These CAFOs are considered "large CAFOs." In general, a medium-sized AFO where more than 300 AUs are confined at a facility is also defined as a CAFO where pollutants are discharged either into navigable waters through a manmade ditch, or directly into waters that originate outside of and pass over, across, or through the facility, or come into direct contact with the confined animals. Today's regulation does not address AFOs that are defined as CAFOs under these criteria.

As mentioned, an AFO can become a CAFO subject to NPDES permitting

through case-by-case designation. See § 122.23(c). Case-by-case designations are based on a Director's determination that the operation or facility is a significant contributor of pollutants to waters of the United States. In designating an operation or facility as a significant contributor of pollutants, the Director essentially finds that the facility's discharges are more like point sources already subject to NPDES regulation than those agricultural nonpoint sources that are not. EPA regulations define the term "Director" as the EPA Regional Administrator or the State Director (in States authorized to administer the NPDES program), as the context requires, or an authorized representative. See § 122.2. This definition explains that when there is an approved State program, "Director" normally means the State Director but that in some circumstances, EPA retains the authority to take certain actions even when there is an approved State program. In the proposed rule, EPA identified designation of CAFOs and concentrated aquatic animal production facilities (CAAPFs) as instances, where the context requires, that EPA retain authority in authorized States.

In making the determination that a source is a significant contributor of pollutants to waters of the United States, the Director conducts an on-site inspection of the facility and considers the following factors: (1) The size of the animal feeding operation and the amount of wastes reaching waters of the United States; (2) the location of the animal feeding operation relative to waters of the United States; (3) the means of conveyance of animal wastes and process waste waters into waters of the United States; (4) the slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes and process waste waters into waters of the United States; and (5) other relevant factors. See § 122.23(c). One such relevant factor could be the water quality of the receiving water, including the degree of nonattainment of water quality standards.

EPA has designated AFOs as CAFOs in States where it is the NPDES permitting authority although it has done so only on rare occasions. EPA believes it should be able to designate facilities in NPDES-authorized States as well, for example, to assure implementation of an EPA-established TMDL. EPA, therefore, proposed to revise § 122.23 to include explicit language describing the Agency's authority (under certain circumstances discussed below) to make such

designations in instances when the State has not already done so.

The proposed regulatory change limited the exercise of this discretion to the situation where EPA establishes a TMDL for a waterbody in an authorized State and determines that designation is necessary to provide reasonable assurance that the wasteload allocations and load allocations under the TMDL will be achieved. EPA may establish a TMDL for a State where a State fails to establish a TMDL for a waterbody in accordance with its approved schedule or where EPA disapproves a State-established TMDL. States must submit each TMDL they establish to EPA for approval. EPA is today promulgating regulations to require States to submit a plan to implement the load allocations and wasteload allocations of a TMDL. EPA will evaluate the adequacy of the implementation plan (a required element of a TMDL) in determining whether to approve a TMDL. If EPA disapproves a TMDL based on a determination that the implementation plan is inadequate EPA would then need to establish the TMDL itself, including an implementation plan.

The implementation plan must provide reasonable assurance that the control actions and/or management measures required to implement the load allocations and wasteload allocations of the TMDL will be put in place and the load allocations and wasteload allocations will be met. Thus, EPA may disapprove the TMDL if the Agency determines that the wasteload allocation or load allocation is not appropriate, or the implementation plan does not provide such reasonable assurance. For example, EPA may determine that the implementation plan lacks reasonable assurance that certain AFOs will achieve and maintain their respective pollutant load allocations. Under these circumstances, EPA proposed that it would work with the State to provide the necessary reasonable assurance. EPA might suggest to the State, for example, that certain additional management measures be put in place to control the water quality impacts from AFOs contributing to the water quality impairment necessitating the TMDL. EPA also might recommend that certain improvements be made to existing State programs, whether voluntary or regulatory, to control water quality impacts from such sources.

If working with the State to achieve reasonable assurance has failed, however, EPA proposed that it would disapprove the TMDL and thereafter establish the TMDL, including an implementation plan. Under these

circumstances, EPA proposed that the Agency may then determine that an AFO is a significant contributor of pollutants to waters of the United States. EPA may also determine that the best way for EPA to provide reasonable assurance that such feedlot pollutant sources achieve and maintain assigned pollutant load allocations is through the issuance (and enforcement) of an NPDES permit. Under the proposal, EPA could then invoke its designation authority and require the AFO to seek an NPDES permit as a CAFO.

What comments did EPA receive? In addition to the comments noted above under the section titled "What Comments Did the Agency Receive on These Proposed New Tools," the Agency received several comments specific to the proposed designation of animal feeding operations. The following discussion summarizes some of the major comments received on this provision. EPA received several comments supporting the proposed authority to designate certain AFOs. Many commenters also recommended that using its designation authority, the Agency correct NPDES-authorized States that fail to properly permit all large AFOs as CAFOs.

Many commenters, on the other hand, opposed EPA designation in NPDES-authorized States. These commenters asserted that States should have the lead in regulating AFOs and expressed concern that the proposed rule would result in increased coordination costs for Federal and State governments. Others expressed concern that EPA designation of AFOs in NPDES-authorized States would not be consistent with a State's designation authority. These commenters asserted that EPA is not required to conduct the same analysis as a State when deciding whether to require a permit.

Several comments stated that EPA could not intervene in NPDES-authorized States unless it decides to withdraw the NPDES program. Commenters stated that EPA designation in authorized States would conflict with State decisions regarding its NPDES program, for example, by overriding a State's decision not to regulate certain AFOs. One commenter expressed concern that the rule could result in inconsistent permitting decisions for similar sources located in different EPA Regions.

EPA also received comments recommending that a limit or threshold level be established for the number of small AFOs that would be designated on a case-by-case basis under this rule. These commenters suggested that such a limitation would place a cap on the

potential strain to State resources caused by the inclusion of a large number of additional facilities that would be added to the NPDES program. Some comments stated that only AFOs that discharge pollutants from a point source—a discrete, confined, discernable conveyance—can be permitted whereas nonpoint source dischargers could not. Others commented that Congress only intended to regulate large AFOs.

What is EPA promulgating today? In response to comments received on the proposed rule, EPA is not taking final action on the proposed changes to the NPDES regulations applicable to AFOs and CAFOs at § 122.23.

3. Designation of Concentrated Aquatic Animal Production Facilities (CAAPFs)

What did EPA propose? EPA proposed changes to the NPDES regulations regarding the designation of concentrated aquatic animal production facilities (CAAPFs). EPA proposed explicit language describing its authority, in States with approved NPDES programs, to designate aquatic animal production facilities (AAPFs) as CAAPFs. Once designated, these sources would become subject to NPDES program requirements. This designation authority would be discretionary and if invoked, would be used on a case-by-case basis. The proposed authority was limited to instances where EPA is establishing a TMDL and the Agency determines that designation is necessary to provide reasonable assurance that the TMDL will be implemented. The Agency's purpose and basis for this action is nearly identical to the purpose and basis explained for EPA designation of CAFOs in NPDES-authorized States.

Under existing regulations, concentrated aquatic animal production facilities are subject to the NPDES program. As with AFOs, one situation in which an AAPF is considered "concentrated" and thus subject to NPDES permitting, is when the Director so designates the operation or facility on a case-by-case basis. See § 122.24(c). As with case-by-case designations of CAFOs, case-by-case designations of CAAPFs are based on a determination that the operation or facility is a significant contributor of pollutants to waters of the United States. In designating an operation or facility as a significant contributor of pollutants, the Director essentially finds that the facility's discharges are more like point sources already subject to NPDES regulation than agricultural nonpoint sources that are not.

In making the determination that an AAPF is a significant contributor of pollutants to waters of the United States, the Director conducts an on-site inspection of the facility and considers the following factors: (1) The location and quality of the receiving waters of the United States; (2) the holding, feeding and production capacities of the facility; (3) the quantity and nature of the pollutants reaching waters of the United States; and (4) other relevant factors. See § 122.24(c). The proposed regulatory change would restrict EPA's authority to exercise the discretion to designate CAAPFs to the same limiting situations for designating CAFOs, specifically, when EPA establishes a TMDL for a waterbody in an authorized State and determines that designation is necessary to provide reasonable assurance that the wasteload allocations and load allocations under the TMDL will be achieved.

In addition, the preamble to the proposed rule offered an interpretation of the distinction between "aquaculture" and "concentrated aquatic animal production facilities." Based on additional consultation, today's preamble offers a clarification to that interpretation as explained below.

What comments did EPA receive? In addition to the comments noted above under the section titled "What Comments Did EPA Receive on These Proposed New Tools," the Agency received several comments specific to the designation of CAAPFs. EPA received very few comments addressing issues relevant solely to the designation of CAAPFs. The following is a summary of those comments. One comment expressed support for the proposal but suggested that the scope of designation authority should be broadened. This commenter expressed concern that there were too many exemptions under which a facility would not be covered under the NPDES program and that the proposal should be revised to allow for designation of all CAAPFs in every instance.

Most of the comments received opposed EPA's proposal to designate certain AAPFs in those instances where other means of working with a State have failed. One commenter expressed concern that the proposal was a questionable expansion of EPA's authority to supercede current State actions that efficiently and economically regulate CAAPFs. This commenter stated that States with large aquatic production industries already have a comprehensive regulatory framework, enforcement authority and compliance assistance, as well as voluntary incentives, including operator

training and certification, complaint systems, and coordination with various State agencies.

What is EPA promulgating today? In response to comments received on the proposed rule, EPA is withdrawing the proposed changes to the NPDES regulations applicable to AAPFs and CAAPFs at § 122.24.

By today's preamble, however, EPA offers a clarification of its interpretation of the distinction between "aquaculture" and "concentrated aquatic animal production facilities." The preamble to the proposed rule differentiated between "aquaculture" and "aquatic animal production facilities" based on the location of aquatic stock confinement relative to jurisdictional waters of the United States. The proposal indicated that with respect to "aquaculture," aquatic stock is confined within jurisdictional waters whereas aquatic stock in "aquatic animal production facilities" is not confined within jurisdictional waters but the facilities discharge to jurisdictional waters. Upon closer review of the original CWA legislative history, the regulations for aquaculture and aquatic animal production facilities, and past Agency statements on the matter, EPA today clarifies the statements in the preamble to the proposed rule. As an initial matter, the Agency notes that it did not intend to amend or revise existing EPA interpretations regarding the scope of the two regulations, but merely to provide clarification for the reader. EPA regrets any confusion fostered by the proposal.

Section 318 of the CWA specifically addresses "aquaculture." The CWA does not specifically address "concentrated aquatic animal production facilities." The latter are a type of "concentrated animal feeding operation," which the CWA explicitly identifies as a "point source." The legislative history is clear that "aquaculture," as the term is used in Section 318 of the Act, is intended to refer to controlled conditions at an approved aquaculture project, i.e., innovative reuse of effluent discharged from municipal and/or industrial sources. In 1977, EPA explained that aquaculture projects were viewed as one way to put existing pollution to productive use. (42 FR 25478, May 17, 1977.) ("aquaculture projects using pollutants within navigable waters will be unique since discharges in excess of those permitted pursuant to effluent limitations are to be allowed within the project area."). When EPA proposed the aquaculture regulations in August 1978, the proposed regulatory text provided:

The regulations are intended to authorize, on a selective basis, controlled discharges which could otherwise be unlawful under the Act in order to determine, in a carefully supervised manner, the existing and potential feasibility of using pollutants to grow aquatic organisms which can be harvested and used beneficially and to encourage such projects, while at the same time protecting the other beneficial uses of the waters.

Section 125.15(b) (as proposed at 43 FR 37132 on August 21, 1978). The Agency further proposed that:

These regulations do not apply to those aquaculture facilities such as fish hatcheries, fish farms, and similar projects which do not use discharges of wastes from a separate industrial or municipal point source for the maintenance, propagation and/or production of harvestable freshwater, marine, or estuarine organisms. Such projects are regulated directly as aquatic animal production facilities under section 402 of the Act.

Section 125.15(c) (as proposed on August 21, 1978). The 1978 proposal was nearly identical to the aquaculture regulations then in existence under Part 115. Its purpose was to incorporate the Part 115 regulations into the NPDES permit regulations, reflecting the Agency's intent to merge aquaculture permitting into the NPDES program following changes to Section 318 in the 1977 CWA amendments. While the current regulations addressing aquaculture have changed slightly and been renumbered, the proposed regulatory text quoted above most clearly illustrates the distinction between "aquaculture" within the meaning of CWA section 318 and regulated under § 122.25, and "concentrated aquatic animal production facilities" regulated under § 122.24. Therefore, by today's final rule, EPA is clarifying that the distinction between "aquaculture" and "concentrated aquatic animal production facilities" is not based on the location of aquatic stock confinement relative to jurisdictional waters of the United States. Most commercial fish husbandry that the layperson refers to as "aquaculture," including fish farms located in waters of the U.S., is subject to NPDES regulation under the rubric "concentrated aquatic animal production facility." As with feedlots, an "aquatic animal production facility" is subject to regulation under the NPDES permitting program only if the facility is "concentrated" according to the NPDES regulations.

4. Designation of Point Source Storm Water Discharges Associated With Silvicultural Operations

What did EPA propose? The proposed regulations would have provided States authorized to administer the NPDES program and EPA with the opportunity to use the NPDES program to manage pollution from forestry operations under certain circumstances. As proposed, a State could designate a forestry operation not already subject to NPDES permit requirements, as requiring an NPDES permit only (1) where the operation includes a physical "discharge" of storm water from a discrete, confined, discernible conveyance (a physical point source); and (2) upon a determination that the operation was a "significant contributor of pollutants" or was contributing to the violation of a water quality standard. The proposal would have also provided EPA with this designation authority. The Agency's use of this authority, however, would have been limited to instances where the Agency establishes a TMDL and designation is deemed necessary to provide "reasonable assurance" that a source would meet its allocated load reductions under the TMDL.

Under the proposed regulations, pollutants from forestry operations that do not cause significant water quality problems would not be subject to the NPDES program. Even where forestry activities were causing significant water quality problems, State permitting authorities would have retained the option of determining that approaches other than the NPDES program, such as State voluntary or alternate regulatory programs, would be more effective and sufficient to restore the health of the polluted waterbody.

As proposed, where a State identifies a polluted waterbody, the State would be required to develop a TMDL to restore the water and provide "reasonable assurance" that the necessary pollution controls would actually be implemented. States authorized to administer the NPDES program would have, among others, the option to issue an NPDES permit for a point source discharge of storm water associated with a forestry operation to provide "reasonable assurance" that the pollution control measures would be implemented. EPA noted in the proposal that the Agency expected that States would use this permit option only to address "bad actors" who had not responded to various non-regulatory approaches and were not adequately implementing best management

practices to control water quality impacts.

The Clean Water Act requires that EPA review and approve TMDLs as adequate to restore the health of polluted waters. Where a State TMDL is not adequate and EPA disapproves the TMDL, EPA is required to establish the TMDL. In cases where EPA establishes a TMDL that identifies silvicultural activities as a significant source of pollutant loadings, the Agency proposed that it would work with the States and rely on voluntary, incentive-based approaches, where such approaches are proven to be effective, to provide reasonable assurance that the loads and wasteloads allocated in the TMDL would be achieved. Where working with the State did not prove successful, the proposed regulations would have allowed EPA to designate, as a point source discharge, the addition of pollutants from forestry activities that discharge storm water through a discrete, confined, discernible conveyance. As discussed in the preamble to the proposed regulations, EPA expected that the Agency would use this authority only as a last resort. To accomplish this objective and achieve the intended result in the least burdensome fashion, EPA proposed changes to the silviculture and storm water permit provisions at §§ 122.27 and 122.26.

Forests have a significant role in protecting the quality of our Nation's waters. Covering about one-third of the Nation's land area, forests are the source of about two-thirds of the Nation's runoff, excluding Alaska. Vegetated forested lands help to dissipate rain, reduce flooding and slow storm water runoff. In addition, forested lands help to refill underground aquifers, cool and cleanse water, and provide critical habitat for fish and wildlife. Forests also improve our quality of life by providing abundant recreational opportunities.

EPA recognized that implementing properly designed forest management plans can result in silvicultural activities that are both profitable and protective of water quality. These plans can be designed to include mechanisms that would accommodate the full range of forestry activities that might otherwise pollute waters (e.g., by designating special areas for protection; planning the proper timing of forestry activities; describing best management measures for road layout, design, construction, and maintenance; and identifying the most appropriate methods for harvesting and forest regeneration). EPA also recognized that in many parts of the country, Federal agencies, States, and professional forest

managers are implementing effective forest management plans combining a range of tools including education, financial assistance, and regulatory requirements.

Despite these public and private forest management efforts, silvicultural activities may yet contribute to water quality impairments and aquatic habitat loss (e.g., when operators resist such forest management efforts or when forest management efforts become outdated or unresponsive to current conditions). Impairments and habitat loss may occur due to sediment and nutrient pollutant loadings, adverse impacts to runoff and infiltration patterns, and water temperature increases. Discharges due to improper road design, location, maintenance and use also can impair aquatic ecosystems and result in physical alterations in stream channel morphology and substrate composition, stream bank destabilization, changes in flow regime, habitat fragmentation, etc. ("Environmental Assessment to the Interim Rule: Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas," February 1999, USDA Forest Service). Sedimentation due to uncontrolled discharges from silviculture activities, for example, discharges from forest road building, threatens water quality and important aquatic habitat.

In 1998, 32 States identified forestry as a source of water quality problems that affect more than 20,000 miles of rivers and streams, 220,000 acres of lakes, and 15 square miles of coastal waters. This data was derived from an unpublished analysis using data from the 1998 section 303(d) lists and the CWA section 305(b) reports. The Agency believes that these numbers underestimate the number of waters impaired by forestry operations due to a number of data limitations.

