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Reader Aids

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Rules and Regulations

Federal Register
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Wednesday, November 14, 2001

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.

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

8 CFR Parts 3 and 241

[INS No. 2156–01; AG Order No. 2533–2001]

RIN 1115–AG29

Continued Detention of Aliens Subject to Final Orders of Removal

AGENCY: Immigration and Naturalization Service and Executive Office for Immigration Review, Justice.

ACTION: Interim rule with request for comments.

SUMMARY: This rule amends the custody review process governing the detention of aliens who are the subject of a final order of removal, deportation or exclusion, in light of the decision of the U.S. Supreme Court in *Zadvydas* v. *Davis,* 533 U.S. ____, 121 S. Ct. 2491 (2001). This rule adds new provisions to govern determinations by the Immigration and Naturalization Service (Service) as to whether there is a significant likelihood that an alien will be removed from the United States in the reasonably foreseeable future, and whether there are special circumstances justifying the continued detention of certain aliens. This rule also makes conforming changes to the existing post-removal-period detention regulations, and provides procedures to implement the statutory provision for the extension of the removal period beyond 90 days if the alien conspires or acts to prevent his or her removal or fails or refuses to assist the Service in obtaining documents necessary to effect his or her removal.

DATES: *Effective date:* This interim rule is effective November 14, 2001. *Comment date:* Written comments must be submitted on or before January 14, 2002.

ADDRESSES: Please submit written comments to the Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, 425 I Street NW., Room 4034, Washington, DC 20536. To ensure proper handling, please reference INS No. 2156–01 on your correspondence. The public may also submit comments electronically to the Service at insregs@usdoj.gov. When submitting comments electronically, please make sure that you include INS No. 2156–01 in the subject field. Comments are available for public inspection at the above address by calling (202) 514–3048 to arrange for an appointment.

FOR FURTHER INFORMATION CONTACT: Joan S. Lieberman, Office of the General Counsel, Immigration and Naturalization Service, 425 I Street NW., Room 6100, Washington, DC 20536, telephone (202) 514–2895 (not a toll-free call). For matters relating to the Executive Office for Immigration Review: Chuck Adkins-Blanch, General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2400, Falls Church, VA 22041, telephone (703) 305–0470.

SUPPLEMENTARY INFORMATION:

I. Background

Section 241(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1231(a), authorizes the Attorney General to detain aliens who are subject to final orders of removal, in order to effectuate their removal from the United States. Section 241(a)(1) of the Act provides a general rule that such aliens shall be removed within the 90-day ''removal period,'' commencing on the date the removal order becomes administratively final, the date that the Service is able to execute the removal order after completion of any judicial review (if the court orders a stay of removal), or the date the alien is released from criminal incarceration, whichever is later. Detention of aliens during the pendency of removal proceedings is governed by Section 236 of the Act, 8 U.S.C. 1226, including the mandatory detention provisions contained in Section 236(c).

Section 241(a)(2) of the Act governs detention of aliens during the statutory removal period; it generally mandates detention of criminal and terrorist aliens during that period. Section 241(a)(1)(C) of the Act also provides that the removal period ''shall be extended,'' and an alien subject to a final order of removal may remain in detention during such extended period, if the alien fails or refuses to make timely application for travel or other necessary documents for the alien's departure, or if the alien conspires or acts to prevent the alien's removal. The provisions of section 241(a)(2) of the Act continue to apply until expiration of the removal period, as extended, including provisions that mandate detention of certain criminal and terrorist aliens.

After expiration of the removal period, section 241(a)(6) of the Act grants authority to the Attorney General to continue the detention of:

- Any inadmissible alien;
- Any alien who is deportable under subsections (a)(1)(C), (a)(2), or (a)(4) of section 237 of the Act, 8 U.S.C. 1227; and
- Any alien whom the Attorney General determines is a danger to the community or is unlikely to comply with the removal order.

The Department's existing standards for detention or release of aliens who are the subject of a final order of removal are set forth in 8 CFR 241.4. That section provides automatic administrative custody review procedures for aliens who are the subject of an administratively final order of removal, deportation, or exclusion. Those procedures provide for multi-level reviews scheduled at regular intervals. District directors have initial responsibility for custody decisions. Detention authority then shifts to the INS Headquarters Post-order Detention Unit (HQPDU) pursuant to standards set forth in the regulation regarding the ability to effect the alien's removal from the United States. The review process provides detained aliens with numerous opportunities to present evidence in support of release. In this rule, the discussion of the provisions of § 241.4 concerns detention of aliens subject to a final order of removal, after expiration of the removal period.

What Is the Scope of the Supreme Court's Decision?

In *Zadvydas* v. *Davis,* 533 U.S. ____, 121 S. Ct. 2491 (2001), the Supreme Court held that section 241(a)(6) of the Act generally permits the detention of aliens who have been admitted to the United States and who are under a final order of removal, only for a period reasonably necessary to bring about

their removal from the United States. The Court held that detention of such aliens beyond the statutory removal period, for up to six months after entry of a final removal order, is ''presumptively reasonable.'' 121 S. Ct. at 2504–05. After six months, if an alien can provide ''good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,'' the government must rebut the alien's showing in order to continue the alien in detention.

In cases where there is a significant likelihood that the alien will be removed in the reasonably foreseeable future, the Supreme Court's decision did not question the Service's authority to detain an lien under section 241(a)(6) of the Act beyond the six-month period, pursuant to the existing detention standards in 8 CFR 241.4. The decision does not require that an alien under a final order of removal be automatically released after six months if he has not yet been removed. Instead, the Court stated: ''To the contrary, an alien may be held in confinement until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future.'' *Id.,* at 2505. What counts as the ''reasonably foreseeable future'' in this context must take account of the length of the alien's prior post-removal prior detention. *Id.*

In addition, the Supreme Court acknowledged that there may be cases involving ''special circumstances,'' such as those involving terrorists or specially dangerous individuals, in which continued detention may be appropriate even if removal is unlikely in the reasonably foreseeable future. *Id.* at 2499.

The Supreme Court's ruling does not govern those aliens who are legally still at our borders, as arriving aliens under section 235 of the Act, 8 U.S.C. 1225, including those who have been paroled into the country pursuant to section 212(d)(5) of the Act, 8 U.S.C. 1182(d)(5) (such as the Mariel Cubans, who are treated as still seeking admission). ''The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. * * * It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.'' 121 S. Ct. at 2500. Of particular relevance here, such aliens do not have due process rights to enter or to be released into the United States, and their continued detention may be appropriate to accomplish the statutory purpose of preventing the entry of a person who has, in contemplation of the law, been stopped at the border. Furthermore, the provisions in section 235 of the Act, governing arriving aliens, and section 212(d)(5) of the Act, governing the exercise of the parole authority, along with the inherent authority of the sovereign to control its borders, furnish additional authority for the detention and redetention of arriving aliens, including aliens granted immigration parole.

II. Implementation of the New Review Process

The Supreme Court's decision will require the Service, drawing, as appropriate, on the expertise of the Department of State, to assess the likelihood of the removal of thousands of aliens to many different countries. The Court emphasized in its decision the need to ''take appropriate account of the greater immigration-related expertise of the Executive Branch, of the serious administrative needs and concerns inherent in the necessarily extensive Service efforts to enforce this complex statute, and the Nation's need 'to speak with one voice' in immigration matters.'' 121 S. Ct. at 2504. The Court also stressed the need for courts to give expert Executive Branch ''decisionmaking leeway,'' for deference to ''Executive Branch primacy in foreign policy matters,'' and for uniform administration. *Id.* at 2504–05.

This rule institutes procedures by which the Executive Branch will make the necessary judgments regarding the likelihood of removal, in a regular and consistent manner, based on a review of its experience with the country in question, the evidence submitted by the particular alien, and other relevant evidence.

The Executive Branch has the knowledge and expertise essential to perform successful its responsibilities to enforce the return of criminal and other removable aliens to the country to which removal was ordered or to a third country where possible. Generally, the United States requests and receives travel documents from most nations without a formalized written agreement. The Service routinely works in close consultation with consular officers of foreign countries on repatriation issues. Formal repatriation agreements are uncommon.

Efforts to secure travel documents and normalize immigration relations with other governments are not static in nature. Efforts to achieve comprehensive solutions and joint cooperation with all nations are on-going, and seeking removal in individual cases is a continuous process as well. Even where experience has demonstrated that obtaining travel documents from certain countries is difficult, the Executive Branch continues with diplomatic and other efforts to forge normalized immigration relations with other governments and to pursue removal efforts in individuals cases in the meantime.

Indeed, while the Service's experience has varied significantly from country to country, it has been successful in removing aliens, even criminal aliens, to all countries.

Additionally, the alien and his or her family may be able to secure travel documents or removal to a third country in cases where the Service has been unable to effect removal. The removal process is a shared responsibility among the alien, the Executive Branch and the country of return. In several respects, as discussed in more detail below, the existing provisions of the Act codify the obligation of the alien to cooperate with the removal effort an to comply with requests from the Service to obtain travel documents or to take other necessary steps to effect the alien's removal from the United States.

What Changes Does This Rule Make?

In light of the Supreme Court's decision in *Zadvydas*, this rule revises the Department's regulations by adding a new 8 CFR 241.13, governing certain aspects of the custody determination of a detained alien after the expiration of the removal period. Specifically, the rule provides a process for the Service to make a determination as to whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future.

Except as provided in this new § 241.13, the existing detention standards in § 241.4 will continue to govern the detention or release of aliens who are subject to a final orders of removal. Thus, aliens who are determined not to be a danger to the community or a flight risk may be released under § 241.4 regardless of whether there is a significant likelihood of removal.

If the Service determines under the procedures of § 241.13 that there is no significant likelihood of removal in the reasonably foreseeable future, then the Service generally will be required to release the alien, under appropriate conditions of supervision intended to protect the public safety and to ensure the Service's continued ability to remove the alien should that become possible in the future. In the alternative, in appropriate cases, the Service may choose to invoke the provisions of § 241.14, as added by this rule, in order to justify continued detention of a

particular alien because of special circumstances, of the sort discussed in the Supreme Court's decision in *Zadvydas*, even though the alien's removal is not significantly likely in the reasonably foreseeable future. In either case, while the Service is evaluating whether or not there is a significant likelihood of removal in the reasonably foreseeable future under § 241.13, or while the Service is pursuing procedures for continued detention of an alien under § 241.14 on account of special circumstances, the Service will be able to continue an alien in detention pending the conclusion of those proceedings as provided for in this rule.

This rule also makes conforming amendments to the existing detention standards in § 241.4 to make appropriate reference to the new procedures for determining whether there is a significant likelihood of removing an alien in the reasonably foreseeable future. This rule does *not* alter either the substantive standards under § 241.4 for the Service to determine whether to release or detain aliens because of risk of flight or danger to the community, or the procedures for the Service to conduct such custody reviews (first by the district director and then by the Service's HQPDU). Thus, aliens who are determined not to be a danger to the community or a flight risk may be released under § 241.4 regardless of whether there is a significant likelihood of removal.

The custody review provisions of § 241.4 will continue to apply to aliens who are subject to final orders of removal, including aliens who have requested a review under § 241.13. However, after the Service has made a determination in a particular case that removal is not significantly likely, the alien's detention will be governed by § 241.13 rather than by § 241.4. If the Service subsequently determines, because of a change in circumstances, that the Service is now likely to be able to remove the alien in the reasonably foreseeable future, then the provisions of § 241.4 will once again provide the governing standards for the continued detention of the alien. The detention standards of § 241.4 will also apply to aliens who are continued in detention under § 241.4 because of special circumstances.

This rule also amends § 241.4 to add a new procedural provision to implement the statutory directive for extension of the removal period if the alien ''fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal,'' as provided in section 241(a)(1)(C) of the Act, 8 U.S.C. 1231(a)(1)(C). This rule directs the Service to provide a specific notice to the alien, during the 90-day removal period, if the alien has acted in a way to invoke the statutory extension of the removal period. Until the alien acts to comply with the statutory requirements, the removal period will continue to be extended, as provided by section 241(a)(1)(C) of the Act. As long as the alien remains in the removal period, including any extension attributable to the alien's conduct, then the detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens. Section 241(a)(6) of the Act applies only to the continued detention of a removable alien after the removal period has expired.

Who Is Covered by the New Procedures in § 241.13 Regarding Likelihood of Removal?

New § 241.13 applies to the following individuals in INS detention who are under a final order of removal:

- Aliens who have been admitted to the United States (including aliens admitted as refugees under section 207 of the Act, 8 U.S.C. 1157), and who are later ordered removed under sections 237 (a)(1)(C), (a)(2), or (a)(4) of the Act; and
- Other deportable aliens who are determined to be a danger to the community or a flight risk; and
- Inadmissible aliens who are present in the United States without inspection.

As discussed below, the Supreme Court's decision in *Zadvydas* does not apply to arriving aliens who are inadmissible, including aliens who have been granted immigration parole into the United States. However, the Department of Justice has determined that the provisions of § 241.13 shall apply to one category of inadmissible aliens: those who are present in the United States without inspection, admission, or parole. Before enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, Div. C, 110 Stat. 3546 (Sept. 30, 1996), these aliens were considered to have ''entered'' the United States. Since the removal provisions of IIRIRA took effect on April 1, 1997, these aliens are no longer considered to have ''entered without inspection,'' but to be applicants for admission who are present without inspection, as provided in section 235(a)(1) of the Act, 8 U.S.C. 1225(a)(1).

Conversely, § 241.13 does not apply to arriving aliens, and those who have not entered the United States, including those who have been granted immigration parole into the country, such as the Mariel Cubans. In *Shaughnessy* v. *United States ex rel. Mezei,* 345 U.S. 206 (1953), the Supreme Court upheld the Attorney General's authority to hold an excludable alien in custody indefinitely, pursuant to section 236(e) of the Act, 8 U.S.C. 1226(e), as it existed prior to enactment of IIRIRA. In *Zadvydas,* the Court acknowledged its opinion in *Mezei,* but distinguished aliens who have entered the United States from such inadmissible aliens who are presumed, in the contemplation of the law, to be ''at the border,'' rather than ''in'' the United States. 121 S. Ct. at 2500. As the Court noted, ''The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law.'' *Id.* Thus, this interim rule reflects what the Court characterized as a ''well-established'' distinction between the rights of those seeking admission and those who have been admitted. Section 241.13 does not apply to Mariel Cubans or parolees. Mariel Cubans will continue to be covered by 8 CFR 212.12, and the provisions of 8 CFR 241.4 govern all other cases where the alien is the subject of an administratively final order of removal.

Section 241.13 does not apply to aliens under a final order of removal while they are still within the statutory removal period. The statutory basis for detention of removable aliens during the removal period, under section 241(a)(2) of the Act, is broader than the authority to detain such aliens under section 241(a)(6) of the Act after the removal period has expired, but it is also strictly time-limited. The Supreme Court's decision in *Zadvydas* was only concerned with the interpretation of section 241(a)(6) of the Act, in light of its concerns that the law should not be read to permit ''indefinite, perhaps permanent, detention.'' 121 S. Ct. at 2502. Those concerns are inapposite to the detention of aliens during the removal period, since that authority, by its terms, expires at the end of the removal period, which is generally 90 days. Section 241(a)(1)(C) of the Act does expressly provide for an extension of the removal period in those cases where the alien ''fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal.'' But any extension

of the removal period in such circumstances is entirely attributable to the alien's own conduct. The extension of the removal period will come to an end when the alien complies with his or her statutory obligations.

When Can an Eligible Alien Submit a Request for Release From Custody on the Ground That There Is No Significant Likelihood of His or Her Removal in the Reasonably Foreseeable Future?

As discussed above, the obligation of the Service to respond to issues concerning the likelihood of removal does not arise as long as the alien is still within the removal period. However, § 241.13 will permit an alien subject to a final order of removal to present, at any time after the removal order becomes final, the contention that there is no significant likelihood of removal in the reasonably foreseeable future. The Service may postpone its consideration of such requests until after expiration of the removal period.

In any event, the Service is not obligated to release an alien until after the Service has had the opportunity, during the ''presumptively reasonable'' 6-month period, to endeavor to remove the alien and to make its determination as to whether or not there is a significant likelihood of removal in the reasonably foreseeable future. *See Zadvydas,* 121 S. Ct. at 2503 (faulting the decision of the Ninth Circuit in one of the cases under review because ''its conclusion may have rested solely upon the 'absence' of an 'extant or pending' repatriation agreement without giving due weight to the likelihood of successful future negotiations.'').

Thus, the Service is entitled to make an assessment of the likelihood of removal in each case, including the prospects for a change in circumstances, even if (for example) there is not extant or pending repatriation agreement at the time the alien makes the request for a decision by the Service under § 241.13. The Service works continuously with other countries to accomplish repatriation. The Service will also evaluate the alien's efforts to fulfill his or her statutory obligation to seek to comply with the removal order.

The six-month presumptively reasonable period of detention to effect the alien's removal commences when the removal period begins as set forth in section 241(a)(1) of the Act, unless that removal period is extended. If the removal period is extended because of the alien's failure to comply with the order of removal or to cooperate in securing travel documents, as provided in section 241(a)(1)(C) of the Act, the Service shall have a reasonable period of time after the expiration of the removal period, as extended, to effect the alien's removal.

What are the Procedures for the Alien to Request Release on the Ground That There is no Significant Likelihood of Removal in the Reasonably Foreseeable Future?

Section 241.13 provides the procedures for the Service to evaluate an alien's challenge to the reasonableness of his or her continued detention, as provided in *Zadvydas.* The alien must provide ''good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future,'' 121 S. Ct. at 2505, and may submit any information that may be relevant to support that contention.

As a threshold matter, this rule requires that an alien requesting a determination under § 241.13 demonstrate his or her efforts to comply with the removal order and to cooperate with the Service's efforts to effect his or her removal. As provided in § 241.13(e)(2), if the HQPDU determines that the alien has not established the requisite efforts to comply with the removal order and to cooperate with the Service's removal efforts, then the alien shall be given a written notice stating those findings and indicating the specific actions that the alien will be required to take to come into compliance. Until the alien responds to the Service's findings regarding the lack of compliance or cooperation with the removal effort, the Service will not have complete information as to the likely prospects for obtaining a travel document or for taking other appropriate steps to remove that alien. Accordingly, the rule provides that, until the alien has responded to the Service's notice, the HQPDU does not have an obligation to continue its consideration of the alien's request for release under this section. Once the alien responds, then the HQPDU will take the information provided by the alien into consideration.

In appropriate cases, the rule provides for the HQPDU to advice the Department of State of the alien's contention that his or her removal is not reasonably foreseeable, and to request the assistance and guidance of that Department in evaluating the likelihood of the alien's removal under the circumstances. The referral to the Department of State will not be automatic, because the Service ordinarily will already have considerable information concerning the repatriation of aliens to each country, and related diplomatic circumstances. However, this rule allows for such a feral in those cases where the HQPDU determines that input from the Department of State is needed under the circumstances. Since the nature and status of diplomatic relationships are likely to be relevant to the prospects for removing aliens to various countries, it is important for the Service to take the opportunity, in appropriate cases, to solicit involvement by the Department of State before the HQPDU must decide whether the alien's removal is reasonably foreseeable.

Although this rule does not set a specific time limit for consultation with the State Department, or for the Service's final decision on the likelihood of removal in the reasonably foreseeable future, the HQPDU will have to be mindful of the overall purposes of the detention laws, as interpreted by the Supreme Court. The time for the Service to determine the likelihood of removal must also be reasonable under the circumstances, in light of the interests at stake. the HQPDU review process should not, itself, give rise to the same kinds of concerns about ''indefinite, perhaps permanent'' detention that troubled the Supreme Court. See *Zadvydas,* at 2503 (''for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' would have to shrink.'')

The rule provides an opportunity for the alien to comment on the available (unclassified) evidence presented by the Service, including any information provided by the Department of State on which the Service intends to rely. The alien may submit with his or her response any evidence or other information that, the alien believes, shows that removal is no longer significantly likely in the reasonably foreseeable future. This may include evidence of why, even if the Service has been able to effect the removal of other aliens to that country or to a third country, the particular alien's own situation is materially different such that he or she is unlikely to be removed.

After receiving all of the evidence, the HQPDU shall consider all the facts of the case, including, but not limited to, those considerations specified in § 241.13(f) of this rule. The history of the Service's efforts to remove aliens to the particular country is of considerable relevance in the determination of the likelihood of removal in the reasonably foreseeable future. If the Service can demonstrate, for example, that it has been successful in returning most aliens to a particular country but the process may often require longer periods (beyond six months), that information is

highly relevant in making the determination as to whether there is a significant likelihood of removing the alien to that country in the reasonably foreseeable future.

If, after considering the alien's submission, the HQPDU determines that ''there is no significant likelihood of removal in the reasonably foreseeable future,'' 121 S. Ct. at 2505, the HQPDU shall include in the alien's file a written explanation for this decision. The HQPDU shall then arrange for the alien's release from custody under appropriate conditions of release, unless the Service determines that the case should be referred for consideration of further detention under § 241.14, as added by this rule, on account of special circumstances.

Where the determination under § 241.13 is to deny the alien's request for release because there is a significant likelihood of removal in the reasonably foreseeable future, the alien's detention will continue to be governed by § 241.4, including the provisions for periodic review of the continued detention of aliens under those standards.

According to *Zadvydas,* the Service's decision to retain the alien in custody remains lawful as long as there is a significant likelihood of removal in the reasonably foreseeable future. Thus, even after an initial decision denying release under § 241.13, this rule will allow aliens who remain in detention to make a new request for release under § 241.13 after a period of six months since the last determination by HQPDU under § 241.13, or at any time upon a showing of materially changed circumstances.

The review process under § 241.13, as required by the Supreme Court's decision in *Zadvydas,* will result in the release of some removable aliens even though they would otherwise not have been subject to release under the detention standards in § 241.4 on account of a danger to public safety or flight risk. The Department is keenly aware of the need to minimize those concerns whenever possible, through the imposition of appropriate conditions of release for those aliens who can no longer be detained. Accordingly, § 241.13(g) makes all of the conditions of release enumerated in section 241(a)(3) of the Act and 8 CFR 241.5(a) mandatory, and specifically provides for the imposition of additional particular conditions of supervision in order to protect the public safety and to ensure the Service's continued ability to remove the alien should circumstances change in the future.

The Supreme Court's decision made clear that, even if an alien must be released under an order of supervision where there is no significant likelihood of removal in the reasonably foreseeable future, such aliens may also be returned to custody if they violate conditions of release. As the Court noted in its analysis:

> [I]f removal is not reasonably foreseeable, the court should hold continued detention unreasonable and no longer authorized by statute. In that case, of course, the alien's release may and should be conditioned on any of the various forms of supervised release that are appropriate to the circumstances, and the alien may no doubt be returned to custody upon a violation of those conditions.

Zadvydas, 121 S. Ct. at 2504. *See also id.* 2502 (''The choice is not between imprisonment and the alien 'living at large.' It is between imprisonment and supervision under *release conditions that cannot be violated.*'') (emphasis added).

Accordingly, § 241.13(i) provides that the Service may take back into custody any alien released under § 241.13, if the alien violates any conditions included in the order of supervision. Section 241.13(i) includes provisions modeled on § 241.4(1) to govern determinations to take an alien back into custody. If the alien's release is revoked on account of violations of the conditions of release, this rule specifically provides for referrals of those cases to the U.S. Attorneys for prosecution in appropriation situations, under section 243(b) of the Act, 8 U.S.C. 1253(b). In addition, this rule provides that the alien would once again be subject to detention for a six-month period, a time that the Court has already determined to be presumptively reasonable in the context of the detention of aliens pending removal. After the expiration of the six-month period, the alien would again be able to request release under the provisions of § 241.13. At that time, the Service would again conduct a review under the procedures of § 241.13. In appropriate cases, taking into account the alien's conduct after his or her prior release under § 241.13 and the reasons for revoking release, the Service may decide to initiate proceedings under § 241.14 for continued detention of the alien because of special circumstances.

On the other hand, if the alien is returned to custody because the Service determines that there is now a significant likelihood that the alien may be removed in the reasonably foreseeable future, the alien's continued detention will once again be governed by the regular procedures under § 241.4 rather than § 241.13.

What Substantive Changes Does This Rule Make to 8 CFR 241.4?

This rule amends 8 CFR 241.4(b), as amended by final rule on December 21, 2000, at 65 CFR 80281, to provide that the detention standards of § 241.4 no longer apply to a detained alien *after* the Service has made the determination under § 241.13 that there is no significant likelihood of removal in the reasonably foreseeable future. As long as that determination by the Service remains in effect, the detention or release of the alien is governed by the standards of § 241.13 (or § 241.14 if applicable). However, in any case where, based on a change of circumstances, the Service later makes a determination that there is a significant likelihood that the Service subsequently will be able to remove the alien to the country to which the alien was ordered deported, or to a third country, in the reasonably foreseeable future, the custody provisions of § 241.4 will again apply. In that event, the Service may return the alien to detention in connection with the removal, and any issues relating to the detention or release of the alien pending his or her removal will once again be governed by the standards of § 241.4.

Although §§ 241.4 and 241.13 are related, this rule keeps the standards and procedures for post-removal period custody reviews under § 241.4 unchanged except as necessary to take account of the new review procedures under § 241.13. Under § 241.4(i)(7), as added by this rule, at the time the HQPDU conducts its review of whether a detained alien should continue to be detained under the established post-removal period detention standards in § 241.4, the HQPDU shall also consider whether there is a substantial reason to believe that the removal of an alien who is now covered under the provisions of § 241.13, may not be significantly likely in the reasonably foreseeable future. If so, the HQPDU shall initiate the review procedures under § 241.13, whether or not the alien has make a specific request for such a review. However, the detention standards and procedures of § 241.4 will continue to apply to such an alien unless the Services has made a determination, after competition of the review process under § 241.13, that there is no significant likelihood of removal in the reasonably foreseeable furture.

With these limited changes to take account of the establishment of a separated review procedure under § 241.13, this rule does not make substantive changes to the existing post-removal period detention standards. It is

important to note that this rule does not alter the existing criteria for release in § 241.4(e), the factors for consideration in § 241.4(f), the procedures governing the review and determination of custody issues by the district directors and the HQPDU in § 241.4(d), (h) or (i), the conditions of release in § 241.(j), or the timing of reviews in general as provided in § 241.4(k). For aliens who continue in detention under the standards of § 241.4 (for example, inadmissible aliens who are not covered by the procedures of § 241.13, or deportable aliens for whom there is a significant likelihood of removal), the provisions in § 241.4 for periodic review of the alien's detention will continue to apply. The periodic reviews under § 241.4 will also apply to aliens who are continued in detention because of special circumstances, pursuant to § 241.14.

However, this rule does include procedural instructions to the Service to take account of the statutory provisions relating to the running of the removal period. The removal period is the time during which the Service and the alien seek to effect the final order of removal. The period described by the statute does not commence until the point at which the alien's removal can be effected—in a case that is stayed pending judicial review, the date when, pursuant to the court's orders, any stay of removal has expired. Accordingly, the regulations specify the circumstances to determine the commencement of the removal period under the statute, based on the earliest availability of a final, executable order of removal.

The revisions to § 241.4(g) specifically take account of the existing statutory provision in section 241(a)(1)(C) of the Act, which provides for extension of the length of the removal period beyond 90 days, if the alien fails or refuses to make timely application in good faith for documents necessary to effect the alien's departure or conspires or acts to prevent his or her removal subject to an order of removal, deportation or exclusion. There are also applicable criminal sanctions in section 243(a) of the Act. These are not new obligations—they are clearly established in the existing law—and this rule does not create any novel obligations for aliens who refuse to comply.

Accordingly, this rule directs the Service to provide a Notice of Failure to Comply to the alien in order to make clear the statutory obligations, the grounds for determining that the alien has met those requirements, and the specific actions that the alien will need to take to comply. A Notice of Failure to Comply has the effect of extending the removal period as provided by law. Since the inability to obtain travel documents is the first criterion for release under § 241.4(e), this rule provides that the Service shall also advise the alien that the Service shall not be obligated to complete its pending scheduled custody reviews under § 241.4 until the alien has responded to the Notice of Failure to Comply and has demonstrated his or her compliance with the statutory requirements. Once the alien's statutory obligations are met, the Service will have a reasonable period to effect the alien's removal. (The Service's failure to provide a Notice of Failure to Comply during the 90-day removal period, however, does not have the effect of excusing the alien's conduct.)

Why is the Department Issuing § 241.14 Regarding Special Circumstances?

The Department is issuing § 241.14 to provide procedures for determining whether particular removable aliens may be continued in detention even if their removal is not significantly likely in the reasonably foreseeable future, in light of the Supreme Court's decision in *Zadvydas*. Under section 241(a)(6) of the Act and the post-removal period review procedures in § 241.4, the Service has been continuing to detain aliens subject to a final order of removal beyond the statutory removal period where the Service determines the alien to be either a risk to the community or a risk of flight. *Zadvydas*, however, interpreted section 241(a)(6) of the Act, in general, to provide that the Service cannot continue to detain criminal aliens who pose a risk to the community once there is not a significant likelihood of removal in the reasonably foreseeable future.

However, the Court did acknowledge that there may be special circumstances where continued detention of particular aliens may be appropriate to avoid special risks to the public. The Court also indicated that detention due to dangerousness may be appropriate in certain limited situations where there are particular reasons to consider an alien to be specially dangerous. 121 S. Ct. at 2499 (''[W]e have upheld preventive detention based on dangerousness only when limited to specially dangerous individuals * * *''.). These special circumstances justifying continued detention may also be based on national security or terrorism grounds. 121 S. Ct. at 2502 (''Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security'').

Section 241(a)(6) of the Act explicitly allows the Service to continue to detain aliens whom the Service determines to be a risk to the community. This rule is being issued to provide procedures to determine whether individual aliens can continue to be detained even when their removal is not reasonably foreseeable in accordance with the Court's decision in *Zadvydas*. The regulation is narrowly drawn to allow continued detention only in certain specific situations where the risk to the public is particularly strong, and where no conditions of release can avoid the danger to the public.

This rule has been written to allow continued detention when there is not a significant likelihood of removal in the reasonably foreseeable future, only in limited situations involving: (1) Highly contagious diseases posing a danger to the public; (2) foreign policy concerns; (3) national security and terrorism concerns; and (4) individuals who are specially dangerous due to a mental condition or personality disorder.

The rule provides that, after the Service has determined in accordance with § 241.13 that a particular alien's removal is not significantly likely in the reasonably foreseeable future, the Service may consider whether that alien's release presents such a danger to the public that the alien should remain detained due to those special circumstances.

What is the Procedure for a Determination That Continued Detention is Justified by Special Circumstances?

The procedures for determining whether continued detention is justified on the basis of special circumstances depend upon which justification in § 241.14 is invoked.

Aliens With Highly Contagious Diseases Posing a Danger to the Public

Under § 241.14(b)(1), the Service may continue to detain an alien with a highly contagious disease posing a danger to the public, upon the advice of the Public Health Service. The alien will remain in custody only until the Service, in consultation with the Public Health Service and appropriate state or local health officials, is able to make arrangements for appropriate medical treatment after the alien is released.

This provision only applies to highly contagious diseases, such as active tuberculosis, smallpox or yellow fever, where the Public Health Service has affirmatively advised the Service that

releasing that alien would pose a danger to the public. Although the law and applicable regulations contain a much broader definition of contagious diseases for use in other immigration contexts (see section 212(a)(1)(A) of the Act; 42 CFR 34.2), only the narrow definition of highly contagious diseases posing a danger to the public will be considered for purposes of special circumstances under this rule.

Aliens Whose Release Would Cause Serious Adverse Foreign Policy Consequences

Section 241.14(c) allows the Service to continue to detain certain aliens whose release would have serious adverse foreign policy consequences. A determination not to release an alien because of serious adverse foreign policy consequences can only be made upon the recommendation of the Secretary of State.

The Department has determined not to refer a decision to continue to detain someone under this justification for review by an immigration judge, and to rely upon the State Department's expertise in foreign policy matters to determine those rare instances when continued detention is appropriate. A decision to detain an alien on this ground would be based on the expertise of the Secretary of State in foreign relations and would not involve factual determinations of the sort that would necessitate a hearing before an immigration judge.

In this context, due process is satisfied by an administrative determination by the Attorney General or Deputy Attorney General, upon recommendation by the Secretary of State. Courts have long recognized that deference should be given to the Executive Branch regarding issues implicating foreign policy and our relations with other nations. Judicial deference to the Executive Branch is especially appropriate in the immigration context, where officials ''exercise especially sensitive political functions that implicate questions of foreign relations.'' *See INS* v. *Aguirre–Aguirre,* 526 U.S. 415, 425 (1999). In *Zadvydas,* 121 S. Ct. at 2502, the Court acknowledged that the judiciary should give deference to ''Executive Branch primacy in foreign policy matters.''

These issues are addressed in more detail in the following section as well, in conjunction with the discussion of cases involving a significant national security or terrorism risk.

Aliens Whose Release Would Pose Significant National Security or Terrorism Risks

Under § 241.14(d), the Service shall continue to detain an alien whose release would pose a significant threat to the national security or a significant risk of terrorism.

The rule provides that the Commissioner must make the decision to invoke the detention procedures on account of security or terrorism grounds, and provides for several levels of review at the highest levels of the Department of Justice in each case.

At the start of the proceedings, the alien will be advised that the Service intends to keep the alien in custody and, to the greatest extent possible consistent with the protection of national security and classified information, will be provided a written description of the factual basis for the alien's continued detention. The alien will have the opportunity to submit a written statement and relevant evidence for consideration before a certification is made. The Commissioner shall consider all evidence relating to the case, including evidence that the alien has previously committed national security or terrorism-related offenses, has engaged in terrorist activity, or otherwise poses a danger to the national security in the United States or abroad; prior convictions in a federal, state or foreign court of relevance to the risk of release; and any other special circumstances relating to the alien's situation indicating that his or her release would pose a significant threat to the national security or a significant risk of terrorism.

In any case where the basis of the alien's final order of removal was some ground not relating to terrorism or national security, and immigration officer will conduct an interview in person at which the alien may be represented by counsel and present any relevant evidence on his or her behalf. This situation will arise, for example, if an alien was ordered removed because he or she overstayed a student or tourist visa but the government has information indicating that the alien's release would pose a significant threat to the national security or a significant risk of terrorism.

Based on the Commissioner's recommendation, and the recommendation of the Director of the Federal Bureau of Investigation, the Attorney General personally shall determine whether to certify that the alien should not be released from custody because of a significant threat to the national security or a significant risk of terrorism. The rule provides that, before making such a certification, the Attorney General shall order any further hearings or review proceedings as may be appropriate under the circumstances.

A decision to continue detention of a removable alien because of national security or terrorism concerns requires a predictive judgment. It is an attempt to predict an alien's possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, he might act in a way that creates a real and legitimate national security threat or an imminent threat to public safety. The decision may be based upon past or present conduct, but it also may be based on a wide variety of other circumstances. *Cf. Department of the Navy* v. *Egan,* 484 U.S. 518, 528–29 (1988) (applying this rationale in security clearance case). Thus, the ''attempt to define not only the individual's future actions, but those of outside and unknown influences renders the [decision] * * * an inexact science at best.'' *See Adams* v. *Laird,* 420 F.2d 230, 239 (D.C. Cir. 1969), *cert. denied,* 397 U.S. 1039 (1970).

In these circumstances, it is the Attorney General who is best situated to assess the due process interests of any particular alien with respect to the matters at issue, to weigh those interests against the national security and public safety concerns presented in the case, to assess the nature and quality of the information that triggered those concerns, and to provide procedures that honor those competing interests. This section creates a process whereby that Executive authority and expertise can be exercised.

The Department has decided to include these provisions for continued detention because cases may arise where the Attorney General believes that it would be irresponsible to release from detention an alien subject to a final order of removal because the release of the alien would result in serious damage to the national security or pose an imminent threat of terrorism. Similarly, there may arise a case where the Attorney General believes, based on a recommendation by the Secretary of State, that it would be irresponsible to release an alien because of serious adverse foreign policy consequences.

Because of the unique relationship that the Attorney General maintains with the intelligence community, particularly the Federal Bureau of Investigation, and based on the broad delegation of discretionary authority granted the Attorney General by Congress in the Act, as well as the Attorney General's unique responsibilities in the Executive Branch,

this section places in the Attorney General the personal responsibility to make the final certification, in those cases where he determines that continued detention beyond the presumptively reasonably six-month period is warranted because of significant national security or terrorism concerns.

Similarly, as provided in § 241.14(c), the State Department is the appropriate agency to assess the foreign policy implications of the release of a particular alien. The judiciary is not well positioned to shoulder primary responsibility for determining the likelihood and importance of such diplomatic repercussions. *See INS* v. *Abudu,* 485 U.S. 94, 110 (1988).

Where national security, foreign relations, and immigration matters converge, as they do in these cases, the decision to detain a certain alien will require the perspective only a high *Aguirre-Aguirre,* 526 U.S. 415, 425 (1999) (''judicial deference to the Executive Branch is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations''); *Galvan* v. *Press,* 347 U.S. 522, 531 (1954) (''Policies pertaining to * * * right [of aliens] to remain here are peculiarly concerned with the political conduct of government.''); *Reno* v. *American-Arab Anti-Discrimination Committee,* 525 U.S. 471, 491 (1999) (declaring that courts are unable to assess the adequacy of the Executive's reasons for ''deeming nationals of a particular country a special threat''); *People's Mojahedin Organization of Iran* v. *Department of State,* 182 F.3d 17, 23 (D.C. Cir. 1999) (Executive Branch finding that foreign terrorist organization threatened national security is nonjusticiable because ''[t]hese are political judgments, decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong to the domain of political power not subject to judicial intrusion or inquiry''), *cert. denied,* 529 U.S. 1104 (2000).

Specially Dangerous Aliens

Under § 241.14(f) the Service may seek to detain specially dangerous aliens. Subject to review before an immigration judge, the Service shall continue to detain in alien if the alien's release would create a special danger to the public due to the three factors identified in § 241.14(f)(1):

- The alien must have been convicted of a crime of violence as defined as 18 U.S.C. 16. This will include relevant state convictions where the offense meets the definitions of a ''crime of violence'' under 18 U.S.C. 16.
- Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future.
- No conditions of release can reasonably be expected to ensure the safety of the public.

The Department recognizes that freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary government action. *See, e.g., Youngberg* v. *Romeo,* 457 U.S. 307, 316 (1982). However, the Supreme Court has held that the ''Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest.'' *United States* v. *Salerno,* 481 U.S. 739, 748 (1987); *see also Foucha* v. *Louisiana,* 504 U.S. 71, 80 (1992). Many states ''have in certain narrow circumstances provided for the forcible civil detainment of people who are unable to control their behavior and thereby pose a danger to the public health and safety.'' *Kansas* v. *Hendricks,* 521 U.S. 346, 357 (1997). The Supreme Court has ''consistently upheld such involuntary commitment statutes provided the confinement takes place pursuant to proper procedures and evidentiary standards.'' *Id.*

Accordingly, the Department has decided that it is necessary to provide specific procedural protections to aliens who may be considered for detention under this standard. *See Zadvydas,* 121 S. Ct. at 2499 (discussing continued detention of ''specially dangerous individuals'' subject to strong procedural protections). Such cases will be referred for a hearing under appropriate standards, where an immigration judge will conduct a full hearing, limited to reviewing the Service's determination regarding dangerousness, and where the Service has the burden of proof by clear and convincing evidence.

This rule contemplates that evidence of the alien's dangerousness must be accompanied by additional evidence relating to whether the alien's mental condition or personality disorder, and associated physical behavior, indicates that the alien is likely to engage in acts of violence in the future. Where preventive detention can be of indefinite duration, the Court ''has demanded that the dangerousness rationale be accompanied by some other special circumstances such as mental illness, that helps to create the danger.'' *Id.*

The rule requires that the Service rely upon a report by a physician employed or designated by the Public Health Service, after a full psychiatric evaluation of the alien, before initiating the review procedures to establish that the alien is specially dangerous. The Service cannot determine the issue of dangerousness without the recommendation of the physician who is a neutral and professional decisionmaker. *Cf. Parham* v. *J.R.,* 442 U.S. 584, 607 (1979) (due process is satisfied where the neutral decisionmaker is a medical professional making a medical judgment); *see also Youngberg* v. *Romeo,* 457 U.S. 397, 323 (1982) (due process only requires the courts to make certain that professional judgment was exercised; a decision, if made by a professional, presumptively valid.)

The provisions of this rule authorizing continuing detention apply only where the alien poses a special danger to others under the standards of the rule, not for those cases where an alien is mentally incompetent but poses no danger to others. In the latter case, where the Service determines that it cannot responsibly release, without continued care or treatment, an alien who is incapable of caring for himself or herself on account of mental illness or mental incompetence, the Service will not continue to detain the alien indefinitely under the authority of section 241(a)(6) of the Act. Instead, the Service will initiate appropriate efforts with the alien's family members, the Public Health Service, or proper State or local government officials to secure proper arrangements for the alien's continued care or treatment, as a condition of the alien's release. Accordingly, § 241.14(f) does not apply to such aliens.

The rule provides that review proceedings will take place before an immigration judge in two phases. After the case is referred for a hearing, the immigration judge will promptly schedule a reasonable cause proceeding. The purpose of the reasonable cause hearing is to provide a quick evaluation by a neutral decision maker as to whether there is a sufficient basis to proceed with the review proceedings.

The reasonable cause hearing is intended to be only a preliminary review of the case, and will likely be based on the evidence initially provided by the Service when it instituted the review proceedings. This hearing is not intended to duplicate the full hearing on the merits of the alien's circumstances, but only to determine whether there is reasonable cause to proceed. The merits hearing is necessary in order to provide

due process, but it will also necessarily require additional time for preparation and resolution, and the Service must continue to detain the alien pending the completion of those proceedings.

If the immigration judge determines that the Service has failed to meet its burden of establishing reasonable cause, the immigration judge may dismiss the review proceeding without a full hearing on the merits. In that case, the Service will be able to make an expedited appeal to the Board. Under the rule, a single Board Member will review the record under the Board's rules and determine whether the Service has established reasonable cause to continue the review proceedings.

Once it is determined that there is reasonable cause for further proceedings, the immigration judge will promptly schedule a merits hearing. At all phases of the review process, the alien will have a number of important rights, including the right to be represented by counsel at no cost to the government, the right to examine the evidence presented by the Service, and the right to cross-examine any witnesses that the Service presents. At the merits hearing, the alien will enjoy the additional right to cross-examine the medical doctor who authored any medical report that formed the basis for the Service's determination that the alien is specially dangerous.

In § 241.14(i)(2), the rule provides a non-exclusive list of factors the immigration judge will consider in making a determination at the conclusion of a merits hearing. If the immigration judge concludes that the Service has met its burden by clear and convincing evidence, the immigration judge will enter an order for the continued detention of the alien. If the immigration judge concludes that the Service has not met its burden, the review proceedings will be dismissed.

Either party may appeal the immigration judge's decision after the merits hearing to the Board of Immigration Appeals pursuant to § 3.38, except that the Service will have only five business days to appeal an adverse decision to the Board. If the Service appeals a dismissal of review proceedings, the immigration judge's order shall be automatically stayed until the Board renders its decision. The Board shall expedite review of a decision and shall consider detention cases involving specially dangerous aliens under § 241.14 as its highest priority.

If a final decision by either the immigration judge or the Board orders the dismissal of the review proceedings, the Service will promptly release the alien on conditions of supervision to be determined by the Service pursuant to § 241.13. As in all other cases involving post-order detention, it is the responsibility of the Service to determine the appropriate conditions of supervision, in order to protect the public and to deter the alien's flight. Accordingly, the conditions of release will not be subject to review by either the immigration judge or the Board.

The case of any alien ordered to remain in Service custody by either an immigration judge or the Board will be periodically reviewed to determine whether the alien's release still poses a special danger to the public. The Service will continue to review the alien's case periodically according to § 241.4. The alien may also request review of his or her case by the Service and the immigration judge because, due to materially changed circumstances, the alien's release would no longer pose a special danger to the public.

The alien must make the request first to the Service, in order to allow the Service to evaluate all of the circumstances and to determine whether the alien would still pose a special danger to the public. After the Service responds to the alien's request, the alien will have the right to file a motion to set aside the prior determination in the review proceedings. In that motion, the alien will bear the burden of proof to demonstrate that the alien's circumstances have changed materially, and that because of those changed circumstances, the alien's release would no longer pose a special danger to the public. If the immigration judge determines that the alien has shown good reason to believe that this is true, the immigration judge shall set aside the prior determination and schedule the case for a new merits hearing under § 241.14(i). Otherwise, the immigration judge will deny the motion. If review is denied, the alien may renew the request for release based on changed circumstances six months after the prior determination under § 241.14(i).

Effective Date of This Interim Rule

The Department's implementation of this interim rule effective upon publication in the **Federal Register**, with provision for post-promulgation of public comment, is based upon the ''good cause'' exceptions found at 5 U.S.C. 553(b)(B) and 553(d)(3). In response to the Supreme Court's decision limiting the authority to continue aliens in detention after the removal period under section 241(a)(6) of the Act, it is essential to implement without delay a standardized plan for dealing with the detention or release of numerous aliens whom the Service had determined should not be released because of a danger to the public or a risk of flight. Hundreds of individuals are affected. Failure to act expeditiously would be contrary to the public interest because it would result in continuing uncertainty and delay compliance with the law. Accordingly, the Service finds that there is good cause to forgo prior publication of a notice of proposed rulemaking and to make this rule effective upon publication in 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. This rule would provide a more uniform review process governing the detention of certain aliens who have received a final administrative removal order but whose departure has not been effected within the 90-day removal period. This rule does not affect small entities as that term is defined in 5 U.S.C. 601(6).

Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

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 to be a ''significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review. Accordingly, this

rule 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 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 sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995, Public Law 104–13, all Departments are required to submit to the Office of Management and Budget (OMB), for review and approval, any reporting or recordkeeping requirements inherent in a final rule. Although § 241.13 and § 241.14 provide that an alien held in a detention facility may submit a written request and supporting documentation in support of his or her assertion that removal is not reasonably foreseeable, the request and documentation are not considered collections of information under 5 CFR 1320.3 and 1320.4. Accordingly, this rule does not impose any new reporting or recordkeeping requirements under the Paperwork Reduction Act.

List of Subjects

8 CFR Part 3

Administrative practice and procedure, Immigration, Organization and functions (government agencies).

8 CFR Part 241

Administrative practice and procedure, Aliens, Immigration.

Accordingly, chapter I of title 8 of the Code of Federal Regulations is amended as follows:

PART 3—EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

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

Authority: 5 U.S.C. 301; 8 U.S.C. 1101 note, 1103, 1252 note, 1252b, 1324b, 1362; 28 U.S.C. 509, 510, 1746; sec. 2 Reorg. Plan No. 2 of 1950; 3 CFR, 1949–1953 Comp., p. 1002; section 203 of Pub. L. 105–100, 111 Stat. 2196–200; sections 1506 and 1510 of Pub. L. 106–386, 114 Stat. 1527–29, 1531–32; section 1505 of Pub. L. 106–554, 114 Stat. 2763A–326 to –328.

2. In § 3.1, the next to last sentence of paragraph (a)(1) is revised and paragraph (b)(14) is added, to read as follows:

§ 3.1 General authorities.

(a) * * *

(1) * * * In addition, a single Board Member may exercise such authority in disposing of the following matters: a Service motion to remand an appeal from the denial of a visa petition where the Regional Service Center Director requests that the matter be remanded to the Service for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; an appeal by the Service of a reasonable cause decision under § 241.14(h)(4) of this chapter; and other procedural or ministerial issues as provided by the Chairman. * * *

* * * * *

(b) * * *

(14) Decisions of immigration judges regarding custody of aliens subject to a final order of removal made pursuant to § 241.14 of this chapter.

* * * * *

PART 241—APPREHENSION AND DETENTION OF ALIENS ORDERED REMOVED

3. The authority citation for part 241 continues to read as follows:

Authority: 8 U.S.C. 1103, 1223, 1227, 1231, 1253, 1253, 1255, and 1330; 8 CFR part 2.

4. Section 241.4 is amended by

a. Adding a new paragraph (b)(4);

b. Removing the words ''beyond the removal period'' in paragraph (g) heading;

c. Redesignating paragraphs (g)(1) through (g)(4) as paragraphs (g)(2) through (g)(5), respectively;

d. Adding a new paragraph (g)(1);

e. Revising newly redesignated paragraph (g)(5); and by

f. Adding a new paragraph (i)(7).

The additions and revisions reasons as follows:

§ 241.4 Continued detention of inadmissible, criminal, and other aliens beyond the removal period.

* * * * *

(b) * * *

(4) *Service determination under 8 CFR 241.13.* The custody review procedures in this section do not apply after the Service has made a determination, pursuant to the procedures provided in 8 CFR 241.13, that there is no significant likelihood that an alien under a final order of removal can be removed in the reasonably foreseeable future. However, if the Service subsequently determines, because of a change of circumstances, that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future to the country to which the alien was ordered removed or to a third country, the alien shall again be subject to the custody review procedures under this section.

* * * * *

(g) * * *

(1) *Removal period.* (i) The removal period for an alien subject to a final order of removal shall begin on the latest of the following dates:

(A) the date the order becomes administratively final;

(B) If the removal order is subject to judicial review (including review by habeas corpus) and if the court has ordered a stay of the alien's removal, the date on which, consistent with the court's order, the removal order can be executed and the alien removed; or

(C) If the alien was detained or confined, except in connection with a proceeding under this chapter relating to removability, the date the alien is released from the detention or confinement.

(ii) The removal period shall run for a period of 90 days. However, the removal period is extended under section 241(a)(1)(C) of the Act if the alien fails or refuses to make timely application in good faith for travel or other documents necessary to the alien's departure or conspires or acts to prevent the alien's removal subject to an order of removal. The Service will provide such an alien with a Notice of Failure to Comply, as provided in paragraph (g)(5) of this section, before the expiration of the removal period. The removal period shall be extended until the alien demonstrates to the Service that he or she has complied with the statutory obligations. Once the alien has complied with his or her obligations under the law, the Service shall have a reasonable period of time in order to effect the alien's removal.

* * * * *

(5) *Alien's compliance and cooperation.* (i) Release will be denied and the alien may remain in detention if the alien fails or refuses to make timely application in good faith for travel documents necessary to the alien's departure or conspires or acts to prevent the alien's removal. The detention provisions of section 241(a)(2) of the Act will continue to apply, including provisions that mandate detention of certain criminal and terrorist aliens.

(ii) The Service shall serve the alien with a Notice of Failure to Comply, which shall advise the alien of the following: the provisions of sections 241(a)(1)(C) (extension of removal period) and 243(a) of the Act (criminal penalties related to removal); the circumstances demonstrating his or her failure to comply with the requirements of section 241(a)(1)(C) of the Act; and an explanation of the necessary steps that the alien must take in order to comply with the statutory requirements.

(iii) The Service shall advise the alien that the Notice of Failure to Comply shall have the effect of extending the removal period as provided by law, if the removal period has not yet expired, and that the Service is not obligated to complete its scheduled custody reviews under this section until the alien has demonstrated compliance with the statutory obligations.

(iv) The fact that the Service does not provide a Notice of Failure to Comply, within the 90-day removal period, to an alien who has failed to comply with the requirements of section 241(a)(1)(C) of the Act, shall not have the effect of excusing the alien's conduct.

* * * * *

(i) * * *

(7) *No significant likelihood or removal.* During the custody review process as provided in this paragraph (i), or at the conclusion of that review, if the alien submits, or the record contains, information providing a substantial reason to believe that the removal of a detained alien is not significantly likely in the reasonably foreseeable future, the HQPDU shall treat that as a request for review and initiate the review procedures under § 241.13. To the extent relevant, the HQPDU may consider any information developed during the custody review process under this section in connection with the determinations to be made by the Service under § 241.13. The Service shall complete the custody review under this section unless the HQPDU is able to make a prompt determination to release the alien under an order of supervision under § 241.13 because there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

* * * * *

§ 241.4 [Amended]

5. Section 241.4 is further amended by removing the term ''90-day'' whenever that term appears in the following paragraphs:

(c)(1)

(c)(2)

(h)(1)

(k)(1)(i)

(k)(1)(ii)

6. Section 241.13 is added to read as follows:

§ 241.13 Determination of whether there is a significant likelihood of removing a detained alien in the reasonably foreseeable future.

(a) *Scope.* This section establishes special review procedures for those aliens who are subject to a final order of removal and are detained under the custody review procedures provided at § 241.4 after the expiration of the removal period, where the alien has provided good reason to believe there is no significant likelihood of removal to the country to which he or she was ordered removed, or to a third country, in the reasonably foreseeable future.

(b) *Applicability to particular aliens.* (1) *Relationship to § 241.4.* Section 241.4 shall continue to govern the detention of aliens under a final order of removal, including aliens who have requested a review of the likelihood of their removal under this section, unless the Service makes a determination under this section that there is no significant likelihood of removal in the reasonably foreseeable future. The Service may release an alien under an order of supervision under § 241.4 if it determines that the alien would not pose a danger to the public or a risk of flight, without regard to the likelihood of the alien's removal in the reasonably foreseeable future.

(2) *Continued detention pending determinations.* (i) The Service's Headquarters Post-order Detention Unit (HQPDU) shall continue in custody any alien described in paragraph (a) of this section during the time the Service is pursuing the procedures of this section to determine whether there is no significant likelihood the alien can be removed in the reasonably foreseeable future. The HQPDU shall continue in custody any alien described in paragraph (a) of this section for whom it has determined that special circumstances exist and custody procedures under § 241.14 have been initiated.

(ii) The HQPDU has no obligation to release an alien under this section until the HQPDU has had the opportunity during a six-month period, dating from the beginning of the removal period (whenever that period begins and unless that period is extended as provided in section 241(a)(1) of the Act), to make its determination as to whether there is a significant likelihood of removal in the reasonably foreseeable future.

(3) *Limitations.* This section does not apply to:

(i) Arriving aliens, including those who have not entered the United States, those who have been granted immigration parole into the United States, and Mariel Cubans whose parole is governed by § 212.12 of this chapter;

(ii) Aliens subject to a final order of removal who are still within the removal period, including aliens whose removal period has been extended for failure to comply with the requirements of section 241(a)(1)(C) of the Act; or

(iii) Aliens who are ordered removed by the Alien Terrorist Removal Court pursuant to title 5 of the Act.

(c) *Delegation of authority.* The HQPDU shall conduct a review under this section, in response to a request from a detained alien, in order to determine whether there is no significant likelihood that the alien will be removed in the reasonably foreseeable future. If so, the HQPDU shall determine whether the alien should be released from custody under appropriate conditions of supervision or should be referred for a determination under § 241.14 as to whether the alien's continued detention may be justified by special circumstances.

(d) *Showing by the alien.* (1) *Written request.* An eligible alien may submit a written request for release to the HQPDU asserting the basis for the alien's belief that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future to the country to which the alien was ordered removed and there is no third country willing to accept the alien. The alien may submit whatever documentation to the HQPDU he or she wishes in support of the assertion that there is no significant likelihood of removal in the reasonably foreseeable future.

(2) *Compliance and cooperation with removal efforts.* The alien shall include with the written request information sufficient to establish his or her compliance with the obligation to effect his or her removal and to cooperate in the process of obtaining necessary travel documents.

(3) *Timing of request.* An eligible alien subject to a final order of removal may submit, at any time after the removal order becomes final, a written request under this section asserting that his or her removal is not significantly likely in the reasonably foreseeable future. However, the Service may, in the exercise of its discretion, postpone its consideration of such a request until after expiration of the removal period.

(e) *Review by HQPDU.* (1) *Initial response.* Within 10 business days after the HQPDU receives the request (or, if later, the expiration of the removal

period), the HQPDU shall respond in writing to the alien, with a copy to counsel of record, by regular mail, acknowledging receipt of the request for a review under this section and explaining the procedures that will be used to evaluate the request. The notice shall advise the alien that the Service may continue to detain the alien until it has made a determination under this section whether there is a significant likelihood the alien can be removed in the reasonably foreseeable future.

(2) *Lack of compliance, failure to cooperate.* The HQPDU shall first determine if the alien has failed to make reasonable efforts to comply with the removal order, has failed to cooperate fully in effecting removal, or has obstructed or hampered the removal process. If so, the HQPDU shall so advise the alien in writing, with a copy to counsel of record by regular mail. The HQPDU shall advise the alien of the efforts he or she needs to make in order to assist in securing travel documents for return to his or her country of origin or a third country, as well as the consequences of failure to make such efforts or to cooperate, including the provisions of section 243(a) of the Act. The Service shall not be obligated to conduct a further consideration of the alien's request for release until the alien has responded to the HQPDU and has established his or her compliance with the statutory requirements.

(3) *Referral to the State Department.* If the HQPDU believes that the alien's request provides grounds for further review, the Service may, in the exercise of its discretion, forward a copy of the alien's release request to the Department of State for information and assistance. The Department of State may provide detailed country conditions information or any other information that may be relevant to whether a travel document is obtainable from the country at issue. The Department of State may also provide an assessment of the accuracy of the alien's assertion that he or she cannot be returned to the country at issue or to a third country. When the Service bases its decision, in whole or in part, on information provided by the Department of State, that information shall be made part of the record.

(4) *Response by alien.* The Service shall permit the alien an opportunity to respond to the evidence on which the Service intends to rely, including the Department of State's submission, if any, and other evidence of record presented by the Service prior to any HQPDU decision. The alien may provide any additional relevant information to the Service, including reasons why his or her removal would not be significantly likely in the reasonably foreseeable future even though the Service has generally been able to accomplish the removal of other aliens to the particular country.

(5) *Interview.* The HQPDU may grant the alien an interview, whether telephonically or in person, if the HQPDU determines that an interview would provide assistance in reaching a decision. If an interview is scheduled, the HQPDU will provide an interpreter upon its determination that such assistance is appropriate.

(6) *Special circumstances.* If the Service determines that there are special circumstances justifying the alien's continued detention nowithstanding the determination that removal is not significantly likely in the reasonably foreseeable future, the Service shall initiate the review procedures in § 241.14, and provide written notice to the alien. In appropriate cases, the Service may initiate review proceedings under § 241.14 before completing the HQPDU review under this section.

(f) *Factors for consideration.* The HQPDU shall consider all the facts of the case including, but not limited to, the history of the alien's efforts to comply with the order of removal, the history of the Service's efforts to remove aliens to the country in question or to third countries, including the ongoing nature of the Service's efforts to remove this alien and the alien's assistance with those efforts, the reasonably foreseeable results of those efforts, the views of the Department of State regarding the prospects for removal of aliens to the country or countries in question, and the receiving country's willingness to accept the alien into its territory. Where the Service is continuing its efforts to remove the alien, there is no presumptive period of time within which the alien's removal must be accomplished, but the prospects for the timeliness of removal must be reasonable under the circumstances.

(g) *Decision.* The HQPDU shall issue a written decision based on the administrative record, including any documentation provided by the alien, regarding the likelihood of removal and whether there is a significant likelihood that the alien will be removed in the reasonably foreseeable future under the circumstances. The HQPDU shall provide the decision to the alien, with a copy to counsel of record, by regular mail.