EPA proposed changes to the NPDES regulations for silviculture and for storm water discharges in order to address this potential source of significant impairment. Most discharges of storm water associated with road building and other land disturbing activity that disturbs more than five acres of land are currently regulated under the NPDES permitting program pursuant to the NPDES permit regulations for storm water discharges at § 122.26. EPA published the storm water discharge application regulations in 1990. After promulgation of those regulations, and in discussions with stakeholders, it became clear to EPA that, at a minimum, there was a perception of a

"gap" in regulatory treatment of silviculture roads compared to all other types of roads. This regulatory gap arose based on the NPDES regulation addressing silvicultural sources which identified, among other things, silvicultural "road construction and maintenance from which there is natural runoff" as a nonpoint source silvicultural activity.

The Agency believes that it acted within its delegated authority when it proposed to remove this sentence from the regulation. EPA proposed that, under limited circumstances, when a silvicultural activity results in a "physical" point source discharge that can and should be regulated under NPDES permits, like those for other storm water discharges, States and EPA should have the option of using the NPDES program as a means to address the water quality impacts from a significant remaining, unregulated source of pollutants causing adverse impacts to water quality. Specifically, the Agency believed that this option should be available to address those sources that are doing a poor job of implementing measures designed to prevent water quality problems.

The proposal would have provided all NPDES permitting authorities with sufficient authority to regulate "physical" point source discharges from silvicultural sources not already subject to NPDES permit requirements. Again, the Agency hastens to note that the existing limitation on regulation of discharges from silvicultural sources was not compelled by the CWA. EPA promulgated the existing regulation on silviculture based on the interpretive authority for rulemaking under CWA section 501(a), which authorizes the Administrator to prescribe regulations that are necessary to carry out her functions under the Act. The CWA preserves the rights of States to experiment with alternative regulatory (and non-regulatory) approaches to control nonpoint sources of pollution. The CWA does not provide specific legal authority for EPA to regulate nonpoint sources in a way that would assure the attainment of water quality standards. Such authority is reserved for the States.

Under the proposed rule, EPA would have deleted a sentence from the existing NPDES regulations that identifies a series of nonpoint source silvicultural activities (§ 122.27(b)(1)). While most such activities, in fact, can result in diffuse runoff (i.e., a nonpoint source of pollutants), some discharges from some silvicultural activities may physically resemble point source discharges. As early as 1976, the Agency

struggled to articulate a general definition for the term nonpoint source. (41 FR 24709, 24710 col.2, June 18, 1976). There was, and perhaps remains, however, no precise and absolute definition. *Id.* In the 1976 preamble, EPA relied on three criteria to characterize nonpoint sources: Pollutants discharged are induced by natural processes; pollutants discharged are not traceable to any discrete or identifiable facility; and pollutants discharged are better controlled through the utilization of BMPs, including process and planning techniques. As evidenced by implementation of the NPDES permitting program for storm water discharges associated with construction, the first and third of these criteria are probably less meaningful in the current context of silvicultural road building and maintenance.

As explained in the preamble to the proposed rule, EPA premised the existing silviculture regulation (at § 122.27) on a judicial decision that held that EPA could not exempt any point sources from the NPDES permitting program. *See Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). EPA interprets the 1987 storm water amendments in CWA section 402(p)(1) to essentially supercede this judicial finding and create a new category of “unregulated point sources.” In place of this regulatory gap from permitting for silvicultural discharges, the proposed rule would allow for case-by-case regulation of a new category of “unregulated point sources” associated with the silvicultural activities that are currently unregulated under the NPDES program. Note that “return flows from irrigated agriculture” and “agricultural storm water” are “statutory” nonpoint sources (based on CWA section 502(14)). As such, EPA can not and would not attempt to regulate those statutory nonpoint sources under the NPDES permitting program. The Agency emphasizes that the proposal would have affected only those currently unregulated silvicultural activities that cause “physical” point source discharges. As discussed previously, except for some CAFOs, a term specifically included in the definition of “point source,” the NPDES permit requirement only applies when a particular source has the “physical characteristics” of a point source discharge. As a threshold matter, regulation as a point source requires a “discrete, confined, and discernible conveyance.” CWA section 502(14), 33 U.S.C. section 1362(14).

In the 1987 amendments to the CWA, Congress established a general

moratorium against permitting discharges composed entirely of storm water in CWA section 402(p)(1). As such, the section created the category of “unregulated” point sources of storm water described above. Unregulated point sources of storm water are point sources to which the NPDES permitting program does not apply. CWA section 402(p)(2) identified discharges that are *not* subject to the moratorium, including discharges from municipal separate storm sewer systems serving populations over a certain size, as well as storm water discharges associated with industrial activity.

Of particular interest, CWA section 402(p)(2)(E) specifically identifies a category of discharges—other than municipal or industrial storm water discharges—that can be regulated on a case-by-case at some future time. EPA regulations that implement section 402(p)(2)(E) are found at § 122.26(a)(1)(v). Section 402(p)(2)(E) is the basis and the only basis, upon which physical *point source discharges* from the currently unregulated silvicultural activities would be required to obtain an NPDES permit. Designation under section 402(p)(2)(E) is only available for point sources. The sentence in EPA’s current silviculture regulation that identified nonpoint source discharges from silvicultural activities enabled inconsistent interpretations regarding whether discharges from such activities, which otherwise would appear to add pollutants from a discrete, confined, discernible conveyance, could be designated under section 402(p)(2)(E). EPA proposed deletion of this sentence to clarify the circumstances when such sources can and should be regulated under the NPDES permitting program for storm water discharges.

As noted above, the reason EPA proposed to remove the sentence describing silvicultural nonpoint sources was to provide States with an additional tool to manage water quality impacts from these sources as well as to ensure that EPA could implement a TMDL that the Agency might be required to establish in the event of State default. Accordingly, the proposed rule would have imposed a restriction on EPA that would not exist for States. Specifically, the Agency could not have designated discharges from currently unregulated silvicultural activities except in instances where EPA must establish a TMDL. This additional tool would be provided to NPDES-authorized States and to EPA under the combination of the existing storm water regulations which allow for case-by-case designation of certain storm water

discharges at § 122.26(a)(1)(v) and by amending the silviculture regulations at § 122.27.

EPA notes that it did not provide an accurate cite for one of the documents cited in the proposal that described the impacts of silviculture on water quality. The Agency did not intend to misrepresent the views of the authors of the cited publication. EPA erroneously cited the wrong document authored by one of the same authors of a document in the same year (1989). The paper that the Agency intended to cite is titled, “An Overview of Nonpoint Source Pollution in the Southern United States” authored by Neary, D.G., Swank, W.T., Riekerk, H., which was published in “Proceedings of the Symposium: Forested Wetlands of the Southern U.S.,” July 12–14, 1988, Orlando Fl., U.S. Forest Service. General Technical Report SE–50, published January 1989.

The proposed rule contained the statement, “silviculture contributes approximately three to nine percent of nonpoint source pollution to the Nation’s waters.” EPA meant to state that, based on State assessments reported in the 1988 section 305(b) Report to Congress (EPA Document #440–4–90–003), three to nine% of assessed rivers are impaired by silviculture. The Neary *et al.* document that the Agency intended to cite supports this statement. This document contains the statement that, “except for two [of the reported] states, (Arkansas and Louisiana), silviculture was responsible for <8% of the impacts on surface waters.” This number falls within the range reported by the States in the 1988 section 305(b) report.

What comments did EPA receive? In addition to the comments noted above under the section titled “What Comments Did EPA Receive on These Proposed New Tools,” the Agency received many comments specific to the designation of silvicultural activities. The following discussion summarizes these comments. An overwhelming number of commenters had a basic misunderstanding of what the Agency proposed. These commenters misinterpreted the proposal to mean that, upon promulgation of the rule, each and every existing and future silvicultural operation would be required to obtain an NPDES permit. Based on this misunderstanding, these commenters also misunderstood the proposal as a mechanism that would unfairly and unnecessarily regulate even those operators that are adequately implementing appropriate measures to protect water quality. As discussed above, the scope of the proposed authority was much narrower, it only

applied in very limited circumstances, and would have been a mechanism to address bad actors only.

Several commenters claimed that obtaining and issuing NPDES permits would be an economic burden to the forestry industry as well as the government and that the money to obtain and issue these permits would not be well spent because it would not produce a meaningful change in water quality. Claiming that forestry has been reported as only a minor source of water quality pollution, commenters further claimed that EPA lacks the data to support this regulatory change. Commenters also asserted that the economic analysis to the proposal underestimated the costs to landowners of obtaining an NPDES permit. Many commenters expressed their belief that existing regulatory and voluntary State Forest Management programs are adequate to manage the environmental impacts from silviculture and that the proposal, if finalized, would undercut these programs.

A significant number of commenters asserted that EPA lacks the authority to make the proposed regulatory changes. These commenters disagreed with the Agency's position that the CWA provides adequate statutory authority to make these revisions. Several commenters stated that EPA did not have the authority to redefine general silvicultural practices as point sources unless there was an associated conveyance. Other commenters argued that EPA cannot and should not shield sources with discharges from discrete, discernible, confined conveyances from NPDES permit requirements. These commenters asserted that all sources with discharges from discrete, discernible, confined conveyances are and should be required to obtain NPDES permits. EPA also received a significant number of comments that asserted that EPA does have the statutory authority to make these regulatory changes. These commenters pointed out that in the absence of clear statutory language excluding silvicultural activities from the definition of a point source, EPA has the authority to regulate them as point sources. These commenters also highlighted the court decision in *NRDC v. Costle*, where the U.S. Court of Appeals for the D.C. Circuit explicitly held that "the power to define point and nonpoint sources is vested in EPA." 568 F.2d at 1382.

The Agency received numerous comments in support of the proposed authority to designate certain silvicultural operations as requiring NPDES permits. Several commenters provided data and case examples

describing the need to permit silvicultural activities including data describing the adverse impacts to water quality from increased sediment loadings, road construction and the use of herbicides. Many commenters stated that the proposed authority was too restrictive to provide meaningful environmental results. These commenters encouraged EPA to expand designation authority to allow EPA to designate a source outside of the context of a TMDL and to expand the authority to apply universally to sources discharging into any water of the United States.

Many commenters encouraged EPA to require NPDES permits for all silvicultural operations that discharge pollutants from a point source to waters of the United States as opposed to the proposed case-by-case approach. Several commenters expressed their concern that the proposed case-by-case designation authority was retroactive in effect because designation was limited to instances where the State or EPA had already determined that the operator is a significant contributor of pollutants or contributes to a violation of water quality standards. These commenters supported a more proactive approach that would place less of a burden on the State or EPA. To preserve unspoiled waters, many also suggested that the authority be available to the State or EPA to designate sources currently located on these waters and those sources that wish to locate on these waters in the future.

Commenters expressed their concern regarding the potential for citizens to petition the State or EPA to issue an NPDES permit to silviculture operators. They were concerned that citizen suits would be costly and cause significant delays in operation. Conversely, some commenters supported the ability for citizens to use the petition process so that citizens can help to identify silvicultural operations that are causing significant water quality problems. Others expressed concern that sources undergoing land clearing activities incidental to activities such as farming or construction and development would claim that they are conducting silvicultural activities and therefore would be exempt from NPDES permit requirements (unless and until designated).

Some commenters asserted that the proposed requirement would override State control over land use decisions. These commenters asserted that requiring an NPDES permit constituted a Federal "taking" of a private landowner's use of property. Commenters also suggested that States

(and the sources within States) that have effective and adequately protective forestry programs should be exempt from the effects of the proposed provisions. These commenters suggested that EPA develop reporting criteria that allow for a reasoned determination of whether a State is demonstrating the level of effort sufficient to warrant a determination that its forestry program provides "reasonable assurance" that water quality will be protected.

What is EPA promulgating today? In response to comments received on the proposed rule, EPA is not taking final action in today's rule on the proposed changes to the NPDES regulations applicable to silviculture at §§ 122.26 and 122.27. EPA has no plans at present to repropose changes to the silviculture exemption or to finalize the August 1999 proposal, but will continue to evaluate how to best address the water quality impacts from forestry.

5. EPA Authority To Reissue Expired and Administratively-Continued NPDES Permits Issued by Authorized States

What did EPA propose? As discussed in Section III.A.3, Reasonable Further Progress Toward Attaining Water Quality Standards in Impaired Waterbodies in the Absence of a TMDL, of this preamble, EPA proposed to grant the Regional Administrator the discretion to trigger the objection procedures of § 123.44 to ensure that established TMDLs are, in fact, implemented.

What comments did EPA receive? The comments received on this proposal are discussed in III.A.3, Reasonable Further Progress Toward Attaining Water Quality Standards in Impaired Waterbodies in the Absence of a TMDL above.

What is EPA promulgating today? After carefully considering all of the comments EPA received on the proposed mechanism and considering further the purpose underlying the authority, EPA is today promulgating proposed § 123.44(k) as reflected in today's **Federal Register**. A discussion of EPA's authority to review, object to, and reissue State-issued NPDES permits that have been administratively-continued authorizing discharges to impaired waters is contained in Section III.A.3. of this preamble and below. The scope of this provision is consistent with what the Agency proposed on August 23, 1999 except as discussed below. The Regional Administrator will generally have the discretionary authority to review, object to, and reissue, if necessary, environmentally-significant State-issued NPDES permits

that have been administratively-continued after expiration. An environmentally-significant permit authorizes a discharge to a waterbody that does not attain and maintain water quality standards where there is a need for a change in the existing permit limits to be protective of water quality standards.

The availability of this authority is important for permits that authorize discharges of pollutant(s) of concern to waterbodies where a TMDL has been established but not implemented through permits. Under these circumstances, the availability of this authority for these permits is important because they do not contain limits and/or conditions that are consistent with applicable wasteload allocations established in a TMDL. In response to comments supporting the proposal and suggesting that EPA commit to action more strongly, EPA has modified the proposed rule as it relates to the operation of the provision after the establishment of a TMDL. In § 130.32(c)(1)(ii) of today's rule, EPA commits to exercise its authority to act on expired State-issued permits (when State law "administratively continues" the expired permit) to ensure the incorporation of effluent limitations (based on the wasteload allocation(s) in a TMDL) into the NPDES permit. EPA commits to exercise this authority to ensure that such limits are incorporated into the permits within two years from the expiration of the permit term, or, when the permit term expired prior to the establishment of the TMDL, within two years from the establishment of the TMDL. In order to ensure that these limits are incorporated into the permits, EPA intends to monitor the State's progress in incorporating the appropriate limits into the permits within one year after the permit expires or, when the permit expired prior to establishment of the TMDL, within one year of establishment of the TMDL. In accordance with the new provisions of § 130.32(c)(1)(ii), if EPA concludes that the State will not issue the permit within the applicable timeframe, with the appropriate limits, EPA will trigger these review and objection procedures. These provisions apply only to TMDLs approved after the effective date of today's rule.

Implementation plans for TMDLs (described in the revisions to Part 130 elsewhere in today's **Federal Register**) need to contain a schedule for reissuing or revising relevant NPDES permits as expeditiously as practicable in order to incorporate effluent limits consistent with the wasteload allocation(s) in the TMDL. Where EPA is the NPDES

permitting authority, EPA must reissue or revise the permits within two years after the establishment of the TMDL. EPA will rely on existing regulations at § 122.62(a)(2) as a basis to modify permits during their term to revise existing WQBELs or incorporate new WQBELs to implement the wasteload allocation(s) in the TMDL (which, in turn, implement existing water quality standards). EPA explained the operation of § 122.62(a)(2) in an earlier rulemaking preamble. (45 FR 33290, 33315 col. 1, May 19, 1980). A TMDL that implements a water quality standard where that water quality standard was in existence at the time of permit issuance represents "new information" that did not exist at the time of permit issuance. This justifies new permit requirements to implement those standards. [Note: Where a TMDL implements a water quality standard and that water quality standard is revised or issued after the issuance of a permit, the applicable regulation would be § 122.62(a)(3) rather than (a)(2). Thus, modification of the permit prior to expiration would not be authorized unless (A) the permit condition to be modified was based on EPA approved or promulgated water quality standards, (B) EPA has approved a State action with regard to the water quality standard on which the permit condition was based and (C) the permittee requests modification in accordance with § 124.5 within 90 days of the **Federal Register** notice of the action on which the request is based.]

The Agency believes that this mechanism is necessary to support the goals of the CWA to attain and maintain water quality standards. The Agency further believes that this authority is necessary to facilitate the fulfillment of EPA's statutory responsibility to ensure timely establishment and implementation of TMDLs and to ensure that permits include water quality-based effluent limitations that will enable the waterbody to meet the applicable water quality standards. CWA sections 303(d) and 301(b)(1)(C). The wasteload allocations derived from the TMDL provide the basis for the water quality-based effluent limitations that permits must contain. EPA has concluded that the time frames discussed above are necessary to ensure timely TMDL implementation.

IV. Costs of the Rule

The incremental costs associated with today's rule are contained in "Analysis of the Incremental Cost of Final Revisions to the Water Quality Planning and Management Regulation and the National Pollutant Discharge

Elimination System Program". **You should read that document for a complete description of the cost estimates and the basis for those estimates.** The following is a summary from that report.

Revision to the current program	Annualized cost (2000 \$ in millions/yr)
Revisions to the listing requirements	\$0.066
Revisions affecting the content and development of TMDLs	13.708
Revisions requiring TMDLs to be developed within 10 years	9.030
EPA reissuance of state-issued expired and administratively continued permits	0.078
Total annualized cost	\$22.882

For the Water Quality Planning and Management Rule (changes to part 130), EPA estimated the incremental costs that will accrue from today's regulation over the period from 2000 through 2008. This period of analysis was chosen because it spans a 10 year period, the full time during which most TMDLs will be developed for waterbodies included on the 1998 section 303(d) lists of impaired waters. Today's final rule allows States, Territories, and authorized Tribes up to 2010 to establish all the TMDLs for waterbodies included on the 1998 section 303(d) list; therefore, the actual costs may be lower than estimated. The incremental costs that are analyzed are the additional requirements of today's rule above the current requirements associated with developing all the section 303(d) lists and all the TMDLs that will be completed during this period. In accordance with today's rule, section 303(d) lists will be developed in 2002, in 2006, and in 2010. During this period, all TMDLs will be developed for waterbodies on the 1998 lists, most of the TMDLs will be developed for waterbodies newly listed in 2002, some of the TMDLs will be developed for waterbodies newly listed in 2006, etc.

As shown above, the net annualized cost that is attributable to the revisions to the listing requirements over and above the current program amounts to about \$0.066 million. This reflects the net of the additional cost attributable to the listing requirement (about \$0.229 million) offset by the annualized savings associated with extending the listing cycle from two years to four years (about \$0.163 million). The additional cost of revised requirements for developing TMDLs is estimated to be about \$13.708 million annually for the TMDLs that will be developed for waterbodies on

the 1998 303(d) list. For perspective, these additional costs represent about a 9% increase in the baseline costs of developing these TMDLs as required under the current program prior to the revision of the Water Quality Planning and Management Rule. Finally, the revised requirements are expected to result in accelerating the development of about 17% of the TMDLs for the 1998 section 303(d) lists. The additional cost associated with developing these TMDLs on a more rapid schedule than would have occurred in the baseline is estimated to be about \$9.03 million annually through 2008.

For the provision in the new regulation affecting the NPDES program (parts 122, 123, and 124), EPA estimated the incremental costs relating to EPA reissuing expired State-issued and administratively continued permits where necessary to implement a TMDL. The analysis of the incremental costs of the NPDES program revision is limited to the incremental costs that the regulation will impose in connection with waterbodies on the current section 303(d) list and associated sources. TMDLs for waterbodies on the 1998 section 303(d) lists are assumed to be developed during the period from 2000 through 2008.

As shown above, the total annualized cost associated with the provision is estimated to be \$0.078 million per year. Costs to State and Federal permit authorities include the additional permitting and evaluation burdens associated with the proposed revision. The annualized costs shown above reflect all costs projected to be incurred from 2000 onward and are presented in March 2000 dollars.

V. Regulatory Requirements

A. Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. For purposes of assessing the impacts of today's rule on small entities, a small entity is defined as: (1) A small business according to the RFA default definition for small business (based on the Small Business

Administration size standards); (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field. For purposes of the RFA, States, Territories and tribal governments are not considered small government jurisdictions since they are independent sovereigns.

After considering the economic impacts of today's final rule on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. This final rule will not impose any requirements on small entities. Today's rule established requirements applicable only to EPA, States, Territories, and authorized Tribes. Thus, EPA is not required to prepare a regulatory flexibility analysis.

Court decisions make it clear that the RFA imposes no obligation on an agency to prepare a small entity impact analysis of the effect of a rule on entities which the rule itself does not regulate. Rules which do not regulate small entities directly—rules which affect the decisions made by other regulators for example—do not require an analysis of such effects. Therefore, the key issue in deciding whether EPA must prepare a regulatory impact analysis here is whether today's rule will "regulate" small entities. Court decisions provide further guidance on when, for purposes of triggering the RFA requirement, a small entity is not subject to a rule or not regulated by a rule.

For example, the U.S. Court of Appeals for the District of Columbia Circuit has determined that the Federal Energy Regulatory Commission (FERC) was not required to analyze the effects of two rules on small entities that were not subject to the requirements of the rules. In the first case, the rule had the effect of increasing the rates that electric utilities could charge their wholesale customers for electricity. The agency certified that the rule would not have a significant impact on a substantial number of small entities because virtually none of the utilities it regulated were small entities. Challengers to the agency argued that the RFA applied to all rules that affect small entities, whether the small entities are directly regulated or not. In their view, therefore, FERC should have considered the effect of the rule on customers of the electric utilities subject to rate regulation by FERC. The court disagreed, finding that under the RFA, an agency may properly certify that no

regulatory flexibility analysis is necessary when it determines that the rule will not have a significant economic impact on a substantial number of small entities *that are subject to the requirements of the rule*.

"Congress did not intend to require that every agency consider every indirect effect that any regulation might have on small businesses in any stratum of the national economy." *Mid-Tex Elec. Coop., Inc. v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985).

In the second FERC case, the court reaffirmed this earlier conclusion. In this case, the rule regulated the rates natural gas pipeline company charged local gas distribution companies for the sale (or transportation) of natural gas purchased by them. Under its enabling statute, FERC had no jurisdiction to regulate the local distribution of gas, only the interstate sale and transportation of natural gas. The local distribution companies argued that the rule would have a significant economic impact on them as customers of the regulated utilities. The court again held that no analysis is required when the agency determines the rule will not have a substantial economic impact on the small entities subject to the rule. FERC had no obligation to prepare an analysis of the economic effects of a rule on small entities which the rule itself did not regulate. *United Distribution Company v. FERC*, 88 F.3d 1105, 1048 (D.C. Cir. 1996).

In addition, there are also a number of cases that have addressed EPA's obligation under the RFA when proposing and promulgating Clean Air Act (CAA) rules. The D.C. Circuit sustained EPA's certification of a rule establishing Federal automobile on-board emissions diagnostic devices. The rule allowed automobile manufacturers to comply with Federal requirements by complying with certain California regulations. EPA certified that the rule would not have a substantial economic impact on a significant number of automobile manufacturers. Businesses that manufacture, rebuild and sell car parts to replace the parts installed by the original manufacturers challenged EPA's failure to consider the effect of the rule on their businesses. The court held that, because the rule did not subject the car parts market itself to regulation, EPA was not required to prepare a flexibility analysis as to small businesses dealing in car parts. EPA only was obliged to consider the impact of the rule on small automobile manufacturers subject to the rule. *Motor & Equipment Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 467 (D.C. Cir. 1998).

Recently, the D.C. Circuit determined that EPA properly certified that its revisions to the ozone and particulate national ambient air quality standards (NAAQS) would not have a significant economic impact on a substantial number of small entities. Under the CAA, EPA must promulgate NAAQS and State must then adopt State Implementation Plans (SIPs) providing for the implementation, maintenance and enforcement of the standards. 42 U.S.C. § 7410(a)(1). The NAAQS themselves impose no regulation upon emission sources. Rather, the States regulate sources of emissions through the SIP. EPA may call for revisions to SIPs if EPA finds that the SIP is inadequate to meet the NAAQS or to otherwise comply with the CAA. 42 U.S.C. § 7410(k)(5). Only if a State does not submit a SIP that complies with CAA requirements must EPA adopt an implementation plan of its own.

The court held that EPA correctly determined that the NAAQS will not directly affect small entities because EPA has no authority to impose any burden upon such entities. The States have broad discretion in determining the manner in which they will achieve compliance with the NAAQS. The court concluded that the possible effects of the NAAQS on small entities were no different from the indirect effects on wholesale customers not subject to regulation in *Mid-Tex*. In the court's view, because States must submit SIPs that will achieve compliance with the NAAQS does not render small entities potentially regulated by the States "subject" to the NAAQS for RFA purposes. The court concluded that the States' nearly complete discretion in determining which entities would bear the burden of achieving the NAAQS made these entities not subject to regulation by EPA. *American Trucking Associations v. EPA*, 175 F. 3d 1027, 1044-45 (D.C. Cir. 1999).

More recently, the D.C. Circuit determined that a CAA rule which would require States to develop, adopt and submit revisions to SIPs to achieve required reductions in air emissions does not regulate small entities because it leaves to the States the task of determining how to obtain the reductions, including which entities to regulate. EPA does not tell States how to achieve compliance with required air quality levels. Rather, EPA merely provides the levels to be achieved by *state-determined* compliance mechanisms. Under the CAA, States retain the power to determine which sources are burdened by regulation and to what extent. The rule leaves the control measures selection decision to

the States. The rule in question did not directly regulate individual sources of emissions and therefore would not establish requirements applicable to small entities. Therefore, the court concluded that EPA properly certified the rule under section 605(b) of the RFA. *State of Michigan v. EPA*, 2000 WL 18.0650, p. 56 (D.C. Cir. Mar. 3, 2000).

In today's regulations, EPA is adopting changes to its water quality planning and management regulations and the NPDES permitting program. In the case of its planning and management regulations, these amendments modify requirements of EPA's current TMDL program. The second area addressed by these changes is EPA's NPDES permitting program, where EPA is adopting provisions which require EPA to step in and reissue NPDES permits in authorized States where the State has failed to take certain actions required under the regulations.

The Agency received numerous comments asserting that today's rule will have a direct, adverse impact on small governments and small businesses such as farmers and landowners, and that EPA has not met the requirements of the Regulatory Flexibility Act because it did not prepare a regulatory flexibility analysis. EPA disagrees with this conclusion for the reasons explained in sections 1 and 2 that follow. More detailed analysis is presented in the economic assessment document.

1. Changes to the TMDL Program

The changes to EPA's listing and TMDL regulations do not directly regulate individual dischargers and therefore do not establish requirements applicable to small entities. As such, certification is proper.

Under section 303(c) of the CWA water quality standards program, States, Territories, and authorized Tribes must adopt water quality standards for their waters that must be submitted to EPA for approval. These State, Territorial, or Tribal standards (or EPA-promulgated standards in the absence of EPA-approved State, Territorial, or Tribal standards) are implemented through various water quality control programs including the NPDES program that limits discharges to navigable waters in compliance with an EPA permit or permit issued under an approved State or Tribal NPDES program. The CWA requires that all NPDES permits include any limits on discharges that are necessary to meet State or Tribal water quality standards. A State or Tribe has discretion in deciding how to achieve compliance with its water quality

standards and in developing discharge limits as needed to meet the standards. For example, in circumstances where there is more than one discharger to a waterbody that is subject to a water quality standard, a State or Tribe has discretion in deciding which dischargers will be subject to permit discharge limits necessary to meet the revised standards and whether and how such limits will be distributed among the discharges.

Section 303(d) of the CWA requires States, Territories and authorized Tribes (and, under certain circumstances, EPA) to establish lists of waterbodies where water quality does not meet applicable State, Territorial or Tribal water quality standards even after application of technology-based effluent limitations on point source dischargers. States, Territories and authorized Tribes (and EPA in some cases) must also develop TMDLs for those waterbodies with reference to criteria contained in those water quality standards.

Today's final regulation amends certain provisions of EPA's existing water quality management and planning regulations dealing with the listing of impaired waters and TMDL requirements. The regulation establishes new requirements for the listing program and requires schedules for completing TMDLs. Further, the rule establishes new requirements for the content and development of TMDLs, including development of an implementation plan as a required element of a TMDL, and also includes new public participation elements. (See Section II of the preamble for a full discussion of these specific changes). These new requirements allow States, Territories and authorized Tribes to tailor their water quality programs to address the characteristics, problems, risks and implementation tools available in individual watersheds, with meaningful involvement from stakeholders in the local community, by using a TMDL to align implementation under current programs. These final rules apply only to EPA, States, Territories and authorized Tribes and do not impose specific listing or TMDL development requirements upon any small entities. Under today's rule, EPA is not requiring or ordering any group of small businesses or government to change their method of operation/practices in any prescribed way.

Even if future listing or TMDL actions ultimately may have some discernable effect on small entities, such impacts would actually arise from requirements already established under section 303(d) of the CWA and the States', Territories' and authorized Tribes' water quality

standards as described above, and not directly from these final regulatory amendments. Independent of today's final amendments, States, Territories and authorized Tribes (and, under certain circumstances, EPA) already have an obligation to list waterbodies and to calculate and apportion TMDLs and their component load and wasteload allocations necessary to implement the State, Territorial, and authorized Tribal water quality standards. Today's final rule merely amends EPA's existing regulations implementing those statutory requirements. Therefore, any potential impacts to small entities result from the independent statutory obligation to establish TMDLs that implement the State, Territorial and authorized Tribal water quality standards, and not from these final regulatory requirements.

Moreover, any potential future effect on small entities that may result from State, Territorial or Tribal action in establishing TMDLs or changing current TMDLs as a consequence of adoption of today's regulation is not directly attributable either to the new or even existing TMDL rules. TMDLs are not self-implementing. They require State, Territorial and Tribal decision to implement them. Under the CWA and EPA's regulations, TMDL wasteload allocation do not automatically translate into NPDES permit limitations for point sources nor do they necessarily apply without modification to non-point sources. State, Territorial and Tribal authorities retain discretion in how they apportion wasteload allocations. Under EPA's NPDES permitting rules, effluent limits in point source permits must be "consistent with" (but not necessarily identical to) wasteload allocations in approved TMDLs. With respect to nonpoint sources, the load allocations in a TMDL are only "enforceable" to the extent State, Territorial, or authorized Tribes chose to bind themselves to these allocation. A State, Territory, or EPA decision to allocate load reductions to nonpoint sources does not bring that operator into a permit or regulatory program. Instead, implementation of the load allocation would be based on current State and local mechanisms, including implementation of State/local nonpoint source programs, and other voluntary and incentive-based actions. There are no Federal requirements that such load allocations must be met by small (or any other) entities.

2. Changes to the NPDES Permitting Program

Today's final rule also amends the NPDES program regulations to require EPA, in certain circumstances, to

reissue state-issued permits that have not been reissued following the expiration of their 5-year term. Where water quality standards (or applicable effluent limitations guidelines) change during a permit term, the permittee generally is protected during the permit term against new or more stringent permit conditions necessary to implement the new water quality standards or effluent limitations guidelines, until a new permit is issued. In most cases, permittees submit timely applications for renewal and permitting authorities reissue these permits in a timely manner. In some cases, authorized States may not reissue NPDES permits at the end of their 5-year term as is currently required, and the existing permits continue in effect under general principles of administrative law. (Administrative continuance protects the permittee who has submitted a timely application for renewal from being penalized for discharging without a permit.)

This final rule requires EPA to reissue a State issued permit that has expired in those cases where the State has not reissued the permit within two years from expiration. EPA's exercise of this authority is limited to circumstances in which a permit authorizes discharges to impaired waterbodies or the permit does not currently contain limits consistent with an applicable waste load allocation in an EPA approved or established TMDL. In addition, where a State permit has expired prior to the establishment of the TMDL, the regulations require EPA to exercise its authority to reissue the permit within two years from the establishment of the TMDL if the State has not acted. While EPA expects that authorized States will expeditiously reissue permits after they have expired with the required water quality-based effluent limits (because CWA section 402 allows a maximum five year permit term), where States do not reissue such permits, EPA would use this new authority to issue such permits in a timely manner.

This provision also would not impose any additional costs on dischargers, including small entities. This is because as a matter of law, the discharger's new permit, when issued, already must include any applicable new or more stringent conditions. Therefore, the effect of the change is, at most, to accelerate the timing of reissuing expired permits such that they contain the legally-mandated new or more stringent conditions. Consequently, EPA has concluded that adoption of a rule to authorize future action by EPA would not result in the imposition of any new costs on small entities.

B. Regulatory Planning and Review, Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), EPA must determine whether the regulatory action is "significant" and therefore subject to Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant regulatory action" as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, it has been determined that this rule is a "significant regulatory action." As such, this action was submitted to OMB for review. Changes made in response to OMB suggestion or recommendations will be documented in the public record.

A detailed presentation and discussion of the costs and impacts of today's amendments to the TMDL and NPDES programs, and the methodologies used to assess them, are included in the document "Analysis of the Incremental Costs of Final Revisions to the Water Quality Planning and Management Regulation and the NPDES Program Regulation", which is available in the docket for the final rulemaking. In addition, the Agency is preparing a supplemental cost and benefit analysis of the current TMDL program with publication planned in the near future.

C. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, Tribal or local governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal Mandates" that may result in expenditures to State, local, and Tribal governments, in the

aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

EPA has determined that today's rule contains no Federal mandates (as defined by the regulatory provisions of Title II of the UMRA) for State, local, or Tribal governments or the private sector. The rule does not impose enforceable duties on any State, local or Tribal government or the private sector. If a State, territory or authorized tribe chooses not to implement this regulation, in whole or in part, EPA cannot compel or enforce compliance. Rather, EPA must undertake the actions the State, Territory, or authorized tribe has declined to implement.

As described in detail previously, the total incremental cost associated with today's rule is not expected to exceed \$22.88 million in any one year, and therefor does not exceed the \$100 million threshold of UMRA. Thus, today's rule is not subject to the requirements of sections 202 and 205 of UMRA.

EPA has determined that this final rule contains no regulatory requirements that might significantly or uniquely affect small governments, including Tribal governments. The requirements in today's rule relating to identification of impaired waters and establishment of TMDLs apply directly only to States, Territories and

authorized Tribes. They do not apply to small governments of cities, counties or towns. Such entities are not required by today's rule to establish lists of impaired waters or TMDLs. Thus, the requirements of today's rule do not significantly or uniquely affect them in any direct way. To the extent that such small governments might in some indirect way be affected by a State's application of these regulations (*e.g.*, its identification of a particular waterbody on a section 303(d) list, or its establishment of a TMDL for a particular waterbody with wasteload allocations that contemplate permit reductions for a particular small government's waste treatment plant), such indirect effects are not significant or unique to small governments. They are not unique because they might be felt by any entity covered by a wasteload or load allocation in a given TMDL.