(1) *Finding of no significant likelihood of removal.* If the HQPDU determines at the conclusion of the review that there is no significant likelihood that the alien will be removed in the reasonably foreseeable future, despite the Service's and the alien's efforts to effect removal, then the HQPDU shall so advise the alien. Unless there are special circumstances justifying continued detention, the Service shall promptly make arrangements for the release of the alien subject to appropriate conditions, as provided in paragraph (h) of this section. The Service may require that the alien submit to a medical or psychiatric examination prior to establishing appropriate conditions for release or determining whether to refer the alien for further proceedings under § 214.14 because of special circumstances justifying continued detention. The Service is not required to release an alien if the alien refuses to submit to a medical or psychiatric examination as ordered.

(2) *Denial.* If the HQPDU determines at the conclusion of the review that there is a significant likelihood that the alien will be removed in the reasonably foreseeable future, the HQPDU shall deny the alien's request under this section. The denial shall advise the alien that his or her detention will continue to be governed under the established standards in § 214.4. There is no administrative appeal from the HQPDU decision denying a request from an alien under this section.

(h) *Conditions of release.* (1) *In general.* An alien's release pursuant to an HQPDU determination that the alien's removal is not significantly likely in the reasonably foreseeable future shall be upon appropriate conditions specified in this paragraph and in the order of supervision, in order to protect the public safety and to promote the ability of the Service to effect the alien's removal as ordered, or removal to a third country, should circumstances change in the future. The order of supervision shall include all of the conditions provided in section 241(a)(3) of the Act, and § 241.5, and shall also include the conditions that the alien obey all laws, including any applicable prohibitions on the possession or use of firearms (*see, e.g.,* 18 U.S.C. 922(g)); and that the alien continue to seek to obtain travel documents and provide the Service with all correspondence to Embassies/Consulates requesting the issuance of travel documents and any reply from the Embassy/Consulate. The order of supervision may also include any other conditions that the HQPDU considers necessary to ensure public safety and guarantee the alien's compliance with the order of removal, including, but not limited to, attendance at any rehabilitative/sponsorship program or

submission for medical or psychiatric examination, as ordered.

(2) *Advice of consequences for violating conditions of release.* The order of supervision shall advise an alien released under this section that he or she must abide by the conditions of release specified by the Service. The order of supervision shall also advise the alien of the consequences of violation of the conditions of release, including the authority to return the alien to custody and the sanctions provided in section 243(b) of the Act.

(3) *Employment authorization.* The Service may, in the exercise of its discretion, grant employment authorization under the same conditions set forth in § 241.5(c) for aliens released under an order of supervision.

(4) *Withdrawal of release approval.* The Service may, in the exercise of its discretion, withdraw approval for release of any alien under this section prior to release in order to effect removal in the reasonably foreseeable future or where the alien refuses to comply with the conditions of release.

(i) *Revocation of release.*

(1) *Violation of conditions of release.* Any alien who has been released under an order of supervision under this section who violates any of the conditions of release may be returned to custody and is subject to the penalties described in section 243(b) of the Act. In suitable cases, the HQPDU shall refer the case to the appropriate U.S. Attorney for criminal prosecution. The alien may be continued in detention for an additional six months in order to effect the alien's removal, if possible, and to effect the conditions under which the alien had been released.

(2) *Revocation for removal.* The Service may revoke an alien's release under this section and return the alien to custody if, on account of changed circumstances, the Service determines that there is a significant likelihood that the alien may be removed in the reasonably foreseeable future. Thereafter, if the alien is not released from custody following the informal interview provided for in paragraph (h)(3) of this section, the provisions of § 241.4 shall govern the alien's continued detention pending removal.

(3) *Revocation procedures.* Upon revocation, the alien will be notified of the reasons for revocation of his or her release. The Service will conduct an initial informal interview promptly after his or her return to Service custody to afford the alien an opportunity to respond to the reasons for revocation stated in the notification. The alien may submit any evidence or information that he or she believes shows there is no significant likelihood he or she be removed in the reasonably foreseeable future, or that he or she has not violated the order of supervision. The revocation custody review will include an evaluation of any contested facts relevant to the revocation and a determination whether the facts as determined warrant revocation and further denial of release.

(j) *Subsequent requests for review.* If the Service has denied an alien's request for release under this section, the alien may submit a request for review of his or her detention under this section, six months after the Service's last denial of release under this section. After applying the procedures in this section, the HQPDU shall consider any additional evidence provided by the alien or available to the Service as well as the evidence in the prior proceedings but the HQPDC shall render a *de novo* decision on the likelihood of removing the alien in the reasonably foreseeable future under the circumstances.

7. Section 241.14 is added to read as follows:

§ 241.14 Continued detention of removable aliens on account of special circumstances.

(a) *Scope.* The Service may invoke the procedures of this section in order to continue detention of particular removable aliens on account of special circumstances even though there is no significant likelihood that the alien will be removed in the reasonably foreseeable future.

(1) *Applicability.* This section applies to removable aliens as to whom the Service has made a determination under § 241.13 that there is no significant likelihood of removal in the reasonably foreseeable future. This section does not apply to aliens who are not subject to the special review provisions under § 241.13.

(2) *Jurisdiction.* The immigration judges and the Board have jurisdiction with respect to determinations as to whether release of an alien would pose a special danger to the public, as provided in paragraphs (f) through (k) of this section, but do not have jurisdiction with respect to aliens described in paragraphs (b), (c), or (d) of this section.

(b) *Aliens with a highly contagious disease that is a threat to public safety.* If, after a medical examination of the alien, the Service determines that a removable alien presents a threat to public safety initiate efforts with the Public Health Service or proper State and local government officials to secure appropriate arrangements for the alien's continued medical care or treatment.

(1) *Recommendation.* The Service shall not invoke authority to continue detention of an alien under this paragraph except upon the express recommendation of the Public Health Service. The Service will provide every reasonably available form of treatment while the alien remains in the custody of the Service.

(2) *Conditions of release.* If the Service, in consultation with the Public Health Service and the alien, identifies an appropriate medical facility that will treat the alien, then the alien may be released on condition that he or she continue with appropriate medical treatment until he or she no longer poses a threat to public safety because of a highly contagious disease.

(c) *Aliens detained on account of serious adverse foreign policy consequences of release.* (1) *Certification.* The Service shall continue to detain a removable alien where the Attorney General or Deputy Attorney General has certified in writing that:

(i) Without regard to the grounds upon which the alien has been found inadmissible or removable, the alien is a person described in section 212(a)(3)(C) or section 237(a)(4)(C) of the Act;

(ii) The alien's release is likely to have serious adverse foreign policy consequences for the United States; and

(iii) No conditions of release can reasonably be expected to avoid those serious adverse foreign policy consequences,

(2) *Foreign policy consequences.* A certification by the Attorney General or Deputy Attorney General that an alien should not be released from custody on account of serious adverse foreign policy consequences shall be made only after consultation with the Department of State and upon the recommendation of the Secretary of State.

(3) *Ongoing review.* The certification is subject to ongoing review on a semi-annual basis but is not subject to further administrative review.

(d) *Aliens detained on account of security or terrorism concerns.* (1) *Standard for continued detention.* Subject to the review procedures under this paragraph (d), the Service shall continue to detain a removable alien based on a determination in writing that:

(i) The alien is a person described in section 212(a)(3)(A) or (B) or section 237(a)(4)(A) of (B) of the Act or the alien has engaged or will likely engage in any other activity that endangers the national security;

(ii) The alien's release presents a significant threat to the national security or a significant risk of terrorism; and

(iii) No conditions of release can reasonably be expected to avoid the

threat to the national security or the risk of terrorism, as the case may be.

(2) *Procedure.* Prior to the Commissioner's recommendation to the Attorney General under paragraph (d)(5) of this section, the alien shall be notified of the Service's intention to continue the alien in detention and of the alien's right to submit a written statement and additional information for consideration by the Commissioner. The Service shall continue to detain the alien pending the decision of the Attorney General under this paragraph. To the greatest extent consistent with protection of the national security and classified information:

(i) The Service shall provide a description of the factual basis for the alien's continued detention; and

(ii) The alien shall have a reasonable opportunity to examine evidence against him or her, and to present information on his or her own behalf.

(3) *Aliens ordered removed on grounds other than national security or terrorism.* If the alien's final order of removal was based on grounds of inadmissibility other than any of those stated in section 212(a)(3)(A)(i), (A)(iii), or (B) of the Act, or on grounds of deportability other than any of those stated in section 237(a)(4)(A) or (B) of the Act:

(i) An immigration officer shall, if possible, conduct an interview in person and take a sworn question-and-answer statement from the alien, and the Service shall provide an interpreter for such interview, if such assistance is determined to be appropriate; and

(ii) The alien may be accompanied at the interview by an attorney or other representative of his or her choice in accordance with 8 CFR part 292, at no expense to the government.

(4) *Factors for consideration.* In making a recommendation to the Attorney General that an alien should not be released from custody on account of security or terrorism concerns, the Commissioner shall take into account all relevant information, including but not limited to:

(i) The recommendations of appropriate enforcement officials of the Service, including the director of the Headquarters Post-order Detention Unit (HQPDU), and of the Federal Bureau of Investigation or other federal law enforcement or national security agencies;

(ii) The statements and information submitted by the alien, if any;

(iii) The extent to which the alien's previous conduct (including but not limited to the commission of national security or terrorism-related offenses, engaging in terrorist activity or other activity that poses a danger to the national security and any prior convictions in a federal, state or foreign court) indicates a likelihood that the alien's release would present a significant threat to the national security or a significant risk of terrorism; and

(iv) Other special circumstances of the alien's case indicating that release from detention would present a significant threat to the national security or a significant risk of terrorism.

(5) *Recommendation to the Attorney General.* The Commissioner shall submit a written recommendation and make the record available to the Attorney General. If the continued detention is based on a significant risk of terrorism, the recommendation shall state in as much detail as practicable the factual basis for this determination.

(6) *Attorney General certification.* Based on the record developed by the Service, and upon this recommendation of the Commissioner and the Director of the Federal Bureau of Investigation, the Attorney General may certify that an alien should continue to be detained on account of security or terrorism grounds as provided in this paragraph (d). Before making such a certification, the Attorney General shall order any further procedures or reviews as may be necessary under the circumstances to ensure the development of a complete record, consistent with the obligations to protect national security and classified information and to comply with the requirements of due process.

(7) *Ongoing review.* The detention decision under this paragraph (d) is subject to ongoing review on a semi-annual basis as provided in this paragraph (d), but is not subject to further administrative review. After the initial certification by the Attorney General, further certifications under paragraph (d)(6) of this section may be made by the Deputy Attorney General.

(e) [Reserved]

(f) *Detention of aliens determined to be specially dangerous.* (1) *Standard for continued detention.* Subject to the review procedures provided in this section, the Service shall continue to detain an alien if the release of the alien would pose a special danger to the public, because:

(i) The alien has previously committed one or more crimes of violence as defined in 18 U.S.C. 16;

(ii) Due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future; and

(iii) No conditions of release can reasonably be expected to ensure the safety of the public.

(2) *Determination by the Commissioner.* The Service shall promptly initiate review proceedings under paragraph (g) of this section if the Commissioner has determined in writing that the alien's release would pose a special danger to the public, according to the standards of paragraph (f)(1) of this section.

(3) *Medical or mental health examination.* Before making such a determination, the Commissioner shall arrange for a report by a physician employed or designated by the Public Health Service based on a full medical and psychiatric examination of the alien. The report shall include recommendations pertaining to whether, due to a mental condition or personality disorder and behavior associated with that condition or disorder, the alien is likely to engage in acts of violence in the future.

(4) *Detention pending review.* After the Commissioner or Deputy Commissioner has made a determination under this paragraph, the Service shall continue to detain the alien, unless an immigration judge or the Board issues an administratively final decision dismissing the review proceedings under this section.

(g) *Referral to Immigration Judge.* Jurisdiction for an immigration judge to review a determination by the Service pursuant to paragraph (f) of this section that an alien is specially dangerous shall commence with the filing by the Service of a Notice of Referral to the Immigration Judge (Form I–863) with the Immigration Court having jurisdiction over the place of the alien's custody. The Service shall promptly provide to the alien by personal service a copy of the Notice of Referral to the Immigration Judge and all accompanying documents.

(1) *Factual basis.* The Service shall attach a written statement that contains a summary of the basis for the Commissioner's determination to continue to detain the alien, including a description of the evidence relied upon to reach the determination regarding the alien's special dangerousness. The Service shall attach copies of all relevant documents used to reach its decision to continue to detain the alien.

(2) *Notice of reasonable cause hearing.* The Service shall attach a written notice advising the alien that the Service is initiating proceedings for the continued detention of the alien and informing the alien of the procedures governing the reasonable cause hearing, as set forth at paragraph (h) of this section.

(3) *Notice of alien's rights.* The Service shall also provide written notice advising the alien of his or her rights during the reasonable cause hearing and the merits hearing before the Immigration Court, as follows:

(i) The alien shall be provided with a list of free legal services providers, and may be represented by an attorney or other representative of his or her choice in accordance with 8 CFR part 292, at no expense to the Government;

(ii) The Immigration Court shall provide an interpreter for the alien, if necessary, for the reasonable cause hearing and the merits hearing.

(iii) The alien shall have a reasonable opportunity to examine evidence against the alien, to present evidence in the alien's own behalf, and to cross-examine witnesses presented by the Service; and

(iv) The alien shall have the right, at the merits hearing, to cross-examine the author of any medical or mental health reports used as a basis for the determination under paragraph (f) of this section that the alien is specially dangerous.

(4) *Record.* All proceedings before the immigration judge under this section shall be recorded. The Immigration Court shall create a record of proceeding that shall include all testimony and documents related to the proceedings.

(h) *Reasonable cause hearing.* The immigration judge shall hold a preliminary hearing to determine whether the evidence supporting the Service's determination is sufficient to establish reasonable cause to go forward with a merits hearing under paragraph (i) of this section. A finding of reasonable cause under this section will be sufficient to warrant the alien's continued detention pending the completion of the review proceedings under this section.

(1) *Scheduling of hearing.* The reasonable cause hearing shall be commenced not later than 10 business days after the filing of the Form I–863. The Immigration Court shall provide prompt notice to the alien and to the Service of the time and place of the hearing. The hearing may be continued at the request of the alien or his or her representative.

(2) *Evidence.* The Service must show that there is reasonable cause to conduct a merits hearing under a merits hearing under paragraph (i) of this section. The Service may offer any evidence that is material and relevant to the proceeding. Testimony of witnesses, if any, shall be under oath or affirmation. The alien may, but is not required to, offer evidence on his or her own behalf.

(3) *Decision.* The immigration judge shall render a decision, which should be in summary form, within 5 business days after the close of the record, unless that time is extended by agreement of both parties, by a determination from the Chief Immigration Judge that exceptional circumstances make it impractical to render the decision on a highly expedited basis, or because of delay caused by the alien. If the immigration judge determines that the Service has met its burden of establishing reasonable cause, the immigration judge shall advise the alien and the Service, and shall schedule a merits hearing under paragraph (i) of this section to review the Service's determination that the alien is specially dangerous. If the immigration judge determines that the Service has not met its burden, the immigration judge shall order that the review proceedings under this section be dismissed. The order and any documents offered shall be included in the record of proceedings, and may be relied upon in a subsequent merits hearing.

(4) *Appeal.* If the immigration judge dismisses the review proceedings, the Service may appeal to the Board of Immigration Appeals in accordance with § 3.38 of this chapter, except that the Service must file the Notice of Appeal (Form EOIR–26) with the Board within 2 business days after the immigration judge's order. The Notice of Appeal should state clearly and conspicuously that it is an appeal of a reasonable cause decision under this section.

(i) If the Service reserves appeal of a dismissal of the reasonable cause hearing, the immigration judge's order shall be stayed until the expiration of the time to appeal. Upon the Service's filing of a timely Notice of Appeal, the immigration judge's order shall remain in abeyance pending a final decision of the appeal. The stay shall expire if the Service fails to file a timely Notice of Appeal.

(ii) The Board will decide the Service's appeal, by single Board Member review, based on the record of proceedings before the immigration judge. The Board shall expedite its review as far as practicable, as the highest priority among the appeals filed by detained aliens, and shall determine the issue within 20 business days of the filing of the notice of appeal, unless that time is extended by agreement of both parties, by a determination from the Chairman of the Board that exceptional circumstances make it impractical to render the decision on a highly expedited basis, or because of delay caused by the alien.

(iii) If the Board determines that the Service has met its burden of showing reasonable cause under this paragraph (h), the Board shall remand the case to the immigration judge for the scheduling of a merits hearing under paragraph (i) of this section. If the Board determines that the Service has not met its burden, the Board shall dismiss the review proceedings under this section.

(i) *Merits hearing.* If there is reasonable cause to conduct a merits hearing under this section, the immigration judge shall promptly schedule the hearing and shall expedite the proceedings as far as practicable. The immigration judge shall allow adequate time for the parties to prepare for the merits hearing, but, if requested by the alien, the hearing shall commence within 30 days. The hearing may be continued at the request of the alien or his or her representative, or at the request of the Service upon a showing of exceptional circumstances by the Service.

(1) *Evidence.* The Service shall have the burden of proving, by clear and convincing evidence, that the alien should remain in custody because the alien's release would pose a special danger to the public, under the standards of paragraph (f)(1) of this section. The immigration judge may receive into evidence any oral or written statement that is material and relevant to this determination. Testimony of witnesses shall be under oath or affirmation. The alien may, but is not required to, offer evidence on his or her own behalf.

(2) *Factors for consideration.* In making any determination in a merits hearing under this section, the immigration judge shall consider the following non-exclusive list of factors:

(i) The alien's prior criminal history, particularly the nature and seriousness of any prior crimes involving violence or threats of violence;

(ii) The alien's previous history of recidivism, if any, upon release from either Service or criminal custody;

(iii) The substantiality of the Service's evidence regarding the alien's current mental condition or personality disorder;

(iv) The likelihood that the alien will engage in acts of violence in the future; and

(v) The nature and seriousness of the danger to the public posed by the alien's release.

(3) *Decision.* After the closing of the record, the immigration judge shall render a decision as soon as practicable. The decision may be oral or written. The decision shall state whether or not the Service has met its burden of

establishing that the alien should remain in custody because the alien's release would pose a special danger to the public, under the standards of paragraph (f)(1) of this section. The decision shall also include the reasons for the decision under each of the standards of paragraph (f)(1) of this section, although a formal enumeration of findings is not required. Notice of the decision shall be served in accordance with § 240.13(a) or (b).

(i) If the immigration judge determines that the Service has met its burden, the immigration judge shall enter an order providing for the continued detention of the alien.

(ii) If the immigration judge determines that the Service has failed to meet its burden, the immigration judge shall order that the review proceedings under this section be dismissed.

(4) *Appeal.* Either party may appeal an adverse decision to the Board of Immigration Appeals in accordance with § 3.38 of this chapter, except that, if the immigration judge orders dismissal of the proceedings, the Service shall have only 5 business days to file a Notice of Appeal with the Board. The Notice of Appeal should state clearly and conspicuously that this is an appeal of a merits decision under this section.

(i) If the Service reserves appeal of a dismissal, the immigration judge's order shall be stayed until the expiration of the time to appeal. Upon the Service's filing of a timely Notice of Appeal, the immigration judge's order shall remain in abeyance pending a final decision of the appeal. The stay shall expire if the Service fails to file a timely Notice of Appeal.

(ii) The Board shall conduct its review of the appeal as provided in 8 CFR part 3, but shall expedite its review as far as practicable, as the highest priority among the appeals filed by detained aliens. The decision of the Board shall be final as provided in § 3.1(d)(3) of this chapter.

(j) *Release of alien upon dismissal of proceedings.* If there is an administratively final decision by the immigration judge or the Board dismissing the review proceedings under this section upon conclusion of the reasonable cause hearing or the merits hearing, the Service shall promptly release the alien on conditions of supervision, as determined by the Service, pursuant to § 241.13. The conditions of supervision shall not be subject to review by the immigration judge or the Board.

(k) *Subsequent review for aliens whose release would pose a special danger to the public.* (1) *Periodic review.* In any case where the immigration judge or the Board has entered an order providing for the alien to remain in custody after a merits hearing pursuant to paragraph (i) of this section, the Service shall continue to provide an ongoing, periodic review of the alien's continued detention, according to § 241.4 and paragraphs (f)(1)(ii) and (f)(1)(iii) of this section.

(2) *Alien's request for review.* The alien may also request a review of his or her custody status because of changed circumstances, as provided in this paragraph (k). The request shall be in writing and directed to the HQPDU.

(3) *Time for review.* An alien may only request a review of his or her custody status under this paragraph (k) no earlier than six months after the last decision of the immigration judge under this section or, if the decision was appealed, the decision of the Board.

(4) *Showing of changed circumstances.* The alien shall bear the initial burden to establish a material change in circumstances such that the release of the alien would no longer pose a special danger to the public under the standards of paragraph (f)(1) of this section.

(5) *Review by the Service.* If the Service determines, upon consideration of the evidence submitted by the alien and other relevant evidence, that the alien is not likely to commit future acts of violence or that the Service will be able to impose adequate conditions of release so that the alien will not pose a special danger to the public, the Service shall release the alien from custody pursuant to the procedures in § 241.13. If the Service determines that continued detention is needed in order to protect the public, the Service shall provide a written notice to the alien stating the basis for the Service's determination, and provide a copy of the evidence relied upon by the Service. The notice shall also advise the alien of the right to move to set aside the prior review proceedings under this section.

(6) *Motion to set aside determination in prior review proceedings.* If the Service denies the alien's request for release from custody, the alien may file a motion with the Immigration Court that had jurisdiction over the merits hearing to set aside the determination in the prior review proceedings under this section. The immigration judge shall consider any evidence submitted by the alien or relied upon by the Service and shall provide an opportunity for the Service to respond to the motion.

(i) If the immigration judge determines that the alien has provided good reason to believe that, because of a material change in circumstances, releasing the alien would no longer pose a special danger to the public under the standards of paragraph (f)(1) of this section, the immigration judge shall set aside the determination in the prior review proceedings under this section and schedule a new merits hearing as provided in paragraph (i) of this section.

(ii) Unless the immigration judge determines that the alien has satisfied the requirements under paragraph (k)(6)(i) of this section, the immigration judge shall deny the motion. Neither the immigration judge nor the Board may *sua sponte* set aside a determination in prior review proceedings. Notwithstanding 8 CFR 3.23 or 3.2 (motions to reopen), the provisions set forth in this paragraph (k) shall be the only vehicle for seeking review based on material changed circumstances.

(iii) The alien may appeal an adverse decision to the Board in accordance with § 3.38 of this chapter. The Notice of Appeal should state clearly and conspicuously that this is an appeal of a denial of a motion to set aside a prior determination in review proceedings under this section.

Dated: November 6, 2001.

John Ashcroft,

Attorney General.

[FR Doc. 01–28369 Filed 11–13–01; 8:45 am]

BILLING CODE 4410–10–M

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AG87

List of Approved Spent Fuel Storage Casks: FuelSolutions™ Cask System Revision

AGENCY: Nuclear Regulatory Commission.

ACTION: Direct final rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is amending its regulations revising the BNFL Fuel Solutions (FuelSolutions™) cask system listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 2 to Certificate of Compliance (CoC) Number 1026. Amendment No. 2 will modify the Technical Specifications (TS). The current TS require that if the W74 canister is required to be removed from its storage cask, then the canister must be returned to the spent fuel pool. The modified TS will allow the W74 canister to be placed in the transfer cask until the affected storage cask is repaired or replaced. The TS will also be modified

to clarify the description of the other non-fissile material permitted to be stored in the W74 canister and to revise the temperatures to correspond to the liner thermocouples. Specific changes will be made to TS Tables 2.1–3 and 2.1–4; TS 3.3.2 and 3.3.3; and the bases for TS 3.3.2 and 3.3.3. No changes will be made to the conditions of the Certificate of Compliance.

DATES: The final rule is effective January 28, 2002 unless significant adverse comments are received by December 14, 2001. A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. If the rule is withdrawn, timely notice will be published in the **Federal Register**.

ADDRESSES: Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attn: Rulemakings and Adjudications Staff. Deliver comments to 11555 Rockville Pike, Rockville, MD, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Certain documents related to this rulemaking, as well as all public comments received on this rulemaking, may be viewed and downloaded electronically via the NRC's rulemaking website at *http://ruleforum.llnl.gov.* You may also provide comments via this website by uploading comments as files (any format) if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, (301) 415–5905; e-mail *CAG@nrc.gov.*

Certain documents related to this rule, including comments received by the NRC, may be examined at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Documents created or received at the NRC after November 1, 1999, are also available electronically at the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/NRC/ADAMS/index.html.* From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. An electronic copy of the proposed CoC and preliminary safety evaluation report (SER) can be found under ADAMS Accession No. ML012680428. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

CoC No. 1026, the revised Technical Specifications, and the underlying Safety Evaluation Report for Amendment No. 2, and the Environmental Assessment, are available for inspection at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. Single copies of these documents may be obtained from Merri Horn, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–8126, e-mail *mlh1@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Merri Horn, telephone (301) 415–8126, e-mail *mlh1@nrc.gov,* of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION:

Background

Section 218(a) of the Nuclear Waste Policy Act of 1982, as amended (NWPA), requires that ''[t]he Secretary [of the Department of Energy (DOE)] shall establish a demonstration program, in cooperation with the private sector, for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the [Nuclear Regulatory] Commission may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.'' Section 133 of the NWPA states, in part, that ''[t]he Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under Section 218(a) for use at the site of any civilian nuclear power reactor.''

To implement this mandate, the NRC approved dry storage of spent nuclear fuel in NRC-approved casks under a general license by publishing a final rule in 10 CFR part 72 entitled, ''General License for Storage of Spent Fuel at Power Reactor Sites'' (55 FR 29181; July 18, 1990). This rule also established a new Subpart L within 10 CFR part 72, entitled ''Approval of Spent Fuel Storage Casks'' containing procedures and criteria for obtaining NRC approval of spent fuel storage cask designs. The NRC subsequently issued a final rule on January 16, 2001 (66 FR 3444) that approved the FuelSolutions™ cask design and added it to the list of NRC-approved cask designs in § 72.214 as CoC No. 1026.

Discussion

On March 20, 2001, and as supplemented on July 16, August 9, and September 19, 2001, the certificate holder BNFL Fuel Solutions submitted an application to the NRC to amend CoC No. 1026 to modify the Technical Specifications (TS). The current TS require that if the W74 canister is required to be removed from its storage cask, then the canister must be returned to the spent fuel pool. The modified TS will allow the W74 canister to be placed in the transfer cask until the affected storage cask is repaired or replaced. The TS will also be modified to clarify the description of the other non-fissile material permitted to be stored in the W74 canister and to revise the temperatures to correspond to the liner thermocouples. Specific changes will be made to TS Tables 2.1–3 and 2.1–4; TS 3.3.2 and 3.3.3; and the bases for TS 3.3.2 and 3.3.3. No changes will be made to the conditions of the Certificate of Compliance. The NRC staff performed a detailed safety evaluation of the proposed CoC amendment request and found that an acceptable safety margin is maintained. In addition, the NRC staff has determined that there is still reasonable assurance that public health and safety and the environment will be adequately protected.

This direct final rule revises the FuelSolutions™ cask system design listing in § 72.214 by adding Amendment No. 2 to CoC No. 1026. The amendment consists of changes to the TS to provide an alternative to returning the W74 canister to the spent fuel building, to clarify the description of the other non-fissile material permitted to be stored in the W74 canister, and to revise the temperatures to correspond to the liner thermocouples. Specific changes would be made to TS Tables 2.1–3 and 2.1–4; TS 3.3.2 and 3.3.3; and the bases for TS 3.3.2 and 3.3.3.

The amended FuelSolutions™ cask system, when used in accordance with the conditions specified in the CoC, the Technical Specifications, and NRC regulations, will meet the requirements of Part 72; thus, adequate protection of public health and safety and the environment will continue to be ensured.

Discussion of Amendments by Section

Section 72.214 List of Approved Spent Fuel Storage Casks

Certificate No. 1026 is revised by adding the effective date of Amendment Number 2.

Procedural Background

This rule is limited to the changes contained in Amendment 2 to CoC No. 1026 and does not include other aspects of the FuelSolutions™ cask system design. The NRC is using the ''direct final rule procedure'' to issue this amendment because it represents a limited and routine change to an existing CoC that is expected to be noncontroversial. Adequate protection of public health and safety and the environment continues to be ensured. The amendment to the rule will become effective on January 28, 2002. However, if the NRC receives significant adverse comments by December 14, 2001, then the NRC will publish a document that withdraws this action and will address the comments received in response to the proposed amendments published elsewhere in this issue of the **Federal Register**. A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, in a substantive response:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change to the CoC or TS.

These comments will be addressed in a subsequent final rule. The NRC will not initiate a second comment period on this action. However, if the NRC receives significant adverse comments by December 14, 2001, then the NRC will publish a document that withdraws this action and will address the comments received in response to the proposed amendments published elsewhere in this issue of the **Federal Register**.

Voluntary Consensus Standards

The National Technology Transfer Act of 1995 (Pub. L. 104–113) requires that Federal agencies use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or otherwise impractical. In this direct final rule, the NRC would revise the FuelSolutions™ cask system design listed in § 72.214 (List of NRC-approved spent fuel storage cask designs). This action does not constitute the establishment of a standard that establishes generally applicable requirements.

Agreement State Compatibility

Under the ''Policy Statement on Adequacy and Compatibility of Agreement State Programs'' approved by the Commission on June 30, 1997, and published in the **Federal Register** on September 3, 1997 (62 FR 46517), this rule is classified as compatibility Category ''NRC.'' Compatibility is not required for Category ''NRC'' regulations. The NRC program elements in this category are those that relate directly to areas of regulation reserved to the NRC by the Atomic Energy Act of 1954, as amended (AEA) or the provisions of the Title 10 of the Code of Federal Regulations. Although an Agreement State may not adopt program elements reserved to NRC, it may wish to inform its licensees of certain requirements via a mechanism that is consistent with the particular State's administrative procedure laws, but does not confer regulatory authority on the State.

Plain Language

The Presidential Memorandum dated June 1, 1998, entitled, ''Plain Language in Government Writing'' directed that the Government's writing be in plain language. The NRC requests comments on this direct final rule specifically with respect to the clarity and effectiveness of the language used. Comments should be sent to the address listed under the heading **ADDRESSES** above.

Finding of No Significant Environmental Impact: Availability

Under the National Environmental Policy Act of 1969, as amended, and the NRC regulations in Subpart A of 10 CFR part 51, the NRC has determined that this rule, if adopted, would not be a major Federal action significantly affecting the quality of the human environment and, therefore, an environmental impact statement is not required. The rule would amend the CoC for the FuelSolutions™ cask system within the list of approved spent fuel storage casks that power reactor licensees can use to store spent fuel at reactor sites under a general license. Amendment No. 2 will modify the Technical Specifications (TS). The current TS require that if the W74 canister is required to be removed from its storage cask, then the canister must be returned to the spent fuel pool. The modified TS will allow the W74 canister to be placed in the transfer cask until the affected storage cask is repaired or replaced. The TS will also be modified to clarify the description of the other non-fissile material permitted to be stored in the W74 canister, and to revise the temperatures to correspond to the liner thermocouples. Specific changes will be made to TS Tables 2.1–3 and 2.1–4; TS 3.3.2 and 3.3.3; and the bases for TS 3.3.2 and 3.3.3. No changes will be made to the conditions of the Certificate of Compliance.

The environmental assessment and finding of no significant impact on which this determination is based are available for inspection at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. Single copies of the environmental assessment and finding of no significant impact are available from Merri Horn, Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, telephone (301) 415–8126, email *mlh1@nrc.gov.*

Paperwork Reduction Act Statement

This direct final rule does not contain a new or amended information collection requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by the Office of Management and Budget, Approval Number 3150–0132.

Public Protection Notification

If a means used to impose an information collection does not display a currently valid OMB control number, the NRC may not conduct or sponsor, and a person is not required to respond to, the information collection.

Regulatory Analysis

On July 18, 1990 (55 FR 29181), the NRC issued an amendment to 10 CFR part 72 to provide for the storage of spent nuclear fuel under a general license in cask designs approved by the NRC. Any nuclear power reactor licensee can use NRC-approved cask designs to store spent nuclear fuel if it notifies the NRC in advance, spent fuel is stored under the conditions specified in the cask's CoC, and the conditions of the general license are met. A list of NRC-approved cask designs is contained in § 72.214. On January 16, 2001 (66 FR 3444), the NRC issued an amendment to

part 72 that approved the FuelSolutions™ cask design by adding it to the list of NRC-approved cask designs in § 72.214. On March 20, 2001, and as supplemented on July 16, August 9, and September 19, 2001, the certificate holder BNFL Fuel Solutions, submitted an application to the NRC to amend CoC No. 1026 to modify the TS. Amendment No. 2 will modify the Technical Specifications (TS). The current TS require that if the W74 canister is required to be removed from its storage cask, then the canister must be returned to the spent fuel pool. The modified TS will allow the W74 canister to be placed in the transfer cask until the affected storage cask is repaired or replaced. The TS will also be modified to clarify the description of the other non-fissile material permitted to be stored in the W74 canister, and to revise the temperatures to correspond to the liner thermocouples. Specific changes will be made to TS Tables 2.1–3 and 2.1–4; TS 3.3.2 and 3.3.3; and the bases for TS 3.3.2 and 3.3.3. No changes will be made to the conditions of the Certificate of Compliance.

The alternative to this action is to withhold approval of this amended cask system design and issue an exemption to each general license. This alternative would cost both the NRC and the utilities more time and money because each utility would have to pursue an exemption.

Approval of the direct final rule will eliminate the above described problem and is consistent with previous NRC actions. Further, the direct final rule will have no adverse effect on public health and safety or the environment. This direct final rule has no significant identifiable impact or benefit on other Government agencies. Based on the above discussion of the benefits and impacts of the alternatives, the NRC concludes that the requirements of the direct final rule are commensurate with the NRC's responsibilities for public health and safety and the environment and the common defense and security. No other available alternative is believed to be as satisfactory, and thus, this action is recommended.

Regulatory Flexibility Certification

In accordance with the Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b)), the NRC certifies that this rule will not, if issued, have a significant economic impact on a substantial number of small entities. This direct final rule affects only the licensing and operation of nuclear power plants, independent spent fuel storage facilities, and BNFL Fuel Solutions. The companies that own these plants do not fall within the scope of the definition of ''small entities'' set forth in the Regulatory Flexibility Act or the Small Business Size Standards set out in regulations issued by the Small Business Administration at 13 CFR part 121.

Backfit Analysis

The NRC has determined that the backfit rule (10 CFR 50.109 or 10 CFR 72.62) does not apply to this direct final rule because this amendment does not involve any provisions that would impose backfits as defined. Therefore, a backfit analysis is not required.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs, Office of Management and Budget.

List of Subjects In 10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 552 and 553; the NRC is adopting the following amendments to 10 CFR part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

1. The authority citation for Part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c),(d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244, (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

2. In § 72.214, Certificate of Compliance 1026 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1026.

Initial Certificate Effective Date: February 15, 2001.

Amendment Number 1 Effective Date: May 14, 2001.

Amendment Number 2 Effective Date: January 28, 2002.

SAR Submitted by: BNFL Fuel Solutions.

SAR Title: Final Safety Analysis Report for the FuelSolutions™ Spent Fuel Management System.

Docket Number: 72–1026.

Certificate Expiration Date: February 15, 2021.

Model Number: WSNF–220, WSNF–221, and WSNF–223 systems; W–150 storage cask; W–100 transfer cask; and the W–21 and W–74 canisters.

* * * * *

Dated at Rockville, Maryland, this 25th day of October, 2001.

For the Nuclear Regulatory Commission.

William F. Kane,

Acting Executive Director for Operations.

[FR Doc. 01–28511 Filed 11–13–01; 8:45 am]

BILLING CODE 7590–01–P

SMALL BUSINESS ADMINISTRATION

13 CFR Part 120

RIN 3245–AE68

Business Loans and Development Company Loans

AGENCY: Small Business Administration (SBA).

ACTION: Direct final rule.

SUMMARY: Recently enacted statutory amendments require changes to SBA rules concerning loan guaranty and loan amounts, minimum guaranteed dollar amount of 7(a) loans, percentages of

financing which can be guaranteed by SBA, guarantee fees paid by lenders, real estate occupancy rules, and borrower prepayment penalties. This direct final rule conforms SBA rules to the statutory provisions.

DATES: This rule is effective December 31, 2001 without further action, unless adverse comment is received by December 14, 2001. If adverse comment is received, SBA will publish a timely withdrawal of the rule in the **Federal Register.**

ADDRESSES: Send written comments to LeAnn Oliver, Deputy Associate Administrator for Financial Assistance, Office of Financial Assistance, Small Business Administration, 409 Third Street, SW, Washington, DC 20416.

FOR FURTHER INFORMATION CONTACT: James W. Hammersley, Director, Office of Loan Programs, Office of Financial Assistance, (202) 205–6490.

SUPPLEMENTARY INFORMATION: The Small Business Reauthorization Act of 2000, Pub. L. 106–554, Tit. II–III, 114 Stat. 2763A–681 to –689 (2000 Act) became effective on December 21, 2000. This direct final rule is necessary to amend SBA regulations to incorporate the legislative changes.

Previously, SBA was authorized to guarantee no more than 80% of a loan if the gross amount of the loan was $100,000 or less, and no more than 70% of a loan over that amount. Section 202 of the 2000 Act amends the 7(a) business loan program by authorizing SBA to guarantee up to 85% of a loan if the gross amount of the loan is no more than $150,000. Under the 2000 Act, the maximum SBA guaranty on a loan greater than $150,000 is 75%. To reflect these changes, SBA is amending § 120.210 of the regulations.

Section 203 of the 2000 Act increases the maximum amount that SBA may guarantee to a single borrower from $750,000 to $1 million. Section 203 provides that the gross amount of any SBA guaranteed loan can not exceed $2 million. Previously, there was no limit on the maximum gross loan amount. SBA is amending § 120.151 of its regulations to implement these changes.

Section 205 of the 2000 Act imposes a prepayment penalty on some borrowers with respect to certain SBA 7(a) guaranteed loans. A prepayment penalty applies if a prepaid loan has a maturity of not less than 15 years, the prepayment is voluntary, the amount of prepayment in the aggregate in any calendar year is more than 25% of the outstanding balance of the loan, and the prepayment is made within the first three years of the initial disbursement of the loan proceeds. The prepayment penalty is paid to SBA and applies to the full amount of the prepayment, not only to the guaranteed portion of the prepayment, as follows: if a borrower prepays during the first year after initial disbursement, the prepayment charge is 5% of the amount of the prepayment; if a borrower prepays during the second year after initial disbursement, the prepayment charge is 3% of the amount of the prepayment; and if a borrower prepays during the third year after initial disbursement, the prepayment charge is 1% of the amount of the prepayment. SBA is adding a new § 120.223 to its regulations to reflect this statutory amendment.

Section 206 of the 2000 Act simplifies the calculation of the guaranty fee payable to SBA by a participating lender. This provision does not change the ability of a lender to pass this fee on to the borrower. Under the new simplified calculation: for all loans with a maturity of over 12 months, if the total loan amount is $150,000 or less, a lender must pay a guaranty fee equal to 2% of the SBA guaranteed portion, however, the lender may retain 25% of the fee (50 basis points). In addition, for all loans with a maturity of over 12 months, if the total loan amount is more than $150,000, but not more than $700,000, a lender must pay a guaranty fee of 3% of the SBA guaranteed portion, and if the total amount is more than $700,000, a lender must pay a guaranty fee equal to 3.5% of the SBA guaranteed portion. SBA is revising § 120.220 to implement these provisions in narrative form replacing the current chart.

Section 207 of the 2000 Act added section 7(a)(28) to the Small Business Act with respect to the ability of a borrower in the 7(a) business loan program to lease out a portion of a building constructed with the proceeds of a guaranteed loan. Borrowers under the 7(a) business loan program will now be treated the same as borrowers under SBA's 504 program, established under sections 501 through 510 of the Small Business Investment Act (SBI Act). Specifically, when the use of proceeds is for new construction, section 7(a)(28) allows a 7(a) borrower to permanently lease to one or more tenants not more than 20 percent of any property constructed with the proceeds of a 7(a) guaranteed loan, if the borrower permanently occupies and uses not less than 60 percent of the total space at the outset.

To reflect this statutory change, SBA is revising section 120.131 of its regulations to cover the leasing of space in new and existing buildings in both the 7(a) and 504 programs. This direct final rule incorporates sections 502(4) and 502(5) of the SBI Act, section 7(a)(28) of the Small Business Act, and existing sections 120.131 and 120.870(c) of SBA's regulations. Under each of the subsections to section 120.131, if a borrower is an eligible passive company which leases 100 percent of the space to one or more operating companies, the operating company, or operating companies together, must follow the rules set forth in the respective subsection. As a result, SBA is revising section 120.870(c), which formerly provided leasing rules only for the 504 program, so that it merely references section 120.131.

Section 120.131(a), as revised, would permit a borrower to use SBA financing to construct a new building if it planned to use no less than 67 percent of the space. It could lease out 33 percent of the building if it planned to occupy and use within three years some of the space leased short term and use within ten years all of the space leased short term.

Section 120.131(b), as revised, would cover the construction of a new building financed with 7(a) or 504 financing. A borrower would be authorized to lease long term up to 20 percent of the space to one or more tenants if it permanently occupies and uses no less than 60 percent of the space. It would have to plan to permanently occupy and use within three years some of the remaining space not immediately occupied and not leased long term, and to plan to use within ten years all of the remaining space not leased long term.

Section 120.131(c), as revised, would apply if SBA financing under the 7(a) or 504 program would be used for the acquisition, renovation or reconstruction of an existing building. A borrower would be authorized to lease up to forty-nine percent of the space long term if it permanently occupies and uses no less than fifty-one percent of the space.

Section 209 of the 2000 Act allows the SBA guaranteed portions of export working capital loans to be sold in the secondary market. The provision accomplishes this by eliminating, for export working capital program (EWCP) loans only, the requirement that a loan be fully disbursed before it can be sold in the secondary market. Any other SBA guaranteed loan made under the agency's 7(a) business loan program still must be fully disbursed before a lender can sell the guaranteed portion in the secondary market. In making this change for EWCP loans, Congress recognized the uniqueness of the revolving feature of such loans. SBA is amending § 120.613(b) to reflect only this statutory change. Other provisions

concerning export working capital loans remain the same.

Section 302 of the 2000 Act adds ''women-owned business development'' to the statutory list of public policy goals of the 504 program. SBA interprets women-owned business development to mean assisting small businesses owned and controlled by women. This interpretation is consistent with SBA's statutory authority to assist small businesses owned and controlled by women as set forth in section 29 of the Small Business Act (15 U.S.C. 656). Section 3(n) of the Small Business Act (15 U.S.C. 632(q)) defines a business ''owned and controlled by women.'' SBA is amending the public policy goals in § 120.862(b) to reflect this change.

SBA is changing the reference to ''Minority Business Development (see § 124.105(b) for minority groups that qualify for this description)'' in § 120.862(b) to ''socially and economically disadvantaged persons as defined in §§ 124.103–124.104 of these regulations.'' SBA no longer defines ''minority'' in its regulations, but instead references ''socially and economically disadvantaged persons'' in § 124.103 of its regulations. When Congress used the term ''minority'' in section 501(d)(3)(C) of the SBI Act (15 U.S.C. 695(d)(3)(C)), SBA equates that to ''socially and economically disadvantaged persons'' and that is the term SBA uses in § 120.862(b)(3). The cross-reference to §§ 124.103–.104 will provide the public a definition of ''socially and economically disadvantaged.'' SBA is amending the public policy goals in § 120.862(b) to reflect this change. This is consistent with § 124.101 of SBA's regulations which requires a small business to be ''unconditionally owned and controlled'' by one or more socially and economically disadvantaged individuals.

The Veterans Entrepreneurship and Small Business Development Act of 1999, Pub. L. 106–50, 113 Stat. 236 (August 17, 1999) added ''expansion of small business concerns owned and controlled by veterans as defined in Section 3(q) of the Small Business Act (15 U.S.C. 632(q)) especially service-disabled veterans, as defined in such section 3(q).'' Accordingly, SBA is adding businesses owned and controlled by veterans (especially service-disabled veterans) to the public policy goal set forth in § 120.862(b)(3) in order to comply with this 1999 statute.

Section 303 of the 2000 Act increases the maximum amount the SBA may guarantee to a single identifiable small business concern borrower under the 504 program from $750,000 to $1 million. The provision also increases from $1 million to $1.3 million the maximum amount of loans that meet the criteria of 15 U.S.C. 695(d)(3), expressed as the public policy goals provided in proposed § 120.862(b). SBA is making these changes in § 120.931.

Section 305 of the 2000 Act makes permanent the Premier Certified Lenders Program (PCLP), formerly a pilot program. SBA is amending § 120.845 to reflect this statutory change. SBA will issue a proposed rule in the near future setting forth requirements for CDCs desiring to participate in PCLP.

Section 306 of the 2000 Act amends Section 508 of the SBI Act (15 U.S.C. 697e), which relates to SBA's Premier Certified Lenders Program (PCLP). Section 306 requires that, if upon default in repayment, SBA acquires a loan guaranteed under this section (a PCLP loan) and identifies such loan for inclusion in a bulk asset sale of defaulted or repurchased loans or other financings, it shall give prior notice to any CDC which has a contingent liability under this section. Under SBA regulations, only a Premier CDC can make a PCLP loan and its contingent liability relates to its responsibility to reimburse SBA for 10 percent of any loss SBA incurs with respect to the PCLP loan. Thus, SBA makes clear in § 120.545(f) that section 306 only requires SBA to give notice to a Premier CDC which has a contingent liability with respect to a PCLP loan SBA intends to include in a bulk asset sale.

Section 306 requires that SBA give notice to the Premier CDC as soon as possible after the financing is identified, but not less than 90 days before the date SBA first makes any records on such financing available for examination by prospective purchasers prior to its offering in a package of loans for bulk sale. SBA is adding a new § 120.545(f) adding this requirement.

Compliance With Executive Orders 13132, 12988, and 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Paperwork Reduction Act (44 U.S.C., Ch. 35)

This regulation 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, for the purposes of Executive Order 13132, SBA determines that this direct final rule has no federalism implications warranting preparation of a federalism assessment.

The Office of Management and Budget (OMB) has determined that this rule does not constitute a ''significant regulatory action'' under section 3(f) of Executive Order 12866.

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

SBA has determined that this direct final 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. Most of the provisions of the rule simply conform the rule to statutory provisions amending the SBA 7(a) and CDC lending programs. This rule imposes no new requirements on these small entities.

SBA has determined that this direct final rule does not impose additional reporting or recordkeeping requirements under the Paperwork Reduction Act, 44 U.S.C., chapter 35.

List of Subjects in 13 CFR Part 120

Loan programs—business, Small businesses.

For the reasons set forth above, SBA is amending 13 CFR part 120 as follows:

1. The authority citation for part 120 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(a) and (h), 696(3), and 697(a)(2).

2. Revise § 120.131 to read as follows:

§ 120.131 Leasing part of new construction or existing building to another business.

(a) If the SBA financing (whether 7(a) or 504) is for the construction of a new building, a Borrower may lease short term up to 33 percent of the Rentable Property to one or more tenants if the Borrower permanently occupies and uses no less than 67 percent of the Rentable Property, plans to permanently occupy and use within three years some of the space leased short term and plans to permanently occupy and use within ten years all of the space leased short term. If the Borrower is an Eligible Passive Company which leases 100 percent of new building's space to one or more Operating Companies, the Operating Company, or Operating Companies together, must follow the same rules set forth in this paragraph.

(b) If the SBA financing (whether 7(a) or 504) is for the construction of a new building, a Borrower may lease long term up to 20 percent of the Rentable Property to one or more tenants if the

Borrower permanently occupies and uses no less than 60 percent of the Rentable Property, plans to permanently occupy and use within three years some of the remaining space not immediately occupied and not leased long term, and plans to permanently occupy and use within ten years all of the remaining space not leased long term. If the Borrower is an Eligible Passive Company which leases 100 percent of the new building's space to one or more Operating Companies, the Operating Company, or Operating Companies together, must follow the same rules set forth in this paragraph.

(c) If the SBA financing (whether 7(a) or 504) is for the acquisition, renovation, or reconstruction of an existing building, the Borrower may lease up to 49 percent of the Rentable Property long term if the Borrower permanently occupies and uses no less than 51 percent of the Rentable Property. If the Borrower is an Eligible Passive Company which leases 100 percent of the space of the existing building to one or more Operating Companies, the Operating Company, or Operating Companies together, must follow the same rules set forth in this paragraph.

3. Remove the first sentence of § 120.151 and all in its place two new sentences to read as follows:

§ 120.151 What is the statutory limit for total loans to a Borrower?

The aggregate amount of the SBA portions of all loans to a single Borrower, including the Borrower's affiliates as defined in § 121.103 of this chapter, must not exceed a guaranty amount of $1,000,000, except as otherwise authorized by statute for a specific program. SBA is authorized to guarantee portions of loans with a gross loan amount of $2,000,000 or less.

* * * * *

4. Revise the third and fourth sentences of § 120.210 to read as follows:

§ 120.210 What percentage of a loan may SBA guarantee?

* * * * *

Effective December 21, 2000, loans up to $150,000 may receive a maximum guaranty of 85 percent. Loans more than $150,000 may receive a maximum guaranty of 75 percent, except as otherwise authorized by law.

5. Amend § 120.220 by adding an introductory paragraph, redesignating paragraphs (b) and (c) as (e) and (f), removing the chart in paragraph (a), revising paragraph (a), and adding new paragraphs (b), (c), and (d) to read as follows:

§ 120.220 Fees that Lender pays SBA.

A Lender must pay a guaranty fee to SBA for each loan it makes. Payment of the guaranty fee by the Lender when due to SBA is a prerequisite for SBA's guaranty. Nonpayment of a guaranty fee relieves SBA of liability in the event of loan default. Acceptance of the guaranty fee by SBA does not waive any right of SBA arising from a Lender's negligence, misconduct or violation of any provision of this part, the guaranty agreement, or the loan authorization.

(a) *Amount of guaranty fee.* For a loan with a maturity of twelve (12) months or less, the guaranty fee which the Lender must pay to SBA is one-quarter (¼) of one percent of the guaranteed portion of the loan. For a loan with a maturity of more than twelve (12) months, the guaranty fee is:

(1) 2 percent of the guaranteed portion of the loan if the total amount of the loan is not more than $150,000,

(2) 3 percent of the guaranteed portion of a loan if the total amount is more than $150,000 but not more than $700,000, and

(3) 3.5 percent of the guaranteed portion of a loan if the total amount is more than $700,000.

(b) *When the guaranty fee is payable.* For a loan with a maturity of twelve (12) months or less, the Lender must pay the guaranty fee to SBA with its application for a guaranty. The Lender may charge the Borrower for the fee when the loan is approved by SBA. For a loan with a maturity in excess of twelve (12) months, the lender must pay the guaranty fee to SBA within 90 days after SBA gives its loan approval. The Lender may charge the Borrower for the fee after the Lender has made the first disbursement of the loan. The Borrower may use the loan proceeds to pay the guaranty fee. However, the first disbursement must not be made solely or primarily to pay the guaranty fee.

(c) *Refund of guaranty fee.* For a loan with a maturity of twelve (12) months or less, SBA will refund the guaranty fee if the loan application is withdrawn prior to approval by SBA; if the SBA declines to guarantee the loan; or if SBA changes the Lender's loan terms and then approves the loan, but SBA's modified terms are unacceptable to the Lender. In that case, the Lender must request a refund in writing within 30 calendar days of SBA's approval. For a loan with a maturity of more than twelve (12) months, SBA will refund the guaranty fee if the Lender has not made any disbursement and the lender requests in writing the refund and cancellation of the SBA guaranty.

(d) *Lender's retention of portion of guaranty fee.* With respect to a loan with a maturity of more than twelve (12) months, where the total loan amount is no more than $150,000, a Lender may retain not more than 25 percent of the guaranty fee (50 basis points).

* * * * *

6. Add a new § 120.223 to subpart B to read as follows:

§ 120.223 Prepayment penalty fee payable to SBA by Borrower.

With respect to an SBA guaranteed loan which has a maturity of not less than 15 years, when, during the first three years after the first disbursement of a loan, borrower makes a voluntary prepayment (or several prepayments in the aggregate) in any calendar year which is more than 25 percent of the outstanding balance of the loan, the following prepayment penalty fees apply:

(a) If the prepayment is made during the first year after first disbursement, the charge is 5% of the total amount of the prepayment;

(b) If the prepayment is made during the second year after first disbursement, the charge is 3 percent of the total amount of the prepayment; and

(c) If the prepayment is made during the third year after first disbursement, the charge is 1 percent of the total amount of the prepayment.

7. Revise § 120.613(b) to read as follows:

§ 120.613 Secondary Participation Guarantee Agreement.

* * * * *

(b) Except for export working capital loans, disburse to the Borrower the full amount of the loan; and

* * * * *

8. Revise the first sentence of the introductory paragraph of § 120.845 and remove paragraph (h) to read as follows:

§ 120.845 Premier Certified Lenders Program (PCLP).

The SBA may designate a CDC a Premier Certified Lender (''Premier CDC''), and authorize it to approve, close, service, foreclose, litigate, and liquidate 504 loans subject to SBA regulations, procedures, and policies.

* * *

* * * * *

9. Revise § 120.862(b)(3) to read as follows:

§ 120.862 Other economic development objectives.

* * * * *

(b) * * *

(3) Expansion of small businesses owned and controlled by women, socially and economically

disadvantaged persons as defined in §§ 124.103 and 124.104 of this chapter, or veterans (especially service-disabled veterans) as defined in the Small Business Act (15 U.S.C. 632 (q)); * * *

10. Revise § 120.870(c) to read as follows:

§ 120.870 Leasing Project Property

* * * * *

(c) The leasing requirements for business loans in § 120.131 apply to 504 loans.

11. Revise § 120.931 to read as follows:

§ 120.931 What is the statutory limit for total loans to a Borrower?

The outstanding balance of all SBA financial assistance to a single Borrower, including the Borrower's affiliates as defined in § 121.103 of this chapter, must not exceed $1,000,000 ($1,300,000 if one or more of the public policy goals enumerated in § 120.862(b) applies to the project) except as otherwise authorized by statute for a specific program.

Dated: November 5, 2001.

Hector V. Barreto,

Administrator.

[FR Doc. 01–28371 Filed 11–13–01; 8:45 am]

BILLING CODE 8025–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Parts 11, 21, and 25

[Docket No. FAA–2001–8994; Amdt. Nos. 11–45, 21–77, 25–99]

RIN 2120–AF68

Type Certification Procedures for Changed Products

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; delay of compliance dates.

SUMMARY: The Federal Aviation Administration (FAA) is delaying the compliance date of a final rule that amends the procedural regulations for certifying changes to type certificated products. This delay will allow the FAA to address the complexities of production design changes by developing more guidance ensuring the uniform application of the rule by both FAA and other civil aviation authorities.

DATES: The mandatory compliance dates of the rule amending 14 CFR parts 11, 21, and 25 published at 65 FR 36244, June 7, 2000, are delayed until June 10, 2003.

FOR FURTHER INFORMATION CONTACT: Randall Petersen, Certification Procedures Branch (AIR–110), Aircraft Certification Services, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC 20591, telephone (202) 267–9583.

SUPPLEMENTARY INFORMATION:

Background

On June 7, 2000 (65 FR 36244), the type certification procedures for changed products final rule became effective. The FAA established a mandatory compliance date of December 10, 2001, for transport category airplanes and restricted category airplanes that have been certified using transport category standards; and a date of December 9, 2002, for all other category aircraft, engines, and propellers. The rule requires, among other things, that an applicant for a change to a type certificate must show the changed product complies with the certification requirements in effect on the date of application. (14 CFR 21.101(a)). The rule also states the applicant may show the changed product complies with an earlier amendment of a regulation if the Administrator determines the change is ''not-significant.'' (14 CFR 21.101(b)(1)). Specifically, in determining the appropriate certification basis for each design change requires an assessment against the automatic criteria of ''significant'' as stated in the rule, coupled with the Administrator's discretionary right to consider the extent of the changes and related revisions to the regulations. (14 CFR 21.101(b)(1)(i) and (ii)).

During the fifteen months since publishing the rule, FAA, Transport Canada Civil Aviation, European Joint Aviation Authorities, and industry developed guidance material in the form of an advisory circular, a draft FAA order, and related training materials. Over the last several months, the aviation industry has questioned the ability to standardize administrative procedures, raising a concern that implementation of the rule may not be uniform among the aviation manufacturing communities, both domestic and international. Based on this concern, FAA wants to ensure the implementation procedures for the rule provide for an equal and balanced application for all manufacturers, both domestic and international, and does not place an undue burden on FAA Aircraft Certification Offices and other civil aviation authorities.

To ensure a uniform application of this rule as it pertains to FAA's determination of ''significant'' and ''not-significant'' design changes, FAA is delaying implementing the rule for 18 months, until June 10, 2002, for all categories of aircraft, engines, and propellers. The consistency of implementation will require changes to the current training materials, the current advisory material, and developing harmonized policies and procedures between FAA and other civil aviation authorities. This delay will ensure that FAA and all civil aviation authorities and industry have sufficient guidance material, and the associated training, to implement the provisions of the rule in a consistent, uniform manner.

Since the delay in the mandatory compliance dates of the final rule does not impose any new requirements or any added burden on the regulated public, FAA finds that good cause exists for immediate adoption of the new mandatory compliance date without a 30-day notice.

Issued in Washington, DC, on November 7, 2001.

John J. Hickey,

Director, Aircraft Certification Service.

[FR Doc. 01–28498 Filed 11–13–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–20–AD; Amendment 39–12498; AD 2001–23–01]

RIN 2120–AA64

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

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment supersedes an existing airworthiness directive (AD), applicable to certain Boeing Model 737–600, –700, and –800 series airplanes, that currently requires repetitive inspections of certain elevator hinge plates, and corrective action, if necessary. That AD also provides for an optional replacement of the elevator hinge plates with new, improved hinge plates, which would end the repetitive inspections. This amendment requires accomplishment of the previously optional replacement of the elevator hinge plates with new, improved hinge plates, as terminating action for the repetitive inspections. The actions specified by this AD are intended to

prevent fatigue cracking of the elevator hinge plates, which could lead to the loss of the attachment of the elevator to the horizontal stabilizer, and consequent reduced controllability of the airplane. This action is intended to address the identified unsafe condition.

DATES: Effective December 19, 2001.

The incorporation by reference of certain publications listed in the regulations was approved previously by the Director of the Federal Register as of April 9, 2001 (66 FR 16116, March 23, 2001).