Today's rule will not significantly or uniquely affect Tribal governments. As explained earlier in this preamble, the Clean Water Act authorizes EPA to treat an Indian Tribe in the same manner as a State for purposes of establishing lists of waters and TMDLs, and EPA today is clarifying the test an Indian Tribe must meet to be authorized to establish lists of impaired waters and TMDLs. Currently, there are no Tribes authorized to establish TMDLs under section 303(d). Further, there are only fifteen Tribes with EPA approved or promulgated water quality standards. In addition, there are no Tribes authorized to administer the NPDES program. Consequently, this final rule will not significantly or uniquely affect Tribal governments. However, as Tribes continue to build their Clean Water Act capacity and establish water quality programs, more Tribes are likely to adopt water quality standards and seek approval to administer the NPDES program and establish TMDLs. Therefore, EPA included a Tribal representative on the TMDL FACA Committee that developed a set of recommendations that served as the framework for EPA in developing the TMDL proposal. The Committee's final report addressed Tribal issues, and recommended that EPA increase efforts to educate Tribes about water quality programs, including TMDLs, and ensure that EPA and State water quality staff respect the government-to-government relationship with Tribes in all TMDL activities. Additionally, once this rule is in effect, EPA will participate in Tribal conferences and workshops to inform and educate Tribal participants about the TMDL program and offer training to Tribes interested in administering the

TMDL program on how to comply with the requirements of this rule.

D. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved the information collection requirements contained in part 130 of this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2040-0071.

The requirements of part 130 guide how States and Territories (there are no currently authorized Tribes) identify and rank waterbodies which do not attain and maintain water quality standards following implementation of technology-based controls and establish TMDLs for those waterbodies that do not meet standards as a result of pollutant discharges. These activities are required by section 303(d) of the CWA. EPA also uses the information submitted under section 303(d) to review the section 303(d) lists submitted to review whether they comply with the requirements of the statute and EPA's regulations and reflect an accurate accounting of waterbodies not meeting water quality standards after the application of technology-based controls. Also as required by section 303(d), EPA reviews TMDLs developed and submitted by the States and Territories to determine their technical sufficiency and whether they otherwise comply with the requirements of section 303(d) and the EPA regulations. Information collected through the proposed activities is not confidential because all respondents are State and Territorial agencies working entirely in a public forum.

The revisions to part 130 increase the burden to States and Territories for four activities related to preparation of the section 303(d) lists: revising the listing methodology, establishing schedules for TMDL development, increased public participation, and providing the listing methodology in a new format. The revisions also increase the burden for two activities related to establishing TMDLs: developing the implementation plans and writing responses to public comments. EPA's currently approved ICR for the period March 1999 through April 2003 was based on the burden to respondents of the current program and did not include consideration of the impact of the proposed regulations. The revised ICR include the increased section 303(d) listing burden to States and Territories that would result under the proposed regulations in the first three years following the effective date of the regulation.

The average additional burden associated with the revised 303(d) rule requirements is estimated to be 6,497 hours per respondent, and the total annual burden for all 56 respondents is estimated to be 363,845 hours. The information for lists of impaired waterbodies and the methodologies to develop those lists is required every four years. TMDLs are required consistent with schedules that are developed by States and Territories as part of the lists. The average additional cost associated with the revised 303(d) rule requirements is estimated to be \$252,676 per respondent, and the total annual cost for all 56 respondents is estimated to be \$14,149,932. This estimate is entirely labor costs, and thus does not include a total capital and start-up cost component annualized over its expected useful life, a total operation and maintenance component, or a purchase of services component.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15. EPA is amending the table in 40 CFR part 9 of currently approved ICR control numbers issued by OMB for various regulations to list the information requirements contained in this rule.

E. Federalism, Executive Order 13132

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999) requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct

effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

Under section 6 of Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. EPA also may not issue a regulation that has federalism implications and that preempts State law, unless EPA consults with State and local officials early in the process of developing the proposed regulation.

EPA received numerous comments asserting that today's rule does have federalism impacts and that the Agency had not met the requirements specified under E.O. 13132. Some commenters stated that EPA has no statutory or regulatory authority to require States to develop implementation plans as one of the required elements of TMDLs, and that such a requirement does substantially alter the relationship between EPA and the States in the TMDL Program. Other commenters believed that EPA did not work closely enough with the States or enable them to provide input on the rule. EPA also received comments claiming that the Agency's part 122 provisions enabling EPA to reissue State-issued expired and administratively-continued permits represents a significant intrusion into the functioning of State authorities and a substantial revision of existing relationships. Others stated that the NPDES provisions would lead to a shift in the traditional relationship between States and the federal government beyond what was intended by Congress in the Clean Water Act. EPA disagrees with these comments that today's rule has federalism implications, for the reasons described below.

Today's final rule amends the existing TMDL rule to clarify how impaired waters are identified and how TMDLs are established so that they can more effectively contribute to improving the nation's water quality. The regulation establishes new requirements for the content and format of the lists and the methodology for developing lists. It also establishes new requirements for the content and development of TMDLs, including development of an implementation plan as a required element of a TMDL and new public participation elements. These new

requirements continue to allow the States, Territories and authorized Tribes to better tailor their water quality programs to address the characteristics, problems, risks and implementation tools available in individual watersheds, with meaningful involvement from stakeholders in the local community. Under this new rule, States continue to have primary responsibility for identifying impaired waters, setting priorities, and developing TMDLs. EPA's role continues to be one of reviewing State actions and exercising its authority to identify waters and develop TMDLs only in the face of inadequate State action or in unique circumstances where there are interstate waters or Federal water quality standards.

As explained previously in the preamble, EPA has estimated that the total incremental costs to the States associated with parts 130 and 123 of the rule, are estimated to be \$22.88 million per year, with no direct costs being incurred by local governments.

After careful consideration, EPA does not believe that this final rule has federalism implications within the meaning of the Executive Order. However, EPA places great value on the views of state, local, and tribal governments, and in the spirit of the Executive Order undertook a consultation process along the lines specified in the Executive Order. EPA initiated or participated in many meetings, teleconferences and exchanges or correspondence with state, local, and tribal governments. Hundreds of hours of in-depth discussions with state, tribal and local officials and organizations representing them preceded and followed the August proposals. Prior to the proposal, EPA convened a Federal Advisory Committee to make recommendations for improving the efficiency and effectiveness of TMDLs. The TMDL FACA Committee was comprised of 20 members, including four senior level State officials, an elected local official, and a Tribal consortium representative. Over a period of one and one-half years, the TMDL FACA Committee held six meetings at locations throughout the country. These meetings were open to the general public, as well as representatives of State, local, and Tribal governments, and all included public comment sessions. The TMDL FACA Committee focused its deliberations on four broad issue areas: identification and listing of waterbodies; development and approval of TMDLs; EPA management and oversight; and science and tools. On July 28, 1998, the TMDL FACA Committee submitted its

final report to EPA containing more than 160 recommendation (100 of them were consensus recommendations) advocating changes and improvements to the existing TMDL rules. EPA notes that the one local elected official did file a minority report taking exception with major portions of the Report. As explained throughout this preamble, EPA carefully reviewed the TMDL FACA Committee's recommendations and incorporated, in whole or in part, most of the majority recommendations in this proposal.

Following completion of the FACA Committee process, EPA continued to meet with State and local government officials to seek their views on needed changes to the TMDL regulations and the NPDES regulations in support of TMDLs. Following the proposal, the Agency sponsored and participated in six public meetings nationwide, to better inform the public on what was included in the proposed rules, and to get informal feedback from the general public. These meetings took place in Denver, CO; Atlanta, GA; Kansas City, MO; Seattle, WA; Manchester, NH; and Los Angeles, CA. In addition, EPA has participated in numerous other meetings, conferences and public fora to discuss the proposed rule and listen to alternative approaches to achieving the nation's clean water goals. The Agency has had an ongoing dialogue with State and local officials and their national/regional organizations throughout the development of this rule. In particular, EPA has met with organizations representing State and local elected officials including: National Governors' Association, Western Governors' Association, Conference of State Legislatures, National Association of Counties, National League of Cities, and EPA's Local Government Advisory Committee. EPA also participated in numerous Congressional briefings and hearings on the proposed rule. There were numerous meetings with members and staff of organizations representing appointed officials of state government who play key roles in implementing the Clean Water Act, including the Environmental Commission of the States, the Association of State and Interstate Water Pollution Control Administrators, the Coastal States Organization, and International City Managers Association.

While expressing support for many of the final changes being considered by EPA, State officials and their representatives also expressed concerns about the capacity of State governments to carry out the new requirements in today's final rule. In particular, States were concerned about the capacity of

the State governments to carry out any new requirements beyond those in the current regulations. Local government officials expressed concerns in particular about any TMDL allocation approaches that could in their view, result in municipal point sources having to bear an inequitable share of the pollutant load reductions need to attain water quality standards. Both levels of government were concerned that, by including the requirement for an implementation plan, EPA was directing specific activities that States and local governments must use to implement TMDLs. The final rule does not direct specific activities that State and local governments must use to implement TMDLs. In developing implementation plans State and local governments are accorded significant flexibility to choose which management measures and other activities they will undertake to implement the load and wasteload allocations in a TMDL. In developing today's rule, EPA considered the concerns of State, local and Tribal governments and determined the need to revise the TMDL regulations to provide States, Territories and Tribes with clear, consistent, and balanced direction for listing waters and developing TMDLs and thereby improve the effectiveness, efficiency and pace of TMDL establishment and water quality improvement.

States were also concerned about the role of EPA in reissuing State-issued expired and administratively-continued NPDES permits. EPA determined that the exercise of its authority in limited circumstances is necessary to assure reasonable further progress in impaired waterbodies prior to the establishment of a TMDL and to provide reasonable assurance that TMDLs will be implemented. In developing today's final rule, EPA considered the concerns of State and local governments and determined the need to revise the NPDES and Water Quality Standards regulations to provide opportunities for further progress toward meeting water quality standards in impaired waterbodies and to provide reasonable assurance of effective TMDL development. Today's rule improves the effectiveness, efficiency and pace of water quality improvement and TMDL establishment.

F. Executive Order 13084: Consultation and Coordination With Indian Tribal Governments

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that

imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with these governments. If EPA complies by consulting, Executive Order 13084 requires EPA to provide to OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

As explained above in the discussion of UMRA requirements, today's rule does not significantly or uniquely affect the communities of Indian tribal governments. In addition, today's rule does not impose any direct compliance costs on Tribes. There are no currently authorized tribal section 303(d) programs; therefore there are no current costs. To the extent that a Tribe decides to apply for section 303(d) authorization, EPA expects that the Tribe will consider the costs in its decisions to apply. Since Tribal assumption of section 303(d) programs is voluntary, the costs of the program are voluntarily assumed. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule. Nonetheless, as stated in the discussion of UMRA, EPA intends to comply with the requirements of section 203 once the rule goes into effect by participating in Tribal conferences and workshops to inform and educate Tribal participants about the TMDL program and offer training to Tribes interested in administering the TMDL program on how to comply with the requirements of this rule.

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

Executive Order 13045 (62 Fed. Reg. 19885, April 23, 1997) applies to any rule that: (1) Is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, the EPA must

evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by EPA.

This final rule is not subject to Executive Order 13045 because it is not "economically significant" as defined under Executive Order 12866. Further, it does not concern an environmental health or safety risk that EPA has reason to believe may have disproportionate effect on children.

H. National Technology Transfer and Advancement Act

As noted in the proposed rule, Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Pub L. No. 104-113, § 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This final rulemaking does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

I. Congressional Review Act

Under the Congressional Review Act, a rule is "major" if the Administrator of the Office of Information and Regulatory Affairs (OIRA) finds that it is likely to result in: an annual effect on the economy of \$100 million or more; a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or significant adverse effects on competition, employment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. The OIRA Administrator finds that this rule is major because it will impose a major increase in costs on State and local government agencies.

J. H.R. 4425 and Implementation of this Rulemaking

Pending for the President's signature is an enrolled bill, H.R. 4425, which among other provisions includes the

following, hereafter referred to as the "TMDL rider.

None of the funds made available for fiscal years 2000 and 2001 for the Environmental Protection Agency may be used to make a final determination on or implement any new rule relative to the Proposed Revisions to the National Pollutant Discharge Elimination System Program and Federal Antidegradation Policy and the Proposed Revisions to the Water Quality Planning and Management Regulations Concerning Total Maximum Daily Load, published in the **Federal Register** on August 23, 1999.

EPA is carefully evaluating this provision, with the assistance of the Office of Legal Counsel, Department of Justice. There is virtually no legislative history which accompanies this provision. The Statement of Managers in the Conference Report simply repeats the bill language with the statement that the provision was added.

H.R. 4425 is an appropriations bill, and if it becomes law, it will remain in effect until October 1, 2001, at which time barring other action by Congress this rule would be allowed to be implemented. The TMDL rider in HR 4425 could also be repealed prior to that time. To accommodate this uncertainty, the final rule has an effective date of 30 days after Congress allows the rule to be implemented, which will be more than 30 days after the rule is published in the **Federal Register**. In this way, the effective date of today's rule will comply with section 553(d) of the Administrative Procedure Act, the Congressional Review Act requirements for major rules, and HR 4425. *In the time period before Congress allows EPA to implement this regulation, the pre-existing regulations will remain in place and EPA will continue to implement those regulations.*

Most of the unique elements of the new rules are scheduled to be phased in after October 1, 2001, such as new listing requirements in 2002, and new elements of TMDLs 18 months after publication of the rule. The only requirement of the new rule that would normally come into effect prior to October 1, 2001, is the requirement for providing the listing methodology to EPA by May 1, 2001. If the rider is in effect on that date, the rule is not effective and States, Territories, and authorized Tribe are not required to provide the methodology by that date. For this reason, if the rider is in effect at that time and the rule is not effective, the final rule requires States, Territories, and authorized Tribes to provide EPA at the time of submission of their year 2002 lists a description of the methodology used to develop their 2002 lists and a description of the data and

information used to identify waters (including a description of the existing and readily available data and information used by the State, Territory, and authorized Tribe). These are the requirements of § 130.7(b), which is the listing requirement of the rules in effect prior to today's rule.

In addition, today's rule adjusts the date on which States, Territories, and authorized Tribes must comply with the new TMDL requirements. That date is either 18 months after the date of publication in the **Federal Register**, or nine months after effective date of the rule, whichever ever occurs later. This approach reflects a balance between providing sufficient time for States, Territories, and authorized Tribes to revise their procedures consistent with the new TMDL requirements and implementing the new requirements as quickly as practicable. As discussed previously in today's preamble, EPA believes 18 months provides States, Territories, and authorized Tribes sufficient time to complete TMDLs underway at the time today's rule is published. Also, States, Territories, and authorized Tribes will have sufficient notice of Congress' action, and thus will have sufficient time to complete TMDLs currently underway.

List of Subjects

40 CFR Part 9

Reporting and recordkeeping requirements.

40 CFR Part 122

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 123

Environmental protection, Administrative practice and procedure, Confidential business information, Hazardous substances, Indians-lands, Intergovernmental relations, Penalties, Reporting and recordkeeping requirements, Water pollution control.

40 CFR Part 124

Environmental protection, Administrative practice and procedure, Hazardous substances, Indians-lands, Reporting and recordkeeping requirements, Water pollution control, Water supply.

40 CFR Part 130

Environmental protection, Intergovernmental relations, Reporting and recordkeeping requirements, Water pollution control.

Dated: July 11, 2000.

Carol Browner,
Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR parts 9, 122, 123, 124, and 130 as follows:

PART 9—OMB APPROVALS UNDER THE PAPERWORK REDUCTION ACT

1. The authority citation for part 9 continues to read as follows:

Authority: 7 U.S.C. 135 *et seq.*, 136–136y; 15 U.S.C. 2001, 2003, 2005, 2006, 2601–2671; 21 U.S.C. 331j, 346a, 348; 31 U.S.C. 9701; 33 U.S.C. 1251 *et seq.*, 1311, 1313d, 1314, 1318, 1321, 1326, 1330, 1342, 1344, 1345 (d) and (e), 1361; E.O. 11735, 38 FR 21243, 3 CFR, 1971–1975 Comp. p. 973; 42 U.S.C. 241, 242b, 243, 246, 300f, 300g, 300g–1, 300g–2, 300g–3, 300g–4, 300g–5, 300g–6, 300j–1, 300j–2, 300j–3, 300j–4, 300j–9, 1857 *et seq.*, 6901–6992k, 7401–7671q, 7542, 9601–9657, 11023, 11048.

2. In § 9.1, amend the table by removing the entries “130.6–130.10” and “130.15”, and adding new entries in numerical order under the indicated heading to read as follows:

§ 9.1 OMB approvals under the Paperwork Reduction Act.

* * * * *

40 CFR citation	OMB control No.
* * * * *	
Water Quality Planning and Management	
130.7	2040–0071
130.11	2040–0071
130.20–130.37	2040–0071
130.51	2040–0071
130.60–130.61	2040–0071
130.64	2040–0071

* * * * *

PART 122—EPA ADMINISTERED PERMIT PROGRAMS: THE NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

1. The authority citation for part 122 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Amend § 122.44 to revise paragraphs (d) introductory text and (d)(1) introductory text to read as follows:

§ 122.44 Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25).

* * * * *

(d) *Water quality standards and State requirements:* any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections

301, 304, 306, 307, 318 and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality and State antidegradation provisions.

* * * * *

PART 123—STATE PROGRAM REQUIREMENTS

1. The authority citation for part 123 continues to read as follows:

Authority: The Clean Water Act, 33 U.S.C. 1251 *et seq.*

2. Amend § 123.44 to add paragraph (k) to read as follows:

§ 123.44 EPA review of and objections to State permits.

* * * * *

(k)(1) Where a State fails to submit a new draft or proposed permit to EPA within 90 days after the expiration of the existing permit, EPA may review the administratively-continued permit, using the procedure described in paragraphs (a)(1) through (h)(3) of this section, if:

(i) The administratively-continued permit allows the discharge of pollutant(s) into a waterbody for which EPA has established or approved a TMDL and the permit is not consistent with an applicable wasteload allocation; or

(ii) The administratively-continued permit allows the discharge of a pollutant(s) of concern into a waterbody that does not attain and maintain water quality standards and for which EPA has not established or approved a TMDL.

(2) To review an expired and administratively-continued permit under this paragraph (k) EPA must give the State and the discharger at least 90 days written notice of its intent to consider the expired permit as a proposed permit. At any time beginning 90 days after permit expiration, EPA may submit this notice.

(3) If the State submits a draft or proposed permit for EPA review at any time before EPA issues the permit under paragraph (h) of this section, EPA will withdraw its notice of intent to take permit authority under this paragraph (k) and will evaluate the draft or proposed permit under this section.

PART 124—PROCEDURES FOR DECISIONMAKING

1. The authority citation for part 124 continues to read as follows:

Authority: Resource Conservation and Recovery Act, 42 U.S.C. 6901 *et seq.*; Safe

Drinking Water Act, 42 U.S.C. 300f *et seq.*; Clean Water Act, 33 U.S.C. 1251 *et seq.*; Clean Air Act, 42 U.S.C. 7401 *et seq.*

2. Revise § 124.7 to read as follows:

§ 124.7 Statement of basis.

(a) EPA shall prepare a statement of basis for every draft permit for which a fact sheet under § 124.8 is not prepared. The statement of basis shall briefly describe the derivation of the conditions of the draft permit and the reasons for them or, in the case of notices of intent to deny or terminate, reasons supporting the tentative decision. In particular, the statement of basis shall include:

(1) In cases where a TMDL has not been established for an impaired waterbody, an explanation of how permit limits and/or conditions were derived for all pollutants in the discharger's effluent for which the waterbody is impaired; and

(2) In cases where a TMDL has been established for an impaired waterbody, any TMDL that has been established for a pollutant contained in the discharger's effluent; the applicable wasteload allocation derived for the pollutant in the TMDL for that discharger; and an explanation of how permit limits for the pollutant of concern were derived as well as how those limits are consistent with the applicable wasteload allocation.

(b) The statement of basis shall be sent to the applicant and, on request, to any other person.

3. Amend § 124.8 by adding paragraphs (b)(4)(i) and (b)(4)(ii) to read as follows:

§ 124.8 Fact sheet.

* * * * *

(b) * * *

(4) * * *

(i) In cases where a TMDL has not been established for an impaired waterbody, an explanation of how permit limits and/or conditions were derived for all pollutants in the discharger's effluent for which the waterbody is impaired; and

(ii) In cases where a TMDL has been established for an impaired waterbody, any TMDL that has been established for a pollutant contained in the discharger's effluent; the applicable wasteload allocation derived for the pollutant in the TMDL for that discharger; and an explanation of how permit limits for the pollutant of concern were derived as well as how those limits are consistent with the applicable wasteload allocation.

* * * * *

PART 130—WATER QUALITY PLANNING AND MANAGEMENT

1. The authority citation for part 130 continues to read as follows:

Authority: 33 U.S.C. 1251 *et seq.*

2. Redesignate §§ 130.4 through 130.6, and 130.8 through 130.15 as follows:
§§ 130.4 through 130.15 [Redesignated]

Old section	New section
130.4	130.10
130.5	130.50
130.6	130.51
130.8	130.11
130.9	130.60
130.10	130.61
130.11	130.62
130.12	130.63
130.15	130.64

§ 130.3 [Removed]

3. Section 130.3 is removed.

§§ 130.0 through 130.2 and § 130.7 [Redesignated as Subpart A]

4. Sections 130.0 through 130.2 and 130.7 are designated as Subpart A and a subpart heading is added to read as follows:

Subpart A—Summary, Purpose and Definitions

§§ 130.10 and 130.11 [Redesignated as Subpart B]

5. Sections 130.10 and 130.11 are designated as Subpart B and a subpart heading is added to read as follows:

Subpart B—Water Quality Monitoring and Reporting

§§ 130.50 and 130.51 [Redesignated as Subpart D]

6. Sections 130.50 and 130.51 are designated as Subpart D and a subpart heading is added to read as follows:

Subpart D—Water Quality Planning and Implementation

§§ 130.60 through 130.64 [Redesignated as Subpart E]

7. Sections 130.60 through 130.64 are designated as Subpart E and a subpart heading is added to read as follows:

Subpart E—Miscellaneous Provisions

8. Amend § 130.1 to revise paragraph (a) as follows:

§ 130.1 Applicability.

(a) This part applies to all State, eligible Indian Tribe, interstate, areawide and regional and local CWA water quality planning and management activities undertaken on or after February 11, 1985 including all updates and continuing certifications for approved Water Quality Management

plans developed under sections 208 and 303 of the Act.

* * * * *

9. Amend § 130.2 to revise paragraphs (c) (d), (e), (f), (g), (h), (i), (j), and (m), and add paragraphs (o), (p), (q), and (r) as follows:

§ 130.2 Definitions.

* * * * *

(c) *Pollution*. The man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water. (See Clean Water Act section 502(19).)

(d) *Pollutant*. Dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 *et seq.*)), heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. This term does not mean: “sewage from vessels” within the meaning of section 312 of the Clean Water Act; or water, gas, or other material that is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that such injection or disposal will not result in the degradation of ground or surface water resources. (See Clean Water Act section 502(6).)

(e) *Load or loading*. An amount of matter or thermal energy that is introduced into a receiving water; to introduce matter or thermal energy into a receiving water. Loading of pollutants may be either man-caused or natural (natural background loading).

(f) *Load allocation*. The portion of a TMDL's pollutant load allocated to a nonpoint source, storm water source for which a National Pollutant Discharge Elimination System (NPDES) permit is not required, atmospheric deposition, ground water, or background source of pollutants.

(g) *Wasteload allocation*. The portion of a TMDL's pollutant load allocated to a point source of a pollutant for which an NPDES permit is required. For waterbodies impaired by both point and nonpoint sources, wasteload allocations may reflect anticipated or expected reductions of pollutants from other sources if those anticipated or expected reductions are supported by reasonable assurance that they will occur.

(h) *Total maximum daily load (TMDL)*. A TMDL is a written, quantitative plan and analysis for

attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant. TMDLs may be established on a coordinated basis for a group of waterbodies in a watershed. TMDLs must be established for waterbodies on Part 1 of the list of impaired waterbodies and must include the following eleven elements:

(1) The name and geographic location of the impaired waterbody;

(2) Identification of the pollutant and the applicable water quality standard;

(3) Quantification of the pollutant load that may be present in the waterbody and still ensure attainment and maintenance of water quality standards;

(4) Quantification of the amount or degree by which the current pollutant load in the waterbody, including the pollutant load from upstream sources that is being accounted for as background loading, deviates from the pollutant load needed to attain and maintain water quality standards;

(5) Identification of source categories, source subcategories or individual sources of the pollutant;

(6) Wasteload allocations;

(7) Load allocations;

(8) A margin of safety;

(9) Consideration of seasonal variations;

(10) Allowance for reasonably foreseeable increases in pollutant loads including future growth; and

(11) An implementation plan.

(i) *Total Maximum Daily Thermal Load (TMDTL)*. A TMDTL is a TMDL for impaired waterbodies receiving a thermal discharge.

(j) *Impaired waterbody*. Any waterbody of the United States that does not attain and maintain water quality standards (as defined in 40 CFR Part 131) throughout the waterbody due to an individual pollutant, multiple pollutants, or other causes of pollution, including any waterbody for which biological information indicates that it does not attain and maintain water quality standards. Where a waterbody receives a thermal discharge from one or more point sources, impaired means that the waterbody does not have or maintain a balanced indigenous population of shellfish, fish, and wildlife.

* * * * *

(m) *Management measures*. Best practical and economically achievable measures to control the addition of pollutants to waters of the United States through the application of nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, best management practices, or other alternatives.

* * * * *

(o) *Thermal discharge*. The discharge of the pollutant heat from a point source

that is required to have an NPDES permit.

(p) *Reasonable assurance.* Reasonable assurance means a demonstration that TMDLs will be implemented through regulatory or voluntary actions, including management measures or other controls, by Federal, State or local governments, authorized Tribes, or individuals.

(1) For point sources regulated under section 402 of the Clean Water Act, the demonstration of reasonable assurance must identify procedures that ensure that NPDES permits will be issued, reissued, or revised as expeditiously as practicable to implement applicable TMDL wasteload allocations for point sources.

(2) For nonpoint sources, storm water sources for which an NPDES permit is not required, atmospheric deposition, ground water or background sources of a pollutant, the demonstration of reasonable assurance must show that management measures or other control actions to implement the load allocations contained in each TMDL meet the following four-part test: they specifically apply to the pollutant(s) and the waterbody for which the TMDL is being established; they will be implemented as expeditiously as practicable; they will be accomplished through reliable and effective delivery mechanisms; and they will be supported by adequate water quality funding.

(i) Adequate water quality funding means that the State, Territory, or authorized Tribe has allocated existing water quality funds from any source to the implementation of the TMDL load allocations to the fullest extent practicable and in a manner consistent with the effective operation of its clean water program. In the event that existing funding is not adequate to fully implement the TMDL load allocations, you may satisfy the funding requirement of reasonable assurance by including an explanation of when adequate funds will become available and the schedule by which these funds will be used to implement the TMDL load allocations. When EPA establishes a TMDL, EPA must show there is adequate funding. It may do so by conditioning Clean Water Act grants to the fullest extent practicable and in a manner consistent with effective operation of other Clean Water Act programs.

(ii) Voluntary and incentive-based actions, or existing programs, procedures or authorities are acceptable means of demonstrating reasonable assurance if they satisfy the four-part test. Examples of voluntary and incentive-based actions include: State, Territorial, or authorized Tribal

programs to audit implementation of agricultural or forestry best management practices; memoranda of understanding between States, Territories, authorized Tribes, and organizations representing categories, subcategories, or individual sources; or State-, Territory-, or authorized Tribe-approved programs for categories, subcategories or individual sources to ensure effectiveness of best management practices.

(iii) Examples of existing programs, procedures or authorities that may be reliable delivery mechanisms include State, Territorial, and authorized Tribal programs approved by EPA under section 319 of the Clean Water Act; participation in existing United States Department of Agriculture conservation or water quality protection programs; participation in existing programs under the Coastal Zone Act Reauthorization Amendments; regulations; local ordinances; performance bonds; contracts; cost-share agreements; memoranda of understanding; site-specific or watershed-specific voluntary actions; and compliance audits of best management practices.

(q) *Waterbody.* A geographically defined portion of navigable waters, waters of the contiguous zone, and ocean waters under the jurisdiction of the United States, made up of one or more of the segments of rivers, streams, lakes, wetlands, coastal waters and ocean waters. Identifications of waterbodies should be consistent with the way in which segments are described in State, Territorial, or authorized Tribal water quality standards.

(r) *List of Impaired Waterbodies or "List."* The list of all impaired waterbodies submitted by a State, Territory, or authorized Tribe. This list consists of Parts 1, 2, 3, and 4 described in § 130.27 and the prioritized schedule described in § 130.28. Part 1 of the list consists of the identification of the waterbodies for which TMDLs must be established and a prioritized schedule for establishing TMDLs.

10. Revise § 130.7 as follows:

§ 130.7 Total maximum daily loads (TMDL) and individual water quality-based effluent limitations.

(a)–(b) [Reserved]

(c) *Development of TMDLs and individual water quality based effluent limitations.* This paragraph will expire January 11, 2002 or nine months from the effective date of this rule, whichever occurs later.

(1) Each State shall establish TMDLs for the waterbodies identified at § 130.27(a) and in accordance with the priority ranking. For pollutants other

than heat, TMDLs shall be established at levels necessary to attain and maintain the applicable narrative and numerical WQS with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality. Determinations of TMDLs shall take into account critical conditions for stream flow, loading, and water quality parameters.

(i) TMDLs may be established using a pollutant-by-pollutant or biomonitoring approach. In many cases both techniques may be needed. Site-specific information should be used wherever possible.

(ii) TMDLs shall be established for all pollutants preventing or expected to prevent attainment of water quality standards as identified pursuant to § 130.27(a). Calculations to establish TMDLs shall be subject to public review as defined in the State CPP.

(2) Each State shall estimate for the waterbodies identified at § 130.27(a) that require thermal TMDLs, the total maximum daily thermal load which cannot be exceeded in order to assure protection and propagation of a balanced, indigenous population of shell-fish, fish and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife in the identified waters or parts thereof.

11. Amend newly designated § 130.10 in paragraph (a) by adding a note to the paragraph, and revise paragraph (b) as follows:

§ 130.10 Water quality monitoring.

(a) * * *

Note to paragraph (a): EPA recommends that you use "Policy and Program Requirements to Implement the Mandatory Quality Assurance Program", EPA Order 5360.1, April 3, 1984, as revised July 16, 1998, or subsequent revisions.

(b) The State's water monitoring program shall include collection and analysis of physical, chemical and biological data and quality assurance and control programs to assure scientifically valid data. The uses of

these data include determining abatement and control priorities; developing and reviewing water quality standards, total maximum daily loads, wasteload allocations and load allocations; assessing compliance with National Pollutant Discharge Elimination System (NPDES) permits by dischargers; reporting information to the public through the section 305(b) report and reviewing site-specific monitoring efforts and source water assessments conducted under the Safe Drinking Water Act.

12. Amend newly designated § 130.11 to revise paragraph (a) as follows:

§ 130.11 Water quality report.

(a) Each State shall prepare and submit biennially to the Regional Administrator a water quality report in accordance with section 305(b) of the Act. The water quality report serves as the primary assessment of State water quality. Based upon the water quality data and problems identified in the 305(b) report, States develop water quality management (WQM) plan elements to help direct all subsequent control activities. Water quality problems identified in the 305(b) report should be analyzed through water quality management planning leading to the development of alternative controls and procedures for problems identified in the latest 305(b) report. States may also use the 305(b) report to describe ground-water quality and to guide development of ground-water plans and programs. Water quality problems identified in the 305(b) report should be emphasized and reflected in the State's WQM plan and annual work program under sections 106 and 205(j) of the Clean Water Act and where the designated use includes public water supply, in the source water assessment conducted under the SDWA.

* * * * *

13. Add Subpart C consisting of §§ 130.20 through 130.37 as follows:

Subpart C—Identifying Impaired Waterbodies And Establishing Total Maximum Daily Loads (TMDLs)

What This Subpart Covers

Sec.

130.20 Who must comply with subpart C of this part?

130.21 What is the purpose of this subpart?

Listing Impaired Waterbodies, and Documenting Your Methodology for Making Listing Decisions

130.22 What data and information do you need to assemble and consider to identify and list impaired waterbodies?

130.23 How do you develop and document your methodology for considering and evaluating all existing and readily

available data and information to develop your list?

130.24 When must you provide your methodology to EPA?

130.25 What is the scope of your list of impaired waterbodies?

130.26 How do you apply your water quality standards antidegradation policy to the listing of impaired waterbodies?

130.27 How must you format your list of impaired waterbodies?

130.28 What must your prioritized schedule for submitting TMDLs to EPA contain?

130.29 Can you modify your list?

130.30 When must you submit your list of impaired waterbodies to EPA and what will EPA do with it?

Establishment and EPA Review of TMDLs

130.31 Which waterbodies need TMDLs?

130.32 What are the minimum elements of a TMDL submitted to EPA?

130.33 How are TMDLs expressed?

130.34 What actions must EPA take on TMDLs that are submitted for review?

130.35 How will EPA assure that TMDLs are established?

Public Participation

130.36 What public participation requirements apply to your lists and TMDLs?

TMDLs Established During the Transition

130.37 What is the effect of this rule on TMDLs established during the transition?

Subpart C—Identifying Impaired Waterbodies And Establishing Total Maximum Daily Loads (TMDLs)

What This Subpart Covers

§ 130.20 Who must comply with subpart C in this part?

(a) Subpart C applies to States, Territories, and authorized Tribes. The term “you” in this subpart refers to these three governmental entities.

(b) Portions of this subpart apply to the United States Environmental Protection Agency (EPA). When this is the case, the rule specifies EPA's responsibilities and obligations.

§ 130.21 What is the purpose of this subpart?

(a) This subpart explains how to identify and list impaired waterbodies and establish TMDLs in accordance with section 303(d) of the Clean Water Act. The subpart also explains how EPA reviews and approves or disapproves your lists and TMDLs. Specifically, the subpart explains how to:

(1) Assemble all existing and readily available water quality-related data and information;

(2) Document your methodology for considering and evaluating all existing and readily available water quality-related data and information to make

decisions on your list and provide the methodology to EPA and the public;

(3) Identify impaired waterbodies to be included on the list and decide which of those waterbodies will have TMDLs established for them;

(4) Identify the pollutant or pollutants causing the impairment for all waterbodies on Part 1 of your list;

(5) Develop a prioritized schedule for establishing TMDLs for waterbodies on Part 1 of your list;

(6) Establish TMDLs for waterbodies on Part 1 of your list and submit them to EPA for review;

(7) Provide public notice and an opportunity for public comment on your methodology, your list, and TMDLs prior to final submission to EPA.

(b) It also explains how EPA must:

(1) Review and approve or disapprove your list of impaired waterbodies;

(2) Develop a list where you fail to do so or if EPA disapproves your list;

(3) Review and approve or disapprove your TMDLs;

(4) Establish TMDLs if you have not made substantial progress in establishing TMDLs in accordance with your approved schedule, or if EPA disapproves your TMDLs.

Listing Impaired Waterbodies, and Documenting Your Methodology for Making Listing Decisions

§ 130.22 What data and information do you need to assemble and consider to identify and list impaired waterbodies?