ADDRESSES: The service information referenced in this AD may be obtained from 2001–NM–20–AD. 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: Nancy Marsh, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2028; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION: A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) by superseding AD 2001–06–08, amendment 39–12155 (66 FR 16116, March 23, 2001); which is applicable to certain Boeing Model 737–600, –700, and –800 series airplanes; was published in the **Federal Register** on June 29, 2001 (66 FR 34591). The action proposed to continue to require repetitive inspections of certain elevator hinge plates, and corrective action, if necessary. That AD also provides for an optional replacement of the elevator hinge plates with new, improved hinge plates, which would end the repetitive inspections. This AD requires accomplishment of the previously optional replacement of the elevator hinge plates with new, improved hinge plates, as terminating action for the repetitive inspections.

Comment

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.

Extend Compliance Time

The commenter asks that the compliance time of ''Before the accumulation of 15,000 total flight cycles, or within 5 years since the airplane's date of manufacture, whichever occurs first,'' as specified in paragraph (b) of the proposed rule, be extended to whichever occurs later. The commenter states that this change will result in an acceptable level of safety, and allow operators to accomplish the work within existing maintenance visits.

The FAA does not agree with the commenter's request to extend the compliance time for the hinge replacement required by paragraph (b) of the final rule. With regard to extending the compliance time to allow the replacement to be accomplished within existing maintenance visits, we have considered factors such as operators' maintenance schedules in setting a compliance time for the required replacement. We have determined the compliance time specified in paragraph (b) of the final rule is an appropriate compliance time in which the replacement may be accomplished during scheduled airplane maintenance for the majority of affected operators. Since maintenance schedules vary from operator to operator, it would not be possible to guarantee that all affected airplanes could be modified during scheduled maintenance. Therefore, we find the compliance time represents the maximum time wherein the affected airplanes may continue to operate without compromising safety. No change to the final rule is necessary.

Conclusion

The FAA has determined that air safety and the public interest require the adoption of the rule as proposed.

Cost Impact

There are approximately 84 airplanes of the affected design in the worldwide fleet. The FAA estimates that 39 airplanes of U.S. registry will be affected by this AD.

The inspections that are currently required by AD 2001–06–08 take 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 the currently required actions on U.S. operators is estimated to be $9,360, or $240 per airplane, per inspection cycle.

The new replacement that is required by this AD action will take approximately 44 work hours per airplane to accomplish, at an average labor rate of $60 per work hour. Required parts will cost approximately $13,116 per airplane. Based on these figures, the cost impact of the requirements of this AD on U.S. operators is estimated to be $614,484, or $15,756 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. The cost impact figures discussed in AD rulemaking actions represent only the time necessary to perform the specific actions actually required by the AD. These figures typically do not include incidental costs, such as the time required to gain access and close up, planning time, or time necessitated by other administrative actions.

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 39–12155 (66 FR

16116, March 23, 2001), and by adding a new airworthiness directive (AD), amendment 39–12498, to read as follows:

2001–23–01 Boeing: Amendment 39–12498. Docket 2001–NM–20–AD. Supersedes AD 2001–06–08, Amendment 39–12155.

Applicability: Model 737–600, –700, and –800 series airplanes; line numbers 1 through 84 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 (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 prevent fatigue cracking of the elevator hinge plates, which could lead to the loss of the attachment of the elevator to the horizontal stabilizer, and consequent reduced controllability of the airplane, accomplish the following:

Restatement of Requirements of AD 2001–06–08

Inspections and Corrective Actions

(a) Prior to the accumulation of 7,000 total flight cycles or within 90 days after April 9, 2001 (the effective date of AD 2001–06–08), whichever occurs later, perform high frequency eddy current and detailed visual inspections of the hinge plate at elevator hinge 4, and a detailed visual inspection of the elevator hinge plate lugs (three locations) at elevator hinges 3, 5, 6, 7, and 8. Do these inspections per Part I of the Accomplishment Instructions of Boeing Service Bulletin 737–55–1067, dated October 19, 2000. Repeat the inspections thereafter no later than every 4,000 flight cycles, per the service bulletin, until paragraph (b) of this AD has been accomplished. If any cracking or unusual wear (*i.e.,* elongated holes, loose or missing nuts or bolts, or missing primer or finish) is found during any inspection per this paragraph, before further flight, replace the affected hinge plate with a new, improved hinge plate, and modify the elevator upper skin, the upper and lower hinge covers, and the upper and lower closure panels, as applicable, per the service bulletin, except as provided by paragraph (c) of this AD. Such replacement and modification ends the repetitive inspections for the replaced hinge plate.

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.''

New Requirements of This AD

Replacement of Hinge Plates

(b) Before the accumulation of 15,000 total flight cycles, or within 5 years since the airplane's date of manufacture, whichever occurs first: Replace the elevator hinge plates at hinges 3, 4, 5, 6, 7, and 8, with new, improved hinge plates; per Part II of the Accomplishment Instructions of Boeing Service Bulletin 737–55–1067, dated October 19, 2000, except as provided by paragraph (c) of this AD. The replacement includes modification of the elevator upper skin, the upper and lower hinge covers, and the upper and lower closure panels, as applicable. Doing this replacement ends the repetitive inspections required by this AD.

Exception to Service Bulletin Instructions: Wear Limits

(c) During the replacement of elevator hinge plates per paragraph (a) or (b) of this AD, where Boeing Service Bulletin 737–55–1067, dated October 19, 2000, specifies to contact Boeing for wear limits, before further flight, contact the Manager, Seattle Aircraft Certification Office (ACO), FAA, or a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings. For wear limits to be approved by the Manager, Seattle ACO, as required by this paragraph, the Manager's approval letter must specifically reference this AD.

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 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

(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) Except as provided by paragraph (c) of this AD, the actions shall be done in accordance with Boeing Service Bulletin 737–55–1067, dated October 19, 2000. This incorporation by reference was approved previously by the Director of the Federal Register as of April 9, 2001 (66 FR 16116, March 23, 2001). 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

(g) This amendment becomes effective on December 19, 2001.

Issued in Renton, Washington, on November 5, 2001.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–28295 Filed 11–13–01; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 117

[CGD01–01–195]

RIN 2115–AE47

Drawbridge Operation Regulations: New Rochelle Harbor, NY

AGENCY: Coast Guard, DOT.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing temporary regulations governing the operation of the Glen Island Bridge, mile 0.8, across the New Rochelle Harbor at New Rochelle, New York. This temporary final rule allows the bridge to remain in the closed position from 7 a.m. on November 26, 2001 through 5 p.m. on April 26, 2002. This action is necessary to facilitate electrical and mechanical repairs at the bridge.

DATES: This temporary final rule is effective from November 26, 2001 through April 26, 2002.

ADDRESSES: Documents as indicated in this preamble are available for inspection or copying at the First Coast Guard District Office, 408 Atlantic Avenue, Boston, Massachusetts, 02110, 7 a.m. to 3 p.m., Monday through Friday, except Federal holidays. The telephone number is (617) 223–8364.

FOR FURTHER INFORMATION CONTACT: Mr. Joe Schmied, Project Officer, First Coast Guard District, at (212) 668–7165.

SUPPLEMENTARY INFORMATION:

Regulatory History

Pursuant to 5 U.S.C. 553, a notice of proposed rulemaking (NPRM) was not published for this regulation. Good cause exists for not publishing a notice of proposed rulemaking (NPRM). This closure is not expected to have a

significant impact on navigation. Known waterway users have been notified of the closure date and none objected. Vessel traffic on New Rochelle Harbor, during the effective period of the rule, is comprised of recreational vessels only, which may use an alternate route to open water, while the bridge is in a closed position for repairs. Accordingly, an NPRM was considered unnecessary.

Moreover, the delay inherent in the NPRM process is considered contrary to the public interest. The existing electrical and mechanical equipment at the bridge was installed in 1927. The bridge owner can no longer satisfactorily maintain this equipment in reliable operable condition due to its age and the difficulty in obtaining replacement parts. The prompt commencement of the electrical and mechanical repairs is necessary to assure safe reliable operation of the bridge.

Background and Purpose

The Glen Island Bridge, mile 0.8, has a vertical clearance of 13 feet at mean high water and 20 feet at mean low water in the closed position. The current operating regulations listed at 33 CFR 117.802, require the bridge to open on signal; except that, from May 1 to October 31, midnight to 6 a.m., a two-hour advance notice is required for bridge openings and from November 1 through April 30, from 8 p.m. to 8 a.m., a twenty-four hours advance notice is required for bridge openings.

The bridge owner, Westchester Department of Public Works, requested a temporary change to the operating regulations governing the Glen Island Bridge to allow the bridge to remain in the closed position from 7 a.m. on November 26, 2001 through 5 p.m. on April 26, 2002, to facilitate electrical and mechanical repairs at the bridge.

New Rochelle Harbor is used exclusively by recreational vessels. All known recreational boating facilities and interested parties were contacted regarding this necessary closure for bridge maintenance. No objections were received. Additionally, vessels located upstream from this bridge have an alternate route to open water; therefore, this closure will not have a significant impact on vessel traffic. The Coast Guard believes this temporary final rule is reasonable and will satisfy both the needs of navigation and the bridge owner's maintenance schedule.

Regulatory Evaluation

This temporary final 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. It has not been reviewed by the Office of Management and Budget under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; Feb. 26, 1979). The Coast Guard expects the economic impact of this temporary final rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. This conclusion is based on the fact that the mariners can take an alternate route during this bridge closure.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601–612) we considered whether this temporary final rule would have a significant economic impact on a substantial number of small entities. ''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 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 conclusion is based on the fact that the mariners can take an alternate route during this bridge closure.

Collection of Information

This temporary final rule does not provide for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this temporary final rule in accordance with the principles and criteria contained in Executive Order 12612 and has determined that this temporary final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Environment

The Coast Guard considered the environmental impact of this temporary final rule and concluded that, under Section 2.B.2., Figure 2–1, paragraph (32)(e), of Commandant Instruction M16475.1C, this temporary final rule is categorically excluded from further environmental documentation because promulgation of changes to drawbridge regulations have been found not to have a significant effect on the environment. A written ''Categorical Exclusion Determination'' is not required for this temporary final rule.

Indian Tribal Governments

This final rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Energy Effects

We have analyzed this rule under Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a ''significant energy action'' under that order because it is not a ''significant regulatory action'' under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. It has not been designated by the Administrator of the Office of Information and Regulatory Affairs as a significant energy action. Therefore, it does not require a Statement of Energy Effects under Executive Order 13211.

List of Subjects in 33 CFR Part 117

Bridges.

Regulations

For the reasons set out in the preamble, the Coast Guard amends 33 CFR part 117 as follows:

PART 117—DRAWBRIDGE OPERATION REGULATIONS

1. The authority citation for part 117 continues to read as follows:

Authority: 33 U.S.C. 499; 49 CFR 1.46; 33 CFR 1.05–1(g); section 117.255 also issued under the authority of Pub. L. 102–587, 106 Stat. 5039.

2. From November 26, 2001, through April 26, 2002, in § 117.802, paragraph (a)(2) is suspended and paragraph (a)(3) is temporarily added to read as follows:

§ 117.802 New Rochelle Harbor.

(a) * * *

(3) The Glen Island Bridge need not open for the passage of vessel traffic from November 26, 2001, through April 26, 2002.

* * * * *

Dated: October 25, 2001.

G.N. Naccara,

Rear Admiral, U.S. Coast Guard, Commander, First Coast Guard District.

[FR Doc. 01–28370 Filed 11–13–01; 8:45 am]

BILLING CODE 4910–15–U

POSTAL SERVICE

39 CFR Part 111

Delivery of Mail to a Commercial Mail Receiving Agency

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: This final rule amends section D042.2.0 of the *Domestic Mail Manual* (DMM) by adding section D042.2.8 to provide procedures to identify when an office business center (OBC) or part of its operation is considered a commercial mail receiving agency (CMRA) for postal purposes.

EFFECTIVE DATE: December 14, 2001.

FOR FURTHER INFORMATION CONTACT: Denise Love, 703–292–3743.

SUPPLEMENTARY INFORMATION: On July 11, 2001, the Postal Service published in the **Federal Register** a proposed rule to add section D042.2.8 to the *Domestic Mail Manual* (66 FR 36224–362260). In order to accommodate requests for additional time, the Postal Service extended the comment period to September 17, 2001 (66 FR 40663–40664). The proposed rule provided procedures to identify when an office business center (OBC) (sometimes called corporate executive center) or part of its operation is considered a commercial mail receiving agency (CMRA), for postal purposes.

Background Summary

It is expected that this notice of proposed rulemaking (NPRM) will be the culmination of an effort by the Postal Service to update and clarify its standards concerning the delivery of mail to CMRAs. The Postal Service has long had rules applicable to CMRAs. Approximately 5 years ago, following reviews demonstrating confusion regarding some of the standards and noncompliance in some instances, the Postal Service reviewed the standards and provided useful clarifications and modifications consistent with changes in the nature of the industry and the needs of postal customers. The initial revisions were published in the **Federal Register** (64 FR 14385–14391) on March 25, 1999.

Traditional CMRAs provide, as a principal service, mail receipt services for their customers. Thus, they provide a mailing address and customers either pick up mail at an assigned ''private mailbox'' provided at the physical location of the CMRA, or they have the mail re-mailed to their actual address or another address they supply to the CMRA. The Postal Service has long required that individuals or businesses desiring the Postal Service to deliver their mail to a CMRA fill out a postal form (PS Form 1583, *Application for Delivery of Mail Through Agent*) authorizing delivery by the Postal Service. As part of this process, CMRAs have long been required to verify the party's identity. Additionally, CMRAs have also been required to register with their local Post Office. Among other things, the initial NPRM clarified these requirements. As part of its efforts, the Postal Service also updated PS Form 1583 and, for the first time, provided a standard ''registration'' form (PS Form 1583–A, *Application to Act as a Commercial Mail Receiving Agency*) for CMRAs.

The initial NPRM (64 FR 14385–14391), along with modifications that followed, addressed other issues. For example, based on privacy concerns expressed by some customers, particularly those working out of their homes and domestic violence victims, the Postal Service modified existing rules to limit the release of information (65 FR 3857–3859). The Postal Service also clarified the responsibility of CMRAs to re-mail mail addressed to former clients, significantly reducing the length of that obligation. The Postal Service also adopted addressing standards for CMRA addresses; no specific postal standards previously existed. Nothing in CMRA regulations had prohibited CMRA customers from citing the ''PMB'' (private mailbox) number assigned by the CMRA as a ''suite,'' even though this may have led some correspondents to believe the CMRA customer to be located at a physical office at the CMRA street address. Under the new standard, CMRA customers are now given the option of using ''PMB'' or the alternative ''#'' sign to designate the private mailbox assigned by the CMRA.

As the Postal Service has become aware, CMRA-type services are now offered by businesses other than traditional CMRAs. These businesses may primarily offer services other than CMRA services, but as an additional business also offer CMRA services. For example, some firms offering storage units may also erect mailboxes and provide mail receipt services to some of their customers. The CMRA rules are applicable to all businesses that provide agent-mailing services to their customers, whether or not the ''CMRA'' label is used to describe the business. Customers of those businesses that receive CMRA-type services are required to follow the same procedures as CMRA customers.

An OBC is another type of business that may provide CMRA-type services to some customers. Generally, OBCs provide private office space for customers along with other business support services. However, some OBCs have customers who do not rent private office space, but only use the OBC for mail receipt (and sometimes other business support services as well). These customers may rent meeting rooms or offices from the OBC on an as-needed basis. Other customers may rent private office space on a part-time basis. These customers generally are not assigned a specific private office for their use, but are assigned to use one of the open private offices in the OBC when they choose to use their allotted time. Customers using private offices on a full- or part-time basis also receive mail at the OBC address. The policy of the Postal Service has long been that OBCs who offer and OBC customers who receive CMRA-type service should follow the same procedures as CMRAs and CMRA customers. However, the Postal Service had not published clear guidelines in this area. During its review of the CMRA standards, the Postal Service was asked to publish such guidelines.

Before formally proposing such rules, the Postal Service asked interested parties for their views. Some principles appear relatively clear. OBC customers who rent private office space on a full-time basis should not be considered CMRA customers. Although they do receive mail at the OBC address, that is incidental to their tenancy. In contrast, OBC customers who contract for mail and other business support services and are not physically located at the OBC address should be treated as CMRA customers. The difficult question is the treatment of OBC customers who contract for private office space on a part-time basis, for example, what part-time customers should be treated as CMRA customers for postal purposes? The Postal Service does not believe that all part-time customers should be considered CMRA customers. However, as the right to occupy space decreases, the Postal Service believes that, at some point, mail service becomes a primary service for the customer rather than incidental to occupancy of private office space.

The purpose of the Postal Service's rulemaking efforts concerning OBCs was to provide guidance when an OBC or a

part of its operation is considered a CMRA for the purpose of postal standards. During the discussions held before rules were formally proposed, interested parties suggested that the test be based on the existence of a right to occupy private office space at the OBC. The test also included the payment of a monthly fee of at least $125 for private office occupancy and a listing in the office directory, if available, and conference rooms and other business support services on demand. The Postal Service published this as a proposed test in the February 2, 2000, **Federal Register** (65 FR 4918). However, based on the comments received, many of which criticized the $125 test, the Postal Service determined to revise its NPRM. Again, the Postal Service discussed the issue with interested parties and an attempt was made to attain a consensus based on the number of private office hours for which the OBC customer contracted. Some parties wanted a relatively low number and others, a higher number. No consensus was reached. Accordingly, the Postal Service published a revised NPRM.

Discussion of Comments Received

Comments on the NPRM were due on or before August 10, 2001. At the request of a commenter representing the OBC industry (and echoed by several other commenters), the Postal Service reopened the public comment period with written comments due on or before September 17, 2001 (66 FR 40663–40664). The Postal Service received a total of 117 comments. Of the total comments, 64 were from individual owners or officers of OBCs, 41 from OBC customers, one from the OBC industry association, and one from a not-for-profit membership organization. These comments were largely identical in content and format, and generally opposed the NPRM asserting that OBC part-time customers should not be considered as CMRA customers. The Postal Service received 10 comments that generally opposed the NPRM asserting that exemption from CMRA rules should only be for those OBC customers that occupy private office space and physically conduct business at the address indicated. CMRA owners, franchisers, the CMRA industry association, a Member of Congress, and the National Association of Attorneys General, representing 48 states and the District of Columbia and Puerto Rico, submitted these comments. A number of comments also appeared to include views on the CMRA rules that were previously adopted. These comments are outside the scope of this NPRM.

As foreshadowed in some of the preproposal discussions described above, there was no dominant view expressed by the commenters. While all were critical of the NPRM to some extent, there was no consensus as to the preferred change. That is, some urged a test so that fewer OBC customers would be considered CMRA customers for postal purposes, while others urged a test so that more OBC customers would be considered CMRA customers. If anything, the NPRM appeared to constitute a middle ground among the commenters.

View—Fewer OBC Customers Considered as CMRA Customers

Commenters opposed to consideration of OBC customers as CMRA customers rely on the assertion that the North American Industry Classification System (NAICS) classifies the OBCs and CMRAs with different industry codes. They believe this defines the two as fundamentally different types of businesses. Also, some commenters suggested that, in economic terms, the Postal Service is attempting to bias competition in a market broader than mail receipt.

The Bureau of Census uses the NAICS in economic surveys to collect data about business activity. The NAICS separates businesses within a primary industrial activity and collects data on the number of establishments, employment, payroll, sales, receipts, or shipments within that segment.

The NPRM does not attempt to classify an OBC and a CMRA as the same type of business, nor does it classify all OBC customers as CMRA customers. Rather, the NPRM is based on the principal that persons receiving similar services should be treated in a similar manner under our standards, regardless of the label placed on the business providing the service.

One commenter stated that ''USPS initiated the extension of the CMRA regulations to OBC operations at the behest of the mail and package stores within the scope of its initial NPRM.'' The commenter also suggested that the purpose of the NPRM is to protect the competitive interests of CMRA stores, including the operations of the Postal Service subject to the CMRA regulations.

It is hardly surprising that comments from the OBC industry would seek to serve the economic interests of OBCs, just as it is no surprise that comments from the CMRA industry sought to protect its economic interests. There is nothing improper in this. Indeed, such comments are extremely useful to the rulemaking process by ensuring that the Postal Service understands the potential consequences of any rules. As the Postal Service has made clear throughout this rulemaking process, the final rules seek to balance numerous interests. These include both economic and consumer interests, represented by diverse parties such as individual postal customers and mailers, domestic violence victims, businesses of all sizes, OBCs, CMRAs, and law enforcement entities. No group has been favored in this process.

It is also important to note that, contrary to the apparent belief of these commenters, Post Office box service is not subject to CMRA regulations. However, the CMRA regulations were designed using current Post Office box regulations and are similar. Both sets of standards were designed to serve consumer protection interests. During the CMRA rulemaking process, we revisited the Post Office box regulations and made revisions to enhance protection for the American public.

Other commenters observed that they may change their agreements with OBCs from year to year and, under the 16-hour standard, might be considered OBC customers in some years and CMRA customers in others. They cited a concern that this might require new stationery in order for them to comply with addressing standards. That is not the case however, since they might use the alternative ''#'' sign to signify their secondary addresses in either instance.

One commenter asserted that, if his corporation were deemed a CMRA customer, the state would revoke its charter under state law. Questions concerning eligibility for state charters are a matter of state, not postal law, and the Postal Service has no wish to be involved in such decisions. States are certainly not required, or encouraged, to incorporate postal standards into their corporate laws. In this instance, the rules in issue are postal addressing standards that are intended to enable correspondents to determine if the sender is physically located at the address provided. The Postal Service does not take any position on whether a corporation considered as a CMRA customer for purposes of postal standards should be authorized to receive a charter under state laws. Rather, that question is one that should be decided by each state and its citizens.

View—More OBC Customers Considered as CMRA Customers

The Postal Service received a comment from a state government concerned that ''State anti-fraud efforts be permitted to coexist with the Postal Service's CMRA rules.'' The commenter asked the Postal Service to ''expressly

take a position that state laws that are more protective of consumers than the CMRA rules are not preempted.'' Questions as to whether postal statutes and regulations preempt state laws ultimately are legal issues for decision by appropriate courts. Except to the extent necessary to fulfill postal responsibilities, the Postal Service does not desire to interfere with state activities and understands that state statutes will not be held preempted by postal laws and regulations except to the extent that there is a conflict between them. *United States Postal Service* v. *Council of Greenburgh Civic Associations,* 453 U.S. 114 (1981); *United States* v. *City of Pittsburg, California,* 661 F.2d 783 (9th Cir. 1981). We expect these instances regarding state regulation of CMRAs to be rare. For instance, postal regulations provide that CMRA customers use one of these options as secondary address designations: ''PMB'' or the alternative ''#.'' If a state were to prescribe that customers subject to its rules use only one of these options, that would comply with postal standards. However, if the state were to prescribe that a third option be used (*e.g.* ''CMRA Box''), that would conflict with postal standards and should be preempted.

Some commenters who urged that more part-time OBC customers be treated as CMRA customers for postal purposes stated that the proposed rule places CMRAs and their customers at a competitive disadvantage. Several commenters pointed out that the 16-hour standard per month represents only 2 days (10 percent) of the standard 20-day work month, and that the rule does not require occupancy, only payment for the right of occupancy. The commenters assert that without standards requiring an actual and increased physical presence at the location, it was unlikely that individuals would be able to find the OBC customer at the address, even though their mailing address would imply a physical presence there. Given that, these commenters asserted that there would be little practical difference between these OBC customers and those at CMRAs. Some commenters also pointed out the potential danger that some customers seeking no more than mail service might be willing to contract for private office space with the OBC, even without any intent to occupy the space. Finally, one commenter also stated that the consequences of being considered a CMRA customer (rather than an OBC customer) for postal purposes are relatively light in any case.

There likely is merit to each of these points. The Postal Service recognizes the need to balance all interests here, including economic, consumer, and mailer concerns. Adopting occupancy standards and increasing the 16-hours standard, although likely to yield some consumer protection benefits, would likely impose additional costs on OBCs and their customers. The Postal Service believes it appropriate to err on the side of caution and has determined not to change these standards—with one exception. Section D042.2.8 (b)(2) has been revised to make clear that agreements for the right to private office space at an OBC must be made at an appropriate market rate for the location. This is intended to ensure that customers seeking CMRA-type service from an OBC cannot circumvent the intent of these standards by the inclusion, in their service agreements with the OBC, of a provision granting them the right to occupy office space for a nominal fee.

To minimize implementation costs for OBCs and their CMRA customers to comply with the adopted rules in section 2.8, 2.5 through 2.7, and all other applicable postal standards, the Postal Service has established the following timeline for compliance to the rules by the OBC and its CMRA customers:

1. OBCs with CMRA customers must complete Form 1583–A to register as a CMRA and submit it to their local postal delivery office within 30 days of the effective date of this rule;

2. OBC customers considered CMRA customers must complete Form 1583 and submit it to the OBC within 90 days of the effective date of this rule; and

3. The Postal Service is extending the deadline for compliance by OBC CMRA customers with section D042.2.6e, addressing standards, until November 1, 2002. This allows OBC CMRA customers to advise correspondents of their new address and to deplete existing stationery in the ordinary course of business. This timeline is similar to that established for CMRA customers after the earlier rulemakings.

For the reasons discussed above, the Postal Service hereby adopts the following amendments to the *Domestic Mail Manual*, which is incorporated by reference into the Code of Federal Regulations (see 39 CFR part 111.1).

List of Subjects in 39 CFR Part 111

Postal Service.

PART 111—[AMENDED]

1. The authority citation for 39 CFR part 111 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 404, 3001–3011, 3201–3219, 3403–3406, 3621, 5001.

2. The *Domestic Mail Manual* (DMM) is amended by revising module D to read as follows:

Domestic Mail Manual (DMM)

* * * * *

D Deposit, Collection, and Delivery

* * * * *

D000 Basic Information

* * * * *

D040 Delivery of Mail

* * * * *

D042 Conditions of Delivery

* * * * *

2.0—DELIVERY TO ADDRESSEE'S AGENT

[*Add new 2.8 to read as follows*]

2.8 OBC Acting as a CMRA

The procedures for an office business center (OBC) or part of its operation acting as a commercial mail-receiving agency (CMRA) for postal purposes are as follows:

a. An OBC is a business that operates primarily to provide private office facilities and other business support services to individuals or firms (customers). OBCs receive single point delivery. OBC customers that receive mail at the OBC address will be considered CMRA customers for postal purposes under the standards set forth in b. Parties considered CMRA customers under this provision must comply with the standards set forth in 2.5 through 2.7. An OBC must register as a CMRA by completing PS Form 1583–A, *Application to Act as a Commercial Mail Receiving Agency*, and comply with all other CMRA standards if one or more customers receiving mail through its address is considered a CMRA customer.

b. An OBC customer is considered to be a CMRA customer for postal purposes if its written agreement with the OBC provides for mail service only or mail and other business support services (without regard for occupancy or other services that the OBC might provide and bill separately). Additionally, an OBC customer receiving mail at the OBC address is considered to be a CMRA customer for postal purposes if each of the following is true:

(1) The customer's written agreement with the OBC does not provide for the full-time use of one or more of the

private offices within the OBC facility; and

(2) The customer's written agreement with the OBC does not provide all of the following:

(A) The use of one or more of the private offices within the facility for at least 16 hours per month at market rate for the location;

(B) Full-time receptionist service and live personal telephone answering service during normal business hours and voice mail service after hours;

(C) A listing in the office directory, if available, in the building in which the OBC is located; and

(D) Use of conference rooms and other business services on demand, such as secretarial services, word processing, administrative services, meeting planning, travel arrangements, and videoconferencing.

c. Notwithstanding any other standards, a customer whose written agreement provides for mail services only or mail and other business support services will not be considered an OBC customer (without regard for occupancy or other services that an OBC may provide and bill for on demand).

d. The Postal Service may request from the OBC copies of written agreements or any other documents or information needed to determine compliance with these standards. Failure to provide requested documents or information might be basis for suspending delivery service to the OBC under the procedures set forth in 2.6f through h.

* * * * *

Notice of issuance of the transmittal letter will be published in the **Federal Register** as provided by 39 CFR 111.3.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 01–28547 Filed 11–13–01; 8:45 am]

BILLING CODE 7710–12–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[TN–T5–2001–04; FRL–7103–2]

Clean Air Act Final Full Approval of Operating Permit Programs; Tennessee and Memphis-Shelby County

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final full approval.

SUMMARY: EPA is promulgating full approval of the operating permit programs of the Tennessee Department of Environment and Conservation and the Memphis-Shelby County Health Department. These programs were submitted in response to the directive in the 1990 Clean Air Act (CAA) Amendments that permitting authorities develop, and submit to EPA, programs for issuing operating permits to all major stationary sources and to certain other sources within the permitting authorities' jurisdiction. EPA granted interim approval to the Tennessee and Memphis-Shelby County operating permit programs on July 29, 1996. Tennessee and Memphis-Shelby County revised their programs to satisfy the conditions of the interim approval and EPA proposed full approval in the **Federal Register** on March 20, 2001. Because EPA received adverse comments on the proposed action, this action responds to those comments and promulgates final full approval of the Tennessee and Memphis-Shelby County operating permit programs.

EFFECTIVE DATE: November 30, 2001.

ADDRESSES: Copies of the Tennessee and Memphis-Shelby County submittals and other supporting documentation used in developing the final full approval are available for inspection during normal business hours at EPA Region 4, Air Planning Branch, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960. Interested persons wanting to examine these documents, which are contained in EPA docket file numbered TN–T5–2001–01, should make an appointment at least 48 hours before the visiting day.

FOR FURTHER INFORMATION CONTACT: Ms. Kim Pierce, Regional Title V Program Manager, Air Planning Branch, EPA, 61 Forsyth Street, SW, Atlanta, Georgia 30303–8960, (404) 562–9124, or *pierce.kim@epa.gov/*.

SUPPLEMENTARY INFORMATION: This section provides additional information by addressing the following questions:

What is the operating permit program?

Why is EPA taking this action?

What were the concerns raised by the commenters?

What is involved in this final action?

What is the effective date of EPA's full approval of the Tennessee and Memphis-Shelby County title V operating permit programs?

What Is the Operating Permit Program?

Title V of the CAA Amendments of 1990 required all state and local permitting authorities to develop operating permit programs that met certain federal criteria. In implementing the title V operating permit programs, the permitting authorities require certain sources of air pollution to obtain permits that contain all applicable requirements under the CAA. The focus of the operating permit program is to improve enforcement by issuing each source a permit that consolidates all of the applicable CAA requirements into a federally enforceable document. By consolidating all of the applicable requirements for a facility, the source, the public, and the permitting authorities can more easily determine what CAA requirements apply and how compliance with those requirements is determined.

Sources required to obtain an operating permit under the title V program include: ''major'' sources of air pollution and certain other sources specified in the CAA or in EPA's implementing regulations. For example, all sources regulated under the acid rain program, regardless of size, must obtain operating permits. Examples of major sources include those that have the potential to emit 100 tons per year or more of volatile organic compounds (VOCs), carbon monoxide, lead, sulfur dioxide, nitrogen oxides (NO_X), or particulate matter (PM_{10}); those that emit 10 tons per year of any single hazardous air pollutant (specifically listed under the CAA); or those that emit 25 tons per year or more of a combination of hazardous air pollutants (HAPs). In areas that are not meeting the National Ambient Air Quality Standards for ozone, carbon monoxide, or particulate matter, major sources are defined by the gravity of the nonattainment classification. For example, in ozone nonattainment areas classified as ''serious,'' major sources include those with the potential of emitting 50 tons per year or more of VOCs or NO_X.

Why Is EPA Taking This Action?

Where a title V operating permit program substantially, but not fully, met the criteria outlined in the implementing regulations codified at 40 Code of Federal Regulations (CFR) part 70, EPA granted interim approval contingent on the state revising its program to correct the deficiencies. Because the Tennessee and Memphis-Shelby County operating permit programs substantially, but not fully, met the requirements of part 70, EPA granted interim approval to each program in a rulemaking published on July 29, 1996 (61 FR 39335). The interim approval notice described the conditions that had to be met in order for the Tennessee and Memphis-Shelby County programs to receive full approval. Interim approval of these programs expires on December 1, 2001.

Tennessee and Memphis-Shelby County fulfilled the conditions of the interim approval and EPA published a direct final notice (66 FR 15680, March 20, 2001) to fully approve their operating permit programs. However, adverse comments were received in response to the companion proposal notice that was also published on March 20, 2001, so the direct final rule was withdrawn (see 66 FR 24061, May 11, 2001).

What Were the Concerns Raised by the Commenters?

EPA received three comment letters during the public comment period. The National Parks Conservation Association (NPCA) submitted two letters, dated April 19, 2001 and June 11, 2001. The Tennessee Valley Authority (TVA) also submitted a letter on June 11, 2001. Copies of these letters are included in the docket file maintained at the EPA Region 4 office.

1. Letter From NPCA Dated April 19, 2001.

In its April letter, NPCA raised five issues regarding EPA's proposed full approval of the Tennessee operating permit program. The first issue concerned EPA's failure to extend the public comment period for the proposed rulemaking published on March 20, 2001. During the initial 30-day public comment period, NPCA submitted a Freedom of Information Act request to EPA for information they believed to be necessary for their preparation of comments on the proposed action. Because NPCA did not receive all of the desired information until the last day of the public comment period, they requested an extension in order to review the information and prepare comments. In response to this request, EPA published a notice (66 FR 24084) on May 11, 2001, reopening the public comment period for an additional 30 days.

The second issue concerned EPA's incorrect identification, in the direct final notice published on March 20, 2001, of Paragraph 1200–3–20–.06(5) of the Tennessee Air Pollution Control Regulations as part of the federally approved Tennessee State Implementation Plan (SIP). Paragraph 1200–3–20–.06(5) states that ''[w]here violations are determined from properly certified and operating continuous emission monitors, no notice of violation(s) will be automatically issued unless the specified de minimis levels are exceeded.'' EPA concurs with NPCA's comment and clarifies in this action that Paragraph 1200–3–20–.06(5) is not part of the current Tennessee SIP.

As a third issue, NPCA further requested that if EPA ever acts to approve Paragraph 1200–3–20–.06(5) as part of the Tennessee SIP, then it should be confirmed that this rule does not excuse, provide an affirmative defense for, or automatically exempt any excess emissions. The NPCA maintained that Paragraph 1200–3–20–.06(5) should apply only to the State's SIP-approved obligation to automatically issue a notice of violation for excess emissions. These comments, however, fall outside the scope of this rulemaking because EPA is not taking action on Paragraph 1200–3–20–.06(5). Tennessee has submitted Paragraph 1200–3–20–.06(5) as a SIP revision and EPA will address NPCA's comments when it takes SIP rulemaking action.

The fourth issue raised by NPCA involved the inclusion of Paragraph 1200–3–20–.06(5) in Tennessee's title V operating permit program even though it had not been approved into the SIP. Part 70, however, only requires that program requirements be enforceable as a matter of state law, not that they be approved into the SIP prior to incorporation into a title V program. Moreover, since there are no federal requirements for including excess emissions regulations (such as Tennessee's Chapter 1200–3–20) in title V programs, the State sent a letter to EPA, dated October 16, 2001, voluntarily requesting that Chapter 1200–3–20 be withdrawn from its title V program. This action acknowledges withdrawal of Chapter 1200–3–20 from Tennessee's title V program. For the record, Memphis-Shelby County has never submitted its excess emissions rule to EPA for approval as part of the County's operating permit program.

As the fifth issue, NPCA further contended that Tennessee had used Paragraph 1200–3–20–.06(5) to undercut the enforceability of permit limits derived from applicable requirements. The NPCA cited a permit condition in the title V operating permit issued to the TVA Bull Run plant as an example of Tennessee's use of Paragraph 1200–3–20–.06(5) to weaken an opacity standard, and NPCA requested EPA to require that Tennessee withdraw Rule 1200–3–20–.06 from its operating permit program. As discussed above, the State sent a letter to EPA on October 16, 2001, voluntarily requesting that Chapter 1200–3–20 be withdrawn from its title V program. This action acknowledges the withdrawal.

Tennessee's withdrawal of Chapter 1200–3–20 from its operating permit program does not substantively affect the use of the permit language that NPCA believes is problematic. Specifically, NPCA is concerned about a provision in the TVA Bull Run title V permit stating that no automatic notice of violation shall be issued if the plant exceeds the applicable opacity standard for less than two percent of the total amount of time it operates in a calendar quarter. The permit condition further states that ''[w]ritten responses to the quarterly reports of excess emissions shall constitute *prima facie* evidence of compliance with the applicable visible emission standard.'' The NPCA believes that this permit condition not only limits the ability of EPA and citizens to enforce permit conditions independent of the State, but that it excuses periods of excess emissions of up to two percent of the operating time in a calendar quarter from being violations of the applicable 20 percent visible emission standard. Furthermore, NPCA believes that such a provision violates EPA's policy of not approving the use of ''director's discretion.''

EPA disagrees with NPCA's interpretations of the provision in the TVA Bull Run title V permit. The condition stating that ''no notice of violation shall be automatically issued * * *'' refers to the automatic issuance provision in Rule 1200–3–20–.06, which notifies the regulated community how Tennessee will proceed when it receives monitoring information demonstrating that a violation has occurred. Neither the permit term or the underlying regulation stipulate that the Director may excuse excess emissions. Paragraph 1200–3–20–.06(5) clearly states that ''Where the violations are determined from properly certified and operated continuous emission monitors, no notice of violation(s) will be automatically issued unless the specified de minimis emission levels are exceeded.'' The regulation stipulates that all excess emissions be viewed as violations of the applicable opacity standard. Such treatment is consistent with EPA's policy as articulated in the November 2, 1999, guidance memorandum entitled ''State Implementation Plans (SIPs): Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown.'' EPA does not believe that Tennessee can use the language in the TVA Bull Run permit, or in the underlying regulation, to excuse violations at the facility. Moreover, as stated previously, EPA is not taking action on Rule 1200–3–20–.06 in this rulemaking. EPA will, however, continue to monitor the State's use of Rule 1200–3–20–.06 in permits to ensure that violations are not excused.

Furthermore, EPA does not believe that the language in the TVA Bull Run permit regarding Tennessee's findings of compliance restricts the ability of EPA

and citizens under the CAA to independently enforce title V operating permit limitations and conditions, or to call into question the State's analyses. Tennessee is the primary enforcement authority of the title V operating permit program in the state, as evidenced by EPA's interim approval of the State's program (61 FR 39335, July 29, 1996) and this final full approval. Tennessee's properly conducted analysis of a facility's compliance status would be considered *prima facie* evidence of the facility's compliance status. Under the CAA, EPA or citizens may use direct emissions monitoring data generated by continuous emission monitors (CEMs), as well as any other credible evidence, to establish or support an independent effort to determine a facility's compliance status.

2. Letter From NPCA Dated June 11, 2001.

In the June letter, NPCA asserted that EPA cannot grant full approval to Tennessee's title V program because the State is allowed to exclude requirements from operating permits that should properly be considered applicable requirements. The NPCA cited Subparagraphs 1200–3–9–.02(11)(e)2(ii) and 1200–3–9–.02(11)(b)5 of the Tennessee Air Pollution Control Regulations as allowing the unlawful exemption of applicable requirements. However, Subparagraph 1200–3–9.02(11)(e)2(ii) is a verbatim incorporation of the federal requirements found in 40 CFR 70.6(b)(2) and EPA is not in a position to request that Tennessee make changes to a regulation that tracks the equivalent part 70 regulation. EPA encourages the commenter to provide input into any future federal rulemaking process on this issue.

Subparagraph 1200–3–9–.02(11)(b)5, on the other hand, incorporates additional language beyond the federal minimum requirements found in 40 CFR 70.2 for the definition of ''Applicable requirement.'' Tennessee's definition further specifies that ''terms and conditions that do not implement relevant requirements of the Federal Act'' are not considered applicable requirements, and NPCA believes that this language could be used to designate conditions from state operating permits as terms that are not federally enforceable. EPA concurs with NPCA that it is not clear why the State added this language. However, it is consistent with 40 CFR 70.6(b)(2) and Subparagraph 1200–3–9–.02(11)(e)2(ii), which specifies that ''* * * the Technical Secretary shall specifically designate as not being federally enforceable under the Federal Act any terms and conditions included in the permit that are not required under the Federal Act or under any of its applicable requirements.''

EPA does not agree with NPCA that the additional language in Subparagraph 1200–3–9–.02(11)(b)5, in combination with Tennessee's definition of ''Applicable requirements,'' gives the State authority to exclude requirements from operating permits that should be considered applicable requirements. As stated earlier, the intent of the title V operating permit program is the consolidation of all federal applicable requirements for a source in the operating permit. All federal requirements applicable to the source, such as national emissions standards for hazardous air pollutants, new source performance standards, and the applicable requirements of SIPs and permits issued pursuant to permit programs approved in the SIP [1], are federally enforceable by EPA and citizens under the CAA. If a state does not want a SIP provision or a condition from a permit issued pursuant to a SIP-approved program to be federally enforceable, it must take appropriate steps, in accordance with the substantive and procedural requirements in title I of the CAA, to remove those conditions from the SIP or the permit. If there is no such removal and the SIP provision or permit condition is not carried over to the title V operating permit, then that title V permit would be subject to an objection by EPA pursuant to 40 CFR 70.8(c).

As part of its oversight role, EPA has undertaken a detailed review of at least 10 percent of Tennessee's title V operating permits, and a cursory review of numerous other operating permits, prior to issuance by the State. During these reviews, EPA has not found evidence that the State is not including conditions from permits issued pursuant to SIP-approved programs in its title V operating permits. Moreover, no evidence was presented by NPCA of Tennessee's failure to adequately implement this requirement of the title V program. EPA does, however, agree that the additional language in Subparagraph 1200–3–9–.02(11)(b)5 could be misinterpreted, and will request that Tennessee make clarifications in a future rulemaking. EPA will also ensure that the State continues to include all applicable requirements in its title V operating permits.

3. Letter From TVA Dated June 11, 2001.

In its letter, TVA expressed support for EPA's full approval of the Tennessee and Memphis-Shelby County operating permit programs, as well as concern that the adverse comments submitted by NPCA also affected full approval of the Memphis-Shelby County program. Because NPCA's comments solely concerned Tennessee's program, TVA recommended that EPA immediately publish a notice fully approving the Memphis-Shelby County program and clarifying that the reopened public comment period only applied to the Tennessee program. EPA does not agree with TVA's conclusion.

Because Memphis-Shelby County incorporates the State's regulations, the comments received on the Tennessee operating permit program could have also applied to the County's program. Not only was EPA statutorily required to withdraw the direct final notice if any adverse comments were received, but the potential existed for NPCA's comments to have affected the Memphis-Shelby County program.

What Is Involved in This Final Action?

Based on analysis of the comments received, EPA has determined that the concerns raised do not constitute deficiencies in the Tennessee title V operating permit program. Tennessee and Memphis-Shelby County have fulfilled the conditions of the interim approval granted on July 29, 1996, and EPA is taking final action by this notice to fully approve their operating permit programs. EPA is also taking action to approve other program changes made by Tennessee since the interim approval was granted. For detailed information regarding the program revisions, please refer to the **Federal Register** notices published on March 20, 2001, and to the information contained in the docket files.

What Is the Effective Date of EPA's Full Approval of the Tennessee and Memphis-Shelby County Title V Operating Permit Programs?

EPA is using the good cause exception under the Administrative Procedure Act (APA) to make full approval of the Tennessee and Memphis-Shelby County operating permit programs effective on November 30, 2001. In relevant part, section 553(d) of the APA provides that publication of ''a substantive rule shall be made not less than 30 days before its effective date, except—* * * (3) as otherwise provided by the agency for good cause found and published with

[1] These programs include major and minor new source review (NSR), prevention of significant deterioration (PSD), and federally enforceable state operating permit (FESOP) programs.

the rule. Good cause may be supported by an agency determination that a delay in the effective date is ''impracticable, unnecessary, or contrary to the public interest.'' EPA believes that it is necessary and in the public interest to make this action effective sooner than 30 days following publication. In this case, EPA believes that it is in the public interest for full approval of the Tennessee and Memphis-Shelby County programs to take effect before December 1, 2001, which is the date that interim approval of these programs expires. In the absence of full approval taking effect before the interim approval expires, federal operating permit programs pursuant to 40 CFR part 71 would automatically take effect on December 1, 2001. Since these federal programs would remain in place until the effective date(s) of fully-approved Tennessee and Memphis-County programs, the resulting changes could cause confusion for sources and the public with regards to permitting obligations.

Furthermore, a delay in the effective date is not necessary because Tennessee and Memphis-Shelby County have been administering interim approved operating permit programs for more than five years. Through this action, EPA is approving a few revisions to the existing and currently operational programs. The change from an interim approved program, which substantially but not fully met the part 70 requirements, to a fully approved program is relatively minor, especially when compared to the differences between a state or local program and the federal program. In addition, since sources are already complying with the revisions in the Tennessee and Memphis-Shelby County programs as a matter of state and local law, there is little or no additional burden with complying with these requirements under fully-approved programs.

Administrative Requirements

A. Docket

Copies of the Tennessee and Memphis-Shelby County submittals and other supporting documentation used in developing the final full approval are contained in docket files maintained at the EPA Region 4 office. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this proposed full approval. The primary purposes of the docket are: (1) To allow interested parties a means to identify and locate documents so that they can effectively participate in the approval process, and (2) to serve as the record in case of judicial review. The docket files are available for public inspection at the location listed under the **ADDRESSES** section of this document.

B. Executive Order 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled ''Regulatory Planning and Review.''

C. Executive Order 13045

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 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 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 regulatory action as defined in Executive Order 12866, and it does not involve decisions intended to mitigate environmental health or safety risks.

D. Executive Order 13132

This rule does not have Federalism implications because it will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, ''Federalism'' (64 FR 43255, August 10, 1999). This rule merely approves existing requirements under state law, and does not alter the relationship or the distribution of power and responsibilities between the state and the federal government established in the CAA.

E. Executive Order 13175

This rule does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes, as specified by Executive Order 13175, ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 9, 2000).

F. Executive Order 13211

This rule is not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

G. Regulatory Flexibility Act

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

This rule will not have a significant impact on a substantial number of small entities because operating permit program approvals under section 502 of the CAA do not create any new requirements but simply approve requirements that the state is already imposing. Therefore, because this approval does not create any new requirements, I certify that this action will not have a significant economic impact on a substantial number of small entities.

H. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a federal mandate that may result in estimated costs to state, local, or tribal governments in the aggregate, or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action proposed does not include a federal mandate that may result in estimated costs of $100 million or more to either state, local, or tribal governments in the aggregate, or to the private sector. This federal action approves pre-existing requirements under state or local law, and imposes no new requirements. Accordingly, no additional costs to state, local, or tribal

governments, or to the private sector, result from this action.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use ''voluntary consensus standards'' (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

In reviewing operating permit programs, EPA's role is to approve state choices, provided that they meet the criteria of the CAA and EPA's regulations codified at 40 CFR part 70. In this context, in the absence of a prior existing requirement for the state to use VCS, EPA has no authority to disapprove an operating permit program for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews an operating permit program, to use VCS in place of an operating permit program that otherwise satisfies the provisions of the CAA. Thus, the requirements of section 12(d) of NTTAA do not apply.

J. Paperwork Reduction Act

This action will not impose any collection of information subject to the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, other than those previously approved and assigned OMB control number 2060–0243. For additional information concerning these requirements, see 40 CFR part 70. 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.

K. Submission to Congress and the Comptroller General

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

List of Subjects in 40 CFR Part 70

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

Authority: 42 U.S.C. 7401–7671q.

Dated: November 2, 2001.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

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

2. Appendix A to part 70 is amended by revising the entry for Tennessee to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits Programs

* * * * *

Tennessee

(a)(1) Tennessee Department of Environment and Conservation: submitted on November 10, 1994, and supplemented on December 5, 1994, August 8, 1995, January 17, 1996, January 30, 1996, February 13, 1996, April 9, 1996, June 4, 1996, June 12, 1996, July 3, 1996, and July 15, 1996; interim approval effective on August 28, 1996; interim approval expires on December 1, 2001.

(2) Revisions submitted on July 15, 1997, June 16, 1998, February 5, 1999, February 24, 1999, March 5, 1999, June 16, 1999, July 2, 1999, November 30, 1999, December 30, 1999, August 21, 2000, and October 16, 2001. The rule revisions contained in the February 5, 1999, February 24, 1999, March 5, 1999, June 16, 1999, and December 30, 1999, submittals adequately addressed the conditions of the interim approval effective on August 28, 1996, and which would expire on December 1, 2001. The State's operating permit program is hereby granted final full approval effective on November 30, 2001.

(b)(1) Chattanooga-Hamilton County Air Pollution Control Bureau: submitted on November 22, 1993, and supplemented on January 23, 1995, February 24, 1995, October 13, 1995, and March 14, 1996; full approval effective on April 25, 1996.

(2) [Reserved]

(c)(1) Knox County Department of Air Quality Management: submitted on November 12, 1993, and supplemented on August 24, 1994, January 6, 1995, January 19, 1995, February 6, 1995, May 23, 1995, September 18, 1995, September 25, 1995, and March 6, 1996; full approval effective on May 30, 1996.

(2) [Reserved]

(d)(1) Memphis-Shelby County Health Department: submitted on June 26, 1995, and supplemented on August 22, 1995, August 23, 1995, August 24, 1995, January 29, 1996, February 7, 1996, February 14, 1996, March 5, 1996, and April 10, 1996; interim approval effective on August 28, 1996; interim approval expires December 1, 2001.

(2) Revisions submitted on October 11, 1999 and May 2, 2000. The rule revisions contained in the May 2, 2000, submittal adequately addressed the conditions of the interim approval effective on August 28, 1996, and which would expire on December 1, 2001. The County's operating permit program is hereby granted final full approval effective on November 30, 2001.

(e)(1) Metropolitan Health Department of Nashville-Davidson County: submitted on November 13, 1993, and supplemented on April 19, 1994, September 27, 1994, December 28, 1994, and December 28, 1995; full approval effective on March 15, 1996.

(2) Revisions submitted on December 10, 1996, August 27, 1999, and December 6, 1999.

Revised approval effective on August 7, 2000.

* * * * *

[FR Doc. 01–28505 Filed 11–13–01; 8:45 am]

BILLING CODE 6560–50–P

Proposed Rules

Federal Register
Vol. 66, No. 220
Wednesday, November 14, 2001

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.

NUCLEAR REGULATORY COMMISSION

10 CFR Part 50

Standards for Combustible Gas Control System in Light-Water-Cooled Power Reactors

AGENCY: U.S. Nuclear Regulatory Commission.

ACTION: Availability of draft rule wording.

SUMMARY: The Nuclear Regulatory Commission (NRC) is making available the draft wording of a possible amendment of its regulations. The proposal would amend 10 CFR 50.44, ''Standards for combustible gas control system in light-water-cooled power reactors,'' and associated regulations based on experience gained from a fundamental reevaluation of the need for the regulation, the application of risk insights, and the incorporation of performance-based concepts, to the degree practicable. The proposed changes effectively ''rebaselines'' the existing regulation for current licensees and consolidates combustible gas control regulations for future applicants and licensees. The changes should reduce the regulatory burden for all applicants and licensees and improve the effectiveness of 10 CFR 50.44. Additional conforming changes to 10 CFR 50.34, 50.46, and 10 CFR part 52 are also identified. The availability of the draft wording is intended to inform stakeholders of the current status of the NRC staff's activities to amend 10 CFR 50.44 and to provide stakeholders the opportunity to comment on the draft changes. The NRC staff has also provided additional information within the body of the draft rule language which is bracketed (''[ ]'') to facilitate understanding of the staff's intent and the development of guidance for the proposed rule. As a result of the draft wording changes, certain technical specifications in the standard technical specifications can be deleted or modified. The NRC staff is also making the draft technical specification changes associated with the draft wording of 10 CFR 50.44 available for stakeholders comments. The draft changes to NUREGs 1430, 1431, 1432, 1433, and 1434 are attached.

DATES: Comments should be submitted by December 31, 2001. Any comments received after this date may not be considered during drafting of the proposed rule. Because of scheduling considerations in preparing a proposed rule, the NRC staff requests that stakeholders provide their comments at their earliest convenience before the end of the comment period, if practicable.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemakings and Adjudications Staff, Mail Stop O–16C1 or deliver written comments to One White Flint North, 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

You may also provide comments via the NRC's interactive rulemaking Web site through the NRC's home page at *http://ruleforum.llnl.gov.* This site provides the capability to upload comments as files (any format), if your web browser supports that function. For information about the interactive rulemaking Web site, contact Ms. Carol Gallagher at (301) 415–5905 or by e-mail to *cag@nrc.gov.* Copies of any comments received and certain documents related to this rulemaking may be examined at the NRC Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. The NRC maintains an Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. These documents may be accessed through the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/NRC/ADAMS/index.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by email to *pdr@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Anthony W. Markley, Risk-Informed Initiatives, Environmental, Decommissioning, and Rulemaking Branch, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001; Telephone: (301) 415–3165; Internet: *awm@nrc.gov.*

SUPPLEMENTARY INFORMATION: Since the Commission published a Policy Statement on the Use of Probabilistic Risk Assessment in 1995, the NRC staff's efforts to consider risk insights in the regulatory infrastructure have evolved over the years. In SECY–98–0300, dated December 23, 1998, under Option 3, the staff proposed to add provisions to Part 50 for risk-informed alternative regulations, revise existing requirements to reflect risk-informed considerations, and to remove unnecessary or ineffective regulations. In SECY–00–0198, dated September 14, 2000, the staff provided specific recommendations for risk-informed changes to 10 CFR 50.44. In a Staff Requirements Memorandum dated January 19, 2001, the Commission directed the staff to proceed with risk-informed revisions to 10 CFR 50.44. In SECY–01–0162, dated August 23, 2001, the NRC staff subsequently communicated to the Commission its recommended approach and discussed issues involving 10 CFR 50.44.

During the development of the Option 3 effort, Mr. Bob Christie of Performance Technology, Inc. submitted letters dated October 7 and November 9, 1999 that requested changes to the regulations in 10 CFR 50.44. These letters have been characterized as a petition for rulemaking and assigned the Docket No. PRM–50–68. The petition was published for comment in the **Federal Register** on January 12, 2000 (65 FR 1829). The issues associated with 10 CFR 50.44 which were raised by the petitioner were discussed in SECY–00–0198 and will be addressed in the proposed rulemaking.

The NRC also received a petition for rulemaking filed by the Nuclear Energy Institute. The petition was docketed on April 12, 2000, and has been assigned Docket No. PRM–50–71. The petition was published for comment in the **Federal Register** on May 30, 2000 (65 FR 34599). The petitioner requests that the NRC amend its regulations to allow nuclear power plant licensees to use zirconium-based cladding materials other than zircaloy or ZIRLO, provided the cladding materials meet the requirements for fuel cladding

performance and have received approval by the NRC staff. The petitioner believes the proposed amendment would improve the efficiency of the regulatory process by eliminating the need for individual licensees to obtain exemptions to use advanced cladding materials which have already been approved by the NRC. The issues associated with 10 CFR 50.44 which were raised by the petitioner will also be addressed in the proposed rulemaking.

The NRC has now developed draft wording for the changes to its regulations and has made them available on the NRC's rulemaking Web site at *http://ruleforum.llnl.gov.* This draft rule language is preliminary and may be incomplete in one or more respects. This draft rule language was released to inform stakeholders of the current status of the 10 CFR 50.44 update rulemaking and to provide stakeholders with an opportunity to comment on the draft revisions. Comments received prior to publishing the proposed rule will be considered in the development of the proposed rule. Comments may be provided through the rulemaking Web site at *http://ruleforum.llnl.gov* or by mail as indicated under the **ADDRESSES** heading. The NRC may post updates periodically on the rulemaking Web site that may be of interest to stakeholders.

Dated at Rockville, Maryland, this 29th day of October 2001.

For the Nuclear Regulatory Commission.

Cynthia A. Carpenter,

Chief, Risk-Informed Initiatives, Environmental, Decommissioning, and Rulemaking Branch, Division of Regulatory Improvement Programs, Office of Nuclear Reactor Regulation.

[FR Doc. 01–28398 Filed 11–13–01; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 72

RIN 3150–AG87

List of Approved Spent Fuel Storage Casks: FuelSolutions™ Revision

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations revising the BNFL Fuel Solutions (FuelSolutions™) cask system listing within the ''List of Approved Spent Fuel Storage Casks'' to include Amendment No. 2 to the Certificate of Compliance. Amendment No. 2 would modify the Technical Specifications (TS). The current TS require that if the W74 canister is required to be removed from its storage cask, then the canister must be returned to the spent fuel pool. The modified TS will allow the W74 canister to be placed in the transfer cask until the affected storage cask is repaired or replaced. The TS would also be modified to clarify the description of the other non-fissile material permitted to be stored in the W74 canister and to revise the temperatures to correspond to the liner thermocouples. Specific changes would be made to TS Tables 2.1–3 and 2.1–4; TS 3.3.2 and 3.3.3; and the bases for TS 3.3.2 and 3.3.3. No changes would be made to the conditions of the Certificate of Compliance.

DATES: Comments on the proposed rule must be received on or before December 14, 2001.

ADDRESSES: Submit comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attn: Rulemakings and Adjudications Staff.

Deliver comments to 11555 Rockville Pike, Rockville, MD, between 7:30 a.m. and 4:15 p.m. on Federal workdays.

Certain documents related to this rulemaking, as well as all public comments received on this rulemaking, may be viewed and downloaded electronically via the NRC's rulemaking Web site at *http://ruleforum.llnl.gov.* You may also provide comments via this web site by uploading comments as files (any format) if your web browser supports that function. For information about the interactive rulemaking site, contact Ms. Carol Gallagher, (301) 415–5905; e-mail *CAG@nrc.gov.*

Certain documents related to this rule, including comments received by the NRC, may be examined at the NRC Public Document Room, 11555 Rockville Pike, Rockville, MD. For more information, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Documents created or received at the NRC after November 1, 1999 are also available electronically at the NRC's Public Electronic Reading Room on the Internet at *http://www.nrc.gov/NRC/ADAMS/index.html.* From this site, the public can gain entry into the NRC's Agencywide Documents Access and Management System (ADAMS), which provides text and image files of NRC's public documents. An electronic copy of the proposed Certificate of Compliance (CoC) and preliminary safety evaluation report (SER) can be found under ADAMS Accession No. ML012680428. If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC PDR Reference staff at 1–800–397–4209, 301–415–4737or by e-mail to *pdr@nrc.gov.*

FOR FURTHER INFORMATION CONTACT: Merri Horn, telephone (301) 415–8126, e-mail, *mlh1@nrc.gov* of the Office of Nuclear Material Safety and Safeguards, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001.

SUPPLEMENTARY INFORMATION: For additional information see the direct final rule published in the final rules section of this **Federal Register**.

Procedural Background

This rule is limited to the changes contained in Amendment 2 to CoC No. 1026 and does not include other aspects of the FuelSolutions™ cask system design. The NRC is using the direct final rule procedure to issue this amendment because it represents a limited and routine change to an existing CoC that is expected to be noncontroversial. Adequate protection of public health and safety continues to be ensured.