(a) You need to assemble and consider all existing and readily available water quality-related data and information when you develop your list of impaired waterbodies.

(b) Existing and readily available water quality-related data and information includes at a minimum the data and information in and forming the basis for the following:

(1) Your most recent EPA approved section 303(d) list;

(2) Your most recent Clean Water Act section 305(b) report;

(3) Clean Water Act section 319 nonpoint source assessments;

(4) Drinking water source water assessments under section 1453 of the Safe Drinking Water Act;

(5) Dilution calculations, trend analyses, or predictive models for determining the physical, chemical or biological integrity of streams, rivers, lakes, and estuaries; and

(6) Data, information, and water quality problems reported from local, State, Territorial, or Federal agencies (especially the U.S. Geological Survey National Water Quality Assessment (NAWQA) and National Stream Quality Accounting Network (NASQAN)), Tribal

governments, members of the public, and academic institutions.

§ 130.23 How do you develop and document your methodology for considering and evaluating all existing and readily available data and information to develop your list?

(a) Your methodology needs to explain how you will consider and evaluate all existing and readily available water quality-related data and information to determine which waterbodies you will include on Parts 1, 2, 3, and 4 of your list, and to determine how you will prioritize your schedule for establishing TMDLs for waterbodies on Part 1 of your list. You must develop a draft methodology and notify the public of the availability of the draft methodology for review and comment. You should notify directly those who submit a written request for notification. You must provide the public an opportunity to submit comments on the draft methodology for no less than 60 days. You must provide a summary of all comments received and your responses to significant comments when you provide a copy of the final methodology to EPA, as required by § 130.24 of this subpart. You must make your final methodology available to the public when you provide a copy to EPA.

(b) The methodology should explain how you will consider and evaluate the following types of data and information when you make listing decisions and develop your prioritized schedule for TMDL establishment:

- (1) Physical data and information;
- (2) Chemical data and information;
- (3) Biological data and information;
- (4) Aquatic and riparian habitat data and information; and

(5) Other data and information about waterbody impairments, including drinking water susceptibility analyses.

(c) Your methodology should, at a minimum, identify those types of data and information that you will treat as "existing and readily available" and explain how you consider the following factors in making listing decisions and in developing your prioritized schedule for TMDL establishment:

- (1) Data quality and age;
- (2) Degree of confidence you have in the information you use to determine whether waterbodies are impaired, including a description of the quality assurance/quality control factors you will apply to data and information; and
- (3) Number and degree of exceedances of numeric or narrative criteria and periods of nonattainment of designated uses or other factors used to determine whether waterbodies are impaired.

(d) Your methodology should describe the procedures and methods you will

use to collect ambient water quality information.

(e) Your methodology should, at a minimum, also include the following:

- (1) A description of the selection factors you will use to include and remove waterbodies from your list;
- (2) A process for resolving disagreements with other jurisdictions involving waterbodies crossed by State, Territorial, Tribal or international boundaries; and
- (3) A description of the method and factors you will use to develop your prioritized schedule for establishing TMDLs.

§ 130.24 When must you provide your methodology to EPA?

(a)(1) If this section is not effective by May 1, 2001, you must provide to EPA a description of the methodology used to develop your 2002 list and a description of the data and information used to identify waters (including a description of the existing and readily available data and information used by the State, Territory, and authorized Tribe) by April 1, 2002. The provisions of § 130.23(b) through (e) do not apply to this methodology.

(2) If this section is effective on or before May 1, 2001, you must provide your final methodology for your 2002 list and a summary of public comments on your methodology by November 1, 2001. This methodology will apply to the list required in 2002.

(b) You must provide to EPA the final methodology and a summary of public comments for your 2006 and subsequent lists submitted under § 130.30(a) no later than two years before you submit your next list, beginning in the year 2004. For example, you provide to EPA the methodology for your 303(d) list for 2006 on or before April 1, 2004. When providing final methodologies to EPA, you need to provide only the parts of the previous methodology you are revising; however, prior to submitting your final methodology to EPA, the entire methodology must be available to the public.

(c) EPA will review your final methodology and will provide you with comments within 60 days of receiving it. EPA will not approve or disapprove your methodology. EPA will consider your methodology in its review and approval or disapproval of your next list.

§ 130.25 What is the scope of your list of impaired waterbodies?

(a) Your approvable list of impaired waterbodies includes, based on all existing and readily available water quality-related data and information

using appropriate quality assurance/quality control:

(1) Waterbodies that are impaired by individual pollutants, multiple pollutants, or pollution from any source, including point sources, nonpoint sources, storm water sources for which a National Pollutant Discharge Elimination System (NPDES) permit is not required, ground water, and atmospheric deposition.

(2) Waterbodies for which biological information indicates that they do not attain and maintain water quality standards.

(3) Waterbodies that are impaired by point sources only, nonpoint sources only, or by a combination of point and nonpoint sources.

(b) Your list may include, at your option, waterbodies that are not impaired, but which, based on expected changes in loadings or conditions, you anticipate will become impaired in the next four years.

§ 130.26 How do you apply your water quality standards antidegradation policy to the listing of impaired waterbodies?

(a) Water quality standards as defined at 40 CFR Part 131 include several requirements, including one for a State antidegradation policy. Your list must include waterbodies consistent with your antidegradation policy as described below.

(1) Any waterbody is impaired if it is not maintaining a designated use or more protective existing use that was attained on or after November 28, 1975.

(2) Any Tier 3 waterbody is impaired when the level of water quality that existed at the time the waterbody was designated as Tier 3 has declined. Tier 3 waters are waters you have designated as outstanding national resource waters.

(b) [Reserved]

§ 130.27 How must you format your list of impaired waterbodies?

(a) Your list of impaired waterbodies must include the following four parts:

(1) *Part 1.* Waterbodies impaired by one or more pollutant(s) as defined by § 130.2(d), unless listed in Part 3 or 4. Waterbodies identified as impaired through biological information must be listed on Part 1 unless you know that the impairment is not caused by one or more pollutants, in which case you may place the waterbody on Part 2 of the list. Where the waterbody is listed due to biological information, the first step in establishing the TMDL is identifying the pollutant(s) causing the impairment. Waterbodies must also be included on Part 1 where you or EPA have determined, in accordance with §§ 130.32(c)(1)(v), (2)(vii), and (3)(i),

that a TMDL needs to be revised. Waterbodies that you chose to list pursuant to § 130.25(b), because you anticipate that they will become impaired by one or more pollutant(s), must be included on Part 1 of your list. A TMDL is required for waterbodies on Part 1 of the list.

(2) *Part 2.* Waterbodies impaired by pollution as defined by § 130.2(c) but not impaired by one or more pollutants. A TMDL is not required for waterbodies on Part 2 of the list.

(3) *Part 3.* Waterbodies for which EPA has approved or established a TMDL and water quality standards have not yet been attained. The waterbody must be placed on Part 1 of the list and scheduled for establishment of a new TMDL if you or EPA determine that substantial progress towards attaining the water quality standard is not occurring.

(4) *Part 4.* Waterbodies that are impaired, for which the State, Territory, or authorized Tribe demonstrates that water quality standards will be attained by the date of submission of the next list as a result of implementation of technology-based effluent limitations required by sections 301(b), 306, or 307 of the Clean Water Act or other controls enforceable by State, Territorial or authorized Tribal or Federal law or regulation (including more stringent water quality-based effluent limitations in NPDES permits). A TMDL is not required for waterbodies on Part 4. If a waterbody listed on Part 4 does not attain water quality standards by the time the next list is required to be submitted to EPA, such waterbody must be included on Part 1 unless you can demonstrate that the failure to attain water quality standards is due to failure of point source dischargers to comply with applicable NPDES permit effluent limitations, which are in effect. TMDLs for waterbodies moved from Part 4 to Part 1 of the list must be scheduled for establishment in accordance with the requirements of § 130.28(b).

(b) You must identify:

(1) The pollutant or pollutants causing the impairment for each waterbody on Part 1 of the list, or for waterbodies for which the impairment is a result of biological information, the pollutant or pollutants if known.

(2) The type of pollution causing the impairment for each waterbody on Part 2.

(3) The geographic location of each waterbody on the list, using the National Hydrography Database or subsequent revisions, or a compatible georeferenced database.

(c) Any one of the three reporting formats described in this paragraph are acceptable.

(1) *Separate section 303(d) list.* You may submit your list as a separate four-part section 303(d) list.

(2) *Consolidated section 303(d) list and section 305(b) report.* You may submit your list as a component of your water quality report (section 305(b) report). You must clearly identify the parts of your water quality report you are submitting as your four-part section 303(d) list.

(3) *Part 1 waterbodies in section 303(d) report and Parts 2, 3, and 4 waterbodies in section 305(b) report.* You may submit Part 1 of your list as a separate section 303(d) list, provided you include Parts 2, 3, and 4 of your list as a component of your section 305(b) water quality report and clearly identify the parts of your water quality report that you are submitting as Parts 2, 3, and 4 of your section 303(d) list.

(d) EPA will approve or disapprove your four-part section 303(d) list regardless of the reporting format that you use.

§ 130.28 What must your prioritized schedule for submitting TMDLs to EPA contain?

(a) Your list must include a prioritized schedule for establishing TMDLs for all waterbodies and pollutant combinations on Part 1 of your list.

(b) You must schedule establishment of TMDLs:

(1) as expeditiously as practicable, evenly paced over the duration of the schedule;

(2) no later than 10 years from July 10, 2000, if the waterbody and pollutant was listed on any part of the list before that date or 10 years from the due date of the first subsequent list after July 10, 2000, on which the waterbody and pollutant is initially included. You may extend the schedule for one or more TMDLs by no more than five years if you explain to EPA as part of your list submission that, despite expeditious actions, establishment of all TMDLs on Part 1 of your list within 10 years is not practicable.

(c) You must identify each specific TMDL you intend to establish and the one year period during which it is scheduled to be established. Your schedule should provide for the coordinated establishment of TMDLs within a watershed to the fullest extent practicable.

(d) You must:

(1) explain how you considered the severity of the impairment and the designated use of the waterbody in

prioritizing waterbodies for TMDL establishment on your schedule.

(2) Identify waterbodies:

(i) That are designated in water quality standards as a public drinking water supply, or are used as a source of drinking water, and are impaired by a pollutant that is contributing to a violation of a national primary drinking water regulation (NPDWR) by a public water system or causes a public water system to be vulnerable to a violation of a NPDWR; or

(ii) Where species listed as threatened or endangered under section 4 of the Endangered Species Act are present in the waterbody.

(3) Waterbodies identified in this subsection must be given a higher priority unless you explain why a different priority is appropriate.

(e) When identifying and scheduling your waterbodies for TMDL establishment, you may also consider the presence of sensitive aquatic species and other factors such as the historical, cultural, economic and aesthetic uses of the waterbody. You may consider other factors in prioritizing your schedule, including the value and vulnerability of particular waterbodies; the recreational, economic, and aesthetic importance of particular waterbodies; TMDL complexity; the degree of public interest and support; State, Territorial and authorized Tribal policies and priorities; national policies and priorities; or the efficiencies that might result from coordinating the establishment of TMDLs for multiple waterbodies located in the same watershed. If you are using a rotating basin approach, you may take that approach into account when prioritizing waterbodies on your schedule because of the inherent efficiencies of such an approach.

(f) If you consider other factors, you should identify each factor and explain how you used each factor in prioritizing your schedule.

§ 130.29 Can you modify your list?

(a) You may modify your list at times other than those required by § 130.30, in accordance with this section. If you modify your list and prioritized schedule, you must submit your list to EPA as a modification to your list under this section and follow the public participation requirements of § 130.36, except that such requirements shall apply only to waterbodies and issues addressed by the modification. The requirements of subsections (b), (c), (d), and (e) of this section apply to lists submitted under § 130.30(a) or at any other time.

(b) You must keep each impaired waterbody on your list for a particular

pollutant until it is attaining and maintaining applicable water quality standards for that pollutant.

(c) You may remove a listed waterbody for a particular pollutant if new data or information indicate that the waterbody is attaining and maintaining the applicable water quality standards for that pollutant.

(d) You may add a waterbody to your list if you have data or information indicating that it is impaired.

(e) You may modify your prioritized schedule for establishing TMDLs in accordance with § 130.28 based on new information provided that the modification does not reduce the number of TMDLs scheduled for completion during the first four years of the current approved schedule.

(f) EPA must issue an order approving or disapproving the modification of your list or prioritized schedule in accordance with § 130.30(b).

(g) EPA may also issue an order modifying a list consistent with the provisions of paragraphs (c), (d) and (e) of this section, after providing notice and an opportunity for public comment.

§ 130.30 When must you submit your list of impaired waterbodies to EPA and what will EPA do with it?

(a) You must submit your list of impaired waterbodies to EPA by April 1 of every fourth year, beginning in the year 2002.

(b) EPA must:

(1) Issue an order approving or disapproving your list or modification of your list, within 30 days of receipt, in whole or in part if it is not consistent with the requirements of §§ 130.25 through 130.29.

(2) By order, within 30 days of disapproval, issue a new list consistent with §§ 130.25 through 130.29 if EPA disapproves or partially disapproves your list or modification of your list.

(3) Publish the order required by paragraph (b)(2) of this section in the **Federal Register** and a general circulation newspaper in your State, Territory, or where your Tribe is located and request public comment for at least 30 days.

(4) Issue a subsequent order revising the new list after the close of the public comment period, as appropriate, if EPA revises its initial order required by paragraph (b)(2) of this section based on public comment.

(5) Send you a copy of its order(s).

(6) Establish a list of impaired waterbodies for your State, Territory, or authorized Tribe consistent with §§ 130.25 through 130.29 if you fail to do so by April 1 of every fourth year.

(c) EPA may establish lists of waterbodies that do not attain and

maintain Federal water quality standards.

(d) You must incorporate into your water quality management plan those portions of your list that EPA approves or establishes.

Establishment and EPA Review of TMDLs

§ 130.31 Which waterbodies need TMDLs?

(a) You must establish TMDLs for all waterbodies and pollutant combinations on Part 1 of your list in accordance with your approved schedule and submit the TMDLs to EPA.

(b) You do not need to establish TMDLs for waterbodies on Parts 2, 3, and 4 of your list.

§ 130.32 What are the minimum elements of a TMDL submitted to EPA?

(a) A TMDL is a written, quantitative plan and analysis for attaining and maintaining water quality standards in all seasons for a specific waterbody and pollutant. TMDLs may be established on a coordinated basis for a group of waterbodies in a watershed. A TMDL provides the opportunity to compare relative contributions of pollutants from all sources and consider technical and economic trade-offs between point and nonpoint sources.

(b) You must include the following minimum elements in any TMDL submitted to EPA:

(1) The name and geographic location, as required by § 130.27(b)(3), of the impaired waterbody for which the TMDL is being established and, to the extent known, the names and geographic locations of the waterbodies upstream of the impaired waterbody that contribute significant amounts of the pollutant for which the TMDL is being established;

(2) Identification of the pollutant and the applicable water quality standard for which the TMDL is being established;

(3) Quantification of the pollutant load that may be present in the waterbody and still ensure attainment and maintenance of water quality standards;

(4) Quantification of the amount or degree by which the current pollutant load in the waterbody, including the pollutant load from upstream sources that is being accounted for as background loading, deviates from the pollutant load needed to attain and maintain water quality standards;

(5) Identification of source categories, source subcategories, or individual sources of the pollutant consistent with the definitions of load and wasteload allocation in §§ 130.2(f) and (g), respectively, for which the wasteload

allocations and load allocations are being established;

(6) Wasteload allocations assigned to point sources permitted under section 402 of the Clean Water Act discharging the pollutant for which the TMDL is being established that will, when implemented in conjunction with assigned load allocations, if any, result in the attainment and maintenance of water quality standards in the waterbody. Wasteload allocations that reflect pollutant load reductions for point sources needed to ensure that the waterbody attains and maintains water quality standards must be expressed as individual wasteload allocations for each source. Wasteload allocations that do not reflect pollutant load reductions from point sources needed for the waterbody to attain and maintain water quality standards may be expressed as an individual wasteload allocation for a source or may be included within a wasteload allocation for a category or subcategory of sources. Wasteload allocations for sources subject to a specified general permit, regardless of whether they reflect pollutant reductions, may be allotted to categories of sources. You should submit supporting technical analyses demonstrating that wasteload allocations, when implemented in conjunction with necessary load allocations, will result in the attainment and maintenance of the water quality standard(s) applicable to the pollutant for which the TMDL is being established;

(7) Load allocations, ranging from reasonably accurate estimates to gross allotments, for nonpoint sources of a pollutant, storm water sources for which an NPDES permit is not required, atmospheric deposition, ground water or background sources of a pollutant that, when implemented in conjunction with assigned wasteload allocations, if any, result in the attainment and maintenance of water quality standards in the waterbody. If feasible, a separate load allocation must be allocated to each source of a pollutant. Where this is not feasible, load allocations may be allocated to categories or subcategories of sources. Pollutant loads from sources that do not need to be reduced for the waterbody to attain and maintain water quality standards may be included within a category of sources or subcategory of sources. You should submit supporting technical analyses demonstrating that load allocations, when implemented in conjunction with necessary wasteload allocations, will result in the attainment and maintenance of water quality standards

applicable to the pollutant for which the TMDL is being established;

(8) A margin of safety that appropriately accounts for uncertainty related to the TMDL, including uncertainties associated with pollutant loads, modeling water quality, and monitoring water quality. A margin of safety may be expressed as unallocated assimilative capacity or conservative analytical assumptions used in establishing the TMDL;

(9) Consideration of seasonal variations, stream water flow levels, and other environmental factors that affect the relationship between pollutant loadings and water quality impacts, such that the allocations will result in attainment and maintenance of water quality standards in all seasons of the year and during all flow conditions;

(10) Allowance for reasonably foreseeable increases in pollutant loads including future growth; and

(11) An implementation plan which meets the requirements of paragraph (c) of this section.

(c) The purpose of the implementation plan is to provide a description, in a level of detail appropriate to the circumstances, of actions necessary to implement the TMDL so that the waterbody attains and maintains water quality standards. EPA does not expect the implementation plan to be a complex, lengthy document.

(1) For waterbodies impaired only by point sources for which NPDES permits will implement the TMDL, an implementation plan must include:

(i) An identification of the wasteload allocation(s) that the effluent limitation(s) must be consistent with pursuant to § 122.44(d)(1)(vii)(B) in the NPDES permit(s) that will be issued, reissued, or revised. In all instances, the NPDES permit effluent limitation(s) must be consistent with the applicable wasteload allocation(s). You must identify:

(A) The point sources that are or will be regulated by individual permits and the categories or subcategories of point sources that are or will be regulated by general permits that will be subject to such effluent limitations.

(B) The permit, if you intend to implement the wasteload allocation by requiring a point source to apply for coverage under an existing NPDES general permit.

(C) The elements of the general permit necessary to ensure implementation of the wasteload allocation, if you intend for a point source to be regulated by a new general permit.

(ii) A schedule for issuing, reissuing or revising the NPDES permit(s) as

expeditiously as practicable to include effluent limits consistent with the wasteload allocation(s) in the TMDL. EPA must:

(A) Reissue or revise the permit(s) within two years after the establishment of the TMDL where EPA is the NPDES permitting authority.

(B) Notify the NPDES Director of EPA's intent to object to the permit pursuant to the provisions of § 123.44(k) within one year after expiration of the permit term, or where the permit term expired prior to the establishment of the TMDL, within one year from establishment of the TMDL where the State is the NPDES permitting authority, and the permit term has expired.

(C) Issue an NPDES permit that incorporates effluent limitations based on wasteload allocation(s) in the TMDL within one year thereafter where the State has not done so. Nothing in this paragraph (c)(1)(ii) limits EPA's authority to reissue a permit after the expiration of the two-year time frame set forth in this paragraph (c)(1)(ii), or invoke the mechanism described in § 123.44(k) after the expiration of either of the one-year time frames set forth in this paragraph (c)(1)(ii).

(iii) The date by which the implementation plan will result in the waterbody attaining and maintaining applicable water quality standards and the basis for that determination;

(iv) A monitoring and/or modeling plan designed to measure the effectiveness of the controls implementing the wasteload allocations and the progress the waterbody is making toward attaining water quality standards; and

(v) The criteria you will use to determine that substantial progress toward attaining water quality standards is being made and if not, the criteria for determining whether the TMDL needs to be revised.

(2) For waterbodies impaired only by nonpoint source(s), storm water sources for which an NPDES permit is not required, atmospheric deposition, ground water or background sources of a pollutant where no NPDES permit will implement the TMDL, the implementation plan must include:

(i) An identification of the source categories, source subcategories, or individual sources of the pollutant which must be controlled to implement the load allocations;

(ii) A description of specific regulatory or voluntary actions, including management measures or other controls, by Federal, State or local governments, authorized Tribes, or individuals that provide reasonable assurance, consistent with § 130.2(p),

that load allocations will be implemented and achieve the assigned load reductions. Your selection of management measures for achieving the load allocation may recognize both the natural variability and the difficulty in precisely predicting the performance of management measures over time;

(iii) A schedule, which is as expeditious as practicable, for implementing the management measures or other control actions to achieve load allocations in the TMDL within 5 years, when implementation within this period is practicable;

(iv) The date by which the implementation plan will result in the waterbody attaining and maintaining applicable water quality standards, and the basis for that determination;

(v) A description of interim, measurable milestones for determining whether management measures or other control actions are being implemented;

(vi) A monitoring and/or modeling plan designed to measure the effectiveness of the management measures or other controls implementing the load allocations and the progress the waterbody is making toward attaining water quality standards, and a process for implementing stronger and more effective management measures if necessary; and

(vii) The criteria you will use to determine that substantial progress toward attaining water quality standards is being made and if not, the criteria for determining whether the TMDL needs to be revised.

(3) For waterbodies impaired by both point sources and nonpoint sources where NPDES permits and management measures or other control actions for nonpoint or other sources will implement the TMDL, the implementation plan must include:

(i) The elements of paragraphs (c)(1) and (2) of this section; and

(ii) A description of the extent to which wasteload allocations reflect expected achievement of load allocations requiring reductions in loadings.

(4) For all impaired waterbodies, the implementation plan must be based on a goal of attaining and maintaining the applicable water quality standards within ten years whenever attainment and maintenance within this period is practicable.

(d) TMDTLs must meet all the requirements of paragraphs (b) and (c) of this section, except that, rather than estimating a TMDTL at a level necessary to attain and maintain water quality standards, you must estimate the TMDTL as required by statute at a level

necessary to ensure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife, taking into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and dissipative capacity of the waterbody for which the TMDTL is being established. Estimates for those waterbodies must include a calculation of the maximum heat input and a margin of safety that takes into account any lack of knowledge concerning the development of thermal water quality criteria.

(e) A TMDL must not be likely to jeopardize the continued existence of an endangered or threatened species listed under section 4 of the Endangered Species Act or result in the destruction or adverse modification of its designated critical habitat.

§ 130.33 How are TMDLs expressed?

(a) A TMDL must contain a quantitative expression of the pollutant load or load reduction necessary to ensure that the waterbody will attain and maintain water quality standards, or, as appropriate, the pollutant load or load reduction required to attain and maintain aquatic or riparian habitat, biological, channel or geomorphological or other conditions that will result in attainment and maintenance of water quality standards.

(b) As appropriate to the characteristics of the waterbody and pollutant, the pollutant load or load reduction may be expressed in one or more of the following ways:

(1) The pollutant load that can be present in the waterbody and ensure that it attains and maintains water quality standards;

(2) The reduction from current pollutant loads required to attain and maintain water quality standards;

(3) The pollutant load or reduction of pollutant load required to attain and maintain aquatic, riparian, biological, channel or geomorphological measures so that water quality standards are attained and maintained;

(4) A quantitative expression of a modification of a characteristic of the waterbody, *e.g.*, aquatic and riparian habitat, biological, channel, geomorphological, or chemical characteristics, that results in a pollutant load or reduction of pollutant load so that water quality standards are attained and maintained; or

(5) In terms of either mass per time, toxicity or other appropriate measure.

§ 130.34 What actions must EPA take on TMDLs that are submitted for review?

(a) EPA must:

(1) Review each TMDL you submit to determine if it meets the requirements of §§ 130.31, 130.32 and 130.33 and issue an order approving or disapproving each TMDL you submit within 30 days after you submit it.

(2) Disapprove the TMDL if it does not meet all those requirements.

(3) Issue an order establishing a new TMDL for a waterbody and pollutant within 30 days of EPA's disapproval or determination of the need for revision, if EPA disapproves a TMDL you submit or determines that an existing TMDL needs to be revised.

(4) Publish this order in the **Federal Register** and a general circulation newspaper and request public comment for at least 30 days.

(5) Issue a subsequent order revising the TMDL after the close of the public comment period, as appropriate, if EPA revises its initial order based on public comment.

(6) Send you the final TMDL EPA establishes. You must incorporate any EPA-established or EPA approved TMDL into your water quality management plan.

(b) When EPA establishes a TMDL it must provide reasonable assurance. It may satisfy the adequate funding requirement of reasonable assurance by conditioning Clean Water Act grants to the fullest extent practicable and in a manner consistent with effective operation of other Clean Water Act programs.

(c) EPA may also use any of its statutory or regulatory authorities and voluntary, incentive-based programs, as it determines appropriate, to supplement conditioning Clean Water Act grants in demonstrating reasonable assurance.

§ 130.35 How will EPA assure that TMDLs are established?

(a) EPA must assure that TMDLs for waterbodies and pollutants identified on Part 1 of your list are established. EPA must do this by:

(1) Working with you to assure that TMDLs are established in accordance with your schedule; and

(2) Establishing a TMDL if you have not made substantial progress in establishing the TMDL in accordance with your approved schedule. Substantial progress means that you have established a TMDL not later than the end of the one-year period during which it was scheduled to be established. EPA must establish the TMDL within two years of the date on which you fail to make substantial progress. The Administrator may extend this period for no more than two years on a case-by-case basis if there is a

compelling need for additional time. Notice of such extension shall be published in the **Federal Register**.

(b) EPA may establish TMDLs under other circumstances including:

(1) You request that EPA do so; or

(2) EPA determines it is necessary to establish a TMDL for an interstate or boundary waterbody or to implement Federal water quality standards.

(c) In establishing any TMDL pursuant to this section, EPA shall provide notice and an opportunity for public comment on such order.

Public Participation

§ 130.36 What public participation requirements apply to your lists and TMDLs?

(a) You must provide public notice and allow the public no less than 30 days to review and comment on your list of impaired waterbodies and TMDLs prior to submission to EPA. You should notify directly those who submit a written request for notification.

(b) At the time you make your submission to EPA, you must provide EPA with a summary of all public comments received on your list and TMDLs and your response to all significant comments, indicating how the comments were considered in your final decision.

(c) Prior to your submission to EPA, and at the time that you provide the public the opportunity to review and comment on your list and TMDLs:

(1) You must provide a copy of each of these documents to EPA, the U.S. Fish and Wildlife Service, and to the National Marine Fisheries Service where appropriate (*e.g.*, coastal areas), unless you request EPA to provide these documents to the Services, in which case EPA will do so.

(2) You are encouraged to establish processes with both the U.S. Fish and Wildlife Service and the National Marine Fisheries Service that will provide for the early identification and resolution of threatened and endangered species concerns as they relate to your list and TMDLs. To facilitate consideration of endangered and threatened species in the listing and TMDL process, EPA will ask the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, where appropriate, to provide you and EPA with any comments that they may have on your lists and TMDLs.

(3) You must consider any comments from EPA, the U.S. Fish and Wildlife Service, or the National Marine Fisheries Service in establishing your list and TMDLs and document your consideration of these comments in

accordance with paragraph (b) of this section.

(d) EPA will review any comments submitted by the U.S. Fish and Wildlife Service or the National Marine Fisheries Service and consider how you addressed these and EPA's comments prior to EPA's approval or disapproval of your submission.

TMDLs Established During the Transition

§ 130.37 What is the effect of this rule on TMDLs established during the transition?

(a) EPA will approve any TMDL submitted to it for review before January 11, 2002 or nine months from the effective date of this rule, whichever occurs later, if the TMDL meets either the requirements in § 130.7 in effect prior to July 13, 2000 or the requirements in §§ 130.31, 130.32 and 130.33 of this Subpart C.

(b) EPA will establish TMDLs before January 11, 2002 or nine months from the effective date of this rule, whichever occurs later, either according to the requirements in § 130.7 in effect prior to July 13, 2000 or the requirements in §§ 130.31, 130.32 and 130.33 of this Subpart C.

14. Amend newly designated § 130.50 to revise paragraph (b) introductory text and (b)(3) as follows:

§ 130.50 Continuing planning process

* * * * *

(b) *Content.* The State may determine the format of its CPP as long as the minimum requirements of the CWA and this regulation are met. A State CPP need not be a single document,

provided the State identifies in one document (i.e., an index) the other documents, statutes, rules, policies and guidance that comprise its CPP. The following processes must be described in each State CPP and the State may include other processes, including watershed-based planning and implementation, at its discretion.

* * * * *

(3) The process for developing total maximum daily loads (TMDLs) and individual water quality based effluent limitations for pollutants in accordance with section 303(d) of the Act and §§ 130.31 through 130.36 of this Part.

* * * * *

15. Amend newly designated § 130.51 to revise paragraphs (a), (c)(1), and (f) as follows:

§ 130.51 Water quality management plans

(a) *Water quality management plans.* You must base continuing water quality planning on initial water quality management plans produced in accordance with sections 208 and 303(e) of the Clean Water Act and certified and approved updates to those plans. Your annual water quality planning should focus on priority issues and geographic areas identified in your latest section 305(b) reports and have a watershed focus. Water quality planning should be directed at the removal of conditions placed on previously certified and approved water quality management plans and updates to support the implementation of wasteload allocations and load allocations contained in TMDLs.

* * * * *

(c) * * *

(1) *Total Maximum Daily Loads.* TMDLs in accordance with section 303(d) and (e)(3)(C) of the Act and §§ 130.2 and 130.31 through 130.36; also lists of impaired waters in accordance with §§ 130.2 and 130.22 through 130.30.

* * * * *

(f) *Consistency.* Construction grant and permit decisions must be made in accordance with certified and approved WQM plans as described in §§ 130.63(a) and (b). Likewise, financial assistance under the State water pollution control revolving funds may be made only to projects which are in conformity with such plans as specified in section 603(f) of the Act.

* * * * *

§ 130.61 [Amended]

16. Amend newly designated § 130.61 to remove and reserve paragraph (b)(2), and remove paragraph (d).

17. Revise newly designated § 130.64 as follows:

§ 130.64 Processing application for Indian Tribes

The Regional Administrator shall process an application of an Indian Tribe submitted under § 130.51(d) in a timely manner. He shall promptly notify the Indian Tribe of receipt of the application.

[FR Doc. 00-17831 Filed 7-12-00; 8:45 am]

BILLING CODE 6561-12-P



Federal Register

**Thursday,
July 13, 2000**

Part VII

The President

**Proclamation 7329—President Lincoln and
Soldiers' Home National Monument**

Presidential Documents

Title 3—

Proclamation 7329 of July 7, 2000

The President

President Lincoln and Soldiers' Home National Monument

By the President of the United States of America

A Proclamation

Each year from 1862 through 1864, President Abraham Lincoln and his family left the White House to take up residence during the warm weather months at Anderson Cottage, a home in northwest Washington, D.C., on the grounds of a site then known as the Soldiers' Home. It is estimated that President Lincoln spent one quarter of his presidency at this home, riding out to it many evenings from late June until early November. The house and surrounding land are now part of the U.S. Soldiers' and Airmen's Home, a component of the Armed Forces Retirement Home, an independent establishment in the executive branch. This house and its grounds are objects of great historic significance and interest.

It was here, in September of 1862, that President Lincoln completed the drafting of the Emancipation Proclamation. His second floor bedroom and much of the rest of the house are configured as they were when he was in residence, and original mantels, woodwork, and windows are retained. A magnificent copper beech tree under which he read and relaxed is still growing at the site. It was also from this house that, in July of 1864, he traveled 2 miles north to view the battle of Fort Stevens, during which he actually came under fire as he stood beside the Union troops defending the capital. The house has been designated a National Historic Landmark by the National Park Service.

The land was purchased by the Federal Government through the Soldiers' Home Trust Fund in 1851 to establish a home for invalid and disabled soldiers of the U.S. Army, the first such attempt to provide for members of the regular army. The house was first used as a summer retreat by President Buchanan from 1857 to 1860, and continued to be used as such by several presidents, including President Hayes from 1877 to 1880 and President Arthur from 1882 to 1884. It became known as Anderson Cottage in honor of Major Robert Anderson, the Union commanding officer at Fort Sumter at the outbreak of the Civil War.

Section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), authorizes the President, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and to reserve as a part thereof parcels of lands, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

WHEREAS it appears that it would be in the public interest to reserve such lands as a national monument to be known as the President Lincoln and Soldiers' Home National Monument:

NOW, THEREFORE, I, William J. Clinton, President of the United States of America, by the authority vested in me by section 2 of the Act of June 8, 1906 (34 Stat. 225, 16 U.S.C. 431), do proclaim that there are hereby set apart and reserved as the President Lincoln and Soldiers' Home National Monument for the purpose of protecting the objects identified above, all lands and interests in lands owned or controlled by the United

States within the boundaries of the area described on the map entitled "President Lincoln and Soldiers' Home National Monument" attached to and forming a part of this proclamation. The Federal land and interests in land reserved consist of approximately 2.3 acres, which is the smallest area compatible with the proper care and management of the objects to be protected.

All Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from all forms of entry, location, selection, sale, or leasing or other disposition under the public land or other Federal laws, including but not limited to withdrawal from location, entry, and patent under the mining laws, and from disposition under all laws relating to mineral and geothermal leasing.

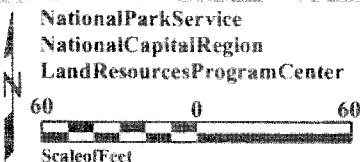
The monument historically has been a part of the U.S. Soldiers' and Airmen's Home, a facility administered by the Armed Forces Retirement Home, an independent establishment of the Executive Branch. The Armed Forces Retirement Home, through the U.S. Soldiers' and Airmen's Home, shall manage the monument as an integral part of that surrounding facility and consistent with the purposes and provisions of this proclamation. In managing the monument, the Armed Forces Retirement Home shall consult with the Secretary of the Interior through the National Park Service.

For the purpose of preserving, restoring, and enhancing the public's appreciation of the monument, the Armed Forces Retirement Home shall prepare, in consultation with the Secretary of the Interior through the National Park Service, a management plan for this monument within 3 years of this date. Further, to the extent authorized, the Armed Forces Retirement Home shall promulgate, in consultation with the Secretary of the Interior through the National Park Service, regulations for the proper care and management of the objects identified above.

Nothing in this proclamation shall be deemed to revoke any existing withdrawal, reservation, or appropriation; however, the national monument shall be the dominant reservation. Warning is hereby given to all unauthorized persons not to appropriate, injure, destroy, or remove any feature of this monument and not to locate or settle upon any of the lands thereof.

IN WITNESS WHEREOF, I have hereunto set my hand this seventh day of July, in the year of our Lord two thousand, and of the Independence of the United States of America the two hundred and twenty-fifth.