Because NRC considers this action noncontroversial and routine, the proposed rule is being published concurrently with a direct final rule. The direct final rule will become effective on January 28, 2002. However, if the NRC receives significant adverse comments by December 14, 2001, then the NRC will publish a document that withdraws this action and will address the comments received in response to the proposed amendments published elsewhere in this issue of the **Federal Register**. A significant adverse comment is a comment where the commenter explains why the rule would be inappropriate, including challenges to the rule's underlying premise or approach, or would be ineffective or unacceptable without a change. A comment is adverse and significant if:

(1) The comment opposes the rule and provides a reason sufficient to require a substantive response in a notice-and-comment process. For example, in a substantive response:

(a) The comment causes the NRC staff to reevaluate (or reconsider) its position or conduct additional analysis;

(b) The comment raises an issue serious enough to warrant a substantive response to clarify or complete the record; or

(c) The comment raises a relevant issue that was not previously addressed or considered by the NRC staff.

(2) The comment proposes a change or an addition to the rule, and it is

apparent that the rule would be ineffective or unacceptable without incorporation of the change or addition.

(3) The comment causes the NRC staff to make a change to the CoC or TS.

These comments will be addressed in a subsequent final rule. The NRC will not initiate a second comment period on this action.

List of Subjects in 10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553, the NRC is proposing to adopt the following amendments to 10 CFR part 72.

PART 72—LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL AND HIGH-LEVEL RADIOACTIVE WASTE

1. The authority citation for Part 72 continues to read as follows:

Authority: Secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 68 Stat. 929, 930, 932, 933, 934, 935, 948, 953, 954, 955, as amended, sec. 234, 83 Stat. 444, as amended (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2282); sec. 274, Pub. L. 86–373, 73 Stat. 688, as amended (42 U.S.C. 2021); sec. 201, as amended, 202, 206, 88 Stat. 1242, as amended, 1244, 1246 (42 U.S.C. 5841, 5842, 5846); Pub. L. 95–601, sec. 10, 92 Stat. 2951 as amended by Pub. L. 102–486, sec. 7902, 106 Stat. 3123 (42 U.S.C. 5851); sec. 102, Pub. L. 91–190, 83 Stat. 853 (42 U.S.C. 4332); secs. 131, 132, 133, 135, 137, 141, Pub. L. 97–425, 96 Stat. 2229, 2230, 2232, 2241, sec. 148, Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168).

Section 72.44(g) also issued under secs. 142(b) and 148(c), (d), Pub. L. 100–203, 101 Stat. 1330–232, 1330–236 (42 U.S.C. 10162(b), 10168(c),(d)). Section 72.46 also issued under sec. 189, 68 Stat. 955 (42 U.S.C. 2239); sec. 134, Pub. L. 97–425, 96 Stat. 2230 (42 U.S.C. 10154). Section 72.96(d) also issued under sec. 145(g), Pub. L. 100–203, 101 Stat. 1330–235 (42 U.S.C. 10165(g)). Subpart J also issued under secs. 2(2), 2(15), 2(19), 117(a), 141(h), Pub. L. 97–425, 96 Stat. 2202, 2203, 2204, 2222, 2244, (42 U.S.C. 10101, 10137(a), 10161(h)). Subparts K and L are also issued under sec. 133, 98 Stat. 2230 (42 U.S.C. 10153) and sec. 218(a), 96 Stat. 2252 (42 U.S.C. 10198).

2. In § 72.214, Certificate of Compliance 1026 is revised to read as follows:

§ 72.214 List of approved spent fuel storage casks.

* * * * *

Certificate Number: 1026.

Initial Certificate Effective Date: February 15, 2001.

Amendment Number 1 Effective Date: May 14, 2001.

Amendment Number 2 Effective Date: January 28, 2002.

SAR Submitted by: BNFL Fuel Solutions.

SAR Title: Final Safety Analysis Report for the FuelSolutions™ Spent Fuel Management System.

Docket Number: 72–1026.

Certificate Expiration Date: February 15, 2021.

Model Number: WSNF–220, WSNF–221, and WSNF–223 systems; W–150 storage cask; W–100 transfer cask; and the W–21 and W–74 canisters.

* * * * *

Dated at Rockville, Maryland, this 25th day of October, 2001.

For the Nuclear Regulatory Commission.

William F. Kane,

Acting Executive Director for Operations.

[FR Doc. 01–28512 Filed 11–13–01; 8:45 am]

BILLING CODE 7590–01–P

DEFENSE NUCLEAR FACILITIES SAFETY BOARD

10 CFR Part 1707

Testimony by DNFSB Employees and Production of Official Records in Legal Proceedings

AGENCY: Defense Nuclear Facilities Safety Board (DNFSB).

ACTION: Proposed rule.

SUMMARY: The Defense Nuclear Facilities Safety Board (DNFSB) is issuing a proposed rule that sets forth procedures that requesters would have to follow when making demands or requests to a DNFSB employee to produce official records or information or to provide testimony relating to official information in connection with a legal proceeding in which the DNFSB is not a party. This proposed rule establishes procedures to respond to such demands and requests in an orderly and consistent manner. The rule, among other benefits, promotes uniformity in decisions, protects confidential information, provides guidance to requesters, and reduces the potential for both inappropriate disclosures of official information and wasteful allocation of agency resources.

DATES: Comments must be received on or before December 14, 2001.

ADDRESSES: Send comments to Richard A. Azzaro, General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

FOR FURTHER INFORMATION CONTACT: Richard A. Azzaro, General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901, telephone: 202–694–7062; FAX: 202–208–6518.

SUPPLEMENTARY INFORMATION:

Background

The Defense Nuclear Facilities Safety Board may receive subpoenas and requests for DNFSB employees to provide evidence in litigation in which the DNFSB is not a party. These subpoenas and requests may also be for DNFSB records that are not available to the public under the Freedom of Information Act. Also, DNFSB could receive subpoenas or requests for DNFSB employees to appear as witnesses in litigation in conjunction with a request for nonpublic records.

Responding to such demands and requests could divert DNFSB resources from their congressionally mandated functions. The proposed regulation will ensure a more efficient use of DNFSB resources, minimize the possibility of involving DNFSB in issues unrelated to its responsibilities, promote uniformity in responding to such requests and subpoenas, and maintain impartiality of DNFSB in matters that are in dispute between other parties. It also serves DNFSB's duty to protect sensitive, confidential, and privileged information and records.

Furthermore, responding to such demands and requests could also result in significant disruption in a DNFSB employee's work schedule. The result is that employees may be diverted from performing their official duties in order to respond to requests from parties in litigation. In order to address this problem, many agencies over the years have issued ''Touhy'' regulations that are similar to this proposed regulation, governing the circumstances and manner in which an employee may respond to demands for testimony or for the production of documents. Such a regulation was upheld by the United States *Supreme Court in United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

In Touhy, the Supreme Court held that a Department of Justice (DOJ) official, acting on order of the Attorney

General, could not be held in contempt for declining to produce records in response to a subpoena. The employee's refusal was based upon a DOJ regulation that prohibited disclosure of agency files, documents, records, or information without the express approval of the Attorney General. The Court upheld the validity of the DOJ regulation, reasoning that it was appropriate for the Attorney General to prescribe regulations not inconsistent with law for the custody, use, and preservation of records, papers, and property pertaining to the Department of Justice.

Briefly summarized, this proposed rule would prohibit disclosure of nonpublic official records or testimony by DNFSB employees unless authorization is provided pursuant to the rule (§§ 1707.201 and 1707.203). The proposed rule identifies the factors that DNFSB will consider in making determinations in response to such requests and what information requesters must provide (§§ 1707.202 and 1707.203). The proposed rule also specifies when the request should be submitted (§ 1707.203), the time period for review (§ 1707.205), potential fees (§ 1707.301), and, if a request is granted, any restrictions that may be placed on the disclosure of records or the appearance of a DNFSB employee as a witness (§§ 1707.207 and 1707.208). The charges for witnesses are the same as those provided by the Federal courts; and the fees related to production of records are the same as those charged under FOIA. The charges for time spent by an employee to prepare for testimony and for certification of records by DNFSB are authorized under 31 U.S.C. 9701, which permits an agency to charge for services or things of value that are provided by the agency.

The proposed rule applies to a broad range of matters in any legal proceeding in which DNFSB is not a named party. It also applies to former and current DNFSB employees (as well as DNFSB consultants and advisors). Former employees are prohibited from testifying about specific matters for which they had responsibility during their active employment unless permitted to testify as provided in the proposed rule. They would not be barred from appearing to testify about general matters unconnected with the specific matters for which they had responsibility.

The proposed DNFSB rule is internal to the agency, and is essentially procedural, not substantive. It would not create a right to obtain official records or the testimony of a DNFSB employee nor would it create any additional right or privilege not already available to DNFSB to deny any demand or request therefor. However, failure to comply with the procedures in the proposed rule would be a basis for denying a demand or request submitted to DNFSB.

Matters of Regulatory Procedure

Administrative Procedure Act

This rulemaking is in compliance with the Administrative Procedure Act (5 U.S.C. 553) and allows for a 30-day comment period. Interested persons are invited to submit written comments to DNFSB on this proposed regulation, to be received on or before December 14, 2001. The Defense Nuclear Facilities Safety Board will review all comments received and consider any modifications to this proposal which appear warranted in issuing its final rule.

Regulatory Flexibility Act

For purposes of the Regulatory Flexibility Act (5 U.S.C. chapter 6), the rule will not have a significant economic impact on a substantial number of small entities. The rule addresses only the procedures to be followed in the production or disclosure of DNFSB materials and information in litigation where DNFSB is not a party.

Accordingly, DNFSB has determined that a Regulatory Flexibility Analysis is not required.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. chapter 25, subchapter II), the proposed rule would not significantly or uniquely affect small governments and would not result in increased expenditures by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more (as adjusted for inflation).

Executive Order 12866

In issuing this regulation, the Defense Nuclear Facilities Safety Board has adhered to the regulatory philosophy and the applicable principles of regulation as set forth in section 1 of Executive Order 12866, Regulatory Planning and Review. This rule has not been reviewed by the Office of Management and Budget under that Executive Order since it is not a significant regulatory action within the meaning of the Executive Order.

Executive Order 12988

The Defense Nuclear Facilities Safety Board, has reviewed this regulation in light of section 3 of Executive Order 12988, Civil Justice Reform, and certifies that it meets the applicable standards provided therein.

Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. chapter 35) does not apply because this regulation does not contain information collection requirements that require approval by the Office of Management and Budget. The Defense Nuclear Facilities Safety Board expects the collection of information that is called for by the regulation would involve fewer than ten persons each year.

Congressional Review Act

The Defense Nuclear Facilities Safety Board has determined that this rulemaking does not involve a rule within the meaning of the Congressional Review Act (5 U.S.C. chapter 8).

List of Subjects in 10 CFR Part 1707

Administrative practice and procedure, Conflict of interests, Courts, Government employees, Records, Subpoenas, Testimony.

Approved: November 8, 2001.

John T. Conway,

Chairman, Defense Nuclear Facilities Safety Board.

Accordingly, for the reasons set forth in the preamble, the Defense Nuclear Facilities Safety Board propses to add a new part 1707 to 10 CFR to read as follows:

PART 1707—TESTIMONY BY DNFSB EMPLOYEES AND PRODUCTION OF OFFICIAL RECORDS IN LEGAL PROCEEDINGS

Subpart A—General Provisions

Sec.

1707.101 Scope and purpose.
1707.102 Applicability.
1707.103 Definitions.

Subpart B—Requests for Testimony and Production of Documents

1707.201 General prohibition.
1707.202 Factors DNFSB will consider.
1707.203 Filing requirements for demands or requests for documents or testimony.
1707.204 Service of subpoenas or requests.
1707.205 Processing demands or requests.
1707.206 Final determination.
1707.207 Restrictions that apply to testimony.
1707.208 Restrictions that apply to released records.
1707.209 Procedure when a decision is not made prior to the time a response is required.
1707.210 Procedure in the event of an adverse ruling.

Subpart C—Schedule of Fees

1707.301 Fees.

Subpart D—Penalties

1707.401 Penalties.

Authority: Enabling Statute of the Defense Nuclear Facilities Safety Board, 42 U.S.C. 2286b(c); 44 U.S.C. 3101–3107, 3301–3303a, 3308–3314.

Subpart A—General Provisions

§ 1707.101 Scope and purpose.

(a) This part sets forth policies and procedures you must follow when you submit a demand or request to an employee of the Defense Nuclear Facilities Safety Board (DNFSB) to produce official records and information, or provide testimony relating to official information, in connection with a legal proceeding. You must comply with these requirements when you request the release or disclosure of official records and information.

(b) The Defense Nuclear Facilities Safety Board intends these provisions to:

(1) Promote economy and efficiency in its programs and operations;

(2) Minimize the possibility of involving DNFSB in controversial issues not related to our functions;

(3) Maintain DNFSB's impartiality among private litigants where DNFSB is not a named party; and

(4) Protect sensitive, confidential information and the deliberative processes of DNFSB.

(c) In providing for these requirements, DNFSB does not waive the sovereign immunity of the United States.

(d) This part provides guidance for the internal operations of DNFSB. It does not create any right or benefit, substantive or procedural, that a party may rely upon in any legal proceeding against the United States.

§ 1707.102 Applicability.

This part applies to demands and requests to employees for factual, opinion, or expert testimony relating to official information, or for production of official records or information, in legal proceedings whether or not the United States or the DNFSB is a named party. However, it does not apply to:

(a) Demands upon or requests for a DNFSB employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of DNFSB;

(b) Demands upon or requests for a former DNFSB employee to testify as to matters in which the former employee was not directly or materially involved while at the DNFSB;

(c) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a; and

(d) Congressional demands and requests for testimony or records.

§ 1707.103 Definitions.

Demand means a subpoena, or an order or other demand of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of a DNFSB employee that is issued in a legal proceeding.

DNFSB means the Defense Nuclear Facilities Safety Board.

DNFSB employee or *employee* means:

(1) Any current or former officer or employee of DNFSB;

(2) Any contractor or contractor employee working on behalf of the DNFSB or who has performed services for DNFSB; and

(3) Any individual who is serving or has served in any advisory capacity to DNFSB, whether formal or informal.

(4) Provided, that this definition does not include persons who are no longer employed by DNFSB and who are retained or hired as expert witnesses or who agree to testify about general matters, matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with DNFSB.

General Counsel means the General Counsel of DNFSB or a person to whom the General Counsel has delegated authority under this part.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, administrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

Records or official records and information mean:

(1) All documents and materials which are DNFSB agency records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in DNFSB files; and

(3) All other information or materials acquired by a DNFSB employee in the performance of his or her official duties or because of his or her official status.

Request means any formal or informal request, by whatever method, for the production of records and information or for testimony which has not been demanded by a court or other competent authority.

Testimony means any written or oral statements, including but not limited to depositions, answers to interrogatories, affidavits, declarations, interviews, and statements made by an individual in connection with a legal proceeding.

Subpart B—Requests for Testimony and Production of Documents

§ 1707.201 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

§ 1707.202 Factors DNFSB will consider.

The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to a demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

(a) The purposes of this part are met;

(b) Allowing such testimony or production of records would be necessary to prevent a miscarriage of justice;

(c) DNFSB has an interest in the decision that may be rendered in the legal proceeding;

(d) Allowing such testimony or production of records would assist or hinder DNFSB in performing its statutory duties or use DNFSB resources where responding to the request will interfere with the ability of DNFSB employees to do their work;

(e) Allowing such testimony or production of records would be in the best interest of DNFSB or the United States;

(f) The records or testimony can be obtained from other sources;

(g) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose;

(h) Disclosure would violate a statute, executive order or regulation;

(i) Disclosure would reveal confidential, sensitive, or privileged information, trade secrets or similar, confidential commercial or financial information, or otherwise protected information, or would otherwise be inappropriate for release;

(j) Disclosure would impede or interfere with an ongoing law enforcement investigation or proceedings;

(k) Disclosure would compromise constitutional rights;

(l) Disclosure would result in DNFSB appearing to favor one litigant over another;

(m) Disclosure relates to documents that were produced by another agency;

(n) A substantial Government interest is implicated;

(o) The demand or request is within the authority of the party making it; and

(p) The demand or request is sufficiently specific to be answered.

§ 1707.203 Filing requirements for demands or requests for documents or testimony.

You must comply with the following requirements whenever you issue demands or requests to a DNFSB employee for official records, information, or testimony.

(a) Your request must be in writing and must be submitted to the General Counsel. If you serve a subpoena on DNFSB or a DNFSB employee before submitting a written request and receiving a final determination, DNFSB will oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(b) Your written request must contain the following information:

(1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved;

(2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance of the testimony, records, or information you seek from the DNFSB;

(3) A list of categories of records sought, a detailed description of how the information sought is relevant to the issues in the legal proceeding, and a specific description of the substance of the testimony or records sought;

(4) A statement as to how the need for the information outweighs the need to maintain any confidentiality of the information and outweighs the burden on DNFSB to produce the records or provide testimony;

(5) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a DNFSB employee, such as a retained expert;

(6) If testimony is requested, the intended use of the testimony, a general summary of the desired testimony, and a showing that no document could be provided and used in lieu of testimony;

(7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested records or testimony;

(8) The name, address, and telephone number of counsel to each party in the case; and

(9) An estimate of the amount of time that the requester and other parties will require with each DNFSB employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(c) The Defense Nuclear Facilities Safety Board reserves the right to require additional information to complete your request where appropriate.

(d) Your request should be submitted at least 45 days before the date that records or testimony is required. Requests submitted in less than 45 days before records or testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for expedited processing.

(e) Failure to cooperate in good faith to enable the General Counsel to make an informed decision may serve as the basis for a determination not to comply with your request.

§ 1707.204 Service of subpoenas or requests.

Subpoenas or requests for official records or information or testimony must be served on the General Counsel, Defense Nuclear Facilities Safety Board, 625 Indiana Avenue, NW., Suite 700, Washington, DC 20004–2901.

§ 1707.205 Processing demands or requests.

(a) After service of a demand or request to testify, the General Counsel will review the demand or request and, in accordance with the provisions of this subpart, determine whether, or under what conditions, to authorize the employee to testify on matters relating to official information and/or produce official records and information.

(b) The Defense Nuclear Facilities Safety Board will process requests in the order in which they are received. Absent exigent or unusual circumstances, DNFSB will respond within 45 days from the date that we receive it. The time for response will depend upon the scope of the request.

(c) The General Counsel may grant a waiver of any procedure described by this subpart where a waiver is considered necessary to promote a significant interest of the DNFSB or the United States or for other good cause.

§ 1707.206 Final determination.

The General Counsel makes the final determination on demands and requests to employees for production of official records and information or testimony. All final determinations are within the sole discretion of the General Counsel. The General Counsel will notify the requester and the court or other authority of the final determination, the reasons for the grant or denial of the demand or request, and any conditions that the General Counsel may impose on the release of records or information, or on the testimony of a DNFSB employee.

§ 1707.207 Restrictions that apply to testimony.

(a) The General Counsel may impose conditions or restrictions on the testimony of DNFSB employees including, for example, limiting the areas of testimony or requiring the requester and other parties to the legal proceeding to agree that the transcript of the testimony will be kept under seal or will only be used or made available in the particular legal proceeding for which testimony was requested. The General Counsel may also require a copy of the transcript of testimony at the requester's expense.

(b) The DNFSB may offer the employee's written declaration in lieu of testimony.

(c) If authorized to testify pursuant to this part, an employee may testify as to facts within his or her personal knowledge, but, unless specifically authorized to do so by the General Counsel, the employee shall not:

(1) Disclose classified, privileged, or otherwise protected information;

(2) Testify as an expert or opinion witness with regard to any matter arising out of the employee's official duties or the functions of DNFSB unless testimony is being given on behalf of the United States (see also 5 CFR 2635.805 for current employees).

§ 1707.208 Restrictions that apply to released records.

(a) The General Counsel may impose conditions or restrictions on the release of official records and information, including the requirement that parties to the proceeding obtain a protective order or execute a confidentiality agreement to limit access and any further disclosure. The terms of the protective order or of a confidentiality agreement must be acceptable to the General Counsel. In cases where protective orders or confidentiality agreements have already been executed, DNFSB may condition the release of official records and information on an amendment to the existing protective order or confidentiality agreement.

(b) If the General Counsel so determines, original DNFSB records may be presented for examination in response to a demand or request, but they are not to be presented as evidence or otherwise used in a manner by which they could lose their identity as official DNFSB records, nor are they to be marked or altered. In lieu of the original records, certified copies will be

presented for evidentiary purposes (see 28 U.S.C. 1733).

§ 1707.209 Procedure when a decision is not made prior to the time a response is required.

If a response to a demand or request is required before the General Counsel can make the determination referred to in § 1707.201, the General Counsel, when necessary, will provide the court or other competent authority with a copy of this part, inform the court or other competent authority that the demand or request is being reviewed, and seek a stay of the demand or request pending a final determination.

§ 1707.210 Procedure in the event of an adverse ruling.

If the court or other competent authority fails to stay the demand, the employee upon whom the demand is made, unless otherwise advised by the General Counsel, will appear at the stated time and place, produce a copy of this part, state that the employee has been advised by counsel not to provide the requested testimony or produce documents, and respectfully decline to comply with the demand, citing *United States ex rel. Touhy* v. *Ragen, 340 U.S. 462 (1951).* A written response may be offered to a request, or to a demand, if permitted by the court or other competent authority.

Subpart C—Schedule of Fees

§ 1707.301 Fees.

(a) *Generally.* The General Counsel may condition the production of records or appearance for testimony upon advance payment of a reasonable estimate of the costs to DNFSB.

(b) *Fees for records.* Fees for producing records will include fees for searching, reviewing, and duplicating records, costs of attorney time spent in reviewing the demand or request, and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. Costs for employee time will be calculated on the basis of the hourly pay of the employee (including all pay, allowance, and benefits). Fees for duplication will be the same as those charged by DNFSB in its Freedom of Information Act fee regulations at 10 CFR part 1703.

(c) *Witness fees.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) *Payment of fees.* You must pay witness fees for current DNFSB employees and any records certification fees by submitting to the General Counsel a check or money order for the appropriate amount made payable to the Treasury of the United States. In the case of testimony by former DNFSB employees, you must pay applicable fees directly to the former employee in accordance with 28 U.S.C. 1821 or other applicable statutes.

(e) *Certification (authentication) of copies of records.* The Defense Nuclear Facilities Safety Board may certify that records are true copies in order to facilitate their use as evidence. If you seek certification, you must request certified copies from DNFSB at least 45 days before the date they will be needed. The request should be sent to the General Counsel. You will be charged a certification fee of $15.00 for each document certified.

(f) *Waiver or reduction of fees.* The General Counsel, in his or her sole discretion, may, upon a showing of reasonable cause, waive or reduce any fees in connection with the testimony, production, or certification of records.

(g) *De minimis fees.* Fees will not be assessed if the total charge would be $10.00 or less.

Subpart D—Penalties

§ 1707.401 Penalties.

(a) An employee who discloses official records or information or gives testimony relating to official information, except as expressly authorized by DNFSB or as ordered by a Federal court after DNFSB has had the opportunity to be heard, may face the penalties provided in 18 U.S.C. 641 and other applicable laws. Additionally, former DNFSB employees are subject to the restrictions and penalties of 18 U.S.C. 207 and 216.

(b) A current DNFSB employee who testifies or produces official records and information in violation of this part shall be subject to disciplinary action.

[FR Doc. 01–28543 Filed 11–13–01; 8:45 am]

BILLING CODE 3670–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–CE–10–AD]

RIN 2120–AA64

Airworthiness Directives; SOCATA—Groupe AEROSPATIALE Model TBM 700 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes to adopt a new airworthiness directive (AD) that would apply to certain SOCATA—Groupe AEROSPATIALE (SOCATA) Model TBM 700 airplanes. This proposed AD would require you to install a new strainer draining system in the cabin fuselage. This proposed AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for France. The actions specified by this proposed AD are intended to prevent water from accumulating in the fuselage, then freezing and interfering with or causing the elevator controls to seize. This could result in loss of elevator control with consequent loss of airplane control.

DATES: The Federal Aviation Administration (FAA) must receive any comments on this proposed rule on or before December 12, 2001.

ADDRESSES: Submit comments to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2001–CE–10–AD, 901 Locust, Room 506, Kansas City, Missouri 64106. You may view any comments at this location between 8 a.m. and 4 p.m., Monday through Friday, except Federal holidays.

You may get service information that applies to this proposed AD from SOCATA-Groupe AEROSPATIALE, Customer Support, Aerodrome Tarbes-Ossun-Lourdes, BP 930–F65009 Tarbes Cedex, France; telephone: (33) (0)5.62.41.73.00; facsimile: (33) (0)5.62.41.76.54; or the Product Support Manager, SOCATA—Groupe AEROSPATIALE, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023; telephone: (954) 894–1160; facsimile: (954) 964–4191. You may also view this information at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106;

telephone: (816) 329–4146; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Comments Invited

How do I comment on this proposed AD? The FAA invites comments on this proposed rule. You may submit whatever written data, views, or arguments you choose. You need to include the rule's docket number and submit your comments to the address specified under the caption **ADDRESSES.** We will consider all comments received on or before the closing date. We may amend this proposed rule in light of comments received. Factual information that supports your ideas and suggestions is extremely helpful in evaluating the effectiveness of this proposed AD action and determining whether we need to take additional rulemaking action.

Are there any specific portions of this proposed AD I should pay attention to? The FAA specifically invites comments on the overall regulatory, economic, environmental, and energy aspects of this proposed rule that might suggest a need to modify the rule. You may view all comments we receive before and after the closing date of the rule in the Rules Docket. We will file a report in the Rules Docket that summarizes each contactwe have with the public that concerns the substantive parts of this proposed AD.

How can I be sure FAA receives my comment? If you want FAA to acknowledge the receipt of your comments, you must include a self-addressed, stamped postcard. On the postcard, write ''Comments to Docket No. ''2001–CE–10–AD.'' We will date stamp and mail the postcard back to you.

Discussion

What events have caused this proposed AD? The Direction Générale de l'Aviation Civile (DGAC), which is the airworthiness authority for France, recently notified FAA that an unsafe condition may exist on certain SOCATA Model TBM 700 airplanes. The DGAC reports an incident in which the elevator controls jammed on one of the affected airplanes.

Jamming of the elevator controls occurred because water accumulated in the fuselage and froze. Water had accumulated in the fuselage because the strainer and draining hole became clogged.

What are the consequences if the condition is not corrected? If this condition is not corrected, water may accumulate in the fuselage, freeze and interfere with or cause the elevator controls to seize. This could result in loss of elevator control.

Is there service information that applies to this subject? ocata has issued Service Bulletin SB 70–082 53, dated June 2000.

What are the provisions of this service information? The service bulletin includes procedures for installing a new strainer draining system in the cabin fuselage.

What action did DGAC take? The DGAC classified this service bulletin as mandatory and issued French AD 2000–373(A), dated October 18, 2000, in order to assure the continued airworthiness of these airplanes in France.

Was this in accordance with the bilateral airworthiness agreement? This airplane model is manufactured in France and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.29) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the DGAC has kept FAA informed of the situation described above.

The FAA's Determination and an Explanation of the Provisions of This Proposed AD

What has FAA decided? The FAA has examined the findings of the DGAC; reviewed all available information, including the service information referenced above; and determined that:

—The unsafe condition referenced in this document exists or could develop on other Socata Model TBM 700 airplanes of the same type design;

—The actions specified in the previously-referenced service information should be accomplished on the affected airplanes; and

—AD action should be taken in order to correct this unsafe condition.

What would this proposed AD require? This proposed AD would require you to incorporate the actions in the previously-referenced service bulletin.

Cost Impact

How many airplanes would this proposed AD impact? We estimate that this proposed AD affects 79 airplanes in the U.S. registry.

What would be the cost impact of this proposed AD on owners/operators of the affected airplanes? We estimate the following costs to accomplish this proposed modification:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2 workhours × $60 = $120	$114	$234	$18,486

Compliance Time of This Proposed AD

What would be the compliance time of this proposed AD? The compliance time of this proposed AD is ''within the next 3 months after the effective date of this AD''.

Why is the compliance time presented in calendar time instead of hours time-in-service (TIS)? Although water in the cabin fuselage could interfere with the elevator controls and become unsafe during flight, the condition is not a direct result of airplane operation. The chance of this situation occurring is the same for an airplane with 10 hours time-in-service (TIS) as it would be for an airplane with 500 hours TIS. A calendar time for compliance will assure that the unsafe condition is addressed on all airplanes in a reasonable time period.

Regulatory Impact

Would this proposed AD impact various entities? 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 proposed rule would not have federalism implications under Executive Order 13132.

Would this proposed AD involve a significant rule or regulatory action? For the reasons discussed above, I certify that this proposed 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) 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 has been placed 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, under 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. FAA amends § 39.13 by adding a new airworthiness directive (AD) to read as follows:

SOCATA—Groupe Aerospatiale: Docket No. 2001–CE–10AD

(a) *What airplanes are affected by this AD?* This AD affects Model TBM 700 airplanes, serial numbers 1 through 164, that are certificated in any category.

(b) *Who must comply with this AD?* Anyone who wishes to operate any of the above airplanes must comply with this AD.

(c) *What problem does this AD address?* The actions specified by this AD are intended to prevent water from accumulating in the fuselage, then freezing and interfering with or causing the elevator controls to seize. This could result in loss of elevator control with consequent loss of airplane control.

(d) *What actions must I accomplish to address this problem?* To address this problem, you must accomplish the following:

Actions	Compliance	Procedures
Incorporate Kit No. OPT70 K072–53	Within the next 3 months after the effective date of this AD, unless already accomplished.	In accordance with the Technical Instructions supplied with Kit No. OPT70 KO72–53, as specified in Socata. Service Bulletin SB 70–082 53, dated June 2000.

(e) *Can I comply with this AD in any other way?* You may use an alternative method of compliance or adjust the compliance time if:

(1) Your alternative method of compliance provides an equivalent level of safety; and

(2) The Manager, Small Airplane Directorate, approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Small Airplane Directorate.

Note 1: This AD applies to each airplane identified in paragraph (a) of this AD, 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) 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 you have not eliminated the unsafe condition, specific actions you propose to address it.

(f) *Where can I get information about any already-approved alternative methods of compliance?* Contact Karl Schletzbaum, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4146; facsimile: (816) 329–4090.

(g) *What if I need to fly the airplane to another location to comply with this AD?* The FAA can issue a special flight permit under sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate your airplane to a location where you can accomplish the requirements of this AD.

(h) *How do I get copies of the documents referenced in this AD?* You may get copies of the documents referenced in this AD from SOCATA-Groupe AEROSPATIALE, Customer Support, Aerodrome Tarbes-Ossun-Lourdes, BP 930—F65009 Tarbes Cedex, France; telephone: (33) (0)5.62.41.73.00; facsimile: (33) (0)5.62.41.76.54; or the Product Support Manager, SOCATA—Groupe AEROSPATIALE, North Perry Airport, 7501 Pembroke Road, Pembroke Pines, Florida 33023; telephone: (954) 894–1160; facsimile: (954) 964–4191. You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

Note 2: The subject of this AD is addressed in French AD 2000–373(A), dated October 18, 2000.

Issued in Kansas City, Missouri, on November 5, 2001.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 01–28420 Filed 11–13–01; 8:45 am]

BILLING CODE 4910–13–P

SOCIAL SECURITY ADMINISTRATION

20 CFR Part 404

[Regulations No. 4]

RIN 0960–AF28

Revised Medical Criteria for Evaluating Impairments of the Digestive System

AGENCY: Social Security Administration.

ACTION: Proposed rules.

SUMMARY: We are proposing to revise the criteria in the Listing of Impairments (the Listings) that we use to evaluate claims involving digestive impairments. We apply these criteria at step three of our sequential evaluation processes when you claim benefits based on disability under title II and title XVI of the Social Security Act (the Act). The proposed revisions will reflect advances in medical knowledge, treatment, and methods of evaluating digestive impairments. We also propose to remove listings that are redundant and only refer to other listings.

DATES: To be sure your comments are considered, we must receive them by January 14, 2002.

ADDRESSES: You may give us your comments by using: our Internet site facility (*i.e.,* Social Security Online) at *http://www.ssa.gov/regulations/index.htm,* e-mail to *regulations@ssa.gov,* telefax to (410) 966–2830 or by sending a letter to the Commissioner of Social Security, P.O. Box 17703, Baltimore, Maryland 21235–7703. You may also deliver them to the Office of Process and Innovation Management, Social Security Administration, L2109 West Low Rise Building, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, between 8 a.m. and 4 p.m. on regular business days. We post comments on our Internet site, or you may inspect them on regular business days by making arrangements with the contact person shown in this preamble.

A list of the sources we consulted when developing these proposed rules, *e.g.,* various medical texts and pertinent articles, will be posted on the above Internet site. The list is also available upon request by letter to the Office of Disability, Division of Medical & Vocational Policy, Social Security Administration, 3√A–8 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235, Attn: Cheryl Wrobel, or by email to Cheryl.Wrobel@SSA.gov. Electronic Version: The electronic file of this document is available on the date of

publication in the **Federal Register** on *http://www.access.gpo.gov/su_docs/aces/aces140.html.* It is also available on the Internet site for SSA (*i.e.,* Social Security Online): *http://www.ssa.gov/regulations/.* Electronic copies of the public comments on these proposed rules may also be found on this site.

FOR FURTHER INFORMATION CONTACT: Suzanne DiMarino, Social Insurance Specialist, Office of Process and Innovation Management, Social Security Administration, 2109 West Low Rise, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, (410) 965–1769 or TTY (410) 966–5609. For information on eligibility or filing for benefits, call our national toll-free number 1–800–772–1213 or TTY 1–800–325–0778, or visit our Internet web site, SSA Online, at *www.ssa.gov.*

SUPPLEMENTARY INFORMATION:

What Programs Would These Proposed Regulations Affect?

These proposed regulations would affect disability determinations and decisions we make for you under title II and title XVI of the Act. In addition, to the extent that Medicare and Medicaid eligibility are based on entitlement to benefits under title II and eligibility for benefits under title XVI, these proposed regulations would also affect the Medicare and Medicaid programs.

Who Can Get Disability Benefits?

Under title II of the Act, we provide for the payment of disability benefits if you are disabled and belong to one of the following three groups:

- Workers insured under the Act;
- Children of insured workers; and
- Widows, widowers, and surviving divorced spouses of insured individuals.

Under title XVI of the Act, we provide for Supplemental Security Income (SSI) payments on the basis of disability if you have limited income and resources.

How Do We Define Disability?

Under both the title II and title XVI programs, disability must be the result of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of at least 12 months. Our definitions of disability are shown in the following table:

If you file a claim under * * *	And you are * * *	Disability means you have a medically determinable impairment(s) that meets the statutory duration requirement and results in * * *
title II	an adult or child	the inability to do any substantial gainful activity (SGA).
title XVI	an adult	the inability to do any SGA.
title XVI	a child	marked and severe functional limitations.

What Are the Listings and How Do We Use Them?

The Listings, found in appendix 1 to subpart P of part 404 of our regulations, are examples of impairments for each of the major body systems that we consider severe enough to preclude you as an adult from performing any gainful activity, without further considering their functional impact or your age, education and work experience. If you are a child seeking SSI benefits based on disability, the listings describe impairments that we consider severe enough to result in marked and severe functional limitations. We generally use the criteria in the Listings only to make findings of disability. Although the Listings are found only in part 404 of our rules, we incorporate them into the SSI program under title XVI of the Act by § 416.925 of our regulations, and apply them to claims under both title II and title XVI of the Act.

There are listings for adults (part A) and for children (part B). We apply the medical criteria in part A when we assess your claim if you are an adult, *i.e.,* a person age 18 or over. If you are a child, we first use the criteria in part B. If the B criteria do not apply, and the specific disease process(es) has a similar effect on adults and children, we then use the criteria in part A.

Our regulations provide for sequential evaluation processes for evaluating disability. We apply the Listings at step three of the sequential evaluation processes for adults and for children. First, we must determine that you are not engaging in substantial gainful activity, and, second, that you have a medically determinable impairment or combination of impairments that is ''severe.''

Then, at step 3 of both processes, we use the Listings to determine if you have an impairment(s) that meets or equals in severity the criteria of a listed impairment.

Why Are We proposing To revise the Listings for Digestive Impairments?

We have reviewed the existing digestive listings and have determined they should be revised in light of medical advances in evaluation and treatment. We last published final rules revising the digestive listings in the **Federal Register** on December 6, 1985 (50 FR 50068). In the preamble to those rules, we said that due to medical advances in treatment and program experience, we would periodically review and update the Listings. The current listings for the digestive system will no longer be effective on July 2, 2003. We are now proposing to revise the listings in Part A, 5.00 and in Part B, 105.00. We are proposing to make the rules effective for five years from the effective date of the final rules we publish in the **Federal Register**, unless we extend them, or revise and issue them again.

We will continue to apply our current listings until we evaluate the public comments on these proposed rules and determine whether they should be issued as final rules. If we finalize these proposed rules, when any final rules become effective, we will apply them to new applications filed on or after the effective date of the final rules, and to cases that are pending in the administrative review process. In accordance with our usual practice, we would explain how we would apply any final rules in greater detail in the preamble to the final rules.

When we conduct reviews to determine whether your disability continues, we would not find that your disability has ended based only on any changes in the listings. Our regulations explain that we continue to use our prior listings when we review your case if you receive disability benefits or SSI payments based on our determination or decision that your impairment(s) met or equaled the listings. In these cases, we determine whether you have experienced medical improvement, and if so, whether the medical improvement is related to the ability to work. If your impairment(s) still meets or equals the same listing section that we used to make our most recent favorable determination or decision, we will find the medical improvement is not related to the ability to work. If your condition has medically improved so that you no longer meet or equal the prior listing, we evaluate your case further to determine whether you are currently disabled. We may find that you are

currently disabled, depending on the full circumstances of your case. See 20 CFR 404.1594(c)(3)(i), 416.994(b)(2)(iv)(A). If you are a child who is eligible for SSI payments, we follow a similar rule when we decide whether you have experienced medical improvement in your condition. 20 CFR 416.994a(b)(2).

What General Revisions Are We Proposing for the Digestive System Listings?

We propose to clarify the listing criteria and to make the listings easier to use by:

1. Replacing reference listings with guidance in the preface. Reference listings are listings that are met by satisfying the criteria of another listing. For example, you can meet current listing 5.03, Stricture, stenosis, or obstruction of the esophagus, with weight loss as described under listing 5.08. Current listing 5.08 requires weight loss to a specific amount due to any persisting gastrointestinal disorder. Therefore current listing 5.03 is redundant.

We also propose to provide general guidance in the preface to the listings (see Section 5.00E1) stating that digestive disorders resulting in impairments in other body systems should be evaluated under the affected body system. We propose to list the most commonly affected body systems.

2. Making nonsubstantive editorial changes to update the medical terminology in the Listings and to be consistent with plain language guidelines. Plain language regulations will make the content easier to understand.

We discuss other specific changes we propose to make in the listings below, in our detailed explanation of the proposed listings.

How Are We Proposing to Change the Preface to the Listings for Evaluating Digestive Impairments in Adults?

5.00 Digestive System

We propose to revise the preface to provide additional guidance for adjudicating digestive impairments, and to update the medical terminology. We also propose to remove references to disorders and complications of diseases that we no longer always consider to result in listing-level severity, *e.g.,* peptic ulcer disease, fistulae, abscesses, or recurrent obstructions.

The remaining relevant material in current section 5.00A is in proposed section 5.00A, while the relevant material in current 5.00B is updated and moved to proposed section 5.00F.

The relevant material in current section 5.00C is moved to proposed section 5.00A. We propose to remove that portion of current section 5.00C that deals with peptic ulcer disease because advances in diagnosis, evaluation and treatment of this impairment make the surgical interventions discussed in the current section (including gastrectomy, vagotomy and pyloroplasty) much less common.

Following is a detailed explanation, section-by-section, of the proposed revised preface material.

Proposed 5.00A—What Kind of Impairments Do We Consider in the Digestive System?

In this section, we propose to list examples of major digestive impairments reflected in the digestive listings. We propose to move the information about colostomy and ileostomy from current section 5.00C to proposed section 5.00A. as part of a general reorganization of the material.

The proposed rules continue to recognize that digestive impairments frequently respond to medical or surgical therapy. As a result, the severity of these disorders should generally be considered within the context of prescribed treatment.

Proposed 5.00B—What Documentation Do We Need?

In this new section, we propose to add examples of the types of clinical and laboratory findings that should be part of the longitudinal evidence. We also state that we usually need longitudinal evidence covering a period of at least 6 months of observations and treatment, unless we can make a fully favorable determination or decision without it. With advances in medication and treatment, favorable response to treatment may reduce the functional impact of digestive impairments. We believe the 6-month evidence period should allow sufficient time for your impairment to stabilize so we can make an accurate projection regarding its severity and duration. However, this does not prevent us from making a finding of disability before the 6-month period elapses, after considering all of the medical and other evidence. The rules we have proposed will provide us with flexibility to address situations in which your medical condition is so severe that we can determine before the 6-month period elapses that your impairment(s) will continue to be disabling for at least 12 months. One example would be under listing 5.02, recurrent gastrointestinal hemorrhage, if 3 distinct episodes are documented in less than 6 months. Another example would be an impairment that meets listing 5.09 Liver transplant, due to a traumatic event or previously unrecognized and untreated liver condition with little or no pre-surgical treatment documentation.

We also provide guidance on those situations when you have not received ongoing treatment or do not have an ongoing relationship with the medical community despite the existence of a severe impairment.

Proposed 5.00C—How Do We Evaluate Digestive Disorders Under Listings That Require Recurring or Persistent Findings?

We propose this new section to discuss the requirement for recurring or persistent findings in listings 5.02, 5.05, 5.06 and 5.08, and other considerations which allow us to make findings regarding continued impairment severity to satisfy the duration of disability requirement.

We also discuss the events and episodes needed to meet certain listings. There are no minimal periods of time for which an episode has to last, although for some listings, all incidents within a specified period will constitute one episode. The duration of an episode is controlled by the requirements that constitute an episode for a specific disorder. For example, the requirement for blood transfusion inherently implies that you must seek medical care that results in the appropriate clinical and laboratory evaluation to determine that transfusion is necessary.

The required number of recurrent episodes is specified in each listing. Listings 5.02, 5.06, 105.05A, and 105.06A are characterized by ''episodes.''

Listing 5.02 requires 3 episodes of gastrointestinal hemorrhage requiring at least two units of blood transfused per episode, occurring during a consecutive 6-month period. Listing 5.02 further qualifies that all incidents occurring within a consecutive 14-day period constitute one episode. Listing 5.06 and 105.06A require documentation of at least two episodes of abdominal pain, distention, and vomiting as a result of inflammatory bowel disease, which is documented as required in the listing. These episodes must occur during the consecutive 6-month period of persistent or recurrent intestinal obstruction that occurs despite prescribed treatment. Listing 105.05A requires 3 episodes of bleeding requiring transfusion due to hemodynamic instability, occurring over a consecutive 6-month period.

Section 5.00C2 and 105.00C2 explain: * * * In every listing in which we require more than one event, there must be at least 1 month between the events (unless otherwise specified), to ensure that we are evaluating separate episodes.''

Proposed 5.00D—How Do We Consider the Effects of Treatment?

We propose this new section to describe our policy on assessing the effects of treatment when we determine the severity and duration of the impairment.

Proposed 5.00E—How Do We Evaluate Impairments That Do Not Meet One of the Digestive Listings?

In this new section, we propose guidance for assessing digestive impairments that do not meet the digestive listings, but are accompanied by systemic manifestations in other body systems. For example, we site hepatic encephalopathy to explain that the resultant impairment should be evaluated under the affected body system. This replaces the criteria in current listing 5.05E, which states the impairment should be evaluated under the criteria in listing 12.02.

We also explain how evaluation of the impairment(s) will continue through the sequential evaluation process.

Proposed 5.00F—What Are Our Guidelines for Evaluating Specific Digestive Impairments?

We incorporated and revised the guidance in current 5.00B into this proposed section. We removed the discussion in current section 5.00B about a distinction between primary and secondary digestive disorders resulting in weight loss and malnutrition since the distinction is not necessary for adjudication. Rather, the weight loss must only be shown to be related to a digestive impairment. When a medically determinable impairment is established, we do not require that a direct connection with a specific etiology be determined. The wording in current 5.00B can be incorrectly interpreted to imply that we must determine that the digestive disorder is the primary or secondary cause of the weight loss. Since this is not necessary for our disability evaluation process, we propose to revise the section. If you have a digestive disorder that can reasonably be expected to lead to weight loss, or a treating source actually states that weight loss results from a specific digestive disorder, this is sufficient for our purposes.

We added an explanation of how to use the weight tables in Listing 5.08, when fractions of inches or centimeters in height measurements must be converted to specific table values.

We also propose to add a new section, 5.00F2, which describes how we evaluate chronic liver disease and resulting impairments, including liver transplants.

How Are We Proposing to Change the Criteria in the Listings for Evaluating Digestive Impairments in Adults?

5.01 Category of Impairments, Digestive System

Addition of new listing:

We propose to add a new listing, 5.09 Liver Transplant, in keeping with our other organ transplantation listings, *e.g.* heart transplant in listing 4.09 and kidney transplant in listing 6.02B.

Removal of redundant or reference listings:

We propose to remove several current listings because they are redundant. These four listings are all reference listings referring to listing 5.08:

- 5.03—Stricture, stenosis, or obstruction of the esophagus with weight loss,
- 5.04D—Peptic ulcer disease with weight loss,
- 5.06E—Chronic ulcerative or granulomatous colitis with weight loss, and
- 5.07D—Regional enteritis with weight loss.

We propose to remove listing 5.05E because it is a reference listing to 12.02. We propose to add language to the preface in 5.00E to refer to the appropriate body system that may be affected by a digestive impairment.

We propose to remove several listings or listing sections because there has been significant progress in medical technology and clinical experience related to the treatment of the digestive impairments that are contained in the current listings. Our program experience is that such advances in treatment mean that the criteria in some of the current listings are no longer appropriate indicators of listing-level severity. Many of these impairments can be controlled or resolved and thus are less likely to result in listing-level severity. Even if listing-level severity is initially present, the 12 month statutory duration requirement may no longer be met.

We propose to remove current listing 5.04, Peptic ulcer disease (demonstrated by X-ray or endoscopy), due to progress in evaluation and treatment.

Advances in medical and surgical management have made many complications from peptic ulcer disease such as recurrent ulceration (current listing 5.04A), fistula formation (current listing 5.04B) and recurrent obstruction (current listing 5.04C) less common. Treatment often results in significant improvement so that the criteria in these listings are no longer an appropriate indicator of listing-level severity. Therefore, we propose to remove all three current peptic ulcer disease listings.

We also propose to remove several of the chronic liver disease listings, listing 5.05, due to progress in treatment and other reasons as described:

- 5.05B—Chronic liver disease with performance of a shunt operation for esophageal varices. At the time this listing was written, only surgical shunts were available. Surgical shunts involve extensive abdominal surgery. They were not usually performed until your condition became serious enough to warrant undertaking the risks associated with prolonged surgery and anesthesia. Surgical shunts are now performed much less frequently. Clinical experience indicates that procedures such as the transjugular intrahepatic portal systemic shunt (TIPS), may be performed with minimal anesthesia and with fewer complications.

TIPS represents an advance in the medical management of portal hypertension and massive ascites. Indications for a TIPS procedure include bleeding esophageal varices or refractory ascites.

- 5.05C—Chronic liver disease with specific levels of serum bilirubin. Current listing 5.05C requires only a persistent elevated bilirubin level. We propose to delete this listing because a laboratory finding alone is not an accurate measure of your ability to function.
- 5.05F—Chronic liver disease with liver biopsy. This listing requires confirmation of chronic liver disease by a liver biopsy, with a specified clinical or laboratory finding. We propose to delete this listing because it does not necessarily characterize an impairment of listing-level severity. A liver biopsy, while confirming the presence of liver disease, does not correlate with any specific level of impairment severity or decrease in functional ability. The biopsy only confirms what may have been discovered with imaging and other laboratory evidence. The specific laboratory values in the listing also are not an accurate measure of the severity and duration of the impairment. Proposed listing 5.05 will replace many of the criteria in current 5.05 to reflect more accurately listing-level impairments related to chronic liver disease.

We also propose to remove current listing 5.06, Chronic ulcerative or

granulomatous colitis and current listing 5.07, Regional enteritis for the following reasons:

• 5.06A—Chronic ulcerative or granulomatous colitis with recurrent bloody stools documented on repeated examinations and anemia manifested by hematocrit of 30 percent or less.

Anemia, when caused by inflammatory bowel disease, is not an appropriate indicator of listing-level severity. Hematocrit level does not necessarily correlate with ability to function. A gradual reduction in hemoglobin, even to very low levels, is often well tolerated if you have normal cardiovascular and pulmonary systems.

• 5.06B and 5.07B—Persistent or recurrent systemic manifestations, such as arthritis, iritis, fever or liver dysfunction due to chronic ulcerative or granulomatous colitis or regional enteritis. These listings required only the presence of a systemic manifestation in another body system or organ, without regard to degree of severity of functional impact. These listings are not an appropriate indicator of listing-level severity.

• 5.06C and 5.07C—Intermittent obstruction due to intractable abscess, fistula formation or stenosis. Advances in surgical treatment have improved the management of these conditions, so that these listings are no longer an appropriate indicator of listing-level severity.

• 5.06D—Recurrence of findings of A, B, or C after total colectomy. We are proposing to remove this listing consistent with our proposal to remove listings 5.06A, B, and C.

We propose to combine the remainder of listings 5.06—Chronic ulcerative or granulomatous colitis, and 5.07—Regional enteritis, into one listing for inflammatory bowel disease (IBD) (proposed listing 5.06). IBD includes both ulcerative colitis and Crohn's disease. Crohn's disease includes regional enteritis. Crohn's disease may involve the entire gastrointestinal tract, but usually involves the small intestine or colon.

We also propose to remove current listing 5.08B, Weight loss due to any persisting gastrointestinal disorder, with weight equal to or less than the values specified in Table III or IV and one of the listed abnormal laboratory findings present on repeated examinations. This listing allowed a lesser level of weight loss than that required to meet listing 5.08A when accompanied by one of the additional listed findings. Those findings, however, do not correlate with any specific level of impairment severity or decrease of functional ability that would be an accurate indicator of listing-level severity.

The following is a detailed explanation of the proposed listing criteria.

Proposed Listing 5.02—Recurrent Gastrointestinal Hemorrhage

We propose to revise the severity criteria in this listing from anemia with a hematocrit level of 30 percent or less, to the requirement for at least 2 units of blood transfused per episode, with hemorrhages occurring at least three times during a consecutive six-month interval. A hematocrit level is not an appropriate indicator of the severity of gastrointestinal hemorrhage. It is the frequent recurrence of the hemorrhages and the cumulative effect on you that results in your inability to perform any gainful activity. We also propose to revise the source of gastrointestinal bleeding covered by this listing from ''upper gastrointestinal hemorrhage from undetermined cause'' to ''gastrointestinal hemorrhage from any cause.''

Since improvements in medical treatment may resolve the frequency of hemorrhages and thus the overall severity of the impairment, we propose that you may be considered to be under a disability for one year following the last documented hemorrhage. Thereafter, we will evaluate your residual impairment(s).

Proposed Listing 5.05—Chronic Liver Disease

We propose to replace current listing 5.05 with criteria that more accurately reflect listing-level severity.

We propose to remove ''portal, postnecrotic, or biliary cirrhosis'' in the current listing 5.05 and replace it with ''cirrhosis of any kind.'' We listed these kinds of cirrhosis as examples of chronic liver disease, but we did not intend that we must specify the kind of cirrhosis present. Removing the examples would clarify our intent. We also propose to remove ''Wilson's disease'' and ''chronic active hepatitis'' from the examples of chronic liver disease because hepatic impairment due to Wilson's disease and chronic active hepatitis is included in the revised term ''cirrhosis of any kind.''

We propose to revise listing 5.05A, esophageal varices, by defining our criteria for a massive hemorrhage. By providing a specific transfusion requirement, we intend to exclude minor variceal bleeding which would not be an indicator of listing-level severity.

Newer techniques in primary prevention and treatment of esophageal varices, *e.g.,* TIPS, banding, and sclerotherapy, have significantly improved the management of varices. Based on these advances, it is no longer appropriate to establish disability for 3 years as under current listing 5.05A, so we propose that you will be considered under a disability for one year following the last documented massive hemorrhage. Thereafter, we will evaluate your residual impairment(s).

We are proposing to change current listing 5.05D, ascites due to chronic liver disease, to 5.05B. We propose to clarify how the persistence of the ascites over 6 months must be demonstrated. We are revising the required time interval from 5 months of ascites to 6 months of ascites to be consistent with the other proposed digestive system listings. In our experience, requiring 6 months of persistent findings enables us to make a more reliable prediction of listing-level severity. We also require that evaluations be done at least two months apart within the six-month period to substantiate the chronic nature of the impairment, and to ensure that we are evaluating separate episodes.

The presence of sufficient ascitic fluid *requiring* frequent paracentesis indicates disease of listing-level severity. Under current listing 5.05D, if paracentesis was not performed, ascites sufficient to be detected on physical examination, along with hypoalbuminimia would fulfill these criteria. However, current imaging techniques are capable of identifying even minimal amounts of ascites before they could be detected on physical examination, which would not be an indicator of listing-level severity liver disease. We explain this in the preface.

If ascites is documented by medically acceptable imaging rather than by paracentesis, we still require evidence to confirm that there is significant deterioration of liver function. Therefore, we propose in listing section 5.05B2 to require reduction of serum albumin to the level specified in the listing or prolongation of the prothrombin time as specified in the listing.

Proposed Listing 5.06—Inflammatory Bowel Disease

We propose to combine portions of current listings 5.06 and 5.07 into listing section 5.06. Ulcerative colitis, Crohn's disease, granulomatous colitis, and regional enteritis are now commonly referred to as ''Inflammatory bowel disease'' (IBD). Combining these listings is appropriate considering current medical practice. The listing-level criteria for IBD concern persistent or recurrent intestinal obstruction. These criteria reiterate current listing 5.07A.

and also clarify that the intestinal obstruction must be documented by appropriate medically acceptable imaging, or operative findings. We propose the additional requirement that two episodes of obstruction over a consecutive 6-month period despite prescribed therapy be documented in order to ensure that this is a chronic impairment that will meet the 12-month duration requirement, rather than a single occurrence that can be successfully treated.

Proposed Listing 5.08—Weight Loss Due to Any Persisting Gastrointestinal Disorder

We propose that the weight level demonstrating listing-level severity be documented for at least 6 consecutive months, despite prescribed therapy and expected to persist at this level for at least 12 months, in order to ensure the continuing nature of the impairment. Weight loss of shorter duration may respond to treatment, and therefore may not be expected to persist for 12 months. Since these listings were originally written, there have been significant advances in the treatment of many digestive disorders, which have resulted in more favorable prognoses with treatment. However, it may take up to 6 months to determine whether treatment will lead to long-term improvement and possibly recovery, or just result in a temporary remission of impairment severity. In light of the current medical knowledge, we believe that 6 months is the minimum amount of time needed to determine that the weight loss due to a digestive impairment will continue at listing-level severity for long enough to fulfill the duration requirement of 12 months. This is consistent with the changes we propose in the other digestive listings.

We also propose to update the weights listed in Tables I and II of listing 5.08. While we are proposing to adopt the use of Body Mass Index (BMI) in evaluating malnutrition in children (listing 105.08), we are not, at this time, proposing to adopt BMI to evaluate weight loss in adults. The Centers for Disease Control and Prevention (CDC) state that BMI is used differently with children than it is with adults. ''* * * Body Mass Index, or BMI (wt/ht^2) provides a guideline based on weight and height to determine underweight and overweight. As children grow, their body fatness changes over the years. The interpretation of BMI depends on the child's age. Additionally, girls and boys differ in their body fatness as they mature. Therefore, we plot the BMI-for-age according to sex-specific charts.'' The CDC has prepared charts and tables that calculate BMI values for selected heights and weights for you from ages 2 to 20 years. The CDC has further determined that a BMI-for-age <5th percentile meets their criteria for underweight. The CDC does not calculate a figure nor indicate a cutoff that is judged to be indicative of malnutrition.

The current listings are based on standard growth charts to satisfy the listing for malnutrition. Current listing 105.08 requires (in part): ''Malnutrition, due to a demonstrable gastrointestinal disease causing either a fall of 15 percentiles of weight which persists or the persistence of weight which is less than the third percentile (on standard growth charts).

The 3rd percentile is generally accepted as the lower limit of the normal range for most biologic measurements. Persistence below this level would warrant evaluation and, if available, intervention. Since the new BMI-for-age charts continue to provide percentiles, we are able to continue our policy of measurements below the 3rd percentile determined to correspond with listing-level severity for children.

In assessing weight loss in adults, we have never used percentiles based on age calculations. Our current listing 5.08 is based on the Metropolitan Life Insurance Company's weight chart for medium frame individuals. The weights in tables 1 and 2 of listing 5.08 represent a 20% reduction in the beginning weight for medium frame individuals as reflected in the weight charts in effect at the time the listings were last revised.

The CDC has no such BMI-for-age charts for adults. They do state that ''underweight'' in adults is indicated by a BMI less than 18.5; however, neither the CDC nor any other recognized authority known to us has determined a BMI for adults that would be consistent with listing-level severity weight loss due to a gastrointestinal impairment. Until we have a scientific basis for changing the way we calculate listing-level severity weight loss in adults, we determined it would be best to just update our tables 1 and 2 using the latest Metropolitan Life Insurance Company's weight chart, last updated in 1983.

We also expanded the heights and weights in the tables to add the metric equivalents for assistance in adjudication.

The weight loss tables in listing 5.08 include listing-level weights for men whose height is between 5 feet 1 inch and 6 feet 4 inches, and for women whose height is between 4 feet 10 inches and 6 feet 1 inch. If your height is outside these table values and you allege disability due to weight loss related to a digestive impairment, these tables cannot be applied to evaluate whether your impairment meets the listing. In this situation, we would review the evidence in file to determine if your condition medically equals the listing. Considering the table weights and your weight, we would make a severity judgment. If you have a severe impairment that does not meet nor equal the listings, we continue to evaluate your claim through the sequential evaluation process, which would require assessment of your residual functional capacity and, if necessary, consideration of vocational factors such as your age, education and past work experience.

Proposed Listing 5.09—Liver Transplant

We propose that you should be considered under a disability for 12 months following the surgery, due to the nature and course of recovery for this procedure. After that time, we will evaluate the residual impairment(s). This is consistent with our criteria for assessing other organ transplants, such as kidney and heart.

How Are We Proposing To Change the Preface To the Listings for Evaluating Digestive Impairments in Children?

105.00 Digestive System

As we already discussed in the explanation of 5.00 in the adult rules, we propose to revise the preface to provide additional guidance for adjudicating digestive impairments. Where necessary, we added information specific to the childhood listings; however, we repeated much of the proposed preface 5.00 in the proposed preface 105.00. This is because the same basic rules for establishing and evaluating the existence and severity of digestive impairments in adults also apply to children.