A handwritten signature in black ink, reading "William Clinton". The signature is written in a cursive, flowing style with a large, prominent "W" and "C".



The President Lincoln and Soldiers' Home National Monument



This drawing should not be used for any legal or engineering purposes. Figures represented in this drawing are approximate.

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Federal Register

Vol. 65, No. 135

Thursday, July 13, 2000

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FEDERAL REGISTER PAGES AND DATE, JULY

40967-41320.....	3
41321-41550.....	5
41551-41864.....	6
41865-42272.....	7
42273-42596.....	10
42597-42854.....	11
42855-43212.....	12
43213-43676.....	13

CFR PARTS AFFECTED DURING JULY

At the end of each month, the Office of the Federal Register publishes separately a List of CFR Sections Affected (LSA), which lists parts and sections affected by documents published since the revision date of each title.

3 CFR

Proclamations:

7325.....	41313
7326.....	41547
7327.....	41865
7328.....	42595
7329.....	43673

Executive Orders:

13129 (See Notice of June 30, 2000).....	41549
13161.....	41543
13162.....	43211

Administrative Orders:

Memorandums	
July 5, 2000.....	43213

Notices:

June 30, 2000.....	41549

Presidential

Determinations:

No. 2000-25 of June 29, 2000.....	42273

5 CFR

3.....	41867
178.....	40967
213.....	41867
315.....	41867
532.....	42597, 43215
550.....	41868

7 CFR

272.....	41321, 41752
273.....	41321, 41752
274.....	41321
723.....	41551
929.....	42598
931.....	41557
947.....	42275
958.....	40967
982.....	40970
985.....	40973
989.....	40975
1230.....	43498
1464.....	41551
1735.....	42615

Proposed Rules:

205.....	43259
905.....	41608, 42642
927.....	41018

8 CFR

103.....	43528
214.....	43528

Proposed Rules:

103.....	43527
214.....	43527
248.....	43527
264.....	43527

9 CFR

Proposed Rules:

1.....	42304

2.....	42304

10 CFR

Proposed Rules:

54.....	42305
55.....	41021
72.....	42647

11 CFR

104.....	42619

12 CFR

5.....	41559
563b.....	43088
575.....	43088
915.....	41560
925.....	40979
950.....	40979

Proposed Rules:

226.....	42092
563b.....	43092
575.....	43088
917.....	43408
925.....	43408
930.....	43408
931.....	43408
932.....	43408
933.....	43408
956.....	43408
960.....	43408

13 CFR

120.....	42624

Proposed Rules:

123.....	43261

14 CFR

35.....	42278
39.....	40981, 40983, 40985, 40988, 41326, 41869, 41871, 42281, 42855, 43215, 43217, 43219, 43221, 43223, 43228, 43406

71.....	40990, 40991, 41328, 41329, 41330, 41576, 42856, 42858, 42859, 42860, 43406

95.....	41578

97.....	43230, 43232

Proposed Rules:

Ch. 1.....	43265
13.....	41528
21.....	42796
36.....	42796
39.....	41381, 41385, 41884, 42306, 43265
71.....	41387, 41388, 43406

15 CFR

30.....	42556

732.....	42556

740.....	42556, 43130

743.....	42556

748.....42556	24 CFR	52.....41344, 41346, 41350,	74.....41401
750.....42556	960.....42518	41352, 41355, 41592, 42290,	87.....41032
752.....42556	964.....42512	42861	
758.....42556	982.....42508	60.....42292	48 CFR
762.....42556	Proposed Rules:	63.....41594, 42292	501.....41377
772.....42556, 43130	15.....42578	122.....43586	511.....41377
774.....42556, 43130, 43406	27.....41538	123.....43586	512.....41377
	290.....41538	124.....43586	525.....41377
	990.....42488	130.....43586	532.....41377
17 CFR		180.....41365, 41594, 41601,	537.....41377
211.....40992	26 CFR	42863	552.....41377
Proposed Rules:	1.....40993, 41332	261.....42292	Proposed Rules:
210.....43148	Proposed Rules:	270.....42292	2.....42852
240.....43148	1.....41610, 42900	271.....42871, 43246	3.....42852
18 CFR	29 CFR	300.....41369	8.....41264
284.....41581, 41873	Proposed Rules:	712.....41371	14.....42852
Proposed Rules:	4022.....41610	Proposed Rules:	15.....41264, 42852
284.....41885	4044.....41610	52.....41389, 41390, 41391,	28.....42852
19 CFR		42312, 42649, 42900, 42907,	35.....42852
Ch. I.....42634	30 CFR	42913, 42919	44.....41264
Proposed Rules:	3.....42769	80.....42920	52.....41264, 42852
4.....42893	250.....41000	81.....42312	225.....41037
19.....42893	Proposed Rules:	82.....42653	242.....41038
122.....42893	70.....42122	125.....42936	252.....41038
123.....42893	72.....42068	131.....41216	
127.....42893	75.....42122	136.....41391	49 CFR
141.....42893	90.....42122	141.....41031	1.....41282
142.....42893	250.....41892	142.....41031	209.....42529
20 CFR	31 CFR	146.....42248	211.....42529
404.....42283, 42772	501.....41334	260.....42937	215.....41282
416.....42283, 42772	598.....41334	261.....42937	220.....41282
655.....43539	32 CFR	268.....42937	238.....41282
Proposed Rules:	199.....41002	271.....42937, 42960, 43284	260.....41838
655.....43547	33 CFR	300.....41392	821.....42637
21 CFR	100.....41003	434.....41613	Proposed Rules:
73.....41581, 41584	165.....41004, 41005, 41007,	42 CFR	613.....41891
178.....41874	41009, 41010, 41342, 41590,	59.....41268	621.....41891
314.....43233	42287, 42289, 43236, 43244	409.....41128	622.....41892
524.....41587	34 CFR	410.....41128	623.....41892
556.....41588	99.....41852	411.....41128	
558.....41589, 41876	36 CFR	413.....41128	50 CFR
884.....41330	Proposed Rules:	424.....41128	223.....42422, 42481
Proposed Rules:	800.....42834	484.....41128	622.....41015, 41016, 41379
20.....43269	37 CFR	45 CFR	635.....42883
58.....43269	Proposed Rules:	1635.....41879	648.....41017
101.....41029	1.....42309	47 CFR	679.....41380, 41883, 42302,
170.....43269	102.....41903	27.....42879	42641, 42888
171.....43269	201.....41612	52.....43251	Proposed Rules:
174.....43269	39 CFR	64.....43251	17.....41404, 41405, 41782,
179.....43269	111.....41877	73.....41012, 41013, 41375,	41812, 41917, 42316, 42662,
23 CFR	775.....41011	41376, 41377	42962, 42973, 43450
Proposed Rules:	40 CFR	101.....41603	25.....42318
450.....41891	9.....43586	Proposed Rules:	32.....42318
771.....41892		1.....41613	600.....41622
1410.....41891		2.....41032	622.....41041, 42978
1420.....41892		24.....41034	648.....42979
1430.....41892		27.....42960	660.....41424, 41426
		73.....41035, 41036, 41037,	679.....41044
		41393, 41401, 41620, 41621	

REMINDERS

The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

RULES GOING INTO EFFECT JULY 13, 2000**ENVIRONMENTAL PROTECTION AGENCY**

Air quality implementation plans; approval and promulgation; various States:

Alaska

Failure to submit required plan for carbon monoxide; published 7-14-00

FEDERAL COMMUNICATIONS COMMISSION

Common carrier services:

Truth-in-billing and billing format; principles and guidelines; published 7-13-00

Wireless telecommunications services—

Cellular radiotelephone service; geographic partitioning and spectrum disaggregation; published 6-13-00

HEALTH AND HUMAN SERVICES DEPARTMENT**Food and Drug Administration**

Medical devices:

General hospital and personal use devices—
Subcutaneous, implanted, intravascular infusion port and catheter, and percutaneous, implanted, long-term intravascular catheter; classification; published 6-13-00

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Acquisition regulations:

Risk management; published 6-13-00

POSTAL SERVICE

Domestic Mail Manual:

SAVE verification procedures and revisions; First-Class and Standard Mail (A) automation letter mail; combined postage payment standards; published 7-7-00

TRANSPORTATION DEPARTMENT
Federal Aviation Administration

Airworthiness directives:

Boeing; published 6-28-00

Cessna; published 6-18-99

Airworthiness standards:

Special conditions—

Cessna Model 172/K/L/M/ N/P airplane, etc.; published 6-13-00

Class D airspace; published 5-25-00

COMMENTS DUE NEXT WEEK**AGRICULTURE DEPARTMENT****Agricultural Marketing Service**

Winter pears grown in—

Oregon and Washington; comments due by 7-18-00; published 7-3-00

AGRICULTURE DEPARTMENT**Animal and Plant Health Inspection Service**

Exportation and importation of animals and animal products:

Bovine spongiform encephalopathy; disease status change—

Denmark; comments due by 7-17-00; published 5-17-00

AGRICULTURE DEPARTMENT**Forest Service**

Special areas:

Roadless area conservation; comments due by 7-17-00; published 5-10-00

AGRICULTURE DEPARTMENT**Farm Service Agency**

Program regulations:

Servicing and collection—

Disaster set-aside program; comments due by 7-17-00; published 5-17-00

Special programs:

Lamb Meat Adjustment Assistance Program; comments due by 7-19-00; published 6-21-00

COMMERCE DEPARTMENT**Export Administration Bureau**

Export administration regulations:

North Korea; easing of export restrictions; comments due by 7-19-00; published 6-19-00

COMMERCE DEPARTMENT
National Oceanic and Atmospheric Administration

Fishery conservation and management:

Alaska; fisheries of Exclusive Economic Zone—

Trawl gear in Gulf of Alaska Central Regulatory Area, seasonal adjustment of closure areas to; comments due by 7-18-00; published 7-3-00

Atlantic highly migratory species—

Atlantic bluefin tuna and swordfish; trade restrictions; comments due by 7-18-00; published 5-24-00

Atlantic swordfish and northern albacore tuna; comments due by 7-18-00; published 5-24-00

North Atlantic swordfish; comments due by 7-18-00; published 6-6-00

Magnuson-Stevens Act provisions—

Domestic fisheries; exempted fishing permits; comments due by 7-21-00; published 7-6-00

DEFENSE DEPARTMENT

Acquisition regulations:

Pollution control and clean air and water; comments due by 7-21-00; published 5-22-00

Profit incentives to produce innovative new technologies; comments due by 7-21-00; published 5-22-00

DEFENSE DEPARTMENT
Engineers Corps

Permits for discharges of dredged or fill material into U.S. waters:

Fill material and discharge of fill material; definitions; comments due by 7-19-00; published 6-16-00

DEFENSE DEPARTMENT
Navy Department

Privacy Act; implementation; comments due by 7-17-00; published 5-18-00

ENVIRONMENTAL PROTECTION AGENCY

Air quality implementation plans:

Preparation, adoption, and submittal—

Air quality models; guidelines; comments due by 7-20-00; published 4-21-00

Air quality implementation plans; approval and promulgation; various States:

Pennsylvania; correction; comments due by 7-19-00; published 6-19-00

Air quality implementation plans; approval and promulgation; various States; air quality planning purposes; designation of areas:
California; comments due by 7-19-00; published 6-19-00

Hazardous waste:

Project XL program; site-specific projects—

IBM semiconductor manufacturing facility, Essex Junction, VT; comments due by 7-17-00; published 6-16-00

Permits for discharges of dredged or fill material into U.S. waters:

Fill material and discharge of fill material; definitions; comments due by 7-19-00; published 6-16-00

Superfund program:

National oil and hazardous substances contingency plan—

National priorities list update; comments due by 7-21-00; published 6-21-00

FARM CREDIT ADMINISTRATION

Farm credit system:

Loan policies and operations, etc.—

Other financial institutions lending; comments due by 7-19-00; published 6-26-00

FEDERAL COMMUNICATIONS COMMISSION

Common carrier services:

Personal communications services—

Narrowband rules; modifications; competitive bidding; comments due by 7-19-00; published 7-3-00

Point-to-point and point-to-multipoint common carrier and private operational fixed microwave rules; consolidation; comments due by 7-20-00; published 6-20-00

Radio stations; table of assignments:

California; comments due by 7-17-00; published 6-9-00

Florida; comments due by 7-17-00; published 6-8-00

FEDERAL DEPOSIT INSURANCE CORPORATION

Gramm-Leach-Bliley Act; implementation:

Community Reinvestment Act (CRA)-related

agreements; disclosure and reporting; comments due by 7-21-00; published 5-19-00

FEDERAL RESERVE SYSTEM

Gramm-Leach-Bliley Act; implementation:
Community Reinvestment Act (CRA)-related agreements; disclosure and reporting; comments due by 7-21-00; published 5-19-00

FEDERAL TRADE COMMISSION

Comprehensive Smokeless Tobacco Health Education Act of 1986; implementation; comments due by 7-21-00; published 5-8-00

HEALTH AND HUMAN SERVICES DEPARTMENT

Food and Drug Administration

Medical devices:
Reclassification of 38 preamendments class III devices into class II; comments due by 7-18-00; published 4-19-00

HEALTH AND HUMAN SERVICES DEPARTMENT

Health Care Financing Administration

Medicare:
Coverage decisions; criteria; comments due by 7-17-00; published 6-15-00

HEALTH AND HUMAN SERVICES DEPARTMENT

Inspector General Office, Health and Human Services Department

Medicare and State health care programs; fraud and abuse:
Ambulance restocking safe harbor under anti-kickback statute; comments due by 7-21-00; published 5-22-00

HOUSING AND URBAN DEVELOPMENT DEPARTMENT

Manufactured home construction and safety standards:
Smoke alarms; comments due by 7-17-00; published 5-18-00

Privacy Act; implementation; comments due by 7-21-00; published 5-22-00

INTERIOR DEPARTMENT

Indian Affairs Bureau

Tribal government:
Certificate of degree of Indian or Alaska Native blood; documentation

requirements and filing, processing, and issuing requirements and standards; comments due by 7-17-00; published 4-18-00

INTERIOR DEPARTMENT Land Management Bureau

Land resource management:
Recreation permits for public lands; comments due by 7-17-00; published 5-16-00
Correction; comments due by 7-17-00; published 5-30-00
Correction; comments due by 7-17-00; published 5-31-00

INTERIOR DEPARTMENT Fish and Wildlife Service

Endangered and threatened species:
Colorado butterfly plant; comments due by 7-17-00; published 5-17-00

INTERIOR DEPARTMENT Minerals Management Service

Royalty management:
Indian leases; gas valuation regulations; amendments; comments due by 7-17-00; published 6-15-00
Correction; comments due by 7-17-00; published 7-7-00

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

Acquisition regulations:
NASA Inspector General hotline posters; comments due by 7-21-00; published 5-22-00

ARTS AND HUMANITIES, NATIONAL FOUNDATION National Foundation on the Arts and the Humanities

Federal claims collection; comments due by 7-17-00; published 6-15-00

PERSONNEL MANAGEMENT OFFICE

Retirement:
Federal Employees Retirement System (FERS)—
Intra-agency transfer; automation and simplification of employee recordkeeping; comments due by 7-19-00; published 4-20-00

SMALL BUSINESS ADMINISTRATION

Small business investment companies:

Types of consideration paid by small business excluded from cost of money limitations; comments due by 7-20-00; published 6-20-00

TRANSPORTATION DEPARTMENT

Federal Aviation Administration

Airmen certification:
Advanced Qualification Program; comments due by 7-17-00; published 6-16-00

Airworthiness directives:

Boeing; comments due by 7-17-00; published 6-21-00

Dornier; comments due by 7-17-00; published 6-15-00

Eurocopter France; comments due by 7-21-00; published 5-22-00

MD Helicopters Inc.; comments due by 7-17-00; published 5-17-00

Class D airspace; comments due by 7-20-00; published 6-20-00

Jet routes; comments due by 7-17-00; published 6-2-00

TREASURY DEPARTMENT Alcohol, Tobacco and Firearms Bureau

Alcohol; viticultural area designations:

Red Mountain, WA; comments due by 7-18-00; published 5-19-00

TREASURY DEPARTMENT Comptroller of the Currency

Gramm-Leach-Bliley Act; implementation:
Community Reinvestment Act (CRA)-related agreements; disclosure and reporting; comments due by 7-21-00; published 5-19-00

TREASURY DEPARTMENT Thrift Supervision Office

Gramm-Leach-Bliley Act; implementation:
Community Reinvestment Act (CRA)-related agreements; disclosure and reporting; comments due by 7-21-00; published 5-19-00

LIST OF PUBLIC LAWS

This is a continuing list of public bills from the current session of Congress which have become Federal laws. It may be used in conjunction with "PLUS" (Public Laws

Update Service) on 202-523-6641. This list is also available online at <http://www.nara.gov/fedreg>.

The text of laws is not published in the **Federal Register** but may be ordered in "slip law" (individual pamphlet) form from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402 (phone, 202-512-1808). The text will also be made available on the Internet from GPO Access at <http://www.access.gpo.gov/nara/index.html>. Some laws may not yet be available.

H.R. 3051/P.L. 106-243

To direct the Secretary of the Interior, the Bureau of Reclamation, to conduct a feasibility study on the Jicarilla Apache Reservation in the State of New Mexico, and for other purposes. (July 10, 2000; 114 Stat. 497)

S. 1309/P.L. 106-244

To amend title I of the Employee Retirement Income Security Act of 1974 to provide for the preemption of State law in certain cases relating to certain church plans. (July 10, 2000; 114 Stat. 499)

S. 1515/P.L. 106-245

Radiation Exposure Compensation Act Amendments of 2000 (July 10, 2000; 114 Stat. 501)

Last List July 11, 2000

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