Proposed 105.00A through 105.00F correspond to proposed 5.00A through 5.00F in the adult rules. Because we already described these provisions under the explanation of proposed 5.00, the following discussions describe only those provisions that are unique to the childhood rules or that require further explanation.

Proposed 105.00A—What Kind of Impairments Do We Consider in the Digestive System?

This section contains the information in current 105.00A, and information from the last sentence in current 105.00C. It differs from the corresponding 5.00A in the proposed adult rules in the following ways:

• We added a paragraph addressing congenital defects of the gastrointestinal organs; and

• We added ''growth and development'' to ''nutrition'', in the paragraph addressing surgical diversions of the intestinal tract, since these factors are relevant to the assessment of disability in children.

Proposed 105.00B—What Documentation Do We Need?

This section contains the information in current 105.00B. We made editorial changes to refer to ''children'' rather than ''individuals'' and changes to reflect the sequential evaluation of disability for children. Aside from these changes, the only substantive difference between this section and the corresponding proposed section for adults is the addition of ''assessment(s) of growth and development'' to the list of types of evidence that we consider.

Proposed 105.00C—How Do We Evaluate Digestive Disorders Under Listings That Require Recurring or Persistent Findings?

This is a new section. It differs from the corresponding proposed 5.00C in the adult rules, only in that it references childhood listings 105.05, 105.06, and 105.08, rather than adult listings.

Proposed 105.00D—How Do We Consider the Effects of Treatment?

This is a new section that corresponds to the proposed adult section 5.00D.

Proposed 105.00E—How Do We Evaluate Impairments That Do Not Meet One of the Digestive Listings?

This is a new section. It contains two subsections that do not appear in the proposed adult rules. Subsection 105.00E1b includes the information in current 105.00D about multiple anomalies and subsection 105.00E1c contains an updated version of the information in the first two sentences of current 105.00C about digestive impairments and reduction in the rate of growth.

We also explain how evaluation of your impairment(s) will continue through the sequential evaluation process. We added a sentence about functionally equaling the listings, with a cross-reference to the appropriate regulatory citation.

Proposed 105.00F—What Are Our Guidelines for Evaluating Specific Digestive Impairments?

This section contains the information in the first two sentences of current 105.00C. The rest of the information in this section is new. It is divided into four subsections: Malnutrition, weight loss and growth retardation; Chronic liver disease; Esophageal stricture or stenosis; and Inflammatory bowel disease.

In subsection 105.00F1a, we explain how to evaluate weight loss and growth retardation that result from malnutrition. We also list examples of laboratory findings that represent chronic nutritional deficiency. In the revised listing 105.08, we require a documented sign of chronic nutritional deficiency to confirm the existence of a gastrointestinal disease resulting in malnutrition. We do not include these specific findings in the listing language because the required laboratory finding(s) are not limited to one of these specific examples. We will also accept other medically acceptable laboratory findings that represent chronic nutritional deficiency.

Since we also are proposing to revise listing 105.08 by using Body Mass Index (BMI) measurements, we added a discussion of these measurements in subsection 105.00F1b.

The Centers for Disease Control and Prevention (CDC) state that BMI is used differently with children than it is with adults. ''* * * Body Mass Index, or BMI (wt/ht^2) provides a guideline based on weight and height to determine underweight and overweight. As children grow, their body fatness changes over the years. The interpretation of BMI depends on the child's age. Additionally, girls and boys differ in their body fatness as they mature. Therefore, we plot the BMI-for-age according to sex-specific charts.'' The CDC has prepared charts and tables that calculate BMI values for selected heights and weights for you from ages 2 to 20 years. The CDC has further determined that a BMI-for-age <5th percentile meets their criteria for underweight. The CDC does not calculate a figure nor indicate a cutoff that is judged to be indicative of malnutrition.

The current listings are based on standard growth charts to satisfy the listing for malnutrition. Current listing 105.08 requires (in part): ''Malnutrition, due to a demonstrable gastrointestinal disease causing either a fall of 15 percentiles of weight which persists or the persistence of weight which is less than the third percentile (on standard growth charts).

The 3rd percentile is generally accepted as the lower limit of the normal range for most biologic measurements. Persistence below this level would warrant evaluation and, if available, intervention. Since the new BMI-for-age charts continue to provide percentiles, we are able to continue our policy of measurements below the 3rd percentile determined to correspond with listing-level severity for children.

The new subsection on chronic liver disease, section 105.00F2, corresponds to the information in the proposed adult rules, except that we also added a discussion on portal hypertension in proposed 105.00F2C because chronic liver disease in children often presents as complications of portal hypertension.

Section 105.00F3 addresses esophageal stricture or stenosis. This new preface section gives guidance in adjudicating this impairment when the malnutrition listing is not met.

Section 105.00F4 discusses the documentation of an intractable perineal or intra-abdominal complication, such as intractable fecal incontinence.

How Are We Proposing To Change the Criteria in the Listings for Evaluating Digestive Impairments in Children?

105.00 Category of Impairments, Digestive System

Addition of new listing:

As in the proposed adult rules, we propose to add a new listing for children to address liver transplantation. The new listing will be 105.09, liver transplant.

Removal of redundant or reference listings:

We propose to remove these listings because they refer to listing 105.08:

• 105.03—Esophageal obstruction, caused by atresia, stricture or stenosis, and

• 105.07B—Chronic inflammatory bowel disease with malnutrition.

These listings are met only when listing 105.08—Malnutrition, due to demonstrable gastrointestinal disease, is met. As we noted above, we are proposing to remove reference listings because they are redundant.

We also propose to remove these other reference listings:

• 105.05E—Chronic liver disease with hepatic encephalopathy. This reference listing directs us to evaluate the impairment under the criteria in 112.02—Organic mental disorders. Hepatic encephalopathy is addressed in proposed section 105.00E1a of the preface, which states that the impairment should be assessed under the criteria for the appropriate mental disorder or neurological listing.

• 105.07C—Chronic inflammatory bowel disease, with growth impairment as described under the criteria in 100.03. This listing refers us to the criteria in listing 100.03—Growth impairment. We propose to add material

to the preface in 105.00E1c and 105.00F1a to address assessment of these impairment manifestations.

As in the proposed adult rules, we propose to remove several listings or listing sections since there has been significant progress in medical technology and clinical experience related to the treatment of digestive impairments. Our program experience shows that because of these advances the criteria in some of the current listings can no longer be considered to result in marked and severe functional limitations. Even if listing-level severity is initially present, the statutory duration requirement may no longer be met.

We propose to remove the following chronic liver disease listings:

• 105.05A.—Chronic liver disease with inoperable biliary atresia. Children with this impairment often receive transplants and they would be evaluated under the proposed new listing 105.09—liver transplant. Otherwise, manifestations of this disease would be evaluated under the other liver disease listings.

• 105.05D.—Chronic liver disease with hepatic coma. Hepatic coma, like hepatic encephalopathy, will now be assessed under the criteria for the appropriate mental or neurological listings.

• 105.05F.—Chronic liver disease with chronic active inflammation or necrosis documented by SGOT persistently more than 100 units or serum bilirubin of 2.5 mg. percent or greater. We propose to remove this listing because it requires only a persistent laboratory finding. Based on our program experience, a laboratory finding alone is not an accurate measure of the severity or duration of the impairment.

The following is a detailed explanation of the proposed listing criteria.

Proposed Listing 105.05—Chronic Liver Disease

We propose to add ''cirrhosis of any kind,'' for consistency with the proposed adult rules.

We propose to revise current listing 105.05C.—Chronic liver disease with esophageal varices, and renumber it as proposed listing 105.05A. We have added the requirement for bleeding attributable to the varices because the mere presence of esophageal varices, by itself, does not necessarily result in marked and severe functional limitations. As in the proposed adult listings, we have provided a specific transfusion requirement to exclude minor variceal bleeding which is not an indicator of listing-level severity. The transfusion requirement for children is based on frequency of needed transfusions, rather than amount of blood transfused, because in children, blood transfusions are only administered in cases of extreme need and the amount of blood transfused is variable depending on body size.

We propose to revise current listing 105.05B—Chronic liver disease with intractable ascites, by removing the albumin level requirement. Persistent ascites related to chronic liver disease is an impairment of listing-level severity in children, regardless of serum albumin level.

As explained in the preamble concerning the comparable adult listing, the presence of sufficient ascitic fluid *requiring* frequent paracentesis indicates disease of listing-level severity. However, current imaging techniques are capable of identifying even minimal amounts of ascites before they could be detected on physical examination, which would not be an indicator of listing-level severity liver disease; thus, in the absence of paracentesis, we require ascites to be documented on physical examination and by medically appropriate imaging techniques. We explain this in the preface.

Proposed Listing 105.06—Inflammatory Bowel Disease

We propose to renumber current listing 105.07—Chronic inflammatory bowel disease, to proposed listing 105.06, for consistency with the corresponding proposed adult listing. We are revising and clarifying current 105.07A—Chronic inflammatory bowel disease with intestinal manifestations or complications, which becomes the only listing under proposed 105.06. We added the requirements for persistent or recurrent findings to ensure a frequency or duration of impairment consistent with listing-level severity. We also now require appropriate medically acceptable imaging evidence of the impairment. We are also adding a requirement for functionally limiting signs and symptoms that are characteristic of the impairment. Since inflammatory bowel disease can affect the entire digestive tract, we added an alternate subsection for perineal or intra-abdominal complications.

Proposed Listing 105.08—Malnutrition

We propose to revise this section to be consistent with the new weight-for-length and Body Mass Index (BMI) measurements, growth charts and data file tables from the Centers for Disease Control and Prevention (CDC). On May 30, 2000, the CDC updated their 1977 weight-for-length growth charts, and introduced BMI-for-age charts and tables. The CDC explains: ''* * * (BMI) is used to judge whether an individual's weight is appropriate for their height. * * * The new BMI growth charts can be used clinically beginning at 2 years of age, when an accurate stature can be obtained. These BMI-for-age charts were created for use in place of the 1977 weight-for-stature charts, as they are considered a more accurate tool.'' (NHANES (National Health & Nutrition Examination Survey) CDC Growth Charts: United States, The Revised Growth Charts, May 30, 2000. Both the weight-for-length and BMI-for-age charts and tables are available at *http://www.cdc.gov/nchs/about/major/nhanes/growthcharts/background.htm.)*

We will prepare a Social Security Ruling containing instructions consistent with the CDC's BMI guidelines. It will be issued concurrent with publication of this material as a final rule.

In children, the CDC defines ''Underweight'' as a BMI-for-age <5th percentile. However, neither the CDC nor any other recognized expert authority has published guidelines for the classification of malnutrition based on BMI. We will continue to investigate this area. In the meantime, we propose to continue to use our current criteria of persistence of weight for length or height below the third percentile to meet listing-level severity for malnutrition.

Proposed Listing 105.09—Liver Transplant. We propose to add this new listing for children, consistent with the addition of listing 5.09—Liver transplant in the proposed adult rules. We propose that you should be considered under a disability for 12 months following the surgery, due to the nature and course of recovery for this procedure. After that time, we will evaluate the residual impairment(s). This is consistent with our criteria for assessing other organ transplants, such as kidney transplant in listing 106.02D and heart transplant in listing 104.09.

Clarity of These Proposed Rules

Executive Order 12866 requires each agency to write all rules in plain language. In addition to your substantive comments on these proposed rules, we invite your comments on how to make these proposed rules easier to understand.

For example:

• Have we organized the material to suit your needs?

• Are the requirements in the rules clearly stated?

• Do the rules contain technical language or jargon that isn't clear?
• Would a different format (grouping and order of sections, use of headings, paragraphing) make the rules easier to understand?
• Would more (but shorter) sections be better?
• Could we improve clarity by adding tables, lists, or diagrams?
• What else could we do to make the rules easier to understand?

Regulatory Procedures

Executive Order (E.O.) 12866

We have consulted with the Office of Management and Budget (OMB) and determined that these proposed rules meet the criteria for an economically significant regulatory action under E.O. 12866. They are also a ''major'' rule under 5 U.S.C. 801ff. The following is a discussion of the potential costs and benefits of this regulatory action. This assessment also contains an analysis of alternatives we considered and chose not to adopt.

These proposed rules benefit society by updating the current listings to provide criteria that reflect state-of-the-art medical science and technology. The proposed rules ensure that determinations of disability have a sound medical basis, that claimants receive equal treatment through the use of specific criteria, and that people who are disabled can be readily identified and awarded benefits if all other factors of entitlement or eligibility are met.

We are projecting savings in program expenditures as a result of these actions, described in more detail below.

Program Savings

1. Title II

We estimate that, if finalized, these proposed rules would result in reduced program outlays resulting in the following savings (in millions of dollars) to the title II program ($295 million total in a 5-year period beginning in FY 2003).

Fiscal year:	
2003	−$5
2004	−$35
2005	−$60
2006	−$85
2007	−$110
Total	[1] −$295

2. Title XVI

We [1] estimate that, if finalized, these proposed rules will result in reduced program outlays resulting in the following savings (in millions of dollars) to the SSI program ($85 million in a 5-year period beginning in FY 2003).

Fiscal year:	
2003	−$2.5
2004	−$10
2005	−$20
2006	−$25
2007	−$30
Total	[2] −$85

Program Costs

We[2] do not expect any program costs to result from these proposed regulations.

Administrative Savings

We do not expect any administrative savings to result from these proposed regulations.

Administrative Costs

We expect that, if finalized, there will be some administrative costs associated with these proposed rules. If finalized, the proposed rules are expected to result in administrative costs less than 25 work years and less than $2 million per year.

Policy Alternatives

We considered, but did not select, the following policy alternative:

Keep the current criteria with no or only minor technical changes

We considered not revising the listings, or making only minor technical changes and thus, continuing to use our current criteria. However, we believe that proposing these revisions is preferable because of the medical advances that have been made in treating and evaluating these types of impairments. The current listings are now over 15 years old. Medical advances in disability evaluation and treatment and our program experience make clear that the current listings do not reflect state-of-the-art medical knowledge and technology.

Since there would be no changes or only minor technical changes in using this alternative, the program and administrative costs would be the same as under the current rules. However, the program savings associated with the proposed rules would not be achieved.

Regulatory Flexibility Act

We certify that these proposed rules would not have a significant economic impact on a substantial number of small entities because they would affect only individuals. Thus, a regulatory flexibility analysis as provided in the Regulatory Flexibility Act, as amended, is not required.

Paperwork Reduction Act

These proposed rules contain reporting requirements at 5.00B, 5.00D, 105.00B, and 105.00D. The public reporting burden is accounted for in the Information Collection Requests for the various forms that the public uses to submit the information to SSA. Consequently, a 1-hour placeholder burden is being assigned to the specific reporting requirement(s) contained in these rules. We are seeking clearance of the burdens referenced in these rules because they were not considered during the clearance of the forms. An Information Collection Request has been submitted to OMB. We are soliciting comments on the burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize the burden on respondents, including the use of automated collection techniques or other forms of information technology. Comments should be submitted to the Social Security Administration at the following address: Social Security Administration, Attn: SSA Reports Clearance Officer, Rm. 1–A–20 Operations Building, 6401 Security Boulevard, Baltimore, MD 21235–6401. Comments can be received for between 30 and 60 days after publication of this notice. Comments will be most useful if received by SSA within 30 days of publication.

(Catalog of Federal Domestic Assistance Program Nos. 96.001, Social Security-Disability Insurance; 96.002, Social Security-Retirement Insurance; 96.004, Social Security-Survivors Insurance; and 96.006, Supplemental Security Income)

List of Subjects in 20 CFR Part 404

Administrative practice and procedure, Blind, Disability benefits, Old-Age, Survivors, and Disability Insurance, Reporting and recordkeeping requirements, Social Security.

Dated: November 5, 2001.

Larry G. Massanari,

Acting Commissioner of Social Security.

For the reasons set forth in the preamble, we propose to amend chapter III of title 20 of the Code of Federal Regulations as set forth below:

PART 404—FEDERAL OLD-AGE, SURVIVORS AND DISABILITY INSURANCE (1950–)

1. The authority citation for subpart P of part 404, continues to read as follows:

Authority: Secs. 202, 205(a), (b), and (d)–(h), 216(i), 221(a) and (i), 222(c), 223, 225, and 702(a)(5) of the Social Security Act (42 U.S.C. 402, 405(a), (b), and (d)–(h), 416(i), 421(a) and (i), 422(c), 423, 425, and

[1] 5-year total may not be equal to the sum of the annual totals due to rounding-out.

[2] Federal SSI payments due on October 1st in fiscal years 2006 and 2007 are included with payments for the prior fiscal year.

902(a)(5)); sec. 211(b), Pub. L. 104–193, 110 Stat. 2105, 2189.

2. Item 6 of the introductory text before part A of appendix 1 is amended by revising the expiration date, as follows:

Appendix 1 to Subpart P of Part 404—Listing of Impairments

* * * * *

6. Digestive System (5.00 and 105.00): [Insert date of publication of the final rules in the **Federal Register**.]

* * * * *

3. Section 5.00 in part A and section 105.00 in part B of appendix 1 are revised to read as follows:

* * * * *

5.00 Digestive System

A. What Kind of Impairments Do We Consider in the Digestive System?

1. Impairments of the digestive system include malnutrition, inflammatory bowel disease, hemorrhage, esophageal dysfunction, and hepatic (liver) dysfunction.

2. Digestive disorders may also lead to complications (*e.g.,* obstruction) or be accompanied by systemic manifestations in other body systems.

3. Surgical diversion of the intestinal tract such as colostomy and ileostomy does not usually result in an inability to perform any gainful activity, as long as you are able to maintain adequate nutrition.

4. Gastrointestinal impairments frequently respond to medical or surgical treatment and, therefore, the severity of these disorders should generally be considered within the context of prescribed treatment. This may be necessary in determining whether the duration requirement for disability will be met for cases in which you have not otherwise satisfied the duration requirement.

B. What Documentation Do We Need?

1. When we assess gastrointestinal or liver impairments, we usually need longitudinal evidence covering a period of at least 6 months of observations and treatment, unless we can make a fully favorable determination or decision without it. The evidence should include all available clinical and laboratory findings, including appropriate medically acceptable imaging studies, endoscopy, operative, and pathology reports. Criteria for documentation will be found in the individual listings.

3. You may not have received ongoing treatment or have an ongoing relationship with the medical community, despite the existence of a severe impairment(s). We evaluate such cases on the basis of the objective medical evidence and other available evidence, taking into consideration all relevant factors including your medical history, symptoms, and medical source statements. Even though you may not be able to show an impairment that meets the criteria of one of the digestive listings, you may have an impairment(s) that medically equals the listings or may be found disabled based on consideration of your residual functional capacity (RFC) and age, education, and work experience.

C. How Do We Evaluate Digestive Disorders Under Listings That Require Recurring or Persistent Findings?

1. Listings 5.02, 5.05, 5.06 and 5.08 require specific findings to be present on a recurring or persisting basis. *Recurring* means the longitudinal clinical record shows that the finding(s) satisfies the criteria in the listing as specified and that pattern has lasted or is expected to last for a continuous period of at least 12 months. *Persisting* means the longitudinal clinical record shows that, with few exceptions, the finding(s) has been at, or is expected to be at, the level specified in the listing for a continuous period of at least 12 months.

2. Events necessary to meet the listing (*e.g.,* 3 events within a consecutive 6 month period) must occur within the period we are considering in connection with an application or continuing disability review. In every listing in which we require more than one event, there must be at least 1 month between the events (unless otherwise specified), to ensure that we are evaluating separate episodes.

D. How Do We Consider the Effects of Treatment?

1. We assess the effect of treatment by determining if there is improvement in the signs, symptoms, and laboratory findings of the disorder, and if there are side effects that may result in functional limitations. We assess the effects of medication, therapy, surgery, or any other form of treatment you receive, when determining the severity and the duration of the impairment(s). The medical evidence should include:

(a) a description of the treatment prescribed (*e.g.,* the type of medication or therapy, the use of total parenteral nutrition (TPN) or enteral nutrition);

(b) dosage, method, and frequency of administration;

(c) your response to the treatment;

(d) any adverse effects of such treatment;

(e) the expected duration of the treatment.

2. Because treatment itself or the effects of treatment may be temporary, in most cases sufficient time must elapse to allow us to evaluate the impact and expected duration of treatment and side effects. Where adverse effects of treatment contribute to the impairment severity, the duration or expected duration of the treatment must be considered in assessing the duration of the impairment(s).

3. *Nutritional therapy*. The requirement for aggressive nutritional therapy, including parenteral or specialized enteral nutrition to avoid debilitating complications of a disease does not, in and of itself, indicate an inability to perform gainful activity, but should be considered, as any other treatment, in evaluation of the overall severity of the impairment.

E. How do we evaluate impairments that do not meet one of the digestive listings?

1. These listings are only examples of common digestive impairments that we consider severe enough to prevent you from doing any gainful activity. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system. For example, when liver disease results in hepatic encephalopathy, we should evaluate the impairment(s) under the criteria for the appropriate mental disorder or neurological listing(s).

2. If you have a medically determinable impairment(s) that does not meet a listing, we will determine whether your impairment(s) medically equals the listings. (See§§ 404.1526 and 416.926.) If your impairment(s) does not meet or medically equal the listings, you may or may not have the RFC to engage in substantial gainful activity. In that situation, we proceed to the fourth, and if necessary, the fifth steps of the sequential evaluation process in §§ 404.1520 and 416.920. When we decide whether you continue to be disabled, we use the rules in §§ 404.1594 and 416.994, as appropriate.

F. What are our guidelines for evaluating specific digestive impairments?

1. Malnutrition and weight loss. Gastrointestinal disease may result in malnutrition and weight loss. In addition to the impairments specifically mentioned in the listings, other gastrointestinal disorders such as stricture, stenosis or obstruction of the esophagus may result in significant weight loss. The resulting weight loss should be evaluated under the criteria of 5.08. When using the tables in 5.08:

(a) If the reported height measured in inches falls between the whole number values, the height should be rounded off to the nearest inch by whole number (*e.g.*, if height is given as 62¼ inches, round off to 62 inches). If the fraction is precisely one-half inch, the height should be rounded up to the nearest whole number (*e.g.*, if height is given as 62½ inches, round up to 63 inches).

(b) If the reported height measured in centimeters falls evenly between two table values (*e.g.*, 151 cm falls evenly between 150 cm and 152 cm), the height should be rounded up to the nearest table value (*e.g.*, 152 cm).

(c) If the reported height measured in centimeters falls between two table values (*e.g.*, 148 cm is between 147 cm and 150 cm), the height should be rounded off to the nearest table value (*e.g.*, 147 cm).

2. Chronic liver disease is liver cell necrosis, inflammation, or scarring from any cause, that persists for more than 6 months, and is expected to continue for at least 12 months. Clinical manifestations may vary from an asymptomatic state to incapacitation due to liver failure. Acute hepatic injury is frequently reversible, as in viral, drug induced, and alcoholic hepatitis, and hepatic ischemia. In the absence of continuing evidence of a chronic impairment, episodes of acute liver disease do not necessarily meet the requirement for chronic liver disease.

(a) Signs, and symptoms of chronic liver disease often include: jaundice (yellow appearance of the skin and mucous membranes), intractable pruritis (itching), ascites (accumulation of fluid in the abdominal cavity), lower extremity edema (swelling due to large amounts of fluid), gastrointestinal bleeding, fatigue, nausea,

change in mental status and loss of appetite. Laboratory findings in cases involving liver disease may include abnormalities of liver enzymes, decreased serum albumin, increased bilirubin, abnormal coagulation studies, and abnormal liver biopsy.

(b) Liver disease may result in portal hypertension and esophageal varices, massive variceal hemorrhage, ascites, hepatic encephalopathy, and/or liver transplantation. We should assess impairment due to hepatic encephalopathy under the criteria for the appropriate mental disorder or neurological listing(s).

(c) *Massive hemorrhage from esophageal varices* typically involves hematemesis (vomiting of blood), melena (passage of dark stools), or hematochezia (passage of bloody stools). You may be hemodynamically unstable as shown by signs and symptoms such as pallor (paleness), diaphoresis (profuse perspiration), postural hypotension (fall in blood pressure when standing), and syncope (fainting). The situation can be considered life-threatening with urgent need for multiple transfusions and other supportive care.

(d) *Liver function tests* such as serum bilirubin or enzyme levels may correlate poorly with the clinical severity of liver disease, and must not be relied upon in isolation. Ascites, when associated with either albumin depletion or prolongation of the prothrombin time, usually indicates severe loss of liver function. Minimal ascites, as might be detected *only* by imaging techniques and not on physical examination, is not sufficient to meet the criteria in listing 5.05B.

(e) *Liver transplantation* may be performed for progressive liver failure, life-threatening complications of liver disease, tumor or trauma. Disability is considered to last for one year from the date of transplant. After that time, we will evaluate the residual impairment(s), as outlined in paragraph (g) below.

(f) When we use the phrase ''[c]onsider under a disability for 1 year following'' a specific event, we are making a statement about the expected duration of disability, not about the onset of disability. We do not restrict the determination of the onset of disability to the date of the specified event. We can establish an earlier onset date if you are not engaging in substantial gainful activity (SGA) and the evidence in file supports the earlier onset date of disability.

(g) After the one-year period following transplantation, we evaluate the effects of any residual impairment(s). Functional improvement after liver transplant depends upon various factors, including adequacy of post-transplant liver function, incidence and severity of infection, occurrence of rejection crisis(es), the presence of systemic complications and the side effects of immuno-suppressive agents.

5.01 Category of Impairments, Digestive System

5.02 *Recurrent gastrointestinal hemorrhage* from any cause, requiring at least two units of blood transfused per episode, and occurring at least three times during a consecutive 6-month period. (All incidents within a consecutive 14-day period constitute one episode.) Consider under a disability for 1 year following the last documented hemorrhage; thereafter, evaluate the residual impairment(s).

5.05 Chronic liver disease and cirrhosis of any kind, WITH:

A. Esophageal varices demonstrated by x-ray, endoscopy, or other appropriate medically acceptable imaging, with massive hemorrhage attributed to varices which requires a transfusion of at least 5 units of blood in 48 hours. Consider under a disability for 1 year following the last documented massive hemorrhage; thereafter, evaluate the residual impairment(s); OR

B. Ascites persisting over a consecutive 6-month period despite prescribed treatment. The following findings must be demonstrated on at least two evaluations occurring at least 2 months apart within the 6-month period:

1. Ascites documented by paracentesis; OR

2. Ascites documented on physical examination and by appropriate medically acceptable imaging with:

(a) an associated serum albumin of 3.0 gm/dl or less, or;

(b) prolongation of the prothrombin time of at least 2 seconds over the control.

5.06 *Inflammatory bowel disease* (*e.g.*, ulcerative colitis, Crohn's disease) as documented by endoscopy, biopsy, appropriate medically acceptable imaging, or operative findings, with persistent or recurrent intestinal obstruction over a consecutive 6-month period, despite prescribed treatment, WITH:

A. Confirmation, by appropriate medically acceptable imaging, of stenotic areas in small intestine or colon with proximal dilatation, and;

B. Documentation of at least two episodes of abdominal pain, distention, and vomiting.

5.08 *Weight loss due to any persisting gastrointestinal disorder,* with weight equal to or less than the values specified in Table I or II, persistent for at least 6 consecutive months despite prescribed treatment, and expected to persist at this level for at least 12 consecutive months.

TABLE I.—MEN

Height	Weight
Inches/centimeters	Pounds/kilograms
61 in./155 cm	103 lbs/47 kg
62 in./158 cm	105 lbs/48 kg
63 in./160 cm	106 lbs/48 kg
64 in./163 cm	108 lbs/49 kg
65 in./165 cm	110 lbs/50 kg
66 in./168 cm	111 lbs/51 kg
67 in./170 cm	114 lbs/52 kg
68 in./173 cm	116 lbs/53 kg
69 in./175 cm	118 lbs/54 kg
70 in./178 cm	121 lbs/55 kg
71 in./180 cm	123 lbs/56 kg
72 in./183 cm	126 lbs/57 kg
73 in./185 cm	128 lbs/58 kg
74 in./188 cm	131 lbs/60 kg
75 in./191 cm	134 lbs/61 kg
76 in./193 cm	137 lbs/62 kg

TABLE II.—WOMEN

Height	Weight
Inches/centimeters	Pounds/kilograms
58 in./147 cm	87 lbs/40 kg
59 in./150 cm	89 lbs/40 kg
60 in./152 cm	90 lbs/41 kg
61 in./155 cm	92 lbs/42 kg
62 in./158 cm	94 lbs/43 kg
63 in./160 cm	97 lbs/44 kg
64 in./163 cm	99 lbs/45 kg
65 in./165 cm	102 lbs/46 kg
66 in./168 cm	104 lbs/47 kg
67 in./170 cm	106 lbs/48 kg
68 in./173 cm	109 lbs/49 kg
69 in./175 cm	111 lbs/50 kg
70 in./178 cm	114 lbs/52 kg
71 in./180 cm	116 lbs/53 kg
72 in./183 cm	118 lbs/54 kg
73 in./185 cm	121 lbs/55 kg

5.09 *Liver transplant.* Consider under a disability for 1 year following surgery. Thereafter, evaluate the residual impairment (see 5.00F2e.)

* * * * *

Part B

* * * * *

105.00 DIGESTIVE SYSTEM

A. What kind of impairments do we consider in the digestive system?

1. Impairments of the digestive system include malnutrition, inflammatory bowel disease, hemorrhage, esophageal dysfunction, and hepatic (liver) dysfunction.

2. Digestive disorders may also lead to complications (*e.g.,* obstruction) or be accompanied by systemic manifestations in other body systems.

3. Congenital defects involving the organs of the gastrointestinal system may result in your inability to maintain adequate nutrition, growth and development.

4. Surgical diversion of the intestinal tract such as colostomy and ileostomy does not usually result in marked and severe functional limitations, as long as you are able to maintain adequate nutrition, growth and development.

5. Gastrointestinal impairments frequently respond to medical or surgical treatment, and, therefore, the severity of these disorders should generally be considered within the context of prescribed treatment. This may be necessary in determining whether the duration requirement for disability will be met for cases in which you have not already otherwise satisfied the duration requirement.

B. What documentation do we need?

1. When we assess gastrointestinal or liver impairments, we usually need longitudinal evidence covering a period of at least 6 months of observations and treatment, unless we can make a fully favorable determination or decision without it. The evidence should include all available clinical findings, including assessment(s) of growth and development, as well as all laboratory findings, including operative, appropriate medically acceptable imaging studies, endoscopy, and pathology reports. Criteria

for documentation will be found in the individual listings.

2. You may not have received ongoing treatment or have an ongoing relationship with the medical community, despite the existence of a severe impairment(s). We evaluate such cases on the basis of the objective medical evidence and other available evidence, taking into consideration all relevant factors (see §§ 416.924, 416.924a, and 416.924b) including your medical history, symptoms, and medical source statements. Even though you may not be able to show an impairment that meets the criteria of one of the digestive listings, you may have an impairment(s) medically equivalent in severity to one of the listed impairments or, as appropriate, may be disabled based on functionally equaling the listings (See §§ 404.1526, 416.926, and 416.926a.).

C. How do we evaluate digestive disorders under listings that require recurring or persistent findings?

1. Listings 105.05, 105.06 and 105.08 require specific findings to be present on a recurring or persisting basis. *Recurring* means the longitudinal clinical record shows that the finding(s) satisfies the criteria in the listing as specified and that pattern has lasted or is expected to last for a continuous period of at least 12 months. *Persisting* means the longitudinal clinical record shows that, with few exceptions, the finding(s) has been at, or is expected to be at, the level specified in the listing for a continuous period of at least 12 months.

2. Events necessary to meet the listing (*e.g.,* 3 events within a consecutive 6-month period) must occur within the period we are considering in connection with an application or continuing disability review. In every listing in which we require more than one event, there must be at least 1 month between the events (unless otherwise specified), to ensure that we are evaluating separate episodes.

D. How do we consider the effects of treatment?

1. We assess the effect of treatment by determining if there is improvement in the symptoms, signs, and laboratory findings of the disorder, and if there are side effects that may result in functional limitations. We assess the effects of medication, therapy, surgery, or any other form of treatment you receive, when determining the severity and the duration of the impairment(s). The medical evidence should include:

(a) a description of the treatment prescribed (*e.g.,* the type of medication or therapy, the use of total parenteral nutrition (TPN) or enteral nutrition);

(b) dosage, method, and frequency of administration;

(c) your response to the treatment;

(d) any adverse effects of such treatment;

(e) the expected duration of the treatment.

2. Because treatment itself or the effects of treatment may be temporary, in most cases sufficient time must elapse to allow us to evaluate the impact and expected duration of treatment and side effects. Where adverse effects of treatment contribute to the impairment severity, the duration or expected duration of the treatment must be considered in assessing the duration of the impairment(s).

3. *Nutritional therapy.* The requirement for aggressive nutritional therapy, including parenteral or specialized enteral nutrition to avoid debilitating complications of a disease does not, in and of itself, indicate marked and severe functional limitations, but should be considered, as any other treatment, in evaluation of the overall severity of the impairment.

E. How Do We Evaluate Impairments That Do Not Meet One of the Digestive Listings?

1. These listings are only examples of common digestive impairments that we consider severe enough to result in marked and severe functional limitations. If your impairment(s) does not meet the criteria of any of these listings, we must also consider whether you have an impairment(s) that satisfies the criteria of a listing in another body system. For example:

(a) *When liver disease results in hepatic encephalopathy or hepatic coma,* we should evaluate your impairment(s) under the criteria for the appropriate mental disorder or neurological listing(s).

(b) *If you have multiple congenital anomalies,* you should be evaluated under the criteria for the multiple body system listings (section 110.00) or the criteria for other appropriate body system(s).

(c) *Digestive impairments that interfere with intake, digestion, and/or absorption of nutrition,* may result in a reduction in the rate of growth. If such a reduction is not reflected in the malnutrition listing (105.08), it may be necessary to refer to the growth impairment listings for further evaluation of the impairment.

2. If you haves a medically determinable impairment(s) that does not meet a listing, we will determine whether the impairment(s) medically equals the listings, or, in the case of a claim for SSI payments under Title XVI, functionally equals the listings. (See §§ 404.1526, 416.926, and 416.926a.) When we decide whether you continue to be disabled under Title XVI, we use the rules in § 416.994a.

F. What Are Our Guidelines For Evaluating Specific Digestive Impairments?

1. *Malnutrition, weight loss and growth retardation.*

(a) *Chronic nutritional deficiency.* Gastrointestinal disease may result in malnutrition. The resulting weight loss or growth retardation, or both, should be considered under the criteria of 105.08 and, if necessary, section 100.00 (growth impairments) of the listings. To meet the criteria in 105.08, the malnutrition must be documented with a laboratory finding(s) confirming a chronic nutritional deficiency associated with a gastrointestinal impairment, which exists despite prescribed treatment. Such findings include, but are not limited to, the following:

(1) Severe anemia (hemoglobin less than 8);

(2) Serum albumin less than 3.0 Gm/Del;

(3) Intractable steatorrhea, despite enzyme therapy, with fecal fat excretion more than:

15% of fat intake in infants less than 6 months; OR

10% of fat intake in infants 6–18 months; OR

6% of fat intake in children more than 18 months of age.);

(4) Vitamin, mineral, or trace mineral deficiency despite aggressive medical and nutritional therapy.

(b) *Body Mass Index (BMI).* BMI is the ratio of your weight to the square of your height. According to the Centers for Disease Control and Prevention (CDC), it is the recommended measure to determine if your weight is appropriate for your height beginning at 2 years of age. Prior to age 2, the CDC's weight-for-length charts should be used. A BMI-for-age less than the 5th percentile indicates underweight; a BMI-for-age less than the 3rd percentile satisfies our criteria for malnutrition when due to a demonstrable gastrointestinal or other impairment.

2. Chronic liver disease is liver cell necrosis, inflammation, or scarring from any cause, that persists for more than 6 months, and is expected to continue for at least 12 months. Clinical manifestations may vary from an asymptomatic state to incapacitation due to liver failure. Acute hepatic injury is frequently reversible as in viral, drug-induced, and alcoholic hepatitis, and hepatic ischemia. In the absence of continuing evidence of a chronic impairment, episodes of acute liver disease do not necessarily meet the requirement for chronic liver disease.

(a) Signs and symptoms of chronic liver disease often include: jaundice (yellow appearance of the skin and mucous membranes), intractable pruritis (itching), ascites, lower extremity edema (swelling due to large amounts of fluid), gastrointestinal bleeding, fatigue, nausea, change in mental status and loss of appetite. Laboratory findings in cases involving liver disease may include abnormalities of liver enzymes, decreased serum albumin, increased bilirubin, abnormal coagulation studies, and abnormal liver biopsy.

(b) Liver disease may result in portal hypertension, bleeding from esophageal varices, ascites, hepatic encephalopathy, hepatic coma, and/or liver transplantation. We should assess impairment due to hepatic encephalopathy and hepatic coma under the criteria for the appropriate mental disorder or neurological listing(s).

(c) Chronic liver disease in children may cause portal hypertension that precedes or seems out of proportion to the severity of hepatocellular injury. You may have chronic recurrent variceal bleeding, cholestasis (stoppage or suppression of the flow of bile), and/or ascites (accumulation of fluid in the abdominal cavity) well before other features of liver failure.

(d) *Massive hemorrhage from esophageal varices* typically involves hematemesis (vomiting of blood), melena (passage of dark stools), or hematochezia (passage of bloody stools). You may be hemodynamically unstable as shown by signs and symptoms such as pallor (paleness), diaphoresis (profuse perspiration), postural hypotension (fall in blood pressure when standing), and syncope (fainting). The situation can be life-threatening with urgent need for multiple transfusions and other supportive care.

(e) *Liver function tests* such as serum bilirubin or enzyme levels may correlate

poorly with the clinical severity of liver disease, and must not be relied upon in isolation. Ascites, when associated with either albumin depletion or prolongation of the prothrombin time, usually indicates severe loss of liver function. However, persistent ascites related to chronic liver disease is an impairment of listing-level severity in children, regardless of serum albumin level. Minimal ascites, as might be detected *only* by imaging techniques and not on physical examination, is not sufficient to meet the criteria in 105.05B.

(f) *Liver transplantation* may be performed for progressive liver failure, life-threatening complications of liver disease, tumor or trauma. Disability is considered to last for one year from the date of the transplant. After that time, we will evaluate your residual impairment(s), as outlined in paragraph (h) below.

(g) When we use the phrase ''[c]onsider under a disability for 1 year following'' a specific event, we are making a statement about the expected duration of disability, not about the onset of disability. We do not restrict the determination of disability onset to the date of the specified event. We can establish an earlier onset date if you are not engaging in substantial gainful activity (SGA) and the evidence in file supports the earlier onset date of disability.

(h) After the one year period following transplantation, we evaluate the effects of any residual impairment(s). Functional improvement after liver transplant depends upon various factors, including adequacy of post-transplant liver function, incidence and severity of infection, occurrence of rejection crisis(es), the presence of systemic complications and the side effects of immuno-suppressive agents. Growth and development may also be affected.

3. Esophageal stricture or stenosis (narrowing) from congenital atresia (absence or closure of a normal body tubular organ) or destructive esophagitis may meet the criteria for malnutrition in listing 105.08. It also may result in complications that include respiratory impairments due to frequent aspiration, problems maintaining nutritional status short of listing-level severity, or multiple infections such as pneumonia. While none of these complications may be of a severity or persistence to meet the criteria of another specific listing, the combination may result in marked and severe functional limitations.

4. Inflammatory bowel disease under listing 105.06B. requires an intractable perineal or intra-abdominal complication such as intractable fecal incontinence. Intractable is defined as resistant to cure, relief or control. There must be evidence of surgical or medical therapy that has failed to resolve the complication. Fecal incontinence involves passage of actual fecal material, not mere staining or spotting.

105.00 Category of Impairments, Digestive System

105.05 Chronic liver disease and cirrhosis of any kind

WITH:

A. Esophageal varices demonstrated by x-ray, endoscopy, or other appropriate medically acceptable imaging, with at least three episodes of bleeding requiring transfusion due to hemodynamic instability, occurring over a consecutive 6-month period. Episodes must be separated by at least 1 month. Consider under a disability for 1 year following last episode; thereafter, evaluate the residual impairment(s); or

B. Ascites persisting over a consecutive 6-month period despite prescribed treatment. The following findings must be demonstrated on at least two evaluations occurring at least 2 months apart within the 6-month period:

1. Ascites documented by paracentesis; OR

2. Ascites documented on physical examination and by appropriate medically acceptable imaging.

105.06 *Inflammatory bowel disease* (*e.g.,* ulcerative colitis, Crohn's disease) as documented by endoscopy, biopsy, appropriate medically acceptable imaging, or operative findings WITH:

A. Persistent or recurrent intestinal obstruction over a consecutive six-month period, despite prescribed treatment, WITH:

(1) Confirmation, by appropriate medically acceptable imaging, of stenotic areas in small intestine or colon with proximal dilatation, and;

(2) documentation of at least two episodes of abdominal pain, distention, and vomiting; OR

B. Perineal or intra-abdominal complications such as abscess, fistuli or fecal incontinence; intractable despite medical or surgical treatment; clinically documented over a consecutive 6-month period.

105.08 *Malnutrition,* despite prescribed treatment, due to gastrointestinal, hepatobiliary, or pancreatic disease with a documented sign of chronic nutritional deficiency, meeting one of the following:

A. For children under age 2, weight-for-length less than the 3rd percentile on the CDC's weight-for-length growth charts or data files, documented at least three times over a consecutive 6-month period, and expected to persist for at least 12 months; OR

B. For children age 2 and over, Body Mass Index (BMI) for age less than the 3rd percentile on the CDC's BMI-for-age growth charts or data files, documented at least three times over a consecutive 6-month period, and expected to persist for at least 12 months.

105.09 *Liver transplant.* Consider under a disability for 1 year following surgery. Thereafter, evaluate the residual impairment(s) (see 105.00F2e.)

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[FR Doc. 01–28455 Filed 11–13–01; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–137519–01]

RIN 1545–BA09

Consolidated Returns; Applicability of Other Provisions of Law; Non-Applicability of Section 357(c)

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rule-making and notice of public hearing.

SUMMARY: This document proposes amendments relating to the consolidated return regulations dealing with the non-applicability of section 357(c) in a consolidated group. The proposed amendments clarify that, in certain transfers described in section 351 between members of a consolidated group, a transferee's assumption of certain liabilities described in section 357(c)(3) will not reduce the transferor's basis in the transferee's stock received in the transfer. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments and requests to speak (with outlines of oral comments to be discussed) at the public hearing scheduled for March 21, 2002, must be submitted by February 28, 2002.

ADDRESSES: Send submissions to: CC:ITA:RU (REG–137519–01), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:ITA:RU (REG–137519–01), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS internet site at *http://www.irs.gov/tax_regs/reglist.html.* The public hearing will be held in room 4718, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, T. Ian Russell of the Office of Associate Chief Counsel (Corporate), (202) 622–7930; concerning submissions, the hearing, and/or to be placed on the building access list to attend the hearing, Donna M. Poindexter (202–622–7180) (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Section 357(c)(1) generally provides that, in the case of certain exchanges described in section 351, if the sum of the amount of the liabilities assumed by the transferee corporation exceeds the total of the adjusted basis of the property transferred pursuant to such exchange, then such excess shall be considered as gain from the sale or exchange of a capital asset or of property that is not a capital asset. Section 357(c)(3), however, excludes from the computation of liabilities assumed liabilities the payment of which would give rise to a deduction, provided that the incurrence of such liabilities did not result in the creation of, or an increase in, the basis of any property.

Section 358(a) generally provides that, in the case of an exchange to which section 351 applies, the basis of the property permitted to be received without the recognition of gain or loss is decreased by the amount of any money received by the transferor. For this purpose, under section 358(d)(1), the transferee's assumption of a liability of the transferor is treated as money received by the transferor on the exchange. Section 358(d)(2), however, provides an exception for liabilities excluded under section 357(c)(3).

On August 15, 1994, final regulations (TD 8560) adding paragraph (d) to § 1.1502–80 were published in the **Federal Register** (59 FR 41666). A correcting amendment adding a sentence to the end of paragraph (d) of § 1.1502–80 was published in the **Federal Register** for March 14, 1997 (62 FR 12096). As currently in effect, § 1.1502–80(d) provides that ''[s]ection 357(c) does not apply to any transaction to which § 1.1502–13, § 1.1502–13T, § 1.1502–14, or § 1.1502–14T applies, if it occurs in a consolidated return year beginning on or after January 1, 1995.'' The example in that regulation contemplates that, to the extent that the transferor does not recognize gain under section 357(c) by reason of the rule of § 1.1502–80(d), the transferor's basis in the stock of the transferee that it receives in the exchange is reduced, with the result that an excess loss account may arise.

A concern has been raised that, as currently drafted, § 1.1502–80(d) may produce an unintended basis result in certain intragroup transfers described in section 351. In particular, it is possible that one might conclude that, because § 1.1502–80(d) provides that section 357(c) does not apply to certain intragroup section 351 exchanges, no liabilities can technically be excluded under section 357(c)(3). If that analysis were correct, in the case of a transfer described in section 351 between members of a consolidated group, the transferor's basis in the stock of the transferee received in the transfer would be reduced by liabilities assumed by the transferee, including those liabilities described in section 357(c)(3) that would not have reduced basis had section 357(c) applied. Assuming the transferor and the transferee are members of the consolidated group at the time the liability does in fact give rise to a deduction on the part of the transferee and is taken into account on the consolidated return, the transferor's basis in the stock of the transferee would be reduced a second time under the principles of § 1.1502–32. This duplicated basis reduction, i.e., once at the time of the transfer described in section 351 and again at the time the liability is taken into account by the consolidated group, may ultimately cause the transferor to recognize an amount of gain on the sale of the stock of the transferee that does not clearly reflect income.

Explanation of Provisions

These proposed regulations clarify that, in certain transfers described in section 351 between members of a consolidated group, a transferee's assumption of liabilities described in section 357(c)(3)(A), other than those also described in section 357(c)(3)(B), will not reduce the transferor's basis in the transferee's stock received in the exchange.

Proposed Effective Date

These regulations are proposed to apply to transactions occurring in consolidated return years beginning on or after the date these regulations are published as final regulations in the **Federal Register**.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations do not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will affect affiliated groups of corporations that have elected to file consolidated returns, which tend to be larger businesses. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, these regulations will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (preferably a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury request comments on the clarity of the proposed regulations and how it may be made easier to understand. All comments will be available for public inspection and copying.

A public hearing has been scheduled for March 21, 2002, beginning at 10 a.m., in room 4718, Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Because of access restrictions, visitors will not be admitted beyond the Internal Revenue Building lobby more than 15 minutes before the hearing starts.

The rules of 26 CFR 601.601(a)(3) apply to the hearing.

Persons that wish to present oral comments at the hearing must submit timely written comments and an outline of the topics to be discussed and the time to be devoted to each topic (preferably a signed original and eight (8) copies) by February 28, 2002.

A period of 10 minutes will be allotted to each person for making comments.

An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these regulations is T. Ian Russell, Office of Associate Chief Counsel (Corporate). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. In § 1.1502–80, paragraph (d) is revised to read as follows:

§ 1.1502–80 Applicability of other provisions of law.

(d) *Non-applicability of section 357(c)*—(1) *In general.* Section 357(c) does not apply to cause the transferor to recognize gain in any transaction to which § 1.1502–13 applies, if such transaction occurs in a consolidated return year beginning on or after [the date these regulations are published as final regulations in the **Federal Register**]. Notwithstanding the foregoing, for purposes of determining the transferor's basis in property under section 358(a) received in a transfer described in section 351, section 358(d)(2) shall operate to exclude liabilities described in section 357(c)(3)(A), other than those also described in section 357(c)(3)(B), from the computation of the amount of liabilities assumed that is treated as money received under section 358(d)(1), if such transfer occurs in a consolidated return year beginning on or after [the date these regulations are published as final regulations in the **Federal Register**]. This paragraph (d)(1) does not apply to a transaction if the transferor or transferee becomes a nonmember as part of the same plan or arrangement. The transferor (or transferee) is treated as becoming a nonmember once it is no longer a member of a consolidated group that includes the transferee (or transferor). For purposes of this paragraph (d)(1), any reference to a transferor or transferee includes, as the context may require, a reference to a successor or predecessor. For rules regarding the application of section 357(c) to transactions occurring in consolidated return years beginning on or after January 1, 1995, but before [the date these regulations are published as final regulations in the **Federal Register**], see § 1.1502–80(d) in effect prior to the date these regulations are published as final regulations in the **Federal Register** (see 26 CFR part 1 revised April 1, 2001).

(2) *Examples.* The principles of paragraph (d)(1) of this section are illustrated by the following examples:

Example 1. P, S, and T are members of a consolidated group. P owns all of the stock of S and T with bases of $30 and $20, respectively. S has assets with a total fair market value equal to $100 and an aggregate basis of $30 and liabilities of $40. S merges into T in a transaction described in section 368(a)(1)(A) (and in section 368(a)(1)(D)). Section 357(c) does not apply to cause S to recognize gain in the merger. P's basis in T's stock increases to $50 ($30 plus $20), and T succeeds to S's $30 basis in the assets transferred and the $40 of liabilities.

Example 2. P owns all the stock of S1. S1 has assets with a total fair market value equal to $100 and an aggregate basis of $30. S1 has $40 of liabilities, $5 of which are described in section 357(c)(3)(A), but not section 357(c)(3)(B), and $35 of which are not described in section 357(c)(3)(A). S1 transfers its assets to a newly formed subsidiary, S2, in exchange for stock of S2 and S2's assumption of the liabilities of $40 in a transaction to which section 351 applies. Section 357(c) does not apply to cause S1 to recognize gain in connection with the transfer. For purposes of determining S1's basis in the S2 stock it received in the exchange, section 358(d)(2) operates to exclude $5 of the liabilities from the computation of the amount of liabilities assumed that are treated as money received under section 358(d)(1). S1's basis in the S2 stock received in the exchange is a $5 excess loss account (reflecting its $30 basis in the assets transferred reduced by $35, the amount of liabilities assumed that are not described in section 357(c)(3)(A)).

* * * * *

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

[FR Doc. 01–28409 Filed 11–13–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 31

[REG–142686–01]

RIN 1545–BA26

Application of the Federal Insurance Contributions Act, Federal Unemployment Tax Act, and Collection of Income Tax at Source to Statutory Stock Options

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document contains proposed regulations relating to incentive stock options and options granted under employee stock purchase plans. These proposed regulations would provide guidance concerning the application of the Federal Insurance Contributions Act (FICA), Federal Unemployment Tax Act (FUTA), and Collection of Income Tax at Source to these options. These proposed regulations would affect employers that grant these options and employees who exercise these options. This document also provides notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments and outlines of topics to be discussed at the public hearing scheduled for March 7, 2002, must be received by February 14, 2002.

ADDRESSES: Send submissions to: CC:ITA:RU (REG–142686–01), Room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:ITA:RU (REG 142686–01), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the ''Tax Regs'' option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at *http://www.irs.gov/tax_regs/reglist.html.* The public hearing will be held in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Stephen Tackney of the Office of Division Counsel/Associate Chief Counsel (Tax Exempt and Government Entities), (202) 622–6040; concerning submissions of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Treena Garrett, (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Employment Tax Regulations (26 CFR part 31) under sections 3121(a), 3306(b), and 3401(a) of the Internal Revenue Code of 1986 (Code), and to the Income Tax Regulations (26 CFR part 1) under section 424 of the Code. These regulations would clarify current law regarding FICA tax, FUTA tax, and income tax withholding consequences upon the exercise of statutory stock options, *i.e.,* incentive stock options described in section 422(b) and options granted under an employee stock purchase plan described in section 423(b). FICA tax consequences are determined by sections 3101 through 3128, FUTA tax consequences by sections 3301 through 3311, and income tax withholding consequences by sections 3401 through 3406.

A. Statutory Stock Options

Section 422(b) sets forth the requirements for treatment of options as incentive stock options. If certain conditions are met, special tax treatment is provided in section 421(a) for the transfer of stock to an individual

pursuant to the exercise of an incentive stock option. These conditions include a requirement that the individual not dispose of the stock within two years from the date of the grant of the option, and a requirement that the individual not dispose of the stock within one year after the transfer of the stock to the individual.

Section 423(b) sets forth the requirements for establishment of an employee stock purchase plan. If certain conditions are met, special tax treatment is provided under section 421(a) for the transfer of stock to an individual pursuant to the exercise of an option granted under an employee stock purchase plan. These conditions include a requirement that the individual not dispose of the stock within two years from the date of the grant of the option, and a requirement that the individual not dispose of the stock within one year after the transfer of the stock to the individual.

Section 421(a) provides that at the time stock is transferred to an individual pursuant to the exercise of an option, if the conditions of section 422(a) or 423(a) are met, then no income to the individual results upon the exercise. Section 421(b) provides that at the time stock is transferred to an individual pursuant to the exercise of an option, if the stock is sold or disposed of by the individual and the holding period requirements of section 422(a)(1) or 423(a)(1) are not met, then any income to the individual which results for the taxable year, in which the option was exercised, attributable to the sale or disposition of the stock is income to the individual in the taxable year, of the individual, in which the sale or disposition occurred.

Section 423(c) provides guidance when the option price of a share of stock acquired by an individual pursuant to the exercise of an option granted under an employee stock purchase plan is less than 100 percent of the fair market value of the share at the time the option was granted. Section 423(c) provides that in the event of either the disposition of the share of stock by the individual which meets the holding period requirements of section 423(a) or in the event of the individual's death while owning the share of stock, that any resulting compensation is attributable to the individual in the taxable year in which the disposition or death occurred. The compensation attributable to the individual is the amount equal to the lesser of (1) the excess of the fair market value of the share at the time of the disposition or death over the amount paid for the share under the option or (2) the excess of the fair market value of the share at the time the option was granted over the option price.

B. FICA, FUTA, and Income Tax Withholding

1. FICA

FICA tax is generally imposed on each employer and employee. Under section 3111, FICA tax is imposed on the employer in an amount equal to a percentage of the wages paid by that employer. Under section 3101, FICA tax is also imposed on the employee in an amount equal to a percentage of the wages received by the employee with respect to employment.

FICA tax is composed of a tax for Old-Age, Survivors, and Disability Insurance (OASDI) and a tax for Hospital Insurance (HI). The OASDI portion of FICA tax is imposed separately on the employer and on the employee in an amount equal to 6.2 percent of wages. Under section 3121(a)(1), the wages subject to the OASDI portion of FICA tax are limited to the contribution and benefit base for OASDI for that year ($80,400 for calendar year 2001). The HI portion of FICA tax is separately imposed on the employer and the employee in an amount equal to 1.45 percent of wages. There is no dollar limit on the wages subject to the HI portion of FICA tax.

Under section 3102, the employer is required to collect the employee portion of FICA tax by deducting the amount of the tax from wages, as and when paid, and is liable for payment of the tax required to be collected. Under § 31.3102–1(a) of the Employment Tax Regulations, the employer is required to collect the employee portion of FICA tax, notwithstanding that the wages are paid in something other than money, and to pay over the tax in money.

2. FUTA

FUTA tax is generally imposed under section 3301 on each employer in an amount equal to a percentage of wages paid by the employer with respect to employment. FUTA tax is imposed on the employer in an amount equal to 6.2 percent of wages. Under section 3306(b), wages of an employee subject to the FUTA tax are limited to $7,000 per calendar year.

3. Income Tax Withholding

Income tax withholding is imposed under section 3402(a), which requires employers paying wages to deduct and withhold income tax on those wages. The amount deducted and withheld is determined in accordance with tables or computational procedures prescribed by the Secretary of the Treasury.

C. Wages

1. FICA

For FICA purposes, section 3121(a) provides that the term wages, with certain exceptions, means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash. Similarly, under § 31.3121(a)–1(b), the term *wages* means all remuneration for employment unless specifically excepted under section 3121(a) or § 31.3121(a)–1(j). Neither the Code nor the regulations contain an exclusion from wages for the value of stock transferred pursuant to the exercise of an option.

Under § 31.3121(a)–1(e), in general, the medium in which the remuneration is paid is immaterial. It may be paid in cash or in kind. The amount of non-cash remuneration is based on the fair market value of the non-cash remuneration at the time of payment.

Under § 31.3121(a)–1(a), in general, wages are received by an employee at the time that they are paid by the employer to the employee. Wages are generally paid by an employer at the time that they are actually or constructively paid.

Under § 31.3121(a)–1(i), remuneration for employment, unless specifically excepted under section 3121(a) or § 31.3121(a)–1(j), constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

2. FUTA

For FUTA purposes, section 3306(b) provides that the term *wages,* with certain exceptions, means all remuneration for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash. Similarly, under § 31.3306(b)–1(b), the term *wages* means all remuneration for employment unless specifically excepted under section 3306(b) or § 31.3306(b)-1(j). Neither the Code nor the regulations contain an exclusion from wages for the value of stock transferred pursuant to the exercise of an option.

Under § 31.3306(b)–1(e), in general, the medium in which the remuneration is paid is immaterial. It may be paid in cash or in kind. The amount of non-cash remuneration is based on the fair market value of the non-cash remuneration at the time of payment.

Under § 31.3301–4, wages are considered paid when actually or constructively paid.

Under § 31.3306(b)–1(i), remuneration for employment paid by an employer to an individual for employment, unless specifically excepted under section 3306(b), constitutes wages even though at the time paid the individual is no longer an employee.

3. Income Tax Withholding

For income tax withholding purposes, section 3401(a) provides that the term *wages,* with certain exceptions, means all remuneration for services performed by an employee for his employer, including the cash value of all remuneration (including benefits) paid in any medium other than cash. Similarly, under § 31.3401(a)–1(a), the term *wages* in general means all remuneration for employment for services performed by an employee for his employer unless specifically excepted under section 3401(a) or 3402(e).

Under § 31.3401(a)–1(a)(4), in general, the medium in which the remuneration is paid is immaterial. It may be paid in cash or in kind. The amount of non-cash remuneration is based on the fair market value of the non-cash remuneration at the time of payment.

Under § 31.3402(a)–1(b), the employer is required to collect the tax by deducting and withholding the amount from the employee's wages as and when paid, either actually or constructively.

Under § 31.3401(a)–1(a)(5), remuneration for services, unless specifically excepted by statute, constitutes wages even though at the time paid the relationship of employer and employee no longer exists between the person in whose employ the services were performed and the individual who performed them.

The legislative history of sections 3401 through 3404 indicates that a purpose of income tax withholding is to enable individuals to pay income tax in the year in which the income is earned. H.R. Conf. Rep. No. 78–510 at 1 (1943); H.R. Rep. No. 78–401 at 1 (1943); Rep. No. 78–221 at 1 (1943); and Senate Rep. No. 78–221 at 1 (1943). Therefore, income tax withholding is generally imposed only upon remuneration paid by an employer to the extent that an employee recognizes income. Section 421(a) provides that if a share of stock is transferred to an individual in a transfer which meets the requirements of section 422(a) or 423(a), no income is recognized at the time of the transfer.

As part of the Social Security Amendments of 1983, Public Law 98–21, 97 Stat. 65 (1983), Congress amended sections 3121(a) and 3306(b)[1] to provide specifically that regulations providing an exclusion from wages for income tax withholding purposes are not to be construed to require a similar exclusion from wages for FICA and FUTA purposes. The legislative history to the Social Security Amendments of 1983 at S. Rep. No. 98–23, 42, 98th Cong., 1st Sess. explains as to FICA and income tax withholding that ''[S]ince, [however], the [social] security system has objectives which are significantly different from the objective underlying the income tax withholding rules, the committee believes that amounts exempt from income tax withholding should not be exempt from FICA unless Congress provides an explicit FICA tax exclusion.'' The legislative history further explains that Congress intended to reverse the holding in *Rowan Companies* v. *U.S.,* 452 U.S. 247 (1981), that the definitions of *wages* for FICA and income tax withholding purposes were the same. Thus, wages for income tax withholding purposes are not always the same as wages for FICA and FUTA purposes.

D. Application of Law to Statutory Stock Options

Revenue Ruling 71–52 (1971–1 C.B. 278) which was published before the statutory changes to sections 3121(a) and 3306(b) mentioned immediately above, addressed the FICA, FUTA, and income tax withholding consequences applicable to the exercise of qualified stock options under former section 422.[2] The ruling holds that a taxpayer does not make a payment of wages for purposes of FICA, FUTA, and income tax withholding at the time of the exercise of a qualified stock option under former section 422.

Notice 87–49 (1987–2 C.B. 355) addressed potential inconsistencies among and coordination of the proposed regulations under former section 422A (current section 422), section 83, and Rev. Rul. 71–52. Notice 87–49 provided that Rev. Rul. 71–52 was being reconsidered, but, until the results of such reconsideration were announced, the principles of Rev. Rul. 71–52 apply to the disposition of stock, acquired by an individual pursuant to the exercise of an incentive stock option, which does not meet the requirements of former section 422A(a) (current section 422(a)).

Notice 2001–14 (2001–6 I.R.B. 416) addresses the FICA, FUTA, and income tax withholding consequences applicable to the exercise of statutory stock options. Notice 2001–14 provides that in the case of any statutory stock option exercised before January 1, 2003, the IRS will not assess FICA or FUTA tax upon the exercise of the option and will not treat the disposition of stock acquired by an employee pursuant to the exercise of the option as subject to income tax withholding. Notice 2001–14 also provides that Revenue Ruling 71–52 is obsolete and that the holding of Revenue Ruling 71–52 does not apply to the exercise of a statutory stock option or to the disposition of stock acquired pursuant to the exercise of a statutory stock option. Consistent with that conclusion, Notice 2001–14 also provides that the provisions of Notice 87–49 described above no longer apply.

It has long been recognized that the transfer of stock to an employee pursuant to the exercise of a nonstatutory stock option granted in connection with employment constitutes a payment of compensation to the extent that the fair market value of the stock received by the employee pursuant to the exercise of the nonstatutory option exceeds the option exercise price. *Commissioner* v. *LoBue,* 351 U.S. 243 (1956); *Commissioner* v. *Smith,* 324 U.S. 177 (1945). The exclusion from gross income for income tax purposes that is provided by section 421(a)(1) for the transfer of stock upon the exercise of a statutory stock option, does not alter the compensatory character of such stock transfers or serve to distinguish statutory stock options from nonstatutory stock options for purposes of sections 3121(a) and 3306(b).

Comments Received Pursuant to Notice 2001–14

Notice 2001–14 announced the intent to issue further administrative guidance clarifying current law with respect to the application of employment taxes to statutory stock options and solicited public comments on the anticipated guidance. In response to the request for comments, the IRS received a number of comments addressing a variety of topics pertaining to the application of FICA, FUTA, and income tax withholding to

[1] Sections 3121(a) and 3306(b) were amended by section 327(b)(1) and (c)(4), respectively, of the Social Security Amendments of 1983, Public Law 98–21, 97 Stat. 65 (1983).

[2] Section 603 of the Tax Reform Act of 1976, Public Law 94–355, 90 Stat. 1520 (1976), amended former section 422 to provide, generally, that qualified stock options could not be granted after May 20, 1976. Current section 422 (Incentive Stock Options) was added to the Internal Revenue Code of 1954 (Code), as section 422A, by section 251(a) of the Economic Recovery Tax Act of 1981, Public Law 97–34, 95 Stat. 172 (1981). Subsequently, section 11801(c)(9)(A)(i) of the Omnibus Budget Reconciliation Act of 1990, Public Law 101–508, 104 Stat. 1388 (1990), repealed former section 422 (Qualified Stock Options) and re-designated former Code section 422A as section 422 of the Internal Revenue Code of 1986.

transactions involving statutory stock options. Because the proposed regulations address only the application of the FICA, FUTA, and income tax withholding at the time of exercise of a statutory stock option, only comments relating to these types of transactions are addressed.

The IRS also received comments regarding an employer's income tax withholding and reporting obligations upon the sale or disposition of stock acquired by an individual pursuant to the exercise of a statutory stock option. The IRS intends to publish two notices, discussed more fully below, at the time of publication of these proposed regulations. One notice includes proposed rules addressing an employer's income tax withholding and reporting obligations upon the sale or disposition of stock acquired by an individual pursuant to the exercise of a statutory stock option. That notice discusses the comments received in response to Notice 2001–14 relating to those types of transactions.

Most commentators who addressed the application of FICA and FUTA tax at the time of exercise of a statutory stock option argued that there was no statutory basis for such application. As discussed more fully previously, the applicable Code provisions do not provide an exception from FICA or FUTA tax for wages paid to an employee arising from the exercise of a statutory stock option.

Several comments were received requesting that the IRS's acquiescence on decision in *Sun Microsystems* v. *Commissioner,* T.C.M. 1995–69, *acq.* 1997–2 C.B. 1, not be affected by the proposed regulations. The proposed regulations address only the application of FICA and FUTA to statutory stock options and do not address the section 41 issues raised in the *Sun Microsystems* decision.

Some commentators also expressed concern about the administrative burden of applying FICA and FUTA tax at the time of exercise, especially as to former employees, because there is often no payment of cash compensation to the employee at that time. As a result, some employees may need to sell some shares of the acquired stock to fund the employment tax obligations, resulting in a disqualifying disposition of the shares sold. In addition, some commentators expressed concern that the administrative burdens stemming from the application of FICA and FUTA tax upon the exercise of statutory stock options would make the use of these options less attractive to employers and employees. However, commentators did not cite applicable Code provisions that provide a statutory basis for excluding this type of compensation from the relevant employment taxes. As discussed below, the proposed regulations would enable the IRS to issue rules of administrative convenience to lessen the administrative burdens that commentators cited.

Explanation of Provisions

These proposed regulations would clarify current law regarding FICA tax, FUTA tax, and income tax withholding on the transfer of stock pursuant to the exercise of statutory stock options. These proposed regulations would provide that at the time of the exercise of a statutory stock option, the individual who was granted the statutory stock option receives wages for FICA and FUTA purposes. These proposed regulations would also provide that the amount of wages received equals the excess of the fair market value of the stock acquired pursuant to the exercise of the statutory stock option over the amount paid for the stock.

The position taken in these regulations is based upon the broad statutory definition of wages for FICA and FUTA purposes and the absence of any statutory exclusion for this form of remuneration. These regulations follow the Congressional directive that no exception from FICA taxes should be created without a specific exclusion and the section 3121(a) and 3306(b) provisions that no exception from FICA and FUTA taxes should be inferred from the fact that income tax withholding does not apply.

These proposed regulations would also provide that income tax withholding is not required when an individual exercises a statutory stock option because no income is recognized at the time of the exercise by reason of section 421(a)(1).

In response to the concerns about administrative burdens, the proposed regulations authorize the IRS to adopt rules of administrative convenience to assist employers and employees in meeting the employment tax obligations. Specifically, the proposed regulations permit the IRS to adopt rules permitting employers to deem the payment of wages resulting from the exercise of a statutory stock option as occurring at a specific date or dates, including over a period of dates, as well as any other appropriate rules of administrative convenience.

Section 424(h) provides that for purposes of the rules governing incentive stock option plans and employee stock purchase plans, if the terms of any option to purchase stock are modified, extended, or renewed, such modification, extension, or renewal is considered as the grant of a new option. Section 424(h)(3) generally defines the term *modification* as any change in the terms of the option which gives the employee additional benefits. The proposed regulations clarify that the adoption of any of the rules of administrative convenience that may be prescribed by the IRS pursuant to the proposed regulations, and the application of those rules to outstanding incentive stock options under section 422 or outstanding options under an employee stock purchase plan under section 423, will not constitute a modification for purposes of section 424(h).

These regulations are proposed to apply only upon publication of final regulations in the **Federal Register** and cannot be relied upon prior to publication. These proposed regulations, upon becoming final, would be effective only for the exercise of a statutory stock option that occurs on or after January 1, 2003. If these regulations are finalized as proposed, neither FICA nor FUTA tax will apply to the exercise of a statutory stock option prior to January 1, 2003. Consistent with this proposed position, the IRS will not assert FICA or FUTA tax which is based upon the exercise of a statutory stock option that occurs prior to January 1, 2003.

While neither FICA nor FUTA tax will apply to the exercise of a statutory stock option prior to January 1, 2003 if these regulations are finalized as proposed, an employer will be able to apply the final regulations to the exercise of a statutory stock option that occurs prior to January 1, 2003 if the employer elects to do so.

Related Administrative Guidance

As noted above, the IRS is concurrently publishing two notices. One of the two notices sets forth proposed rules of administrative convenience under the authority provided to the IRS in the proposed regulations. These proposed rules would permit employers to deem the payment of wages resulting from the exercise of a statutory stock option as occurring at a specific date or dates, including over a period of dates. The notice also describes certain arrangements available under the current federal tax law that may assist employers and employees, including employee pre-funding of the employee portion of FICA tax and employer advances of funds to satisfy the employee portion of FICA tax.

The IRS is publishing a second notice that proposes rules regarding an employer's income tax withholding and reporting obligations upon the sale or disposition of stock acquired by an individual pursuant to the exercise of a statutory stock option. As indicated above, the proposed rule in this notice would state that the employer has no income tax withholding obligation when an employee sells or disposes of stock acquired by the employee pursuant to the exercise of a statutory stock option.[3]

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. All comments will be available for public inspection and copying.

Treasury and the IRS specifically request comments on the clarity of the proposed regulations, how they can be made easier to understand, and the administerability of the rules in the proposed regulations. In addition, the proposed regulations do not include special rules for transactions in which an individual exercising a statutory stock option receives stock subject to a restriction, such as a substantial risk of forfeiture. Treasury and the IRS also specifically request comments as to whether the proposed regulations should include such special rules, including comments as to the prevalence of incentive stock option plans or employee stock purchase plans that impose such terms on stock received pursuant to the exercise of a statutory stock option.

A public hearing has been scheduled for March 7, 2002, beginning at 10 a.m. in the Auditorium of the Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. In addition, all visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601 (a) (3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the time to be devoted to each topic (signed original and eight (8) copies) by February 14, 2002. A period of 10 minutes will be allotted to each person for making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

The principal author of these proposed regulations is Stephen Tackney, Office of the Associate Chief Counsel (Tax Exempt and Government Entities). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

Proposed Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 31 are proposed to be amended as follows:

PART 1—INCOME TAXES

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

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.425–1, as proposed at 49 FR 4519 (February 7, 1984), is amended by adding a sentence immediately after the third sentence of paragraph (e)(5)(i) to read as follows:

§ 1.425–1 Definitions and special rules applicable to statutory options.

* * * * *

(e) * * *

(5)(i) * * * In addition, the application to an outstanding option of any of the methods for the payment or withholding of employment taxes under sections 3101, 3111, or 3301 that may be prescribed under § 31.3121(a)–1(k)(2) or § 31.3306(b)–1(l)(2) of this chapter is not a modification. * * *

* * * * *

PART 31—EMPLOYMENT TAXES AND COLLECTION OF INCOME TAXES AT THE SOURCE

Par. 3. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 4. In § 31.3121(a)–1, paragraph (k) is added to read as follows:

§ 31.3121(a)–1 Wages.

* * * * *

(k) *Statutory stock options*—(1) *When an individual receives wages*—(i) *Statutory stock option defined.* For purposes of this section, a statutory stock option is an option that either satisfies the requirements of section 422(b) or is granted under a plan that satisfies the requirements of section 423(b).

(ii) *Wages at exercise.* If an individual is granted a statutory stock option, the individual receives wages when stock is transferred to the individual pursuant to the exercise of the option. The amount of the wages received by the individual is equal to the excess of the fair market value of the stock, determined at the time of exercise, over the amount paid for the stock by the individual. The provisions of this paragraph (k) are illustrated by the following example:

Example. (i) Individual X is granted an option under a plan that satisfies the requirements of section 423(b). The option allows X to acquire 50 shares of stock of X's employer, Y, at an exercise price equal to 85% of the fair market value of the stock at the time the option is granted. The fair market value of the Y stock at the time the option is granted is $100 per share. X exercises the option later when the fair

[3] These proposed regulations, along with the two notices, are intended to clarify the application of employment taxes to statutory stock options in a manner that recognizes and addresses the practical burdens that are imposed, including the imposition of withholding when neither the employer nor any other person (other than the employee) has control over a payment of remuneration, while also ensuring that ''amounts exempt from income tax withholding should not be exempt from FICA unless Congress provides an explicit FICA tax exclusion.'' Social Security Amendments of 1983 at S. Rep. No. 98–23, 42, 98th Cong., 1st Sess.

market value of the Y stock is $120 per share. Thus, at the time of exercise, X acquires 50 shares of Y stock having a fair market value of $120 per share for $85 per share.

(ii) In this *Example,* at the time of exercise, X has received wages equal to the excess of the fair market value of the stock ($120 per share) over the amount paid for the stock ($85 per share). Thus, for purposes of section 3121, X has received wages equal to $35 per share, for a total of $1,750.

(2) *Rules of administrative convenience.* The Commissioner may prescribe rules of administrative convenience for employers and employees to satisfy obligations under sections 3101 and 3111 that arise with respect to wages received pursuant to the exercise of a statutory stock option. Such rules may include, but are not limited to, permitting employers to deem the payment of wages due to the exercise of the statutory stock option as occurring at a specific date or dates, including over a period of dates.

(3) *Effective date.* This paragraph (k) is applicable to the exercise of a statutory option that occurs on or after January 1, 2003.

Par. 5. In § 31.3306(b)–1, paragraph (l) is added to read as follows:

§ 31.3306(b)–1 Wages.

* * * * *

(l) *Statutory stock options*—(1) *When an individual receives wages*—(i) *Statutory stock option defined.* For purposes of this section, a statutory stock option is an option that either satisfies the requirements of section 422(b) or is granted under a plan that satisfies the requirements of section 423(b).

(ii) *Wages at exercise.* If an individual is granted a statutory stock option, the individual receives wages when stock is transferred to the individual pursuant to the exercise of the option. The amount of the wages received by the individual is equal to the excess of the fair market value of the stock, determined at the time of exercise, over the amount paid for the stock by the individual. The provisions of this paragraph (l) are illustrated by the following example:

Example. (i) Individual X is granted an option under a plan that satisfies the requirements of section 423(b). The option allows X to acquire 50 shares of stock of X's employer, Y, at an exercise price equal to 85% of the fair market value of the stock at the time the option is granted. The fair market value of the Y stock at the time the option is granted is $100 per share. X exercises the option later when the fair market value of the Y stock is $120 per share. Thus, at the time of exercise, X acquires 50 shares of Y stock having a fair market value of $120 per share for $85 per share.

(ii) In this *Example,* at the time of exercise, X has received wages equal to the excess of the fair market value of the stock ($120 per share) over the amount paid for the stock ($85 per share). Thus, for purposes of section 3306, X has received wages equal to $35 per share, for a total of $1,750.

(2) *Rules of administrative convenience.* The Commissioner may prescribe rules of administrative convenience for employers to satisfy obligations under section 3301 that arise with respect to wages received pursuant to the exercise of a statutory stock option. Such rules may include, but are not limited to, permitting employers to deem the payment of wages due to the exercise of the statutory stock option as occurring at a specific date or dates, including over a period of dates.

(3) *Effective date.* This paragraph (l) is applicable to the exercise of a statutory option that occurs on or after January 1, 2003.

Par. 6. In § 31.3401(a)–1, paragraph (b)(15) is added to read as follows:

§ 31.3401(a)–1 Wages.

* * * * *

(b) * * *

(15) *Statutory stock options*—(i) *When stock is transferred pursuant to an exercise*—(A) *Statutory stock option defined.* For purposes of this section, a statutory stock option is an option that either satisfies the requirements of section 422(b) or is granted under a plan that satisfies the requirements of section 423(b).

(B) *Withholding at exercise.* If an individual is granted a statutory stock option, withholding is not required when stock is transferred to the individual pursuant to the exercise of the option to the extent that the individual does not recognize income by reason of section 421(a)(1). The provisions of this paragraph (b)(15) are illustrated by the following example:

Example. (i) Individual X is granted an option under a plan that satisfies the requirements of section 423(b). The option allows X to acquire 50 shares of stock of X's employer, Y, at an exercise price equal to 85% of the fair market value of the stock at the time the option is granted. The fair market value of the Y stock at the time the option is granted is $100 per share. X exercises the option later when the fair market value of the Y stock is $120 per share. Thus, at the time of exercise, X acquires 50 shares of Y stock having a fair market value of $120 per share for $85 per share. X continues to hold the Y stock after exercise. Under section 421(a), no income is recognized at the time of exercise.

(ii) In this *Example,* for purposes of section 3401, X has not received wages at the time of exercise.

(ii) *Effective date.* This paragraph (b)(15) is applicable to the exercise of a statutory stock option that occurs on or after January 1, 2003.

* * * * *

Robert E. Wenzel.

Deputy Commissioner of the Internal Revenue.

[FR Doc. 01–28535 Filed 11–13–01; 8:45 am]

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NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1827, 1835, and 1852

RIN 2700–AC33

Scientific and Technical Reports

AGENCY: National Aeronautics and Space Administration (NASA)

ACTION: Proposed rule.

SUMMARY: This proposed rule would amend the NFS to clarify the review requirements for data produced under Research and Development (R&D) contracts including data contained in final reports and the review requirements for final reports prior to inclusion in NASA's Center for AeroSpace Information (CASI).

DATES: Comments should be submitted on or before January 14, 2002.

ADDRESSES: Interested parties should submit written comments to Celeste Dalton, NASA Headquarters, Office of Procurement, Contract Management Division (Code HK), Washington, DC 20546. Comments may also be submitted by e-mail to: *cdalton@hq.nasa.gov.*

FOR FURTHER INFORMATION CONTACT: Celeste Dalton, (202) 358–1645, e-mail: *cdalton@hq.nasa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

NFS clause 1852.235–70, Center for Aerospace Information—Final Scientific and Technical Reports, is required in all R&D contracts. Paragraph (e) of the current NFS clause 1852.235–70 requires that contractors not release the final report required under the contract, outside of NASA, until a document availability authorization (DAA) review has been completed by NASA and availability of the report has been determined. The DAA review completed by NASA is intended to insure that NASA disseminates NASA scientific and technical information (STI) in a manner consistent with U.S. laws and regulations, Federal information policy, intellectual property rights, technology transfer protection requirements, and budgetary and technological limitations.

The DAA review process applies only to the publication and dissemination of NASA STI by NASA or under the direction of NASA.

This final report review requirement has been incorrectly interpreted by some university contractors as restricting their right to publish any of the data produced under the contract which may be included in the Final Report until NASA has completed its DAA review. The intent of paragraph (e) is to restrict only the release of the ''The Final Report'' as delivered under the contract until NASA completes its DAA review and availability of the report has been determined. This clause does not restrict the contractor's ability to publish, or otherwise disseminate, data produced during the performance of the contract, including data contained in the Final Report, as provided under FAR clause 52.227–14, Rights in Data—General. However, in certain limited situations, contract requirements may include research activity that will result in data subject to export control, national security restrictions, or other restrictions designated by NASA, or may require that the contractor receives or is given access to data that includes restrictive markings, e.g., proprietary information of others. In these circumstances, NASA requires a review of data produced under the contract, before the contractor may publish, release, or otherwise disseminate the data.

This proposed rule clarifies the above by—

(a) Revising the existing clause, 1852.235–70, to delete reference to the submission of the final report. This revised clause is titled ''Center for Aerospace Information,'' and will advise contractors of the services provided by CASI;

(b) Establishing a new clause 1852.235–73, Final Scientific and Technical Reports, that requires submission of a final report; states that the contractor may publish, or otherwise disseminate, data produced during the performance of the contract, including data contained in the final report, without prior review by NASA; and retains restriction on release of the final report as delivered under the contract until NASA has completed its DAA review;

(c) Establishing an Alternate I to the new 1852.235–73 clause, that may be used in contracts for fundamental research in which the contractor may publish, or otherwise disseminate, data produced during performance of the contract, including the final report, without prior review by NASA;

(d) Establishing an Alternate II to the new 1852.235–73 clause, for use in contracts in which data resulting from the research activity may be subject to export control, national security restrictions or other restrictions designated by NASA, may include information disclosing an invention in which the government may have rights, or, to the extent the contractor receives or is given access to data that includes restrictive markings, may include proprietary information of others, and will require the contractor to comply with NASA review requirements contained in the new clause, 1852.235–75, Review of Final Scientific and Technical Reports and Other Data;

(e) Establishing a new clause 1852.235–74, Additional Reports of Work—Research and Development, for use in contracts in which monthly, quarterly and other reports in addition to the Final Report may be considered necessary for monitoring contract performance;

(f) Establishing a new clause 1852.235–75, Review of Final Scientific and Technical Reports and Other Data, for use in contracts in which data resulting from the research activity may be subject to export control, national security restrictions or other restrictions designated by NASA, may include information disclosing an invention in which the government may have rights, or, to the extent the contractor receives or is given access to data that includes restrictive markings, may include proprietary information of others, and thus will require NASA review of data produced under the contract before the contractor may publish, release, or otherwise disseminate data produced during the performance of the contract; and

(g) Moving the coverage for Reports of Work from Part 1827, Patents, Data, and Copyrights, to 1835, Research and Development Contracting, by deleting section 1827.406–70, Reports of Work, and adding sections 1835.010, Scientific and technical reports, and 1835.011, Data.

B. Regulatory Flexibility Act

NASA certifies that this proposed rule will not have a significant economic impact on a substantial number of small business entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601, *et. seq.*), because these changes only clarify existing rights and responsibilities relating to release of data produced in performance of a contract.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the NFS do not impose any recordkeeping or information collection requirements, or collection of information from offerors, contractors, or members of the public that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 1827, 1835, and 1852

Government procurement.

Tom Luedtke,

Associate Administrator for Procurement.

Accordingly, 48 CFR Parts 1827, 1835, and 1852 are proposed to be amended as follows:

1. The authority citation for 48 CFR Parts 1827, 1835, and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1).

PART 1827—PATENTS, DATA, AND COPYRIGHTS

2. Delete section 1827.406–70.

PART 1835—RESEARCH AND DEVELOPMENT CONTRACTING

3. Add sections 1835.010 and 1835.011 to read as follows:

1835.010 Scientific and technical reports.

(a)(i) *Final reports.* Final reports must be furnished by contractors for all R&D contracts. The final report should summarize the results of the entire contract, including recommendations and conclusions based on the experience and results obtained. The final report should include tables, graphs, diagrams, curves, sketches, photographs, and drawings in sufficient detail to explain comprehensively the results achieved under the contract. The final report should comply with formatting and stylistic guidelines contained in NPG 2200.2A, Guidelines for Documentation, Approval, and Dissemination of NASA Scientific and Technical Information. The contracting officer must specify in the contract whether the use of electronic formats for submission of reports is acceptable. Information regarding appropriate electronic formats is available from Center STI Managers or the NASA Center for AeroSpace Information (CASI).

(ii) In addition to the final report submitted to the contracting officer, the contractor must concurrently provide the NASA Center for AeroSpace Information (CASI) with a copy of the letter transmitting the final report to the contracting officer.

(iii) It is NASA policy to provide the widest practicable and appropriate dissemination of scientific and technical information (STI) derived from NASA activities, including that generated under NASA research and development contracts. One mechanism for disseminating NASA STI is through CASI. Before approving a final report delivered under a contract for inclusion in the CASI repository, NASA must complete a Document Availability Authorization (DAA) review. The DAA review is intended to insure that NASA disseminates NASA scientific and technical information (STI) in a manner consistent with U.S. laws and regulations, federal information policy and publication standards, intellectual property rights, technology transfer protection requirements, and budgetary and technological limitations. NASA Form 1676, NASA Scientific and Technical Document Availability Authorization (DAA), or a Center-specific version of this form, is used to complete this review. The DAA review process applies to the publication and dissemination of NASA STI by NASA or under the direction of NASA. The final report, as delivered under the contract, must not be released outside of NASA until NASA's DAA review has been completed and the availability of the document has been determined.

(iv) *Additional reports of work.* In addition to the final report required by paragraph (a)(i) of this section, the contracting officer, in consultation with the program or project manager, should consider the desirability of requiring periodic reports and reports on the completion of significant units or phases of work for monitoring contract performance. Any additional reports must be included in the clause at 1852.235–74 as a contract deliverable. (See FAR 27.403.)

(v) Upon receipt of the Final Report, or any additional reports required by 1852.235–74 if included in the contract, the contracting officer must forward the reports to the contracting officer's technical representative (COTR) for review and acceptance. The COTR must ensure that the DAA review is initiated upon receipt of the final report. With respect to any additional reports required by 1852.235–74, if NASA wishes to disseminate such additional reports outside of NASA, the COTR must ensure that the DAA review is initiated upon receipt of such additional reports. Upon completion of the DAA review, the COTR must advise the contracting officer and contractor of the final availability determination and submit the final report along with the final availability determination to CASI. A copy of the letter transmitting the final report to CASI must be submitted to the contracting officer. These responsibilities should be included in the COTR Delegation, NASA Form 1634.

(b) The final report must include a completed Report Documentation Page, Standard Form (SF) 298, as the final page of the report.

1835.011 Data.

(a) In addition to any reports required by 1835.010, the contracting officer must specify what additional data, (type, quantity, and quality) is required under the contract, for example, presentations, journal articles, and seminar notes. (See FAR 27.403.)

4. Revise section 1835.070 to read as follows:

1835.070 NASA contract clauses and solicitation provision.

(a) The contracting officer must insert the clause at 1852.235–70, Center for AeroSpace Information, in all research and development contracts, and interagency agreements and cost-reimbursement supply contracts involving research and development work.

(b) The contracting officer must insert the clause at 1852.235–71, Key Personnel and Facilities, in contracts when source selection has been substantially predicated upon the possession by a given offeror of special capabilities, as represented by key personnel or facilities.

(c) The contracting officer must ensure that the provision at 1852.235–72, Instructions for Responding to NASA Research Announcements, is inserted in all NRAs. The instructions may be supplemented, but only to the minimum extent necessary.

(d)(1) The contracting officer must insert the clause at 1852.235–73, Final Scientific and Technical Reports, in all research and development contracts, and in interagency agreements and cost-reimbursement supply contracts involving research and development work.

(2) The contracting officer, after consultation with and concurrence of the program or project manager and the Center Export Control Administrator, may insert the clause with its Alternate I when the contract includes ''fundamental research'' as defined at 22 CFR 120.11(8) and no prior review of data, including the final report, produced during the performance of the contract is required for export control or national security purposes before the contractor may publish, release, or otherwise disseminate the data.

(3) The contracting officer must insert the clause with its Alternate II when the clause at 1852.235–75, Review of Final Scientific and Technical Reports and Other Data, as prescribed by paragraph (f) of this section, is included in the contract.

(e) The contracting officer must insert a clause substantially the same as the clause at 1852.235–74, Additional Reports of Work—Research and Development, in all research and development contracts, and in interagency agreements and cost-reimbursement supply contracts involving research and development work, when periodic reports, such as monthly or quarterly reports, or reports on the completion of significant units or phases of work are required for monitoring contract performance. The clause should be modified to reflect the reporting requirements of the contract and to indicate the timeframe for submission of the final report.

(f) The contracting officer, after consultation with and concurrence by the program or project manager and where necessary the Center Export Control Administrator, must insert a clause substantially the same as the clause at 1852.235–75, Review of Final Scientific and Technical Reports and Other Data, when prior review of all data produced during the performance of the contract is required before the contractor may publish, release, or otherwise disseminate the data. For example, when data produced during performance of the contract may be subject to export control, national security restrictions, or other restrictions designated by NASA; may include information disclosing an invention in which the government may have rights; or, to the extent the contractor receives or is given access to data that includes restrictive markings, may include proprietary information of others.

PART 1852—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

5. Revise section 1852.235–70 to read as follows:

1852.235–70 Center for AeroSpace Information.

As prescribed in 1835.070(a), insert the following clause:

CENTER FOR AEROSPACE INFORMATION

(XXX/XXX)

(a) The Contractor should register with and avail itself of the services provided by the NASA Center for AeroSpace Information (CASI) (http://www.sti.nasa.gov) for the conduct of research or research and development required under this contract. CASI provides a variety of services and products as a NASA repository of research

information, which may enhance contract performance.

(b) Should the CASI information or service requested by the Contractor be unavailable or not in the exact form necessary by the Contractor, neither CASI nor NASA is obligated to search for or change the format of the information. A failure to furnish information shall not entitle the Contractor to an equitable adjustment under the terms and conditions of this contract.

(c) Information regarding CASI and the services available can be obtained at the Internet address contained in paragraph (a) of this clause or at the following address. Center for AeroSpace Information (CASI), 7121 Standard Drive, Hanover, Maryland 21076–1320, Email: *help@sti.nasa.gov,* Phone: 301–621–0390, FAX: 301–621–0134.

(End of clause)

6. Add sections 1852.235–73, 1852.235–74 and 1852.235–75 to read as follows:

1852.235–73 Final Scientific and Technical Reports.

As prescribed in 1835.070(d)(1) insert the following clause:

FINAL SCIENTIFIC AND TECHNICAL REPORTS

(XXX/XXX)

(A) The Contractor shall submit to the Contracting Officer a final report which summarizes the results of the entire contract, including recommendations and conclusions based on the experience and results obtained. The final report should include tables, graphs, diagrams, curves, sketches, photographs, and drawings in sufficient detail to explain comprehensively the results achieved under the contract.

(b) The final report shall be of a quality suitable for publication and shall follow the formatting and stylistic guidelines contained in NPG 2200.2A, Guidelines for Documentation, Approval, and Dissemination of NASA Scientific and Technical Information.

(c) The last page of the final report shall be a completed Standard Form (SF) 298, Report Documentation Page.

(d) In addition to the final report submitted to the Contracting Officer, the Contractor shall concurrently provide to CASI a copy of the letter transmitting the final report to the Contracting Officer. The copy of the letter shall be submitted to CASI at the following address: Center for AeroSpace Information (CASI), Attn: Document Processing Section, 7121 Standard Drive, Hanover, Maryland 21076–1320.

(e) In accordance with paragraph (d) of the Rights in Data — General clause (52.227–14) of this contract, the Contractor may publish, or otherwise disseminate, data produced during the performance of this contract, including data contained in the final report, and any additional reports required by 1852.235–74 when included in the contract, without prior review by NASA. The Contractor is responsible for reviewing publication or dissemination of the data for conformance with laws and regulations governing its distribution, including intellectual property rights, export control, national security and other requirements, and to the extent the contractor receives or is given access to data necessary for the performance of the contract which contain restrictive markings, for complying with such restrictive markings. Should the Contractor seek to publish or otherwise disseminate the final report, or any additional reports required by 1852.235–74 if applicable, as delivered to NASA under this contract, the Contractor may do so once NASA has completed its document availability authorization review, and availability of the report has been determined.

ALTERNATE I

(XXX/XXX)

As prescribed by 1835.070(d)(2), insert the following as paragraph (e) of the basic clause:

(e) The data resulting from this research activity is ''fundamental research'' which will be broadly shared within the scientific community. No foreign national access or dissemination restrictions apply to this research activity. The Contractor may publish, release, or otherwise disseminate data produced during the performance of this contract, including the final report, without prior review by NASA for export control or national security purposes. However, NASA retains the right to review the final report to ensure that proprietary information, which may have been provided to the Contractor, is not released without authorization and for consistency with NASA publication standards. Additionally, the Contractor is responsible for reviewing any publication, release, or dissemination of the data for conformance with other restrictions expressly set forth in this contract, and to the extent it receives or is given access to data necessary for the performance of the contract which contain restrictive markings, for compliance with such restrictive markings.

ALTERNATE II

(XXX/XXX)

As prescribed by 1835.070(d)(3), when the clause at 1852.235–75 is included in the contract, insert the following as paragraph (e) of the basic clause:

(e) The Contractor shall comply with the requirements of 1852.235–75, Review of Final Scientific and Technical Reports and Other Data, before it publishes, releases, or otherwise disseminates any data or reports produced under this contract.

(End of clause)

1852.235–74 Additional Reports of Work—Research and Development.

As prescribed in 1835.070(e), insert a clause substantially the same as the following:

ADDITIONAL REPORTS OF WORK—RESEARCH AND DEVELOPMENT

(XXX/XXX)

In addition to the final report required under this contract, the Contractor must submit the following report(s) to the Contracting Officer:

(a) *Monthly progress reports.* The Contractor shall submit separate monthly reports of all work accomplished during each month of contract performance. Reports shall be in narrative form, brief, and informal. They shall include a quantitative description of progress, an indication of any current problems that may impede performance, proposed corrective action, and a discussion of the work to be performed during the next monthly reporting period.

(b) *Quarterly progress reports.* The Contractor shall submit separate quarterly reports of all work accomplished during each three-month period of contract performance. In addition to factual data, these reports should include a separate analysis section interpreting the results obtained, recommending further action, and relating occurrences to the ultimate objectives of the contract. Sufficient diagrams, sketches, curves, photographs, and drawings should be included to convey the intended meaning.

(c) *Submission dates.* Monthly and quarterly reports shall be submitted by the 15th day of the month following the month or quarter being reported. If the contract is awarded beyond the middle of a month, the first monthly report shall cover the period from award until the end of the following month. No monthly report need be submitted for the third month of contract effort for which a quarterly report is required. No quarterly report need be submitted for the final three months of contract effort since that period will be covered in the final report. The final report shall be submitted within _____days after the completion of the effort under the contract.

(End of clause)

1852.235–75 Review of Final Scientific and Technical Reports and Other Data.

As prescribed in 1835.070(f) insert the following clause:

REVIEW OF FINAL SCIENTIFIC AND TECHNICAL REPORTS AND OTHER DATA

(XXX/XXX)

Data resulting from this research activity may be subject to export control, national security restrictions or other restrictions designated by NASA, may include information disclosing an invention in which the government may have rights, or, to the extent the Contractor receives or is given access to data necessary for the performance of the contract which contain restrictive markings, may include proprietary information of others. Therefore, the Contractor may not publish, release, or otherwise disseminate, except to NASA, data produced during the performance of this contract, including data contained in the final report required by 1852.235–73 and any additional reports required by 1852.235–74 when included in the contract, without prior review by NASA. Should the Contractor seek to publish, release, or otherwise disseminate data produced during the performance of this contract, the Contractor may do so once the review has been completed by NASA and the availability of the data has been determined.

[FR Doc. 01–28242 Filed 11–13–01; 8:45 am]

BILLING CODE 7510–01–P

Notices

Federal Register
Vol. 66, No. 220
Wednesday, November 14, 2001

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.

AFRICAN DEVELOPMENT FOUNDATION

Board of Directors Meeting; Sunshine Act

TIME: 10 am–2:30 pm

PLACE: ADF Headquarters.

DATE: Tuesday, December 4, 2001.

STATUS: Open.

Agenda

10 am–10:30am—Chairman's Report
10:30 am–12 pm—President's Report
12 pm–1 pm—Lunch
1 pm–2:30pm—Executive Session (Closed)
2:30 pm—Adjournment

If you have any questions or comments, please direct them to Doris Martin, General Counsel, who can be reached at (202) 673–3916.

Nathaniel Fields,

President.

[FR Doc. 01–28580 Filed 11–9–01; 10:41 am]

BILLING CODE 6117–01–P

DEPARTMENT OF COMMERCE

Census Bureau

Current Population Survey (CPS) Fertility Supplement

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 January 14, 2002.

ADDRESSES: Direct all written comments to Madeleine Clayton, Departmental Paperwork Clearance Officer, Department of Commerce, Room 6086, 14th and Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *mclayton@doc.gov*).

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument(s) and instructions should be directed to Karen Woods, Census Bureau, FOB 3, Room 3340, Washington, DC 20233–8400, (301) 457–3806.

SUPPLEMENTARY INFORMATION:

I. Abstract

The Census Bureau plans to request clearance for the collection of data concerning the Fertility Supplement to be conducted in conjunction with the June 2002 CPS. The Census Bureau sponsors the supplement questions, which were previously collected in June 2000, and have been asked periodically since 1971.

This survey provides information used mainly by government and private analysts to project future population growth, to analyze child spacing, and to aid policymakers in their decisions affected by changes in family size and composition. Past studies have discovered noticeable changes in the patterns of fertility rates and the timing of the first birth. Potential needs for government assistance, such as aid to families with dependent children, child care, and maternal health care for single parent households, can be estimated using CPS characteristics matched with fertility data.

II. Method of Collection

The fertility information will be collected by both personal visit and telephone interviews in conjunction with the regular June CPS interviewing. All interviews are conducted using computer-assisted interviewing.

III. Data

OMB Number: 0607–0610.

Form Number: There are no forms. We conduct all interviewing on computers.

Type of Review: Regular.

Affected Public: Individuals or Households.

Estimated Number of Respondents: 30,000.

Estimated Time Per Response: 1 minute.

Estimated Total Annual Burden Hours: 500.

Estimated Total Annual Cost: There are no costs to the respondents other than their time to answer the CPS questions.

Respondents' Obligation: Voluntary.

Legal Authority: Title 13, U.S.C., section 182; and Title 29, U.S.C., sections 1–9.

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 OMB approval of this information collection; they also will become a matter of public record.

Dated: November 8, 2001.

Madeleine Clayton,

Departmental Paperwork Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–28529 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–07–P

DEPARTMENT OF COMMERCE

Foreign-Trade Zones Board

[Docket 45–2001]

Foreign-Trade Zone 42—Orlando, FL; Application for Subzone Status, Mitsubishi Power Systems, Inc., Plant, (Power Generation Turbine Components) Orlando, FL

An application has been submitted to the Foreign-Trade Zones Board (the Board) by the Greater Orlando Aviation Authority, grantee of FTZ 42, requesting special-purpose subzone status for the power generation turbine components

manufacturing plant of Mitsubishi Power Systems, Inc. (MPS) (a subsidiary of Mitsubishi Heavy Industries, Ltd., of Japan), located in Orlando, Florida. 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 November 6, 2001.

The MPS plant (15 acres/109,000 sq.ft.) is located within the Orlando Central Park at 2287 Premier Row, Orlando (Orange County), Florida. The facility (350 employees) is used to contract repair and manufacture combustion baskets, transition pieces, turbine blades and turbine vanes used a components for simple-cycle and advanced combined-cycle large power generation turbines (HTSUS# 8411.99), and to distribute similar imported components for export and the U.S. market. The production process involves inspection, welding, ceramic coating and repair. In addition to the component production, the application indicates that complete rotor assemblies would be repaired and/or manufactured at the facility in the future. The components are manufactured from cold-formed nickel alloy plate (HTSUS 7506.20; duty rate—3.0%) and cobalt alloy (8105.90; 3.7%) sourced from abroad. Domestic purchases of these alloys are planned.

FTZ procedures would exempt MPS from Customs duty payments on the foreign materials used in export production. On its domestic sales and exports to NAFTA markets, the company would be able to choose the duty rate that applies to finished combustion baskets, transition pieces, turbine blades, turbine vanes and rotor assemblies (2.4%) for the foreign-sourced nickel and cobalt alloys noted above. MPS would be able to defer Customs duty payments on the foreign-origin finished power generation turbine components that would be admitted to the proposed subzone for U.S. distribution. Duties would be deferred or reduced on foreign production equipment admitted to the proposed subzone until which time it becomes operational. The application indicates that subzone status would help improve the plant'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 on the application is invited from interested parties. Submissions (original and three copies) shall be addressed to the Board's Executive Secretary at the following addresses:

1. Submissions via Express/Package Delivery Services: Foreign-Trade Zones Board, U.S. Department of Commerce, Franklin Court Building—Suite 4100W, 1099 14th Street, NW, Washington, DC 20005; or,

2. Submissions via the U.S. Postal Service: Foreign-Trade Zones Board, U.S. Department of Commerce, FCB–4100W, 1401 Constitution Ave., NW, Washington, DC 20230.

The closing period for their receipt is January 14, 2002. Rebuttal comments in response to material submitted during the foregoing period may be submitted during the subsequent 15-day period (to January 29, 2002).

A copy of the application will be available for public inspection at the Office of the Foreign-Trade Zones Board's Executive Secretary at address No.1 listed above and at the U.S. Department of Commerce Export Assistance Center, Suite 1270, 200 E. Robinson Street, Orlando, FL 32801.

Dated: November 6, 2001.

Dennis Puccinelli,

Executive Secretary.

[FR Doc. 01–28534 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Survey of International Air Travelers

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 the 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 January 14, 2002.

ADDRESSES: Direct all written comments to Madeleine Clayton, Departmental Paperwork Clearance Officer, (202) 482–3129, Department of Commerce, Room 6086, 14th & Constitution Avenue, NW., Washington, DC 20230 (or via the Internet at *Mclayton@doc.gov.).*

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the information collection instrument and instructions should be directed to: Ron Erdmann, ITA's Tourism Industries, Room 7025, 1401 Constitution Ave, NW., Washington, DC 20230; phone: (202) 482–4554, and fax: (202) 482–2887. E-Mail: *ron—erdmann@ita.doc.gov* To learn more about the this research program, visit TI's Web site at: *http://www.tinet.ita.doc.gov/research/programs/ifs/index.html*

SUPPLEMENTARY INFORMATION:

I. Abstract

The International Trade Administration, Tourism Industries office ''Survey of International Air Travelers'' is the only source for estimating international travel and passenger fare exports and imports for this country. This program also supports the U.S. Department of Commerce, Bureau of Economic Analysis mandate to collect and report this type of information which is used to calculate GDP for the United States. This project also serves as the core data source for Tourism Industries. Numerous reports and analyses are developed to assist businesses in increasing U.S. exports in international travel. An economic impact of international travel on state economies, visitation estimates, traveler profiles, presentations and reports are generated by Tourism Industries to help the federal government agencies and the travel industry better understand the international market. It is also a service that the U.S. Department of Commerce provides to travel industry businesses seeking to increase international travel and passenger fare exports for the country, as well as U.S. outbound travel. It provides the only comparable estimates of nonresident visitation to the states and cities within the U.S., as well as U.S. resident travel abroad. Traveler characteristics data are also collected to help travel related businesses better understand the international travelers to and from the U.S. so they can develop targeted marketing and other planning related materials.

II. Method of Collection

The collection is on U.S. and foreign flag airlines who voluntarily agree to allow us to survey their passengers on departing flights from the U.S. Additional surveys are also collected at U.S. departure airports and selected U.S. sites as cooperation is obtained from the travel industry.

III. Data

OMB Number: 0625–0227.
Form Number: N/A.
Type of Review: Regular submission.
Affected Public: International travelers departing the United States 18 years or older which includes U.S. and

non-U.S. residents for all countries except Canada.

Estimated Number of Respondents: 165,600.

Estimated Time per Response: 15 minutes.

Estimated Total Annual Burden Hours: 24,840 hours.

Estimated Total Annual Cost: This is a $1.5 million research program. The government only funds $690,00 of this program. The remaining funds are obtained from inkind contributions of the airlines, airports and other travel industry partners as well as the sale of this data to the public. Respondents will not need to purchase equipment or materials to respond to this collection.

IV. Requested for Comments

Comments are invited on: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden (including hours and cost) of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology.

Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval of this information collection; they also will become a matter of public record.

Dated: November 8, 2001.

Madeleine Clayton,

Departmental Forms Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 01–28530 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–DR–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–428–801]

Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof From Germany; Notice of Amended Final Results of Antidumping Duty Administrative Reviews Pursuant to Final Court Decision

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of amended final results of administrative reviews pursuant to final court decision

SUMMARY: The United States Court of International Trade and the United States Court of Appeals for the Federal Circuit have affirmed the Department of Commerce's final remand results affecting final assessment rates for the administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from Germany. The classes or kinds of merchandise covered by these reviews are ball bearings and parts thereof, cylindrical roller bearings and parts thereof, and spherical plain bearings and parts thereof. The period of review is May 1, 1992, through April 30, 1993. As there is now a final and conclusive court decision in this case, we are amending our final results of reviews and we will instruct the Customs Service to liquidate entries subject to these reviews.

EFFECTIVE DATE: November 14, 2001.

FOR FURTHER INFORMATION CONTACT: Katja Kravetsky or Mark Ross, AD/CVD Enforcement 3, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–4733.

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 in effect as of December 31, 1994. In addition, unless otherwise indicated, all citations to the Department of Commerce's (the Department's) regulations are to the regulations as codified at 19 CFR part 353 (1995).

Background

On February 28, 1995, the Department published its final results of administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from France, Germany, Italy, Japan, Singapore, Sweden, Thailand, and the United Kingdom, covering the period May 1, 1992, through April 30, 1993. See *Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, et al.; Final Results of Antidumping Duty Administrative Reviews, Partial Termination of Administrative Reviews, and Revocation In Part of Antidumping Duty Orders*, 60 FR 10900 (February 28, 1995). These final results were amended on February 28, 1995, June 13, 1995, and September 26, 1995 (see 60 FR 10967, 60 FR 31142, and 60 FR 49568, respectively). The classes or kinds of merchandise covered by these reviews are ball bearings and parts thereof (BBs), cylindrical roller bearings and parts thereof (CRBs), and spherical plain bearings and parts thereof (SPBs). A domestic producer, the Torrington Company, and a number of respondent interested parties challenged the final results in the United States Court of International Trade (CIT).

In *INA Walzlager Schaeffler KG, and INA Bearing Company, Inc., FAG Kugelfischer Georg Schafer AG, FAG Bearings Corporation, SKF USA Inc., and SKF GmbH* v. *United States*, 957 F. Supp. 251 (CIT 1997), the CIT ordered the Department to make methodological changes and to recalculate the antidumping margins for INA, FAG, and SKF. Specifically, the CIT ordered the Department, *inter alia*, to make the following changes:

(1) Deduct imputed interest for INA's credit expenses and inventory carrying expenses from cost of production (COP);

(2) Adjust the profit calculation for INA for the differences between sales COP and constructed value COP;

(3) Apply a tax-neutral amount methodology in computing the value-added tax (VAT) adjustment;

(4) Deny the adjustment to foreign market value (FMV) for FAG's negative billing adjustments, post-sale price adjustments, and third-party discounts;

(5) Allow a direct adjustment to FMV for SKF's rebate two; and

(6) Explain the circumstances in which the Department will apply the reimbursement regulation in exporter's-sales-price (ESP) situations.

On June 3, 1997, the Department submitted the recalculated results consistent with the CIT's remand order. The Department deducted imputed interest for INA's credit and inventory carrying costs from COP and adjusted the profit calculation for the differences between sales COP and constructed value COP; applied a tax-neutral methodology in computing the VAT adjustment for all three respondents; denied the indirect selling expense adjustment to FMV for FAG's negative billing adjustments, post-sale price adjustments, and third-party discounts; allowed a direct adjustment to FMV for SKF's rebate two; and explained the circumstances under which we will apply the regulation regarding reimbursement of antidumping duties in ESP situations.

On September 29, 1997, the CIT affirmed the Department's Final Results

of Redetermination on Remand (Slip Op. 97–141).

One respondent, SKF, appealed two issues, the Department's denial of SKF's billing adjustment two and cash discounts, to the Court of Appeals for the Federal Circuit (CAFC).

On June 10, 1999, the CAFC agreed that the Department properly disallowed SKF's billing adjustment two and cash discounts because the claimed adjustments were not limited to merchandise within the scope of the antidumping duty order. *SKF USA Inc. and SKF GmbH* v. *U.S.*, 180 F. 3d 1370 (Fed. Cir. 1999). This decision was not appealed.

As there is a final and conclusive court decision in this action, we are amending our final results of review in this matter, and we will instruct the Customs Service to liquidate entries subject to these reviews.

Amendment to Final Results

Pursuant to section 516A(e) of the Act, we are now amending the final results of the administrative reviews of the antidumping duty orders on antifriction bearings (other than tapered roller bearings) and parts thereof from Germany for the period May 1, 1992, throughApril 30, 1993. The revised weighted-average percentage margins are as follows:

Company	BBs	CRBs	SPBs
INA Walzlager Schaeffler KG	26.62	9.72	(1)
FAG Kugelfischer Georg Schafer AG	9.38	12.32	14.46
SKF GmbH	14.48	9.97	21.35

(1) No shipments during the period of review.

Assessment Rates

Accordingly, the Department will determine, and the Customs Service will assess, antidumping duties on all appropriate entries. Individual differences between United States price and foreign market value may vary from the percentages listed above. For companies covered by these amended results, the Department will issue appraisement instructions to the Customs Service after publication of these amended final results of reviews.

We are issuing and publishing this determination in accordance with sections 751(a)(1) and 777(i)(1) of the Act.

Dated: November 2, 2001.

Faryar Shirzad,

Assistant Secretary for Import Administration.

[FR Doc. 01–28532 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–841]

Structural Steel Beams From the Republic of Korea: Notice of Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of preliminary results of changed circumstances antidumping duty administrative review.

SUMMARY: On October 1, 2001, the Department of Commerce (''Department'') published a notice of initiation in the above-named case. As a result of this review, the Department preliminarily finds for the purposes of this proceeding that INI Steel Company is the successor-in-interest to Inchon Iron and Steel Co., Ltd.

EFFECTIVE DATE: November 14, 2001.

FOR FURTHER INFORMATION CONTACT: Cheryl Werner or Laurel LaCivita, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–2667 and (202) 482–4243, respectively.

Applicable Statute and Regulations

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. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations at 19 CFR part 351 (2001).

SUPPLEMENTARY INFORMATION:

Background

In an August 6, 2001, letter to the Department, INI Steel Company (''INI''), formerly Inchon Iron and Steel Co., Ltd. (''Inchon''), notified the Department that as of August 1, 2001, Inchon's corporate name had changed to INI Steel Company. INI requested that the Department conduct an expedited changed circumstances review to confirm that INI is the successor-in-interest to Inchon. Since the Department had insufficient information on the record concerning this corporate name change, the Department concluded that it would be inappropriate to conduct an expedited changed circumstances review and issue a preliminary results concurrent with the initiation of a changed circumstance review. Thus the Department published only a notice of initiation. (*See Notice of Initiation of Changed Circumstances Antidumping Duty Administrative Review,* 66 FR 49929 (October 1, 2001) (''*Notice of Initiation*''). On October 17, 2001, the Department sent a questionnaire to INI requesting more information. On October 24, 2001, the Department received INI's response to the questionnaire. INI provided documentation on the name change requested by the Department consisting of: the minutes of Inchon's July 27, 2001 shareholders' meeting where the name change was approved; the Inchon District Court's official certification of the name change registered on July 31, 2001; INI's Business Registration Certificate issued on August 1, 2001 by the Inchon Tax Office; organization charts before and after the corporate name change; a list of the Board of Directors before and after the corporate name change; a chart of suppliers before and after the corporate name change; and a customer list before and after the name change.

Scope of the Review

The products covered by this review include structural steel beams that are doubly-symmetric shapes, whether hot- or cold-rolled, drawn, extruded, formed or finished, having at least one dimension of at least 80 mm (3.2 inches or more), whether of carbon or alloy (other than stainless) steel, and whether or not drilled, punched, notched, painted, coated or clad. These products include, but are not limited to, wide-flange beams (''W'' shapes), bearing piles (''HP'' shapes), standard beams (''S'' or ''I'' shapes), and M-shapes.

All products that meet the physical and metallurgical descriptions provided above are within the scope of this investigation unless otherwise excluded. The following products are

outside and/or specifically excluded from the scope of this investigation: structural steel beams greater than 400 pounds per linear foot or with a web or section height (also known as depth) over 40 inches.

The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheadings: 7216.32.0000, 7216.33.0030, 7216.33.0060, 7216.33.0090, 7216.50.0000, 7216.61.0000, 7216.69.0000, 7216.91.0000, 7216.99.0000, 7228.70.3040, 7228.70.6000. Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the merchandise under investigation is dispositive.

Preliminary Results

In making successor-in-interest determinations, the Department examines several factors including, but not limited to, changes in: (1) Management; (2) production facilities; (3) supplier relationships; and (4) customer base. *See e.g., Brass Sheet and Strip from Canada; Final Results of Antidumping Duty Administrative Review,* 57 FR 20460, 20461 (May 13, 1992). While no single factor, or combination of factors, will necessarily be dispositive, the Department will generally consider the new company to be the successor to its predecessor company if the resulting operations are essentially the same as the predecessor company. *E.g, id.* and *Industrial Phosphoric Acid from Israel; Final Results of Changed Circumstances Review,* 59 FR 6944, 6945 (February 14, 1994). Thus, if the evidence demonstrates that, with respect to the production and sale of the subject merchandise, the new company operates as the same business entity as its predecessor, the Department will treat the new company as the successor-in-interest to the predecessor.

Based on the information submitted by INI during the course of this changed circumstances review, we preliminarily find that INI is the successor-in-interest to Inchon because we preliminarily find that the company's organizational structure, senior management, production facilities, supplier relationships, and customers have remained essentially unchanged after the name change with respect to the subject merchandise. Furthermore, INI has provided sufficient internal and public documentation of the name change. If there are no changes in the final results of the changed circumstances review, INI shall retain the antidumping duty deposit rate assigned to Inchon by the Department in the most recent administrative review of the subject merchandise.

We are issuing and publishing this finding and notice in accordance with sections 751(b) and 777(i)(1) of the Act and 19 CFR 351.221(c)(3) and 19 CFR 351.216.

Public Comment

Pursuant to 19 CFR 351.310, any interested party may request a hearing within 10 days of publication of this notice. Case briefs and/or written comments from interested parties may be submitted no later than 21 days after the date of publication of this notice. Rebuttal briefs and rebuttals comments, limited to the issues raised in those case briefs or comments, may be filed no later than 28 days after the publication of this notice. All written comments must be submitted and served on all interested parties on the Department's service list in accordance with 19 CFR 351.303. Any hearing, if requested, will be held no later than 30 days after the date of publication of this notice, or the first working day thereafter. Persons interested in attending the hearing should contact the Department for the date and time of the hearing. The Department will publish in the **Federal Register** a notice of final results of this changed circumstances antidumping duty administrative review, including the results of its analysis of any issues raised in any written comments.

During the course of this changed circumstances review, we will not change any cash deposit instructions on the merchandise subject to this changed circumstances review, unless a change is determined to be warranted pursuant to the final results of this review.

This notice is in accordance with section 751(b)(1) of the Act and 19 CFR 351.216 and 351.221(c)(3).

Dated: November 7, 2001.

Faryar Shirzad,

Assistant Secretary for Import Administration.

[FR Doc. 01–28533 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[C–351–833, C–122–841, C–428–833, C–274–805, C–489–809]

Carbon and Certain Alloy Steel Wire Rod From Brazil, Canada, Germany, Trinidad and Tobago, and Turkey: Postponement of Preliminary Determinations of Countervailing Duty Investigations

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of postponement of preliminary determinations.

SUMMARY: The Department of Commerce is postponing the preliminary determinations of the countervailing duty investigations of carbon and certain alloy steel wire rod from Brazil, Canada, Germany, Trinidad & Tobago, and Turkey. For each investigation the period of investigation is January 1, 2000 through December 31, 2000. These postponements are made pursuant to section 703(c)(2) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act.

EFFECTIVE DATE: November 14, 2001.

FOR FURTHER INFORMATION CONTACT: Melani Miller (Brazil and Trinidad and Tobago) at 202–482–0116; Sally Hastings (Canada) at 202–482–3464; Annika O'Hara or Melanie Brown (Germany) at 202–482–3798 or 202–482–4987, respectively; and Jennifer D. Jones (Turkey) at 202–482–4194. Import Administration, International Trade Administration, U.S. Department of Commerce, Room 3099, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

Postponement of Preliminary Determinations

The Applicable Statute and Regulations

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. In addition, unless otherwise indicated, all citations to the Department of Commerce's (''Department'') regulations are to 19 CFR part 351 (2001).

Postponement

On September 24, 2001, the Department initiated the countervailing duty investigations of carbon and certain alloy steel wire rod from Brazil, Canada, Germany, Trinidad and Tobago,

and Turkey. *See Notice of Initiation of Countervailing Duty Investigations: Carbon and Certain Alloy Steel Wire Rod from Brazil, Canada, Germany, Trinidad and Tobago, and Turkey,* 66 FR 49931 (October 1, 2001). Currently, the preliminary determinations must be issued by November 28, 2001.

On November 1, 2001, the petitioners made timely requests pursuant to section 703(c)(1)(A) of the Act and 19 CFR 351.205(e) of the Department's regulations for postponement of the preliminary determinations. The petitioners requested postponement until February 1, 2002 in order to allow time for the petitioners to submit comments regarding the respondents' questionnaire responses and to allow time for the Department to analyze these responses.

The petitioners' requests for these postponements were timely, and the Department finds no compelling reason to deny the requests. Therefore, pursuant to 703(c) of the Act and 19 CFR 351.205(b)(2), the Department is postponing the preliminary determinations until no later than February 1, 2002.

We are issuing and publishing this notice in accordance with sections 703(c)(2) and 777(i)(1) of the Act.

Dated: November 6, 2001.

Faryar Shirzad,

Assistant Secretary for Import Administration.

[FR Doc. 01–28531 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Institute of Standards and Technology; Notice

AGENCY: National Institute of Standards and Technology Commerce.

ACTION: Notice of government-owned inventions available for licensing.

SUMMARY: The inventions listed below are owned in whole or in part by the U.S. Government, as represented by the Department of Commerce. The Department of Commerce's interest in the inventions is available for exclusive or non-exclusive licensing in accordance with 35 U.S.C. 207 and 37 CFR part 404 to achieve expeditious commercialization of results of federally funded research and development.

FOR FURTHER INFORMATION CONTACT: Technical and licensing information on these inventions may be obtained by writing to: National Institute of Standards and Technology, Office of Technology Partnerships, Building 820, Room 213, Gaithersburg, MD 20899; Fax 301–869–2751. Any request for information should include the NIST Docket number and title for the relevant invention as indicated below.

SUPPLEMENTARY INFORMATION: NIST may enter into a Cooperative Research and Development Agreement (''CRADA'') with the licensee to perform further research on the inventions for purposes of commercialization. The inventions available for licensing are:

NIST Docket Number: 97–022US.

Title: Immobilized Biological Membranes.

Abstract: The invention is jointly owned by the U.S. Government, as represented by the Department of Commerce, and Health Research, Inc. The Department of Commerce's ownership interest is available for licensing. A composition comprising an immobilized biological membrane is provided. The functional immobilized biological membrane consists of a support structure, a metal layered onto a surface of the support structure, and alkanethiol monolayer assembled onto the metal, and a biological membrane deposited on the alkanethiol monolayer. Also provided is a method of producing the immobilized biological membrane, wherein the method involves contacting an alkanethiol with a metal surface of a support structure in forming an alkanethiol monolayer assembled onto the metal, and depositing a biological membrane onto the alkanethiol monolayer such that the biological membrane becomes associated with the alkanethiol monolayer. Uses of the biological membrane include as a sensing indicator in a biosensor, as an adsorbent in a chromatography system, and as a coating for medical devices.

NIST Docket Number: 95–051US.

Title: Diode Laser Vibrometer Using Feedback Induced Frequency Modulation.

Abstract: The invention is jointly owned by the U.S. Government, as represented by the Department of Commerce, and the University of Colorado. The Department of Commerce's ownership interest is available for licensing. A diode laser vibrometer has been developed which is an inexpensive, sensitive sensor for measuring target position, velocity and vibration based on optical feedback-induced fluctuations in the operating frequency of a diode laser. The sensor comprises a diode laser, an optical frequency discriminator to measure the laser operating frequency, and an electronic signal analyzer to obtain the modulation frequency of the laser operating frequency. This invention further includes two calibration mechanisms for vibration amplitude measurement. In a first calibration mechanism, the diode laser is mounted on a laser vibrator, which vibrates the laser relative to the target. In a second calibration mechanism, a frequency modulator is coupled to the diode laser to modulate the operating frequency.

NIST Docket Number: 98–023US.

Title: An Apparatus Available for Health Assessment and Diagnostics of Conductive Materials.

Abstract: The invention is jointly owned by the U.S. Government, as represented by the Department of Commerce, and Colorado School of Mines. The Department of Commerce's ownership interest is available for licensing. The invention is a device for diagnosing the integrity of conductive materials (e.g. copper ground riser and transmission lines). The device integrates advances in electro-magnetic acoustic technology (EMAT) with artificial neural networks. The described advances enable field engineers and maintenance crews to loosely clamp the device to a bare section of conductor, transmit and receive a VHF acoustic signal, analyze the signal and determine the existence and location of any conductivity losses.

NIST Docket Number: 98–030US.

Title: Process for the Removal of Carbonyl Sulfide from Liquid Petroleum Gas.

Abstract: This invention is jointly owned by the U.S. Government, as represented by the Department of Commerce, and the University of Colorado. Liquefied petroleum gas (LPG) is an important fuel and chemical feedstock. It is generally derived from two primary sources: the refining of crude oil, and as a by-product of the production of natural gas. The primary constituent of commercial LPG is propane, although other organic constituents are present as well. Many sources of LPG contain organic sulfur compounds. Some of these, such as hydrogen sulfide, must be removed (to a level of 5 ppm or lower) to make the LPG merchantable. Other sulfur compounds such as carbonyl sulfide (COS) were once considered to be relatively innocuous, but are now recognized as being problematic for a variety of reasons. This invention provides a method for the removal of COS from LPG.

NIST Docket Number: 93–021US.

Title: Optical Cooling of Solids.

Abstract: A device and method for laser cooling of a solid to extremely low temperatures is disclosed, the device including an active cooling structure

having a high purity surface passivated direct band gap semiconductor crystal of less than about 3 microns thick and a transparent hemispherical body in optical contact with the crystal. The crystal is itself cooled when illuminated with a laser beam tuned to a frequency no greater than the band gap edge frequency of the crystal. Cooling is caused by emission of photons of higher energy than photons entering the crystal, the additional energy being accounted for by a process of absorption of thermal phonons from the crystal lattice.

Dated: November 1, 2001.

Karen H. Brown,

Deputy Director.

[FR Doc. 01–28337 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–13–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

Coastal Impact Assistance Program: Availability of Environmental Assessment and Finding of No Significant Impact

AGENCY: National Oceanic and Atmospheric Administration, Department of Commerce.

ACTION: Notice of availability of Environmental Assessment and Finding of No Significant Impact on Approval of State Plans from Alabama, Alaska, California, Florida, Louisiana, Mississippi, and Texas under the Coastal Impact Assistance Program.

SUMMARY: Notice is hereby given of the availability of the Environmental Assessment (EA) and Finding of No Significant Impact on approval of State plans from Alabama, Alaska, California, Florida, Louisiana, Mississippi, and Texas under the Coastal Impact Assistance Program (CIAP). The Fiscal Year 2001 Appropriations Act for the Departments of Commerce, Justice, and State (Pub. L. 106–553) created the CIAP by amending the Outer Continental Shelf Lands Act. The CIAP will direct approximately $142 million to the outer continental shelf (OCS) oil and gas producing states of Alaska, Alabama, California, Florida, Louisiana, Mississippi, and Texas and the approximately 150 coastal political subdivisions within those states to help mitigate the impacts of OCS activities and protect coastal resources. The CIAP required these states to submit Coastal Impact Assistance Plans to the National Oceanic and Atmospheric Administration (NOAA) detailing how the funds will be expended. NOAA must approve the plans before disbursing funds.

Three alternatives are available to NOAA pertaining to the CIAP: approve the State plans; conditionally approve the State plans; and deny approval of the State plans. NOAA's preferred alternative is to approve the State plans. NOAA finds that the State plans meet the requirements of the CIAP legislation. This alternative will have a beneficial effect on the environment because it will fulfill the intent of the legislation by helping to mitigate impacts from outer continental shelf oil and gas activities. The requirements of 40 CFR parts 1500–1508 (Council on Environmental Quality (CEQ) regulations to implement the National Environmental Policy Act) apply to the preparation of this Environmental Assessment. Specifically, 40 CFR 1506.6 requires agencies to provide public notice of the availability of environmental documents. This notice is part of NOAA's action to comply with this requirement.

Copies of the Environmental Assessment and Finding of No Significant Impact may be found on the NOAA Web site at *http://www.ocrm.nos.noaa.gov/cpd/* or may be obtained upon request from: John R. King, Acting Chief, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, phone (301) 713–3155, x188, e-mail *john.king@noaa.gov.*

DATES: Individuals or organizations wishing to submit comments on the Environmental Assessment should do so by December 16, 2001.

ADDRESSES: Comments should be made to: John R. King, Acting Chief, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, phone (301) 713–3155, x188, e-mail *john.king@noaa.gov.*

FOR FURTHER INFORMATION CONTACT: John R. King, Acting Chief, Coastal Programs Division (N/ORM3), Office of Ocean and Coastal Resource Management, NOS, NOAA, 1305 East-West Highway, Silver Spring, Maryland, 20910, phone (301) 713–3155, x188, e-mail *john.king@noaa.gov.*

Federal Domestic Assistance Catalog 11.419 Coastal Zone Management Program Administration.

Dated: November 6, 2001.

Alan Neuschatz,

Chief Financial Officer/Chief Information Officer, National Ocean Service, National Oceanic and Atmospheric Administration.

[FR Doc. 01–28540 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–08–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[Docket No. 000522149–1259–03]

RIN 0648–ZA87

Dean John A. Knauss Marine Policy Fellowship, National Sea Grant College Program

AGENCY: Office of Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice.

SUMMARY: This notice announces that applications may be submitted for a Fellowship program which was initiated by the National Sea Grant Office (NSGO), National Oceanic and Atmospheric Administration (NOAA), in fulfilling its broad educational responsibilities, to provide educational experience in the policies and processes of the Legislative and Executive Branches of the Federal Government to graduate students in marine and aquatic-related fields. The Fellowship program accepts applications once a year on or before May 1 for a one-year fellowship beginning February 1 of the following year. All applicants must submit an application to the local Sea Grant program in their state. Applicants from states not served by a Sea Grant program should obtain further information by contracting the Knauss Fellows Program Manager at the NSGO.

DATES: Deadlines vary from program to program, but applications are generally due early to mid-April. Contact your state's Sea Grant program for specific deadlines (see list below).

ADDRESSES: Applications should be addressed to your local Sea Grant program. Contact the appropriate state's Sea Grant program from the list below to obtain the mailing address, or the address may be obtained on the Web site *http://www.nsgo.seagrant.org/SGDirectors.html.*

FOR FURTHER INFORMATION CONTACT: Ms. Nikola Garber, Knauss Fellows Program Manager, National Sea Grant College Program, R/SG, NOAA 1315 East-West Highway, Silver Spring, MD 20910, Tel. (301) 713–2431 ext. 124; e-mail:

nikola.garber@noaa.gov. Also call your nearest Sea Grant program or visit the Web site *http://www.nsgo.seagrant.org/Knauss.html*.

Sea Grant Programs

Alabama, Mississippi-Alabama Sea Grant Consortium (228) 875–9368
Alaska, University of Alaska (907) 474–7086
California, University of California, San Diego (858) 534–4440
California, University of Southern California (213) 821–1335
Connecticut, University of Connecticut (860) 405–9128
Delaware, University of Delaware (302) 831–2841
Florida, University of Florida (352) 392–5870
Georgia, University of Georgia (706) 542–5954
Hawaii, University of Hawaii (808) 956–7031
Illinois, Purdue University (765) 494–3593
Indiana, Purdue University (765) 494–3593
Louisiana, Louisiana Sea Grant (225) 388–6710
Maine, University of Maine (207) 581–1435
Maryland, University of Maryland (301) 405–6371
Massachusetts, Massachusetts Institute of Technology (617) 253–7131
Massachusetts, Woods Hole Oceanographic Institution (508) 289–2557
Michigan, University of Michigan (734) 615–4084
Minnesota, University of Minnesota (218) 726–8710
Mississippi, Mississippi-Alabama Sea Grant Consortium (228) 875–9368
New Hampshire, University of New Hampshire (603) 862–0122
New Jersey, New Jersey Marine Science Consortium (732) 872–1300 Ext. 21
New York, New York Sea Grant Institute, SUNY (631) 632–6905
North Carolina, North Carolina State University (919) 515–2454
Ohio, Ohio State University, (614) 292–8949
Oregon, Oregon State University (541) 737–2714
Puerto Rico, University of Puerto Rico (787) 832–3585
Rhode Island, University of Rhode Island (401) 874–6800
South Carolina, South Carolina Sea Grant Consortium (843) 727–2078
Texas, Texas A&M University (979) 845–3854
Virginia, Virginia Graduate Marine Science Consortium (804) 924–5965
Washington, University of Washington (206) 543–6600
Wisconsin, University of Wisconsin-Madison (608) 262–0905

SUPPLEMENTARY INFORMATION: Dean John A. Knauss Marine Policy Fellowship, National Sea Grant College Program Purpose of the Fellowship Program In 1979, the National Sea Grant Office (NSGO), NOAA, in fulfilling its broad educational responsibilities, initiated a program to provide a unique educational experience in the policies and processes of the Legislative and Executive Branches of the Federal Government to graduate students who have an interest in ocean, coastal and Great Lakes resources and in the national policy decisions affecting these resources. The U.S. Congress recognized the value of this program and in 1987, Public Law 100–220 stipulated the Sea Grant Federal Fellows Program was to be a formal part of the National Sea Grant College Program Act. The recipients are designated Dean John A. Knauss Marine Policy Fellows pursuant to 33 U.S.C. 1127(b). The National Sea Grant program is listed in the *Catalog of Federal Domestic Assistance* under number 11.417: Sea Grant Support.

Announcement

Fellows program announcements are sent annually to all participating Sea Grant institutions and campuses by the local Sea Grant program upon receipt of notice from the NSGO.

Eligibility

Any student who, on May 1, 2002, is in a graduate or professional program in a marine or aquatic-related field at a United States accredited institution of higher education may apply to the NSGO through their local Sea Grant program.

How To Apply

Interested students should discuss this fellowship with their local Sea Grant Program Director. Applicants from states not served by a Sea Grant program should contact the Knauss Fellows Program Manager at the NSGO; subsequently, the applicant will be referred to the appropriate Sea Grant program. Applications must be submitted with signature to the local Sea Grant program by the deadline set in the announcement (usually early to mid-April). Each Sea Grant program may select and forward to the NSGO no more than five (5) applicants based on criteria used by the NSGO in the national competition.

Selected applications (one original and two copies) are to be received in the NSGO from the sponsoring Sea Grant program, no later than 5 p.m. EDT on May 1, 2002. The competitive selection process and subsequent notification to the Sea Grant programs will be completed by June 14, 2002.

Stipend and Expenses

The local Sea Grant program receives and administers the overall grant of $38,000 per student on behalf of each Fellow selected from their program. Of this grant, the local Sea Grant program provides $32,000 to each Fellow for stipend and living expenses (per diem). The additional $6,000 will be used to cover mandatory health insurance for the Fellow and moving expenses. In addition, any remaining funds shall be used during the Fellowship year, first to satisfy academic degree-related travel, and second for Fellowship-related travel. Indirect costs are not allowable for either the Fellowships or for any costs associated with the Fellowships, including placement week [15 CFR 917.11(e), National Sea Grant Program Funding Regulations]. No matching funds are required. During the Fellowship (February 1, 2003–January 31, 2004), the host may provide supplemental funds for work-related travel by the Fellow.

Application

An application must include:

(1) Personal and academic curriculum vitae (not to exceed two pages using 12 pt. font).

(2) A personal education and career goal statement emphasizing the applicant's abilities and the applicant's expectations from the experience in the way of career development (1000 words or less). Placement preference in the Legislative or Executive Branches of the Government may be stated; this preference will be honored to the extent possible.

(3) Two letters of recommendation, including one from the student's major professor; if no major professor exists, the faculty person academically knowing the applicant best may be substituted.

(4) A letter of endorsement from the sponsoring Sea Grant Program Director.

(5) Official copy of all undergraduate and graduate student transcripts.

Applications that are bound or contain staples will not be accepted. However, paperclips are acceptable.

All applicants will be evaluated solely on their application package according to the criteria listed below. Therefore, letters of endorsement from members of Congress, friends, relatives and others will not be accepted. Absolutely no prior contacts/arrangements are to be made with possible host offices.

Selection Criteria

The selection criteria will include:

(1) Quality of the applicant's personal education and career goal statement.

(2) Endorsement/content of the letter from the applicant's Sea Grant Program Director, the applicant's major professor and second letter of recommendation.

(3) Strength of academic performance and diversity of educational background including extracurricular activities, awards and honors (from the curriculum vitae and transcripts).

(4) Experience in marine or aquatic-related fields, oral and written communication skills, and interpersonal abilities. The four evaluation criteria will be given equal weight.

Selection

Applicants will be individually reviewed and ranked, according to the criteria outlined above, by a panel appointed by the Director of the NSGO with input from the Sea Grant Association and the National Sea Grant Review Panel. The panel will include representation from the Sea Grant Association and the current, and possibly past, class of Fellows. Once the entire class is selected, based on the criteria listed, the Knauss Program Manager will then place the selected applicants into either the legislative or executive group based upon the applicant's stated preference and/or judgment of the panel based upon material submitted. Academic discipline and geographic representation may be considered by the National Sea Grant Office to provide overall balance. The number of fellows assigned to the Congress will be limited to 10.

Federal Policies and Procedures

Fellows receive funds directly from their sponsoring Sea Grant program and are considered to be subrecipients of Federal assistance. Hence, the Department of Commerce Pre-Award Notification Requirements for Grants and Cooperative Agreements contained in the **Federal Register** notice of October 1, 2000 (66 FR 49917), are applicable to this solicitation.

Minority Serving Institutions Statement

Pursuant to Executive Orders 12876, 12900, and 13021, DOC/NOAA is strongly committed to broadening the participation of Historically Black Colleges and Universities (HBCU), Hispanic Serving Institutions (HSI), and Tribal Colleges and Universities (TCU) in its educational and research programs. The DOC/NOAA vision, mission, and goals are to achieve full participation by Minority Serving Institutions (MSI) in order to advance the development of human potential, to strengthen the Nation's capacity to provide high-quality education, and to increase opportunities for MSIs to participate in and benefit from Federal Financial Assistance programs. DOC/NOAA encourages applicants from MSI to participate. Institutions eligible to be considered HBCU/MSIs are listed at the following *Internet Website: http://www.ed.gov/offices/OCR/minorityinst.html.*

Classification

Prior notice and an opportunity for public comment are not required by the Administration Procedure Act or any other law for this notice concerning grants, benefits, and contracts according to 5 U.S.C. 553(a)(2). Therefore, a regulatory flexibility analysis is not required for purposes of the Regulatory Flexibility Act.

This action has been determined to be not significant for purposes of E.O. 12866.

This document contains collection-of-information requirements subject to the Paperwork Reduction Act. Application requirements have been approved by OMB under Control Number 0648–0362. Public reporting burden for an application is estimated to average 2 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. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Ms. Nikola Garber (see **FOR FURTHER INFORMATION CONTACT** above). The use off SF–LLL has been separately approved by OMB under Control Number 0348–0046.

Notwithstanding any other provision of the law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act, unless that collection of information displays a currently valid OMB Control Number.

Dated: October 7, 2001.

David L. Evans,

Assistant Administrator, Office of Oceanic and Atmospheric Research.

[FR Doc. 01–28421 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–KA–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 110101A]

Marine Mammals; File No. 1013–1648

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

ACTION: Receipt of application.

SUMMARY: Notice is hereby given that Dr. Patricia E. Mascarelli, Carribean Center for Marine Studies, P.O. Box 3197, Lajas, PR 00667, has applied in due form for a permit to take humpback whales (*Megaptera novaeangliae*) for purposes of scientific research.

DATES: Written or telefaxed comments must be received on or before December 14, 2001.

ADDRESSES: The application and related documents are available for review upon written request or by appointment in the following office(s):

Permits and Documentation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376; and

Southeast Region, NMFS, 9721 Executive Center Drive North, St. Petersburg, FL 33702–2432; phone (727) 570–5301; fax (727) 570–5320.

FOR FURTHER INFORMATION CONTACT: Tammy Adams or Ruth Johnson, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The applicant proposes to harass humpback whales in Puerto Rican waters for purposes of photo-identification, passive acoustic recordings, and behavioral observations. Sloughed skin samples will also be collected for genetic analyses. The purpose of the study is to collect data on population abundance, distribution, and habitat use for management purposes. Spinner dolphins (*Stenella longirostris*) and bottlenose dolphins (*Tursiops truncatus*) may be incidentally harassed during the research.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits and Documentation Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

Comments may also be submitted by facsimile at (301) 713–0376, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period. Please note that comments will not be accepted by e-mail or by other electronic media.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of this application to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 7, 2001.

Ann D. Terbush,

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 01–28541 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 110501C]

Marine Mammals; File Nos. 482–1653 and 1018–1655.

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

ACTION: Receipt of applications for scientific research permits.

SUMMARY: Notice is hereby given of the following actions regarding permits for takes of marine mammal species for the purposes of scientific research: NMFS has received scientific research permit applications from: James Gilbert, Ph.D., University of Maine, Department of Wildlife Ecology, 210 Nutting Hall, Orono, ME 04469 (File No. 482–1653); and Luciana Moller, Ph.D., Department of Ecology and Evolutionary Biology, Yale University, New Haven, CT 06520 (File No. 1018–1655).

DATES: Written or telefaxed comments on new applications must be received on or before December 14, 2001.

ADDRESSES: Written comments on any of the applications should be sent to the appropriate office as indicated below. Comments may also be sent via fax to the number indicated for the applications. Comments will not be accepted if submitted via e-mail or the internet. The applications and related documents are available for review upon written request or by appointment in the following office:

Northeast Region, NMFS, One Blackburn Drive, Gloucester, MA 01930–2298; phone (978) 281–9200; fax (978) 281–9371.

Documents may also be reviewed by appointment in the Permits and Documentation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301) 713–2289; fax (301) 713–0376.

Written comments or requests for a public hearing on this application should be mailed to the Chief, Permits and Documentation Division, F/PR1, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910. Those individuals requesting a hearing should set forth the specific reasons why a hearing on this particular request would be appropriate.

FOR FURTHER INFORMATION CONTACT: For Application File No. 482–1653: Amy Sloan or Ruth Johnson, (301) 713–2289.

For Application File No. 1018–1655: Amy Sloan or Lynne Barre, (301) 713–2289.

SUPPLEMENTARY INFORMATION: The subject permits are requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), and the Regulations Governing the Taking and Importing of Marine Mammals (50 CFR part 216).

Application File No. 482–1653: Dr. Gilbert proposes to document the extent of harbor seal (*Phoca vitulina*) predations on the Atlantic salmon aquaculture industry's pen sites and to understand the pattern of attacks and the behavior of seals near pen sites. From this information, non-lethal approaches to deterring seals will be determined. The specific research objectives are (1) to document the frequency, pattern, and extent of seal depredations at Atlantic salmon aquaculture farms; (2) to determine if this frequency, pattern, and extent is related to the number of seals at nearby haulout sites throughout the year; and (3) to determine if repeated depredations at a site are the result of the same seal or different seals. To accomplish this research, seals will be captured, marked, sexed, measured, blood sampled, radio-tagged, and monitored via aerial surveys. Blood samples from adult females will be used for pregnancy testing. Patterns of visitation to the pen sites, including age and sex class, will be determined.

Application File No. 1018-1655: Dr. Moller proposes to import biopsy samples taken from bottlenose dolphins (*Tursiops aduncus*) in Australia. The purpose(s) of this project are (1) to examine the influence of kinship on dolphin social relationships; (2) to assess sex-bias in dispersal patterns; and (3) to investigate population genetic structure of bottlenose dolphins in New South Wales. Biopsy samples already collected and analyzed in Australia for both mtDNA control region and microsatellites will be imported to the U.S. for screening at additional microsatellite loci. Additional biopsy samples will be taken in Australia and imported to the U.S. for conducting both mtDNA and microsatellite analyses.

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), an initial determination has been made that the activities proposed are categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement.

Concurrent with the publication of this notice in the **Federal Register**, NMFS is forwarding copies of these applications to the Marine Mammal Commission and its Committee of Scientific Advisors.

Dated: November 7, 2001.

Ann D. Terbush,

Chief, Permits and Documentation Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 01–28542 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

Patent and Trademark Office

Submission for OMB Review; Comment Request

The United States Patent and Trademark Office (USPTO) 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: United States Patent and Trademark Office (USPTO).

Title: Native American Tribal Insignia Database.

Form Number(s): None.

Agency Approval Number: 0651–00XX.

Type of Request: New Collection.

Burden: 74 hours annually.

Number of Respondents: 400 responses per year.

Avg. Hours Per Response: The USPTO estimates that it will take the public approximately 10 minutes to gather information, prepare, and submit a request to record an official insignia for a federally-recognized Native American tribe and 12 minutes to gather information, prepare, and submit a request to record an official insignia for a state-recognized Native American tribe.

Needs and Uses: This collection of information supports the establishment of a comprehensive database containing the official insignia of federally- and state-recognized Native American tribes. The database is being created following the USPTO's completion of a study and report to the Judiciary Committees of the United States Senate and House of Representatives concerning the protection of the official insignia of recognized tribes. The report recommended the creation of a database containing the official insignia of all federally- and state-recognized Native American tribes, and the Senate Appropriations Committee directed the USPTO to comply with this recommendation. The public uses this collection to request entry of the official insignia of their recognized Native American tribe into the USPTO database of official tribal insignia. The USPTO uses the information collected from the public to determine whether a trademark for which registration is sought may be similar to an official insignia of a Native American tribe, as evidence of what a Native American tribe considers to be its official insignia and address for correspondence, and to maintain a public search library.

Affected Public: Tribal governments.

Frequency: On occasion.

Respondent's Obligation: Required to obtain or retain benefits.

OMB Desk Officer: David Rostker, (202) 395–3897.

Copies of the above information collection proposal can be obtained by calling or writing Susan K. Brown, Records Officer, Office of Data Management, Data Administration Division, USPTO, Suite 310, 2231 Crystal Drive, Washington, DC, 20231, by phone at (703) 308–7400, or by e-mail at *susan.brown@uspto.gov.*

Written comments and recommendations for the proposed information collection should be sent on or before December 14, 2001 to David Rostker, OMB Desk Officer, Room 10202, New Executive Office Building, 725 17th Street, NW., Washington, DC 20503.

Dated: November 7, 2001.

Susan K. Brown,

Records Officer, USPTO, Office of Data Management, Data Administration Division.

[FR Doc. 01–28516 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits for Certain Cotton, Wool, Man-Made Fiber, Silk Blend and Other Vegetable Fiber Textile Products Produced or Manufactured in Bahrain

November 8, 2001.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits.

EFFECTIVE DATE: January 1, 2002.

FOR FURTHER INFORMATION CONTACT: Roy Unger, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at http://www.customs.ustreas.gov. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The import restraint limits for textile products, produced or manufactured in Bahrain and exported during the period January 1, 2002 through December 31, 2002 are based on limits notified to the Textiles Monitoring Body pursuant to the Uruguay Round Agreement on Textiles and Clothing (ATC).

Pursuant to the provisions of the ATC, the third stage of the integration of textile and apparel products into the General Agreement on Tariffs and Trade 1994 will take place on January 1, 2002 (see 60 FR 21075, published on May 1, 1995). Accordingly, certain previously restrained categories may have been modified or eliminated and certain limits may have been revised. Integrated products will no longer be subject to quota.

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish the limits for the 2002 period.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 65 FR 82328, published on December 28, 2000). Information regarding the availability of the 2002 CORRELATION will be published in the **Federal Register** at a later date.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 8, 2001.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Uruguay Round Agreement on Textiles and Clothing (ATC), you are directed to prohibit, effective on January 1, 2002, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton, wool, man-made fiber, silk blend and other vegetable fiber textile products in the following categories, produced or manufactured in Bahrain and exported during the twelve-month period beginning on January 1, 2002 and extending through December 31, 2002, in excess of the following levels of restraint:

Category	Twelve-month restraint limit
Group I	
237, 239pt.[1], 331pt.[2], 332–336, 338, 339, 340–342, 345, 347, 348, 351, 352, 359pt.[3], 433–436, 438, 440, 442–448, 459pt.[4], 631pt.[5], 633–636, 638, 639, 640–647, 648, 651, 652, 659pt.[6], and 852, as a group.	63,720,503 square meters equivalent.
Sublevels in Group I	
338/339	885,448 dozen.
340/640	424,822 dozen of which not more than 318,616 dozen shall be in Categories 340–Y/640–Y[7].

[1] Category 239pt.: only HTS number 6209.20.5040 (diapers).

[2] Category 331pt.: all HTS numbers except 6116.10.1720, 6116.10.4810, 6116.10.5510, 6116.10.7510, 6116.92.6410, 6116.92.6420, 6116.92.6430, 6116.92.6440, 6116.92.7450, 6116.92.7460, 6116.92.7470, 6116.92.8800, 6116.92.9400 and 6116.99.9510.

[3] Category 359pt.: all HTS numbers except 6115.19.8010, 6117.10.6010, 6117.20.9010, 6203.22.1000, 6204.22.1000, 6212.90.0010, 6214.90.0010, 6406.99.1550, 6505.90.1525, 6505.90.1540, 6505.90.2060 and 6505.90.2545.

[4] Category 459pt.: all HTS numbers except 6115.19.8020, 6117.10.1000, 6117.10.2010, 6117.20.9020, 6212.90.0020, 6214.20.0000, 6405.20.6030, 6405.20.6060, 6405.20.6090, 6406.99.1505 and 6406.99.1560.

[5] Category 631pt.: all HTS numbers except 6116.10.1730, 6116.10.4820, 6116.10.5520, 6116.10.7520, 6116.93.8800, 6116.93.9400, 6116.99.4800, 6116.99.5400 and 6116.99.9530.

[6] Category 659pt.: all HTS numbers except 6115.11.0010, 6115.12.2000, 6117.10.2030, 6117.20.9030, 6212.90.0030, 6214.30.0000, 6214.40.0000, 6406.99.1510 and 6406.99.1540.

[7] Category 340–Y: only HTS numbers 6205.20.2015, 6205.20.2020, 6205.20.2046, 6205.20.2050 and 6205.20.2060; Category 640Y: only HTS numbers 6205.30.2010, 6205.30.2020, 6205.30.2050 and 6205.30.2060.

The limits set forth above are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body.

Products in the above categories exported during 2001 shall be charged to the applicable category limits for that year (see directive dated October 11, 2000) to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such products shall be charged to the limits set forth in this directive.

Products to be integrated into the General Agreement on Tariffs and Trade 1994 on January 1, 2002 (listed in the Federal Register notice published on May 1, 1995, 60 FR 21075) which are exported during 2001 shall be charged to the applicable 2001 limits to the extent of any unfilled balances. After January 1, 2002, should those 2001 limits be filled, such products shall no longer be charged to any limit.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception to the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 01–28507 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Restraint Limits for Certain Wool and Man-Made Fiber Textile Products Produced or Manufactured in Bulgaria

November 8, 2001.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits.

EFFECTIVE DATE: January 1, 2002.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at http://www.customs.ustreas.gov. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The import restraint limits for textile products, produced or manufactured in Bulgaria and exported during the period January 1, 2002 through December 31, 2002 are based on limits notified to the Textiles Monitoring Body pursuant to the Uruguay Round Agreement on Textiles and Clothing (ATC).

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish the 2002 limits.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 65 FR 82328, published on December 28, 2000). Information regarding the availability of the 2002 CORRELATION will be published in the **Federal Register** at a later date.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 8, 2001.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Uruguay Round Agreement on Textiles and Clothing (ATC), you are directed to prohibit, effective on January 1, 2002, entry into the United States for consumption and withdrawal from warehouse for consumption of wool and man-made fiber textile products in the following categories, produced or manufactured in Bulgaria and exported during the twelve-month period beginning on January 1, 2002 and extending through December 31, 2002, in excess of the following levels of restraint:

Category	Twelve-month limit
410/624	3,682,477 square meters of which not more than 894,949 square meters shall be in Category 410.
433	14,501 dozen.
435	26,106 dozen.
442	16,917 dozen.
444	79,177 numbers.
448	29,879 dozen.

The limits set forth above are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body.

Products in the above categories exported during 2001 shall be charged to the applicable category limits for that year (see directive dated October 27, 2000) to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such

products shall be charged to the limits set forth in this directive.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 01–28508 Filed 11–13–01 8:45 am]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Announcement of Import Limits for Certain Cotton and Wool Textile Products Produced or Manufactured in Colombia

November 8, 2001.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs establishing limits.

EFFECTIVE DATE: January 1, 2002.

FOR FURTHER INFORMATION CONTACT: Roy Unger, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at http://www.customs.ustreas.gov. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The import restraint limits for textile products, produced or manufactured in Colombia and exported during the period January 1, 2002 through December 31, 2002 are based on limits notified to the Textiles Monitoring Body pursuant to the Uruguay Round Agreement on Textiles and Clothing (ATC).

In the letter published below, the Chairman of CITA directs the Commissioner of Customs to establish the 2002 limits.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 65 FR 82328, published on December 28, 2000). Information regarding the 2002 CORRELATION will be published in the **Federal Register** at a later date.

D. Michael Hutchinson.

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 8, 2001.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: Pursuant to section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended; and the Uruguay Round Agreement on Textiles and Clothing (ATC), you are directed to prohibit, effective on January 1, 2002, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton and wool textile products in the following categories, produced or manufactured in Colombia and exported during the twelve-month period beginning on January 1, 2002 and extending through December 31, 2002, in excess of the following restraint limits:

Category	Twelve-month restraint limit
315	34,899,154 square meters.
443	136,684 numbers.

The limits set forth above are subject to adjustment pursuant to the provisions of the ATC and administrative arrangements notified to the Textiles Monitoring Body.

Products in the above categories exported during 2001 shall be charged to the applicable category limits for that year (see directive dated October 27, 2000) to the extent of any unfilled balances. In the event the limits established for that period have been exhausted by previous entries, such products shall be charged to the limits set forth in this directive.

In carrying out the above directions, the Commissioner of Customs should construe entry into the United States for consumption to include entry for consumption into the Commonwealth of Puerto Rico.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of U.S.C.553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 01–28509 Filed 11–13–01; 8:45 am]

BILLING CODE 3510–DR–S

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Charges for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in Pakistan

November 9, 2001.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting import charges.

EFFECTIVE DATE: November 14, 2001.

FOR FURTHER INFORMATION CONTACT: Ross Arnold, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at http://www.customs.gov. For information on embargoes and quota re-openings, refer to the Office of Textiles and Apparel website at http://otexa.ita.doc.gov.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

In response to a request by the Government of Pakistan regarding differences in calculation of the quantity of import charges between Pakistan authorities and the U.S. Customs Service for the 1998, 1999, and 2000 agreement years, CITA is adjusting import charges to certaincategories for the 2001 agreement year.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 65 FR 82328, published on December 28, 2000). Also see 65 FR 66972, published on November 8, 2000.

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

November 9, 2001.

Commissioner of Customs,
Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 2, 2000, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton and man-made fiber textile products produced or manufactured in Pakistan and exported during the twelve-month period which began on January 1, 2001 and extends through December 31, 2001.

Effective on November 14, 2001, you are directed to deduct the following quantities from the charges to the year 2001 limits for Pakistan:

Category	Amount to be Deducted
331/631	39,233 dozen pairs.
338	41,325 dozen.
340/640	3,711 dozen.
347/348	21,038 dozen.
351/651	5,067 dozen.
360	152,355 numbers.
361	211,663 numbers.
363	2,051,331 numbers.
369–F/369–P	139,653 kilograms.
369–S	27,152 kilograms.
647/648	2,794 dozen.
666–P	48,457 kilograms.
666–S	183,840 kilograms.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,
D. Michael Hutchinson,
Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc. 01–28625 Filed 11–9–01; 3:58 pm]

BILLING CODE 3510–DR–S

CORPORATION FOR NATIONAL AND COMMUNITY SERVICE

Proposed Information Collection; Comment Request

AGENCY: Corporation for National and Community Service.

ACTION: Notice.

SUMMARY: The Corporation for National and Community Service (hereinafter ''Corporation''), as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA95)(44 U.S.C. 3506(c)(2)(A)). This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirement on respondents can be properly assessed.

Currently, the Corporation is soliciting comments concerning the proposed revision of its Forbearance Request Form (OMB #3045–0030) and Interest Accrual Form (OMB #3045–0053).

Copies of the forms can be obtained by contacting the office listed below in the address section of this notice.

DATES: Written comments must be submitted to the office listed in the **ADDRESSES** section by January 14, 2002.

The Corporation is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, including whether the information will have practical utility;
- Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.,* permitting electronic submissions of responses.

ADDRESSES: Send comments to Corporation for National and Community Service, National Service Trust, Mr. Bruce Kellogg, 1201 New York Ave., NW., Washington, DC, 20525.

FOR FURTHER INFORMATION CONTACT: Bruce Kellogg, (202) 606–5000, ext. 526.

SUPPLEMENTARY INFORMATION:

Background

After completing a period of national service in an AmeriCorps project, an AmeriCorps member receives an ''education award'' that can be used to make a payment towards a student loan or pay for post-secondary educational expenses. This award is an amount of money set aside in the member's ''account'' in the National Service Trust Fund. Members have seven years in which to draw against any unused balance.

By law, during the period of time the AmeriCorps members are participating in national service, they are eligible for a postponement (a forbearance) on the repayment of any qualified student loan they have. The purpose of the postponement is to temporarily suspend their obligation to make loan payments while they are earning a minimal living allowance in their national service position. Interest continues to accrue during this period, but payments are not required.

Also, the Corporation's enabling legislation requires that it pay, on behalf of AmeriCorps members, all or a portion of the interest that accrues during their service period, if their loans were in forbearance during their service and if they successfully complete their terms of service. For an AmeriCorps member who serves in a full-time term (which includes serving a minimum of 1700 hours) for a year or less, the Corporation will pay all of the interest that accrued. For a person who serves in anything less than a full-time term, the percentage of accrued interest the Corporation pays is determined by a formula included in the Trust's regulations. The legislative intent for paying the interest is to keep the AmeriCorps members' qualified student loan debts from increasing during their service period.

Current Action

Two forms with two separate sets of circumstances are being addressed by this **Federal Register** notice. Each form will be individually discussed below.

A. Forbearance Request for National Service Form—Renewal (OMB #3045–0030)

Currently, AmeriCorps members use an OMB-approved form entitled *Forbearance Request for National Service* to obtain certification that they are in an approved national service position. The form also serves as the borrower's official request to the loan companies for forbearance. Since forbearance is granted by the loan holder and not the Corporation, the form requests of the loan holder that a forbearance be approved for the national service. The Corporation's role is to verify that the borrower is an AmeriCorps member and is eligible for this mandatory forbearance on qualified student loans. An AmeriCorps member completes one part of the form and sends it to the office of the National Service Trust. The Trust provides

written verification that the borrower is in an approved national service position, then forwards the form to the loan holder at the address provided by the AmeriCorps member. The loan holder will act upon the request.

This form has been adopted by many of the larger loan holders (*e.g.,* Sallie Mae) and is given to their borrowers with the loan holders' own logos at the top of the form. Indeed, the form was originally developed with the assistance of Sallie Mae and representatives of several student loan associations. Having a separate form for forbearance based on AmeriCorps service clearly distinguishes it from forbearance requests based on one of the other conditions for which a borrower may be eligible (e.g., military service, employment in certain low income areas, student status).

Several other loan holders have chosen to modify their own existing forbearance request forms by including an additional option—''AmeriCorps service'' or ''national service'' —to the choices already available. The Corporation verifies national service participation using all types of forms presented to it, on a loan holder's unique form as well as the OMB approved form.

The form needs some minor revisions to clarify certain sections and to facilitate processing of the information. First, to delete an extra box for the SSN; then, to reduce the amount of text in bold type, add a statement of purpose to the member's section, identify the service dates as mandatory, limit the form to a single loan holder each, and add the National Service Trust's toll-free number.

The Corporation seeks to continue using this particular form, albeit in a revised version. This is a voluntary form. It is one way to provide verification to a loan holder that one of its borrowers is eligible for the mandatory forbearance, at the same time allowing the borrower to request the forbearance from the loan company. The Corporation will continue its policy of verifying AmeriCorps participation on any form the loan holder wishes to use. The current form is due to expire March 31, 2002.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Forbearance Request for National Service.

OMB Number: 3045–0030.

Agency Number: None.

Affected Public: AmeriCorps participants and the holders of their qualified student loans.

Total Respondents: 6,500 annually.

Frequency: Average of once per year per loan.

Average Time Per Response: One minute for the AmeriCorps member to complete the form.

Estimated Total Burden Hours: 108 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

B. Interest Accrual—Renewal (OMB #3045–0053)

The Corporation pays all or a portion of the interest that accrues during a period of national service for those who successfully complete their service and have had their loans in forbearance during the service. Using the current form, AmeriCorps members complete the top section and indicate their dates of service. Then they mail the form to the loan holder who indicates the total amount of interest that accrued during the service period, or indicates a daily accrual rate. The loan holder also adds the address where the payment should be sent and returns the form to the National Service Trust. When the Corporation receives this information, it is reviewed for accuracy and is either paid or returned to the loan holder or lender for additional information.

The revisions address the most common causes for delays in processing interest payments. The changes modify the title for consistency, reduce the number of days prior to completion of service for submitting the form, delete an extra box for the SSN, more clearly identify the member's address information, identify the service dates as essential, request loan type information and if more than one loan is cited loan numbers, more clearly identify the space for grace period information, request the lender's address be complete and legible, add to the lender's certification a statement that the loans cited are in forbearance, and add a space for the lender's fax number. The current form is due to expire March 31, 2002.

Type of Review: Renewal.

Agency: Corporation for National and Community Service.

Title: Interest Accrual Form.

OMB Number: 30045–0053.

Agency Number: None.

Affected Public: AmeriCorps members and the holders of their qualified student loans.

Total Respondents: 6,500 annually.

Frequency: Average of once per year per loan.

Average Time Per Response: Three (3) minutes, total (one minute for the AmeriCorps member to complete the form, and two (2) minutes for the loan holder).

Estimated Total Burden Hours: 325 hours.

Total Burden Cost (capital/startup): None.

Total Burden Cost (operating/maintenance): None.

Comments submitted in response to this notice will be summarized and/or included in the request for Office of Management and Budget approval of the information collection request; they will also become a matter of public record.

Dated: November 6, 2001.

Charlene R. Dunn,

Director, National Service Trust.

[FR Doc. 01–28425 Filed 11–13–01; 8:45 am]

BILLING CODE 6050–$$–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 14, 2002.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, *e.g.* new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites

public comment.The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 7, 2001.

John Tressler,

Leader, Regulatory Information Management, Office of the Chief Information Officer.

Student Financial Assistance

Type of Review: Reinstatement.

Title: Federal Direct PLUS Loan Application and Promissory Note.

Frequency: On Occasion.

Affected Public: Individuals or households.

Reporting and Recordkeeping Hour Burden:

Responses: 162,915.

Burden Hours: 81,458.

Abstract: This form is the means by which an individual applies for and agrees to repay a Federal Direct PLUS Loan.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov*, or should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651. Requests may also be electronically mailed to the internet address *OCIO.RIMG@ed.gov* or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request.Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at (202) 708–9266 or via his internet address *Joe.Schubart@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 01–28422 Filed 11–13–01; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 14, 2002.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment.

The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 7, 2001.

John Tressler,

Leader, Regulatory Information Management, Office of the Chief Information Officer.

Office of the Undersecretary

Type of Review: Extension.

Title: Safe and Drug-Free Schools and Communities Act of the Governor's Report Forms.

Frequency: Annually.

Affected Public: State, Local, or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 56.

Burden Hours: 2,240.

Abstract: Section 4117 of the Safe and Drug-Free Schools and Communities Act (SDFSCA) requires state chief executive officers to submit to the Secretary on a triennial basis a report on the implementation and outcomes of Governor's SDFSCA programs. ED must report to the President and Congress regarding the national impact of SDFSCA programs.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* or should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW, Room 4050, Regional Office Building 3, Washington, DC 20202–4651. Requests may also be electronically mailed to the internet address OCIO.RIMG@ed.gov or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request. Comments regarding burden and/or the collection activity requirements should be directed to Jacqueline Montague at (202) 708–5359 or via her internet address *Jackie.Montague@ed.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 01–28450 Filed 11–13–01; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 14, 2002.

SUPPLEMENTARY INFORMATION: Section 3506 of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) requires that the Office of Management and Budget (OMB) provide interested Federal agencies and the public an early opportunity to comment on information collection requests. OMB may amend or waive the requirement for public consultation to the extent that public

participation in the approval process would defeat the purpose of the information collection, violate State or Federal law, or substantially interfere with any agency's ability to perform its statutory obligations. The Leader, Regulatory Information Management Group, Office of the Chief Information Officer, publishes that notice containing proposed information collection requests prior to submission of these requests to OMB. Each proposed information collection, grouped by office, contains the following: (1) Type of review requested, e.g. new, revision, extension, existing or reinstatement; (2) Title; (3) Summary of the collection; (4) Description of the need for, and proposed use of, the information; (5) Respondents and frequency of collection; and (6) Reporting and/or Recordkeeping burden. OMB invites public comment. The Department of Education is especially interested in public comment addressing the following issues: (1) Is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: November 8, 2001.

John Tressler,

Leader, Regulatory Information Management, Office of the Chief Information Officer.

Student Financial Assistance

Type of Review: Reinstatement.

Title: Endorser Addendum to Federal Direct PLUS Loan Application and Promissory Note.

Frequency: On Occasion.

Affected Public: Individuals or household.

Reporting and Recordkeeping Hour Burden:

Responses: 40,729.

Burden Hours: 20,365.

Abstract: If an applicant for a Federal Direct PLUS Loan is determined to have an adverse credit history and obtains and endorser, this form is the means by which an endorser agrees to repay the loan if the borrower does not repay it.

Requests for copies of the proposed information collection request may be accessed from *http://edicsweb.ed.gov,* or should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651. Requests may also be electronically mailed to the internet address OCIO.RIMG@ed.gov or faxed to 202–708–9346. Please specify the complete title of the information collection when making your request. Comments regarding burden and/or the collection activity requirements should be directed to Joseph Schubart at (202) 708–9266 or via his internet address Joe.Schubart@ed.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339.

[FR Doc. 01–28451 Filed 11–13–01; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Agency Information Collection Under Review by the Office of Management and Budget

AGENCY: Department of Energy.

ACTION: Notice and request for comments.

SUMMARY: The Department of Energy (DOE) has submitted the proposed collection of information described in this Notice to the Office of Management and Budget (OMB) for review and approval, in accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13, 44 U.S.C. Chapter 35.) On December 13, 1999, DOE published a Notice of Proposed Rulemaking that calls for regulations to implement standards and test procedures for commercial heating and air-conditioning equipment (64 FR 69598). The proposed rule contained collections of information required for manufacturers' certification to DOE that their products comply with the applicable energy efficiency standards. OMB is particularly interested in receiving public comments that evaluate: (1) Whether the proposed collection of information is necessary, (2) The accuracy of DOE's estimate of the burden of the proposed information collection, (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 choose to respond.

DATES: Comments regarding this collection must be received on or before December 14, 2001. If you anticipate that you will be submitting comments, but find it difficult to do so within the period of time allowed by this notice, please advise the OMB Desk Officer of your intention to make a submission as soon as possible. The Desk Officer may be telephoned at (202) 395–7318. In addition, please notify the DOE contact listed in this Notice.

ADDRESSES: Address comments to the DOE Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, New Executive Office Building, Room 10102, 725 17th Street, NW., Washington, DC 20503. (Comments should also be addressed to Susan L. Frey, Director, Records Management Division, Office the Deputy Associate CIO for Cyber Security, Office of the Chief Information Officer, U.S. Department of Energy, Germantown, MD 20874–1290, and to Cyrus Nasseri, Office of Energy Efficiency and Renewable Energy (EE–41), 1000 Independence Ave., SW., Washington, DC 20585.)

FOR FURTHER INFORMATION CONTACT: Requests for copies of the Department's Paperwork Reduction Act Submission and other information should be directed to Cyrus Nasseri, Office of Energy Efficiency and Renewable Energy (EE–41), 1000 Independence Ave., SW, Washington, DC 20585; (202) 586–9138; or e-mail to *Cyrus.Nasseri@ee.doe.gov*.

SUPPLEMENTARY INFORMATION: This package contains: (1) *OMB No.:* 1910-New; (2) *Package Title:* 10 CFR Part 431–Test Procedures and Certification Requirements for Manufacturers of Commercial Heating and Air-conditioning Equipment; (3) *Type of request:* New Collection; (4) *Purpose:* This information will require manufacturers to maintain records to support their certification of the energy efficiency of commercial heating and air-conditioning equipment; (5) *Respondents:* 124 manufacturers of commercial heating and air-conditioning equipment; (6) *Estimated Number of Burden Hours:* 31,000.

Statutory Authority: Pub. L. 104–13, 44 U.S.C. Chapter 35.

Issued in Washington, DC, on November 5, 2001.

Susan L. Frey,

Director, Records Management Division, Office of Records and Business Management, Office of the Chief Information Officer.

[FR Doc. 01–28453 Filed 11–13–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

International Energy Agency Meeting

AGENCY: Department of Energy.

ACTION: Notice of meeting.

SUMMARY: The Industry Advisory Board (IAB) to the International Energy

Agency (IEA) will meet on November 20, 2001, at the headquarters of the IEA in Paris, France in connection with a meeting of the IEA's Standing Group on Emergency Questions (SEQ).

FOR FURTHER INFORMATION CONTACT: Samuel M. Bradley, Assistant General Counsel for International and National Security Programs, Department of Energy, 1000 Independence Avenue, SW., Washington, DC 20585, 202–586–6738.

SUPPLEMENTARY INFORMATION: In accordance with section 252(c)(1)(A)(i) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(i)) (EPCA), the following notice of meeting is provided:

A meeting of the Industry Advisory Board (IAB) to the International Energy Agency (IEA) will be held at the headquarters of the IEA, 9, rue de la Fédération, Paris, France, on November 20, 2001, beginning at approximately 9 a.m. The purpose of this notice is to permit attendance by representatives of U.S. company members of the IAB at a meeting of the IEA's Standing Group on Emergency Questions (SEQ), which is scheduled to be held at the IEA on November 20, including a preparatory encounter among company representatives from approximately 9 a.m. to 9:15 a.m..

The Agenda for the preparatory encounter among company representatives is to elicit views regarding items on the SEQ's Agenda. The Agenda for the SEQ meeting is under the control of the SEQ. It is expected that the SEQ will adopt the following Agenda:

1. Adoption of the Agenda
2. Approval of the Summary Record of the 102nd Meeting
3. IEA Response Plan: Follow-up
4. The SEQ Program of Work
   —Draft Program of Work and Budget for 2002
5. Update on Compliance with International Energy Program (IEP) Stockholding Commitments
6. Unavailable Stocks
7. Emergency Response Procedures
   —Transition from CERM (Coordinated Emergency Response Measures) to IEP Measures
8. Oil Market, Policy and Legislative Developments in Member Countries
   —Accession of Korea
   —Japan
   —Others
9. The Current Oil Market Situation
   —Report on the Oil Market Situation
10. Current IAB Activities
11. Emergency Response Training and Simulation Exercise
   —Progress Report on the Emergency Response Training SimulationExercise 2002 (ERE 2)
12. Joint SEQ/SLT (Standing Group on Long-Term Cooperation) Seminar
   —Joint SEQ/SLT Inter-fuels Workshop
13. IEA Word Energy Outlook 2001: Insights
14. Oil Security Developments in Non-Member Countries and International Organizations
   —Developments in Poland and Slovakia
   —Report on China
   —Stockholding Agencies: ACOMES
   —Report on ASEAN and APERC Meeting, Bangkok
   —Report on the Seminar on OPEC and Global Energy Balance
   —Other Initiatives and Events
15. Emergency Data and Related Issues for Information
   —Emergency Reserve and Net Import Situation of IEA Countries on July 1, 2001
   —Emergency Reserve Situation of IEA Candidate Countries on July 1, 2001
   —Monthly Oil Statistics July 2001
   —Base Period Final Consumption 2Q2000/2Q2001
   —QOF—4Q2001
   —Update of Emergency Contacts List
16. Other Business
   —Dates of Next Meetings: March 12–15, 2002; June 25–27, 2002

As provided in section 252(c)(1)(A)(ii) of the Energy Policy and Conservation Act (42 U.S.C. 6272(c)(1)(A)(ii)), this meeting is open only to representatives of members of the IAB and their counsel, representatives of members of the SEQ, representatives of the Departments of Energy, Justice, and State, the Federal Trade Commission, the General Accounting Office, Committees of Congress, the IEA, and the European Commission, and invitees of the IAB, the SEQ, or the IEA.

Issued in Washington, DC, November 7, 2001.

Lee Liberman Otis,

General Counsel.

[FR Doc. 01–28454 Filed 11–13–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Office of Civilian Radioactive Waste Management; Site Recommendation Consideration Process—Announcement of Supplemental Public Comment Period

AGENCY: Office of Civilian Radioactive Waste Management, Department of Energy.

ACTION: Notice of a supplemental public comment period on supplemental information regarding the Yucca Mountain site recommendation consideration process.

SUMMARY: The Department of Energy (the Department) announces a supplemental public comment period regarding the consideration of a possible recommendation of the Yucca Mountain by the Secretary of Energy. This supplemental public comment period is being offered to afford the public an additional opportunity to comment on information that was not available during the comment period that ended on October 19, 2001.

DATES: The 30 day comment period begins today and closes on December 14, 2001.

ADDRESSES: Written comments should be addressed to Carol Hanlon, U.S. Department of Energy, Yucca Mountain Site Characterization Office (M/S #205), P.O. Box 364629, North Las Vegas, Nevada, 89036–8629. Supplementary analyses and updated technical information, in the form of contractor reports, are available on the Internet at *www.ymp.gov* or also can be obtained by calling 1–800–967–3477.

FOR FURTHER INFORMATION CONTACT: U.S. Department of Energy, Office of Civilian Radioactive Waste Management, Yucca Mountain Site Characterization Office, (M/S #025), P.O. Box 364629, North Las Vegas, Nevada 89036–8629, 1–800–967–3477.

SUPPLEMENTARY INFORMATION: Today the Department announces a 30-day supplemental comment period regarding possible site recommendation of Yucca Mountain as a geologic repository.

In a **Federal Register** Notice of October 5, 2001, (66 FR 51027), the Secretary indicated that there would be a later public involvement opportunity closer to the decision time on a possible Yucca Mountain site recommendation, the scope of which would be focused exclusively on issues that could not have been raised in the comment period which ended on October 19, 2001. This notice announces the beginning and closing of that opportunity for public involvement.

Since the close of the public comment period on October 19, 2001, the Department has completed preparation of supplemental analyses addressing, to the extent necessary, changes from the proposed to the final regulations of the Environmental Protection Agency (EPA) establishing public health and safety standards for a repository at Yucca Mountain, 40 CFR part 197, and of the Nuclear Regulatory Commission (NRC) establishing licensing regulations for

such a repository, 10 CFR part 63. The EPA issued its final regulations on June 13, 2001 (66 FR 32074); the NRC finalized its regulations, with conforming changes to implement the final EPA public health and safety standards, on November 2, 2001 (66 FR 55732). Following issuance of 10 CFR part 63, the Department finalized its regulation, 10 CFR part 963, establishing guidelines for the Secretary to determine the suitability of the Yucca Mountain site. Those final DOE regulations have been promulgated in a separate part of today's **Federal Register**.

In addition to the supplemental analyses described above, the Department's site characterization work has continued since publication of the *Science and Engineering Report* (S&ER), and the *Preliminary Site Suitability Evaluation* (PSSE). The Department has prepared a report to reflect this updated technical and scientific information completed since publication of the S&ER in May 2001.

The supplementary analyses and updated technical information documents referenced above, in the form of contractor reports, are available on the Internet at *www.ymp.gov* or also can be obtained by calling 1–800–967–3477. These documents are entitled as follows:

(i) Total System Performance Assessment—Analyses for Disposal of Commercial and DOE Waste Inventories at Yucca Mountain-Input to the Final Environmental Impact Statement and Site Suitability Evaluation; Bechtel SAIC Company, LLC (September 17, 2001);

(ii) TSPA Sensitivity Analyses for Final Regulations; Bechtel SAIC Company, LLC (November 2001); and,

(iii) Technical Update Impact Letter Report; Bechtel SAIC Company, LLC (November 2001).

Additional information on the Civilian Radioactive Waste Management program may be obtained at the Yucca Mountain web site at *www.ymp.gov* or by calling 1–800–967–3477.

Issued in Washington, DC on November 8, 2001.

Lake H. Barrett,

Acting Director.

[FR Doc. 01–28649 Filed 11–13–01; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. IC01–719B–001]

Proposed Renewal of Information Collection and Request for Comments

November 7, 2001.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Request for Office of Management and Budget to renew information collection and request for comments.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is providing notice of a request to the Office of Management and Budget (OMB) for renewal of the Commission's May 11, 2001 request for a collection of information in connection with the California electricity markets, and is soliciting public comment on that information collection.

DATES: Comments are requested on or before January 6, 2002.

ADDRESSES: Send comments to: (1) Michael Miller, Office of the Chief Information Officer, CI–1, Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426. Mr. Miller may be reached by telephone at (202) 208–1415 and by e-mail at *mike.miller@ferc.fed.us;* and (2) Amy Farrell, FERC Desk Officer, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10202 NEOB, 725 17th Street NW., Washington, DC 20503. Ms. Farrell may be reached by telephone at (202) 395–7318 or by fax at (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Stuart Fischer, Office of the General Counsel, Federal Energy Regulatory Commission, (202) 208–2103.

SUPPLEMENTARY INFORMATION: The Federal Power Act directs the Commission to ensure just and reasonable rates for transmission and wholesale sales of electricity in interstate commerce. See 16 U.S.C. 824e(a). To enable the Commission to fulfill this duty, the Federal Power Act also authorizes the Commission to conduct investigations of, and collect information from, public utilities. See 16 U.S.C. 825, 825c, 825f, and 825j. Commission staff has been investigating the California electricity market, which in late 2000 and early 2001 was in a state of emergency with prices at extremely high levels and, on some days, rotating blackouts.

One of the likely reasons for the high prices was forced and scheduled outages by electric generators in California. On most days between January and May 2001, the California Independent System Operator (ISO) reported outages of well over 10,000 megawatts for generating plants in California. In addition to causing higher prices, the outages limited the availability of electric power in California, leading the ISO to order rotating blackouts in the state to preserve the transmission system. On April 26, 2001, the Commission issued an Order Establishing Prospective Mitigation and Monitoring Plan for the California Wholesale Electric Markets and Establishing An Investigation of Public Utility Rates in Wholesale Western Energy Markets, *San Diego Gas and Electric Company* v. *Sellers of Energy and Ancillary Service et al,* 95 FERC ¶ 61,115 (2001) (the April 26 Order), *Order on Rehearing,* 95 FERC ¶ 61,418 (June 19, 2001) (the June 19 Order). In the April 26 Order, the Commission stated that:

> the Commission staff will continue its independent monitoring of generating unit outages as well as the real-time and forward price monitoring of both electric and natural gas commodity and transmission prices. Knowledge of these conditions on an ongoing and up-to-date basis is essential, if the Commission is to provide an independent and informed assessment of the key elements of the mitigation plan, such as the level of unplanned outages and conditions that could cause price mitigation to be invoked.

95 FERC at 61,360.

To implement its monitoring efforts, on May 11, 2001, the Commission sought a clearance from OMB to collect information electronically from generators on plant outages within 24 hours of their occurrence and conclusion, whether forced, scheduled or otherwise. 66 FR 24353 (May 14, 2001). OMB granted the Commission's request on May 17, 2001, with an expiration date of November 30, 2001. Currently, the Commission requires this information from all non-municipal generators that sell into the ISO market, are not investor owned utilities, and own, operate or control either one generation unit with a capacity of 30 MW or more, or generation units aggregating 50 MW or more in capacity. Municipal generators that meet the generation capacity parameters are requested to supply the information on a voluntary basis. For the purposes of the data collection, Commission staff considers an outage partial if it reduces the available output of a generation unit below its nameplate rated capacity or below the reliable capacity of the unit as determined by contract with the California ISO. The Commission has

treated the information provided by the generators as non-public pursuant to the provisions of 18 CFR 1b.9.

The Commission proposes that the information continue to be provided through a template that can be requested from Commission staff at the E-Mail address *CALoutages@ferc.fed.us.* That electronic address is also the address to which the Commission requests that generators continue to send the outage information.

The Commission believes that federal oversight of California generator outages in general, and the collection of outage data in particular, played an important role in the maintenance of an adequate system supply and low electricity prices in California this past summer. Since the data collection began, Commission staff has reviewed the outage incident reports submitted and has contacted generators, when warranted, for further information. Staff has also utilized the data to investigate or mediate disputes between the ISO and generators. For example, Commission staff has resolved disputes between generators and the ISO involving the current generating capacity of 30 units and is currently attempting to resolve additional similar disputes. The Commission believes that these efforts have played a significant role in helping to preserve system reliability on the ISO grid.

Because the Commission is potentially requesting information from a large number of generators (over 100) concerning future outages, the data collection may be subject to the Paperwork Reduction Act, which requires OMB to review certain federal reporting requirements. 44 U.S.C. 3507. Because the current authorization will expire on November 30, 2001, the Commission is requesting renewal of the data collection until the expiration of the mitigation plan implemented by the Commission in its April 26 Order and amended in the June 19 Order. As of now, pursuant to the June 19 Order, the mitigation plan is to remain in effect until September 30, 2002. If the Commission subsequently extends the date of the expiration of the mitigation plan, the Commission proposes to continue the information collection through the new expiration date, recognizing that the maximum clearance OMB can grant under the Paperwork Reduction Act is three years, or, in this case, through November 30, 2004.

While the California electric market had adequate generation supply and stable prices this past summer, the Commission is concerned that outages could cause supply shortages and higher prices during the next ten months. From November 2000 through May 2001, California endured tight supplies, high outage rates (often exceeding 10,000 MW per day), extremely high prices and, on seven occasions, rolling blackouts. Between January 16, 2001 and February 16, 2001, the ISO declared a record 32 straight days of Stage 3 emergencies, the highest state of emergency. During the winter and spring, many generators will go off-line for weeks or months to perform scheduled maintenance or to install equipment to comply with upcoming, more stringent environmental standards. Adding to the potential supply problem in the near term is that California traditionally has obtained less imported power during the winter months as its sources provide power to their own loads and export power to the Pacific Northwest.

Generator outages affect the supply of electricity and prices in the market each day in which they occur. By continuing to request that generators provide information on outages within 24 hours of when they begin and end, the Commission staff will be able to analyze outages quickly and, if necessary, investigate outages in real time when the effect on prices is occurring. This analysis will include determining whether generators that have taken plants out of service with the permission of the California ISO for scheduled maintenance return those plants to service promptly and do not improperly extend those outages to influence market prices.

The electronic template asks for the following data: Date of Report; Outage Report Type (Beginning or Ending); Company Name; Name of the Contact Person and Telephone Number; Unit Name; Year Unit Was Built; Unit Type; Is the Unit RMR (Reliability-Must-Run) or Non-RMR; Fuel Type; Nameplate Capacity; Re-Rated Capacity; Output Before Outage; Outage Type (Forced or Scheduled); Complete or Partial Outage; Megawatts Out; Date Outage Began; Time Outage Began; Date Outage Ended or Expected to End; Time Outage Ended or Expected to End; Reason for Outage; and whether a post-outage report was created. Most of the information asked for on the template, such as the identification and operating characteristics of a generation unit, remain constant and do not require additional time to compile after the first report. The only new data in later reports are in those fields asking for information about an outage.

The Commission is seeking to retain the existing reporting format, but is requesting one change in the scope of the reporting requirements. Specifically, the Commission seeks to require generators to file reports of outages that occur for economic reasons. Last summer, the ISO began to grant permission for ''economic'' outages. An ''economic'' outage is an outage in which the ISO allows a generator to take an uneconomic unit out of service because it will not be needed for dispatch. In recent months, these ''economic'' outages have become a significant issue. The ISO alleges that some units are being taken out of service without ISO permission and that others are not being brought back on line when the ISO withdraws permission. On the other hand, generators allege that the ISO is granting permission for ''economic'' outages on an inconsistent basis and is improperly withdrawing that permission. To monitor generation supply effectively in California and ensure just and reasonable rates, it is now important to collect data on outages for economic reasons as well as outages for mechanical reasons.

The Commission estimates that between 100 and 125 entities owning generation could be subject to this data request, but that would only be if co-generation units began selling into the ISO market as opposed to selling their power exclusively to the investor-owned transmission utilities in California (Pacific Gas and Electric Company, San Diego Gas & Electric Company and Southern California Edison Company). During the first five months of the currently approved data collection, 22 different generators, including four municipalities, submitted outage reports. Many entities own several generation units, so the actual number of reports submitted by each entity has varied.

Between May 23, 2001, when the Commission began receiving the first outage reports, and October 23, 2001, the Commission received a total of 1,839 outage reports by a total of 22 generators. (Many generators have multiple units and submitted separate outage reports for each one.) Extrapolating this five-month total for the expected ten-month period of the renewed clearance (assuming that the Commission mitigation plan expires, as is currently proposed, on September 30, 2002), the Commission anticipates that there would be a total of 3,678 reports filed during the upcoming ten-month period. (We note that the May 11 OMB Request estimated that there would be 4,038 reports filed during the entire six-month period of the current clearance. This was before Commission staff excluded from the reporting requirements co-generation units that did not sell into the ISO market from the reporting requirements.)

Because Commission staff has created a pre-existing template, generators need not take any time to develop a reporting format. Moreover, all of the generators that previously submitted outage reports already have the fixed items (such as Nameplate Capacity and Fuel Type) filled in for units that have been the subject of prior reports. The Commission estimates that it would take each generator that previously submitted an outage report for a generation unit approximately 20 minutes to fill out a subsequent report (because much of the information remains constant). The Commission estimates that a generator that has not previously filed an outage report for a unit will take approximately one hour to fill out an initial report. Because all of the major non-municipal generators which are subject to the data collection have already submitted initial outage reports for many of their units, the Commission does not anticipate a large number of new entities filing first-time reports. As such, the Commission anticipates that very few entities will need the one hour to file the first report for a unit.

As stated above, for the first five months of the current approved data collection, the Commission received 1,839 electronic outage incident reports, which extrapolates to 3,678 reports for the proposed ten-month extension period. Assuming a total of 3,678 outage reports for the ten months for which this information collection is requested, the total number of hours it would take to comply with the reporting requirement would be approximately 1,278 hours (78 hours for initial submissions and 1,200 hours for subsequent submissions, assuming 20 minutes per subsequent submission). Commission staff estimates a cost of $50 per hour for complying with the reporting requirement, based on salaries for professional and clerical staff, as well as direct and indirect overhead costs. Therefore, the total estimated cost of compliance would be $63,900.

Commission staff will submit this reporting requirement to OMB for approval. OMB's regulations describe the process that federal agencies must follow in order to obtain OMB approval of reporting requirements. See 5 CFR part 1320. If OMB approves a reporting requirement, it will assign an information collection control number to that requirement. If a request for information subject to OMB review does not display a valid control number, or if the agency has not provided a justification as to why the control number cannot be displayed, then the recipient is not required to respond.

OMB requires federal agencies seeking approval of reporting requirements to allow the public an opportunity to comment on the proposed reporting requirement.5 CFR 1320.5(a)(1)(iv). Therefore, the Commission solicits comments on:

(1) Whether the collection of the information is necessary for the proper performance of the Commission's functions, including whether the information will have practical utility;

(2) The accuracy of Commission staff's estimate of the burden of the collection of this information, including the validity of the methodology and assumptions used;

(3) The quality, utility, and clarity of the information to be collected; and

(4) How to minimize the burden of the collection of this information on respondents, including the use of appropriate automated electronic, mechanical, or other forms of information technology.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28467 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. RT01–88–012,ER99–3144–015, and EC99–80–015]

Alliance Companies: Ameren Services Company on behalf of: Union Electric Company, Central Illinois Public Service Company (not consolidated); American Electric Power Service Corporation on behalf of: Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company; Wheeling Power Company; Consumers Energy Company and Michigan Electric Transmission Company; Exelon Corporation on behalf of: Commonwealth Edison Company, Commonwealth Edison Company of Indiana, Inc.; FirstEnergy Corp. on behalf of: American Transmission Systems, Inc., The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, The Toledo Edison Company; Virginia Electric and Power Company, Illinois Power Company; Northern Indiana Public Service Company; The Dayton Power and Light Company; Notice of Filing

November 6, 2001.

Take notice that on November 1, 2001, Ameren Services Company (on behalf of Union Electric Company and Central Illinois Public Service Company), American Electric Power Service Corporation (on behalf of Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, and Wheeling Power Company), Consumers Energy Company and Michigan Electric Transmission Company, The Dayton Power and Light Company, The Detroit Edison Company and International Transmission Company, Exelon Corporation (on behalf of Commonwealth Edison Company and Commonwealth Edison Company of Indiana, Inc.), FirstEnergy Corp. (on behalf of American Transmission Systems, Inc., The Cleveland Electric Illuminating Company, Ohio Edison Company, Pennsylvania Power Company, and The Toledo Edison Company), Illinois Power Company, Northern Indiana Public Service Company, and Virginia Electric and Power Company (''the Alliance Companies''), and National Grid USA, a wholly-owned subsidiary of The National Grid Group plc, (''collectively, ''the parties'') tendered for filing a Participation Agreement that sets forth covenants and conditions precedent to the execution of definitive agreements necessary to form Alliance Transmission Company, LLC (''Alliance Transco LLC'') as the Alliance Regional Transmission Organization (''Alliance RTO''), and it includes the definitive agreements for the transaction. These agreements are: the Alliance Transco LLC Agreement, the Operation Agreement and the Master Agreement.

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, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before November 23, 2001. Protests will be considered by the Commission to determine 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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the

instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

David P. Boergers,

Secretary.

[FR Doc. 01–28483 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–301–032]

ANR Pipeline Company; Notice of Negotiated Rate Filing

November 7, 2001.

Take notice that on November 2, 2001, ANR Pipeline Company (ANR) tendered for filing and approval twenty Service Agreements between ANR and Madison Gas & Electric Company pursuant to ANR's Rate Schedules ETS, FTS–1, FSS and NNS. ANR states that the agreements contain a negotiated rate arrangement to be effective November 1, 2001. ANR requests that the Commission accept and approve the Agreements to be effective November 1, 2001.

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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28477 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EL02–15–000]

California Independent System Operator Corporation, California Electricity Oversight Board, Public Utilities Commission of the State of California, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company, Complainants, v. Cabrillo Power I LLC, Cabrillo Power II LLC, Duke Energy South Bay, LLC, Geysers Power Company, LLC, and Williams Energy Marketing and Trading Company, Respondents; Notice of Complaint

November 7, 2001.

Take notice that on November 2, 2001, the California Independent System Operator Corporation (the ISO), the California Electricity Oversight Board, the Public Utilities Commission of the State of California, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company submitted a complaint pursuant to section 206 of the Federal Power Act, 16 U.S.C. 824e, against Cabrillo Power I LLC, Cabrillo Power II LLC, Duke Energy South Bay, LLC, Geysers Power Company, LLC, and Williams Energy Marketing and Trading Company alleging that certain rates, referred to as the Fixed Option Payments, in the respective reliability must run (RMR) contracts between the ISO and respondents are unjust and unreasonable.

Complainants allege that the currently effective Fixed Option Payments were set by a series of settlements in 1999 and 2000, that covered all RMR units except those owned by Mirant Energy Delta, LLC and Mirant Energy Potrero, LLC. In an initial decision in Docket No. ER98–495–000, issued June 7, 2000, the complainants allege, the Presiding Administrative Law Judge adopted the ''net incremental cost'' method for calculating the Fixed Option Payment. Claimants assert that the same method, applied to the respondents' RMR units, would yield Fixed Option Payments lower than those currently in effect. Complainants ask that the Commission institute an investigation, set a refund date of January 1, 2002, and defer further action pending its decision on exceptions in Docket No. ER98–495–000.

Copies of the complaint were served on respondents and on other interested parties.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's rules of practice and procedure (18 CFR 385.211 and 385.214). All such motions or protests must be filed on or before November 23, 2001. 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. Answers to the complaint shall also be due on or before November 23, 2001. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28465 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–389–034]

Columbia Gulf Transmission Company; Notice of Compliance Filing

November 7, 2001.

Take notice that on November 2, 2001, Columbia Gulf Transmission Company (Columbia Gulf) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, the following tariff sheet, with an effective date of November 1, 2001:

First Revised Sheet No. 20

Columbia Gulf states that it is filing the tariff sheet to comply with the Commission's October 24, 2001 order approving a negotiated rate agreement in Docket No. RP96–389–031.

Columbia Gulf states further that copies of the filing has served copies of the filing on all parties identified on the official service list in Docket No. RP96–389.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such 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. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28473 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–39–000]

Columbia Gulf Transmission Company; Notice of Tariff Filing

November 7, 2001.

Take notice that on November 1, 2001, Columbia Gulf Transmission Company(Columbia Gulf) tendered for filing as part of its FERC Gas Tariff, Second Revised Volume No. 1, tariff sheets listed in Appendix A to the filing, with a proposed effective date of December 1, 2001.

Columbia Gulf proposes to establish Rate Schedule PAL, under which interruptible parking and lending services would be performed, in order to provide its customers with additional flexibility to manage their natural gas supply portfolios and transportation agreements. Proposed Rate Schedule PAL is closely modeled after the parking and lending services already authorized by the Commission. The proposed parking and lending services will allow Columbia Gulf's customers to park or receive loaned gas at agreed upon points of service. Columbia Gulf states that Rate Schedule PAL services are optional and have the lowest scheduling priority.

Columbia Gulf states that copies of its filing have been mailed by first class mail 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, 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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.

Acting Secretary.

[FR Doc. 01–28482 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER02–64–000]

Mirant Delta, LLC and Mirant Potrero, LLC; Notice of Filing

November 6, 2001.

Take notice that on October 9, 2001, Mirant Delta, LLC and Mirant Potrero, LLC provided to the Commission an informational filing in compliance with Schedule F of their respective Must-Run Service Agreements with the California Independent System Operator Corporation.

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, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All such motions and protests should be filed on or before December 24, 2001. Protests will be considered by the Commission to determine 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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

David P. Boergers,

Secretary.

[FR Doc. 01–28466 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP02–38–000]

National Fuel Gas Supply Corporation; Notice of Tariff Filing

November 7, 2001.

Take notice that on November 1, 2001, National Fuel Gas Supply Corporation (National) tendered for filing as part of its FERC Gas Tariff, Fourth Revised Volume No. 1, the following tariff sheet to become effective November 1, 2001:

Forty Second Revised Sheet No. 9

National states that under Article II, Section 2, of the settlement, it is required to recalculate the maximum Interruptible Gathering (IG) rate monthly and to charge that rate on the first day of the following month if the result is an IG rate more than 2 cents above or below the IG rate as calculated under Section 1 of Article II. The recalculation produced an IG rate of $0.15 per dth. In addition, Article III, Section 1 states that any overruns of the Firm Gathering service provided by National shall be priced at the maximum IG rate.

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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28481 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–176–042]

Natural Gas Pipeline Company of America; Notice of Negotiated Rates

November 7, 2001.

Take notice that on November 2, 2001, Natural Gas Pipeline Company of America (Natural) tendered for filing with the to become part of its FERCGas Tariff, Sixth Revised Volume No. 1, Original Sheet No. 26P.03, to be effective November 2, 2001.

Natural states that the purpose of this filing is to implement an amendment to an existing negotiated rate transaction entered into by Natural and Dynegy Marketing and Trade under Natural's Rate Schedule FTS pursuant to section 49 of the General Terms and Conditions of Natural's Tariff.

Natural states that copies of the filing are being mailed to all parties set out on the Commission's official service list in Docket No. RP99–176.

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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28476 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. OR02–1–000]

Plantation Pipe Line Company; Notice of Petition for Declaratory Order

November 7, 2001.

Take notice that on November 2, 2001, Plantation Pipe Line Company (Plantation), filed in Docket No. OR02–1–000, a petition pursuant to Section 207 of the Commission's Rules of Practice and Procedure (18 CFR 385.207) for a declaratory order, as more fully set forth in the application on file with the Commission and open to public inspection. This filing may be viewed on the web at www.ferc.fed us/online/rims.htm (call 202–208–2222 for assistance).

Plantation states that it proposes to abandon its 8-inch pipeline facilities serving the Chattanooga and Knoxville, Tennessee markets, and to serve those markets via a new 16-inch pipeline from Bremen, Georgia. The new pipeline would be owned by an affiliate. Plantation requests that the Commission find that the abandonment of the current facilities and service would not be subject to Commission jurisdiction, that certain proposed joint rates would be lawful, and that the proposed abandonment and rate arrangements would not affect the grandfathered status under the Energy Policy Act of 1992, of Plantation's existing mainline rates that apply to Bremen, Georgia.

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 on or before December 3, 2001. 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 to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions(call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28468 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP99–513–009]

Questar Pipeline Company; Notice of Negotiated Rate

November 7, 2001.

Take notice that on November 1, 2001, pursuant to 18 CFR 154.7 and 154.203, and as provided by section 30 (Negotiated Rates) to the General Terms and Conditions of Part 1 of Questar Pipeline Company's (Questar) FERC Gas Tariff, Questar filed a tariff filing to implement a negotiated-rate contract as authorized by Commission orders issued October 27, 1999, and December 14, 1999, in Docket Nos. RP99–513, et al. The Commission approved Questar's request to implement a negotiated-rate option for Rate Schedules T–1, NNT, T–2, PKS, FSS and ISS shippers. Questar submitted its negotiated-rate filing in accordance with the Commission's Policy Statement in Docket Nos. RM95–

6–000 and RM96–7–000 (Policy Statement) issued January 31, 1996.

Questar states that a copy of this filing has been served upon Questar's customers, the Public Service Commission of Utah and the Public Service Commission of Wyoming.

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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28478 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP96–200–076]

Reliant Energy Gas Transmission Company; Notice of Negotiated Rates

November 7, 2001.

Take notice that on November 1, 2001, Reliant Energy Gas Transmission Company (REGT) tendered for filing as part of its FERC Gas Tariff, Fifth Revised Volume No. 1, the following tariff sheets to be effective November 1, 2001:

First Revised Sheet No. 636
First Revised Sheet No. 637
First Revised Sheet No. 638
First Revised Sheet No. 639

REGT states that the purpose of this filing is to reflect the addition of a new negotiated rate contract and the expiration of four existing negotiated rate contracts.

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. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28472 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP02–17–000]

Texas Eastern Transmission Corporation; Notice of Application

November 7, 2001.

Take notice that on October 26, 2001, Texas Eastern Transmission Corporation (Texas Eastern), 5400 Westheimer Court, Houston, Texas 77056–5310, filed in Docket No. CP02–17–000 an application pursuant to Sections 7(b) and 7(c) of the Natural Gas Act for approval for it (i) to construct, own, operate, and maintain one 5,000 horsepower electric compressor unit at a new compressor station in Franklin Township, Somerset County, New Jersey, (ii) to uprate the maximum allowable operating pressure of certain main line pipelines in Hunterdon and Somerset Counties, New Jersey, (iii) to implement a new lateral line only transportation service (Rate Schedule MLS–1), (iv) to establish an incremental maximum recourse rate for service to New Jersey Natural Gas Company (New Jersey Natural) on its existing Freehold Lateral under the new Rate Schedule MLS–1, and (v) abandon certain authorizations in order to amend certain existing firm contractual agreements between itself and New Jersey Natural to reflect the addition of the proposed new service. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance).

Texas Eastern's requests are all more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be viewed on the web at http://www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance). Any questions regarding the application should be directed to Steven E. Tillman, Director, Regulatory Affairs, at (713) 627–5113, (713) 627–5947 (Fax), Texas Eastern Transmission Corporation, P.O. Box 1642, Houston, Texas 77251–1642.

Texas Eastern respectfully requests that the Commission issue a preliminary determination on the non-environmental aspects of this application by January 23, 2002, and a final certificate on or before June 1, 2002. Texas Eastern says this is needed to allow it to complete construction of the proposed facilities to meet the November 1, 2002 in-service date requested by New Jersey Natural.

Texas Eastern says New Jersey Natural has requested this service to meet two key business needs: firm hourly swing capability and increased delivery pressure. Texas Eastern says New Jersey Natural requires these additional services due to a continuing increase in service demand in its service area and significant daily load swings because New Jersey Natural has been experiencing the addition of about 12,500 service customers each year and projects that this growth will continue or increase in the future.

The proposed Rate Schedule MLS–1, included in Exhibit P of the application, will be available to any party requesting firm or interruptible transportation service on a portion of Texas Eastern's system designated as a Market Lateral. The proposed service will be provided as a ''lateral line only'' service with no transportation rights, secondary or otherwise, other than on the designated Market Lateral. The MLS–1 service will allow a firm contracting customer to designate in the MLS–1 Service Agreement the Maximum Daily Quantity (MDQ) and Maximum Hourly Quantity to be delivered, not to exceed the customer's MDQ for the Gas Day. A firm customer will be required to pay

for any incremental facilities required to provide the customer's requested service. Firm customers under Rate Schedule MLS–1 will have secondary and capacity release rights only on the Market Lateral. The firm hourly rights will be applicable only as to flows between the Primary Receipt Point and Primary Delivery Point(s) on the Market Lateral.

The proposed MLS–1 service to New Jersey Natural for the Freehold Lateral is contingent on the construction of the proposed incremental facilities which will provide the additional capacity for the additional line pack necessary for New Jersey Natural's requested firm hourly swing service. New Jersey Natural will have non-firm hourly rights at other points on the Freehold Lateral. Additionally, Texas Eastern says that when New Jersey Natural is not using the full capacity, spare capacity will be available to existing Texas Eastern customers for utilization on a secondary or interruptible basis. This will provide operational flexibility for customers other than those taking service under Rate Schedule MLS–1.

Texas Eastern says that the proposal Project will not negatively affect in any way service to other Texas Eastern mainline or Freehold Lateral customers. The rates for New Jersey Natural's existing mainline firm service agreements will remain the same and is not affected by this proposal. The maximum recourse rate for New Jersey Natural's service pursuant to Rate Schedule MLS–1 on the Freehold Lateral is a 100 percent incremental reservation rate of $ 0.661 per Dth. This rate is based on proposed incremental facility costs and includes the cost of the additional initial line pack for the requested pack and draft service. Texas Eastern says it has used its current system depreciation and rate of return to derive this incremental rate.

Texas Eastern says that the proposed facilities and their proposed locations are critical to the proposed new service New Jersey Natural. Texas Eastern proposes to construct, install, and operate a new compressor station located in Franklin Township, Somerset County, New Jersey consisting of one 5,000 HP electric compressor unit and appurtenant piping, buildings, measurement and communication facilities at the head of the Freehold Lateral. The compressor unit will allow Texas Eastern to deliver gas to New Jersey Natural at a higher delivery pressure (720 psig). Also, the compressor and appurtenant facilities will be used as a means to transfer the mainline portion of the line pack into the Freehold Lateral for delivery to New Jersey Natural during the firm hourly swing cycle. Texas Eastern says that New Jersey Natural has evaluated the possibility of adding compression directly to its system, and has informed Texas Eastern that this is not a viable option in achieving the same desired benefits.

Texas Eastern also proposes to uprate the maximum allowable operating pressure (MAOP) to 1,170 psig on its Lambertville compressor discharge piping and its mainline piping east of Lambertville on 36-inch/Line Number 20 and 42 inch/Line Number 38 for about 14 miles. The current MAOP on this section of pipeline (975 psig) is limited by five road crossings in Hunterdon County and Somerset County, New Jersey which Texas Eastern proposes to replace and upgrade. Replacement of these road crossings with higher-grade pipeline will allow Texas Eastern to operate this portion of the mainline facilities at the higher MAOP. In addition, two pressure limiting devices (PLDs) will be installed immediately downstream of the uprated pipelines. The PLDs will be installed to control the gas pressure downstream of the uprated segments on both pipelines.

Texas Eastern says the construction and operation of the facilities is not expected to have any significant adverse impacts on the quality of human health or the environment and that the project was designed to minimize environmental impacts. Texas Eastern says that the proposed facilities will be designed, constructed, installed, inspected, tested, operated and maintained in accordance with all applicable safety standards and plans for maintenance and inspection as prescribed by the U.S. Department of Transportation.

There are two ways to become involved in the Commission's review of this project. First, any person wishing to obtain legal status by becoming a party to the proceedings for this project should, on or before November 30, 2001, file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, a motion to intervene in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). A person obtaining party status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents filed by the applicant and by all other parties. A party must submit 14 copies of filings made with the Commission and must mail a copy to the applicant and to every other party in the proceeding. Only parties to the proceeding can ask for appellate court review of Commission orders in the proceeding.

However, a person does not have to intervene in order to have their comments considered. The second way to participate is by filing with the Secretary of the Commission, as soon as possible, an original and two copies of comments in support of or in opposition to this project. The Commission will consider these comments in determining the appropriate action to be taken, but the filing of comments alone will not serve to make the filer a party to the proceeding. The Commission's rules require that persons filing comments in opposition to the project provide copies of their protests only to the party or parties directly involved in the protest.

Persons who wish to comment only on the environmental review of this project should submit an original and two copies of their comments to the Secretary of the Commission. Environmental commenters will be placed on the Commission's environmental mailing list, will receive copies of the environmental documents, and will be notified of meetings associated with the Commission's environmental review process. Environmental commenters will not be required to serve copies of filed documents on all other parties. However, the non-party commenters will not receive copies of all documents filed by other parties or issued by the Commission (except for the mailing of environmental documents issued by the Commission) and will not have the right to seek court review of the Commission's final order.

The Commission may issue a preliminary determination on non-environmental issues prior to the completion of its review of the environmental aspects of the project. This preliminary determination typically considers such issues as the need for the project and its economic effect on existing customers of the applicant, on other pipelines in the area, and on landowners and communities. The Commission considers the extent to which the applicant may need to exercise eminent domain to obtain rights-of-way for the proposed project and balances that against the non-environmental benefits to be provided by the project. Therefore, if a person has comments on community and landowner impacts from this proposal, it is important either to file comments or to intervene as early in the process as possible. If the Commission decides to set the application for a formal hearing

before an Administrative Law Judge, the Commission will issue another notice describing that process. At the end of the Commission's review process, a final Commission order approving or denying a certificate will be issued.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's website under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28464 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–255–037]

TransColorado Gas Transmission Company; Notice of Compliance Filing

November 7, 2001.

Take notice that on November 1, 2001, TransColorado Gas Transmission Company (TransColorado) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Thirty-Seven Revised Sheet No. 21, Twenty-Sixth Revised Sheet No. 22 and Tenth Revised Sheet No. 22A, to be effective November 1, 2001.

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 propose to revise TransColorado's Tariff to reflect negotiated-rate contract revisions.

TransColorado stated that a copy of this filing has been served upon all parties to this proceeding, TransColorado's customers, the Colorado Public Utilities Commission and the New Mexico Public Utilities Commission.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rule and regulations. All such 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. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28474 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP97–255–038]

TransColorado Gas Transmission Company; Notice of Compliance Filing

November 7, 2001.

Take notice that on November 2, 2001, TransColorado Gas Transmission Company (TransColorado) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, Thirty-Eighth Revised Sheet No. 21 and Eleventh Revised Sheet No. 22A, to be effective November 2, 2001.

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 propose to revise TransColorado's Tariff to reflect negotiated-rate contract revisions.

TransColorado stated that a copy of this filing has been served upon all parties to this proceeding, TransColorado's customers, the Colorado Public Utilities Commission and the New Mexico Public Utilities Commission.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such 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. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28475 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. PR02–2–000]

Transok, LLC; Notice of Petition for Rate Approval

November 7, 2001.

Take notice that on October 31, 2001, Transok, LLC (Transok), filed a Petition for Rate Approval (Petition) pursuant to section 284.123(b)(2) of the Commission's regulations, to restate its system-wide interruptible transportation rate. In the Petition, Transok requests the Commission to approve the continuation of its current rate of $0.4085. Transok explains that it discounted all its section 311 transportation in the most recent 12 month period. Transok states its belief that it could justify a higher rate than what it is requesting.

Pursuant to section 284.123(b)(2), if the Commission does not act within 150 days of the filing date, this rates will be deemed to be fair and equitable and not in excess of an amount which interstate pipelines would be permitted to charge for providing similar transportation service. The Commission may, prior to the expiration of the 150-day period, extend the time for action or institute a proceeding to afford interested parties an opportunity for written comments and for the oral presentation of views, data and arguments.

Any person desiring to participate in this rate proceeding must file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). All motions must be filed with the Secretary of the Commission on or before November 23, 2001. This petition for rate approval is on file with the Commission and is available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link,

select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28471 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–425–004]

Williams Gas Pipelines Central, Inc.; Notice of Proposed Changes in FERC Gas Tariff

November 7, 2001.

Take notice that on November 1, 2001, Williams Gas Pipelines Central, Inc. (Williams) tendered for filing as part of its FERC Gas Tariff, Original Volume No. 1, the following tariff sheet to become effective November 1, 2001:

First Revised Sheet No. 10

Williams states that the purpose of this filing is to reflect a new potentially ''non-conforming'' contract in its tariff as required in section 154.112(b) of the Commission's regulations and to file such agreement with the Commission as potentially ''non-conforming'' in accordance with section 154.1(d).

Williams states that copies of this filing are being mailed to Williams' jurisdictional 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, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such 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. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28479 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. RP00–484–001]

Wyoming Interstate Company, Ltd; Notice of Compliance Filing

November 7, 2001.

Take notice that on November 5, 2001, Wyoming Interstate Company, Ltd. (WIC) tendered for filing the pro forma tariff sheets listed on the Appendix, attached to the filing.

WIC states that it is submitting the filing in order to conform the pro forma tariff sheets included in its Order No. 637 compliance filing, where applicable, to reflect the same or similar terms and conditions of service as were included in Colorado Interstate Gas Company's Order No. 637 compliance filing for its Wyoming system.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426, in accordance with section 385.211 of the Commission's rules and regulations. All such 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. Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at http://www.ferc.gov using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28480 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC02–17–000, et al.]

Mill Run Windpower LLC, et al.; Electric Rate and Corporate Regulation Filings

November 7, 2001.

Take notice that the following filings have been made with the Commission:

1. Mill Run Windpower LLC and EWO Wind, LLC

[Docket No. EC02–17–000]

Take notice that on November 2, 2001, Mill Run Windpower LLC (Mill Run) and EWO Wind, LLC (EWO and, collectively with Mill Run, Applicants) filed with the Federal Energy Regulatory Commission (Commission) a joint application pursuant to section 203 of the Federal Power Act for authorization of a disposition of jurisdictional facilities whereby Applicants request approval of the transfer of between 98% and 100% of the membership interests in Mill Run from Atlantic Renewable Energy Corporation and Zilkha Renewable Energy, LLC to EWO.

Mill Run is engaged exclusively in the business of owning and operating a 15 MW wind-powered electric generating facility located in Springfield and Stuart Townships, Fayette County, Pennsylvania (the Facility), and selling its capacity and energy at wholesale to Exelon Power Generation LLC. The Applicants request privileged treatment by the Commission of the detailed Term Sheet between Zilkha Renewable Energy, LLC and Entergy Power Generation Corp. that governs the proposed transfer.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

2. TCC Attala OL LLC

[Docket No. EG02–19–000]

Take notice that on November 2, 2001, TCC Attala OL LLC (TCC Attala OL), a Delaware limited liability company with its principal place of business at Rodney Square North, 1100 North Market Street, Wilmington, Delaware 18990–0001, filed with the Federal Energy Regulatory Commission (Commission), an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

TCC Attala OL proposes to purchase and hold an undivided interest, as owner lessor, in a natural gas-fired, combined cycle power plant of

approximately 526 MW capacity in Attala County, Mississippi, for the benefit of TCC Attala OP LLC as owner participant. TCC Attala OL proposes to satisfy the requirement of selling energy at wholesale by leasing an undivided interest in the facility to Attala Generating Company, LLC, which in turn will sell the entire output of the facility exclusively at wholesale.

Comment date: November 28, 2001, 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.

3. VCC Attala OL LLC

[Docket No. EG02–20–000]

Take notice that on November 2, 2001, VCC Attala OL LLC (VCC Attala OL), a Delaware limited liability company with its principal place of business at Rodney Square North, 1100 North Market Street, Wilmington, Delaware 18990–0001, filed with the Federal Energy Regulatory Commission (Commission), an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

VCC Attala OL proposes to purchase and hold an undivided interest, as owner lessor, in a natural gas-fired, combined cycle power plant of approximately 526 MW capacity in Attala County, Mississippi, for the benefit of VCC Attala OP LLC as owner participant. VCC Attala OL proposes to satisfy the requirement of selling energy at wholesale by leasing an undivided interest in the facility to Attala Generating Company, LLC, which in turn will sell the entire output of the facility exclusively at wholesale.

Comment date: November 28, 2001, 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. KeySpan-Glenwood Energy Center LLC

[Docket No. EG02–21–000]

Take notice that on November 5, 2001, KeySpan-Glenwood Energy Center LLC(the Applicant) filed an application with the Federal Energy Regulatory Commission (the Commission) for determination of exempt wholesale generator status pursuant to section 32 of the Public Utility Holding Company Act of 1935, as amended, and part 365 of the Commission's regulations.

Applicant is a Delaware limited liability company that will be engaged directly and exclusively in the business of owning and operating all or part of one or more eligible facilities to be located on Long Island, New York. The eligible facilities will consist of an approximately 79 MW electric generation plant and related equipment and interconnection facilities. The output of the eligible facilities will be sold at wholesale.

Comment date: November 28, 2001, 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. KeySpan-Port Jefferson Energy Center LLC

[Docket No. EG02–22–000]

Take notice that on November 5, 2001, KeySpan-Port Jefferson Energy CenterLLC (the Applicant) filed an application with the Federal Energy Regulatory Commission (the Commission) for determination of exempt wholesale generator status pursuant to section 32 of the Public Utility Holding Company Act of 1935, as amended, and part 365 of the Commission's regulations.

Applicant is a Delaware limited liability company that will be engaged directly and exclusively in the business of owning and operating all or part of one or more eligible facilities to be located on Long Island, New York. The eligible facilities will consist of an approximately 79 MW electric generation plant and related equipment and interconnection facilities. The output of the eligible facilities will be sold at wholesale.

Comment date: November 28, 2001, 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. American Ref-Fuel Company of Delaware Valley, L.P.

[Docket No. EG02–23–000]

Take notice that on November 1, 2001, American Ref-Fuel Company of Delaware Valley, L.P. (ARC Delaware Valley), a Delaware limited partnership, with its principal place of business at c/o American Ref-Fuel Company, Timberway One—Suite 200, 15990 North Barker's Landing, Houston, Texas 77079, filed with the Federal Energy Regulatory Commission (Commission) an application for determination of exempt wholesale generator (EWG) status pursuant to part 365 of the Commission's regulations.

ARC Delaware Valley states that it will be engaged directly and exclusively in the business of owning or operating, or both owning and operating, a municipal solid waste-fired small power production facility located in Chester, Massachusetts (Facility). ARC Delaware Valley currently is an EWG, but seeks a redetermination that is an EWG if it modifies the Facility to produce capacity above 79.5 MW. ARC Delaware Valley will sell the capacity exceeding 79.5 MW exclusively at wholesale. A copy of the filing was served upon the Securities and Exchange Commission, the New Jersey Board of Public Utilities, and the Pennsylvania Public Utility Commission.

Comment date: November 28, 2001, 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. El Paso Rio Claro Ltda.

[Docket No. EG02–24–000]

Take notice that on November 6, 2001, El Paso Rio Claro Ltda. filed with the Federal Energy Regulatory Commission (Commission), an application for determination of exempt wholesale generator status pursuant to part 365 of the Commission's regulations.

Applicant, a Brazilian limited liability company, owns power generating facilities in Brazil. These facilities consist of an 875 MW simple cycle gas fired electric generating facility and facilities necessary to make wholesale sales of electricity in Brazil.

Comment date: November 28, 2001, 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. ISO New England Inc.

[Docket No. ES02–7–000]

Take notice that on November 1, 2001, ISO New England Inc. (ISO New England) submitted an application pursuant to section 204 of the Federal Power Act seeking authorization to make additional long-term borrowing in the amount not to exceed $40,000,000 under an existing term credit facility.

ISO New England also requests a waiver of the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment date: November 27, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. New England Power Pool

[Docket No. ER02–185–001]

Take notice that on November 5, 2001, the New England Power Pool

(NEPOOL) Participants Committee tendered for filing with the Federal Energy Regulatory Commission (Commission) a Substitute 5th Revised Sheet No. 506 of New England Power Pool FERC Electric Rate Schedule No. 6, and a blackline showing the correction. The amendment corrects certain text to reflect the formulaic changes that NEPOOL has proposed in this docket which modify the methodology used to calculate whether a generator is operating at its desired dispatch point.

The NEPOOL Participants Committee states that copies of these materials were sent to the New England state governors and regulatory commissions and the Participants in the New England Power Pool.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. Somerset Windpower LLC

[Docket No. ER02–258–000]

Take notice that on November 2, 2001, Somerset Windpower LLC (Somerset), tendered for filing with the Federal Energy Regulatory Commission (Commission) an application to amend its existing authorization to sell capacity and energy at market-based rates pursuant to section 205 of the Federal Power Act.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. Attala Energy Company, LLC

[Docket No. ER02–40–001]

Take notice that on November 5, 2001, Attala Energy Company, LLC (Attala) filed with the Federal Energy Regulatory Commission (Commission) a supplement to its October 4, 2001 Application for Blanket Authorizations, Certain Waivers, Order Approving Rate Schedule and For Expedited Action.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. Citizens Energy Corporation

[Docket No. ER01–2814–001]

Take notice that on November 5, 2001, in compliance with the October 5, 2001 letter order issued by the Federal Energy Regulatory Commission (Commission) in the above-referenced proceeding, Citizens Energy Corporation (Citizens) submitted a supplement to its August 9, 2001 request for market-based rate authority.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. J. Aron & Company

[Docket No. ER02–237–000]

Take notice that on November 2, 2001, J. Aron & Company (Seller) petitioned the Federal Energy Regulatory Commission (Commission) for an order: (1) Accepting Seller's proposed FERC Electric Rate Schedule; (2) granting waiver of certain requirements under Subparts B and C of part 35 of the regulations; (3) granting the blanket approvals normally accorded sellers permitted to sell at market-based rates; and (4) granting waiver of the 60-day notice period.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. California Independent System Operator Corporation

[Docket No. ER02–250–000]

Take notice that on November 2, 2001, the California Independent System Operator Corporation (ISO) tendered for filing with the Federal Energy Regulatory Commission (Commission) its 2002 Grid Management Charge. The purpose of the Grid Management Charge is to allow the ISO to recover its administrative and operating costs. The ISO requests that the unbundled Grid Management Charge be made effective as of January 1, 2002.

The ISO states that this filing has been served on the Public Utilities Commission of California, the California Energy Commission, the California Electricity Oversight Board, and upon all parties with effective Scheduling Coordinator Service Agreements under the ISO Tariff.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

15. Southwestern Electric Power Company

[Docket No. ER02–251–000]

Take notice that on November 2, 2001, Southwestern Electric Power Company (SWEPCO) filed with the Federal Energy Regulatory Commission (Commission) a Restated and Amended Power Supply Agreement (Restated PSA) between SWEPCO and the City of Hope, Arkansas (Hope). The Restated PSA supersedes, in its entirety, the 1982 Power Supply Agreement, as amended, between SWEPCO and Hope.

SWEPCO seeks an effective date of June 15, 2000 for the Restated PSA and, accordingly, seeks waiver of the Commission's notice requirements. Copies of the filing have been served on Hope and on the Arkansas Public Service Commission.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

16. New England Power Company

[Docket No.ER02–252–000]

Take notice that on November 2, 2001, New England Power Company (NEP) submitted for filing with the Federal Energy Regulatory Commission (Commission) Original Service Agreement No. 207 for Firm Local Generation Delivery Service under NEP's Open Access Transmission Tariff, FERC Electric Tariff, Second Revised Volume No. 9 between NEP and Pawtucket Power Associates, Limited Partnership (Pawtucket).

NEP states that a copy of this filing has been served upon Pawtucket and regulators in the State of Rhode Island.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

17. Nevada Power Company

[Docket No. ER02–254–000]

Take notice that on November 2, 2001, Nevada Power Company (Nevada Power) filed with the Federal Energy Regulatory Commission (Commission) pursuant to Section 205 of the Federal Power Act, an executed Interconnection Agreement between Nevada Power and Duke Washoe LLC (Duke). This agreement governs the terms and conditions of the interconnection to Nevada Power's transmission system of Duke's 540 MW electric generation facility located in Washoe County, Nevada.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

18. Puget Sound Energy, Inc.

[Docket No. ER02–255–000]

Take notice that on November 2, 2001, Puget Sound Energy, Inc., a public utility corporation organized under the laws of the State of Washington (PSE), file with the Federal Energy Regulatory Commission (Commission), a Notice of Cancellation of Service Agreement for Firm and Non-Firm Point-To-Point transmission Service under FERC Electric Tariff Original Volume No. 7 Open Access Transmission Tariff (Tariff) with the Merchant Energy Group of the Americas, Inc. (MEGA), as Transmission Customer (Service Agreement Nos. 78 and 79 under the Tariff).

PSE states that a copy of the filing was served upon MEGA.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

19. Mill Run Windpower, LLC

[Docket No. ER02–256–000]

Take notice that on November 2, 2001, Mill Run Windpower, LLC (Mill Run), tendered for filing with the Federal Energy Regulatory Commission (Commission) an application to amend its existing authorization to sell capacity and energy at market-based rates pursuant to section 205 of the Federal Power Act.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

20. Northern Iowa Windpower, LLC

[Docket No. ER02–257–000]

Take notice that on November 2, 2001, Northern Iowa Windpower, LLC (NIW), tendered for filing with the Federal Energy Regulatory Commission (Commission) an application to amend its existing authorization to sell capacity and energy at market-based rates pursuant to section 205 of the Federal Power Act.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

21. WPS Resources Operating Companies

[Docket No. ER02–260–000]

Take notice that on November 5, 2001, WPS Resources Operating Companies (WPS Companies), tendered for filing with the Federal Energy Regulatory Commission (Commission) on behalf of Wisconsin Public Service Corporation (WPSC) and Upper Peninsula Power Company an executed service agreement with their affiliate, Combined Locks Energy Center, LLC (CLEC) pursuant to section 205 of the Federal Power Act. Under this service agreement, WPSC will provide CLEC with Generation Delivery Imbalance Service and Dynamic Scheduling Service pursuant to the WPS Companies' Open Access Transmission Tariff, FERC Electric Tariff, First Revised Volume No. 1 (WPS Tariff). The WPS Companies request an effective date of November 1, 2001 for this service agreement.

Copies of the filing were served upon CLEC and the Public Service Commission of Wisconsin.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

22. PECO Energy Company

[Docket No. ER02–261–000]

Take notice that on November 5, 2001, PECO Energy Company (PECO) submitted for filing with the Federal Energy Regulatory Commission (Commission), pursuant to Order No. 614, FERC Stats. & regs., Regulations Preambles 61,096 (2000), First Revised Sheet Nos. 45–50 superseding Original Sheet Nos. 45–50 to the Construction Agreement between PECO and Liberty Electric Power, LLC (Liberty), designated by the Commission as PECO Rate Schedule FERC No. 140.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

23. Allegheny Energy Service Corporation, on behalf of Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. ER02–262–000]

Take notice that on November 5, 2001, Allegheny Energy Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company (Allegheny Power), filed with the Federal Energy Regulatory Commission (Commission) Service Agreement No. 363 (Agreement) to add the Borough of Chambersburg to Allegheny Power's Open Access Transmission Tariff which has been submitted for filing by the Federal Energy Regulatory Commission in Docket No. OA96–18–000. Copies of the filing have been provided to the Pennsylvania Public Utility Commission and all parties of record.

Allegheny Power requests a waiver of notice requirements and asks the Commission to honor the proposed effective date of December 1, 2001 as specified in the agreement negotiated by the parties.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

24. Intercom Energy, Inc.

[Docket No. ER02–267–000]

Take notice that on November 5, 2001, Intercom Energy, Inc. (Intercom) tendered for filing with the Federal Energy Regulatory Commission (Commission) an application for an order accepting its FERC Electric Rate Schedule No. 1, granting certain blanket approvals, including the authority to sell electricity at market-base rates, and waiving certain regulations of the Commission. Intercom requested expedited Commission consideration. Intercom requested that its Rate Schedule No. 1 become effective upon the earlier of the date the Commission authorizes market-based rate authority, or 30-days from the date of this filing. Intercom also filed its FERC Electric Rate Schedule No. 1.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

25. Progress Ventures, Inc., Progress Genco Ventures, LLC

[Docket No. ER01–2928–001 and Docket No. ER01–2929–001]

Take notice that on November 2, 2001, Progress Ventures, Inc. and Progress Genco Ventures, LLC tendered for filing with the Federal Energy Regulatory Commission (Commission) an amendment to their applications for authorization to sell power at market-based rates in the above-referenced dockets.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

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, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the Web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link.

David P. Boergers,

Secretary.

[FR Doc. 01–28462 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC02–12–000, et al.]

PSEG Power New York, Inc., et al.; Electric Rate and Corporate Regulation Filings

November 6, 2001.

Take notice that the following filings have been made with the Commission:

1. PSEG Power New York Inc.

[Docket No. EC02–12–000]

Take notice that on October 26, 2001, PSEG Power New York Inc. (PSEG New York) filed with the Federal Energy Regulatory Commission (the Commission) a request for Commission authorization under section 203 of the Federal Power Act (FPA) for the sale of Applicant's Albany Steam Station to the Town of Bethlehem Industrial Development Agency (the Agency), and the contemporaneous lease back of the Albany Steam Station to PSEG New York. Additionally, PSEG New York also requests any necessary section 203 authority to exercise its option rights to purchase back its jurisdictional facilities from the Agency.

Comment date: November 16, 2001, in accordance with Standard Paragraph E at the end of this notice.

2. Attala Generating Company, LLC

[Docket Nos. EC02–13–000 and EL02–13–000]

Take notice that on October 25, 2001, Attala Generating Company, LLC (Attala) filed with the Commission a request: (1) A request for authorization under section 203 of the Federal Power Act (FPA) of a sale/leaseback transaction and the assignment of a tolling agreement; (2) a request for a determination that neither the owner lessor nor the owner participant in the sale/leaseback transaction is a ''public utility'' under section 201(f) of the FPA.

Comment date: November 21, 2001, in accordance with Standard Paragraph E at the end of this notice.

3. Cleco Evangeline LLC

[Docket Nos. EC02–14–000 and EL02–14–000]

Take notice that on October 26, 2001, Cleco Evangeline LLC filed with the Commission an Application: (1) Seeking Commission authorization under section 203 of the Federal Power Act to transfer certain Jurisdictional Assets ; and, (2) seeking an order from the Commission that passive financial participants involved in the transaction will not be considered a ''public utility'' under section 201 of the FPA.

Comment date: November 21, 2001, in accordance with Standard Paragraph E at the end of this notice.

4. Cinergy Services, Inc., on behalf of Cinergy Corp., The Cincinnati Gas & Electric Company, Cinergy Power Investments, Inc. and Cinergy Wholesale Energy, Inc.

[Docket Nos. EC02–15–000, EG02–13–000 and ER02–177–000]

Take notice that on October 29, 2001, Cinergy Services, Inc., on behalf of Cinergy Corp., The Cincinnati Gas & Electric Company, Cinergy Power Investments, Inc., and Cinergy Wholesale Energy, Inc. (collectively, Applicants) tendered for filing an application requesting all necessary authorizations under section 203 of the Federal Power Act, 16 U.S.C. 824b (2000), for Applicants to engage in a corporate reorganization.

Copies of this filing have been served on the Public Utilities Commission of Ohio, the Kentucky Public Service Commission and the Indiana Utility Regulatory Commission.

Comment date: November 21, 2001, in accordance with Standard Paragraph E at the end of this notice.

5. Minnesota Power, Rainy River Energy Corporation—Taconite Harbor, and LTV Steel Mining Company

[Docket No. EC02–16–000]

Take notice that on November 1, 2001, LTV Steel Mining Company (LTVSMC), Minnesota Power (MP) and Rainy River Energy Corporation—Taconite Harbor (RRTH) filed with the Federal Energy Regulatory Commission (Commission) a joint application (Application) pursuant to section 203 of the Federal Power Act seeking authorization for LTVSMC to Sell and MP and RRTH to acquire certain jurisdictional facilities including a dual-circuit transmission line, substation and step-up transformers. The transaction also involves the acquisition by RRTH of three 75 MW generating facilities from LTVSMC.

MP owns and operates generation, transmission and distribution facilities and provides electricity to 138,000 customers in northeastern Minnesota and northwestern Wisconsin. RRTH has filed an application for Exempt Wholesale Generator Status and is seeking Commission acceptance of its market-based rate tariff. LTVSMC engaged in the mining and beneficiation of taconite into taconite pellets and in the generation and transmission of electric power.

The applicants have also requested that the Commission process the Application on an expedited basis and LTV has provided contingent notice of the termination of its jurisdictional rate schedules.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

6. NorthWestern Corporation

[Docket No. ES02–6–000]

Take notice that on October 31, 2001, NorthWestern Corporation (NorthWestern) submitted an application under section 204 of the Federal Power Act seeking authorization to issue indebtedness pursuant to a credit facility or other evidence of indebtedness to be established and maintained with one or more financial institutions pursuant to one or more agreements pursuant to which NorthWestern may borrow funds from time to time during such term, on a revolving credit basis or otherwise, up to a maximum principal amount of $1,100,000,000.

NorthWestern also requested a waiver from the Commission's competitive bidding and negotiated placement requirements at 18 CFR 34.2.

Comment date: November 26, 2001, in accordance with Standard Paragraph E at the end of this notice.

7. Florida Power & Light Co.

[Docket Nos. OA96–39–008, ER93–465–031, ER93–922–017, EL94–12–012 and ER96–2381–005]

Take notice that on November 1, 2001, Florida Power & Light Company (FPL) filed with the Federal Energy Regulatory Commission a correction to one of the Open Access Transmission Tariff revised sheets it filed on October 15, 2001. FPL states that the filing corrects Sheet No. 132, line 12 by deleting the word ''Monthly'' which inadvertently was not deleted in the revised sheet filed October 15, 2001.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

8. American Ref-Fuel Company of Delaware Valley, L.P.

[Docket No. QF87–492–003]

Take notice that on November 1, 2001, American Ref-Fuel Company of Delaware Valley, L.P. (ARC Delaware Valley) of Timberway One—Suite 200, 15990 North Barker's Landing, Houston, Texas 77079 filed with the Federal Energy Regulatory Commission an application for recertification of a facility as a qualifying small power production facility pursuant to 292.207(b) of the Commission's

regulations and a request for expedited action.

ARC Delaware Valley seeks to recertify its small power production facility located in Chester, Pennsylvania as a qualifying facility if it modifies the facility to produce an additional 5–10 MW of power above 80 MW and to sell that power at market-based rates as exempt wholesale generated power into the PJM Interconnection, L.L.C. market.

ARC Delaware Valley is interconnected to the transmission system of PECO Energy Company and sells most of the power from the facility to Conectiv.

Comment date: December 3, 2001, in accordance with Standard Paragraph E at the end of this notice.

9. Amerada Hess Corporation

[Docket No. ER97–2153–012]

Take notice that on November 1, 2001, the Amerada Hess Corporation (AHC) filed with the Federal Energy Regulatory Commission (Commission) its 3-year updated market analysis in support of its market-based rate authority. AHC reports that there have been no changes in its status that should affect its continued authority to sell power at market-based rates.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

10. Hess Energy, Inc.

[Docket No. ER97–4381–006]

Take notice that on November 1, 2001, Hess Energy, Inc. (Hess Energy) filed with the Federal Energy Regulatory Commission (Commission) its 3-year updated market analysis in support of its market-based rate authority. Hess Energy reports that there have been no changes in its status that should affect its continued authority to sell power at market-based rates.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

11. Portland General Electric Company

[Docket No. ER01–2501–006]

Take notice that on November 1, 2001, Portland General Electric Company (PGE) tendered for filing with the Federal Energy Regulatory Commission (FERC or Commission) termination of FERC Rate Schedule No. 31 and refiling of FERC Rate Schedule No. 210 to conform the Pacific Northwest Coordination Agreement in accordance to FERC Rule 614.

PGE respectfully requests that the Commission allow the Rate Schedule to become effective January 1, 2002.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

12. Northern Indiana Public Service Company

[Docket No. ER02–231–000]

Take notice that on November 1, 2001, Northern Indiana Public Service Company (Northern Indiana) filed with the Federal Energy Regulatory Commission (Commission) a Service Agreement pursuant to its Wholesale Market-Based Rate Tariff with DTE Energy Trading (DTE). Northern Indiana has requested an effective date of November 1, 2001.

Copies of this filing have been sent to DTE, the Indiana Utility Regulatory Commission, and the Indiana Office of Utility Consumer Counselor.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

13. Northern Indiana Public Service Company

[Docket No. ER02–232–000]

Take notice that on November 1, 2001, Northern Indiana Public Service Company (Northern Indiana) filed with the Federal Energy Regulatory Commission (Commission) a Service Agreement pursuant to its Wholesale Market-Based Rate Tariff with HQ Energy Services (U.S.) Inc. (HQ). Northern Indiana has requested an effective date of November 1, 2001.

Copies of this filing have been sent to HQ, the Indiana Utility Regulatory Commission, and the Indiana Office of Utility Consumer Counselor.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

14. ISO New England Inc.

[Docket No. ER02–233–000]

Take notice that on November 1, 2001, ISO New England Inc. (IS) made a filing with the Federal Energy Regulatory Commission (Commission) under section 205 of the Federal Power Act of changes to its Capital Funding Tariff. The ISO requests that the changes to the Capital Funding Tariff be allowed to go into effect on January 1, 2002.

Copies of the transmittal letter were served upon all Participants in the New England Power Pool (NEPOOL), as well as on the governors and utility regulatory agencies of the six New England States, and NECPUC. Participants were also served with the entire filing electronically. The entire filing is posted on the ISO's web site (*www.iso-ne.com*).

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

15. LTV Steel Mining Company

[Docket No. ER02–234–000]

Take notice that on November 1, 2001, LTV Steel Mining Company filed with the Federal Energy Regulatory Commission (Commission) an Agreement for Temporary Interconnection and Transmission Service under which it proposes to provide temporary interconnection and transmission service to Rainy River Energy Corporation—Taconite Harbor over its transmission facilities.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

16. PJM Interconnection, L.L.C.

[Docket No. ER02–235–000]

Take notice that on November 1, 2001, PJM Interconnection, L.L.C. (PJM) tendered for filing with the Federal Energy Regulatory Commission (Commission) conforming changes and minor revisions to the PJM Open Access Transmission Tariff (PJM Tariff) and the Amended and Restated Operating Agreement of PJM Interconnection, L.L.C. (Operating Agreement) to fully reflect all previous changes to the current version of the Tariff and Operating Agreement in the versions of the Tariff and Operating Agreement that encompass both PJM and PJM West, which will take effect on January 1, 2002. PJM states that, except for certain conforming changes, typographical errors, and other minor changes, all of the submitted changes previously have been filed with the Commission, and have either been approved or are awaiting Commission action.

Copies of this filing have been served on all PJM Members and the state electric regulatory commissions in the PJM control area.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

17. Geysers Power Company, L.L.C.

[Docket No. ER02–236–000]

Take notice that on November 1, 2001, Geysers Power Company, L.L.C. (Geysers Power), tendered for filing with the Federal Energy Regulatory Commission (Commission) its updated Rate Schedules for the calendar year 2002 for Reliability Must-Run services provided to the California Independent System Operator Corporation (CAISO) pursuant to the Geysers Main RMR Agreement accepted by the Commission in California ISO Corp., et al., 87 FERC 61,250 (1999).

Copies of this filing have been served upon the CAISO and Pacific Gas and Electric Company.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

18. Southern California Edison Company

[Docket No. ER02–238–000]

Take notice that on November 1, 2001, Southern California Edison Company (SCE) tendered for filing a revision to its Transmission Owner Tariff (TO Tariff), FERC Electric Tariff, Substitute First Revised Original Volume No. 6. The proposed revision changes SCE's rates charged for Reliability Services, which recover Reliability Services costs billed directly to SCE as a Participating Transmission Owner (PTO) by the California Independent System Operator (ISO).

Copies of this filing were served upon the Public Utilities Commission of the State of California, the California Independent System Operator, the California Electricity Oversight Board, Pacific Gas and Electric Company, San Diego Gas & Electric Company, and the wholesale customers with loads in SCE's historic control area.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

19. Duke Energy South Bay L.L.C.

[Docket No. ER02–239–000]

Take notice that on November 1, 2001, Duke Energy South Bay, L.L.C. (DESB) tendered for filing revisions to its Reliability Must Run Service Agreement (RMR Agreement) with the California Independent System Operator (CAISO). The revisions are being made to (1) amend schedule A, section 3 of Duke South Bay's Must-Run Schedule to reflect Monthly Reserved MWh for Air Emission Limitations and section 12 of Duke South Bay's Must-Run Schedule to reflect Contract Service Limits for the year beginning January 1, 2002; (2) amend schedule B of Duke South Bay's Must-Run Schedule to reflect the Hourly Availability Rate, Hourly Penalty Rate, Target Available Hours and Annual Fixed Revenue Requirement; and (3) amend schedule D of Duke South Bay's Must-Run Schedule to reflect the Prepaid Start-ups for the year beginning January 1, 2002.

DESB requests an effective date of January 1, 2002 for these revisions. Copies of the filing have been served upon the CAISO, and the California Public Utilities Commission.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

20. Duke Energy Oakland, L.L.C.

[Docket No. ER02–240–000]

Take notice that on November 1, 2001, Duke Energy Oakland, L.L.C. (DEO) tendered for filing with the Federal Energy Regulatory Commission (Commission) revisions to its Reliability Must Run Service Agreement (RMR Agreement) with the California Independent System Operator (CAISO). The revisions are being made to (1) amend schedule A, section 12 of DEO's Must-Run Schedule to reflect Contract Service Limits for the year beginning January 1, 2002; (2) amend schedule B of DEO's Must-Run Schedule to reflect the Hourly Availability Rate, Hourly Penalty Rate, Target Availability Hours and Annual Fixed Revenue Requirement; and (3) amend schedule D of DEO's Must-Run Schedule to reflect the Prepaid Start-ups for the year beginning January 1, 2002.

DEO requests effective date of January 1, 2002 for these revisions. Copies of the filing have been served upon the CAISO, and the California Public Utilities Commission.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

21. New England Power Company

[Docket No. ER02–241–000]

Take notice that on November 1, 2001, New England Power Company (NEP) tendered for filing with the Federal Energy Regulatory Commission (Commission) First Revised Service Agreement No. 23 for Network Integration Service under NEP's Open Access Transmission Tariff, FERC Electric Tariff, Second Revised Volume No. 9 between NEP and Granite State Electric Company. NEP states that this filing has been served upon Granite State Electric Company and regulators in the States of Massachusetts, New Hampshire, and Vermont. NEP has requested an effective date of October 3, 2001.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

22. Commonwealth Edison Company

[Docket No. ER02–242–000]

Take notice that on November 1, 2001 Commonwealth Edison Company (ComEd) submitted for filing with the Federal Energy Regulatory Commission (Commission) a Service Agreement for Network Integration Transmission Service (NSA) and a Network Operating Agreement (NOA) between ComEd and MidAmerican Energy Company (MidAmerican). These agreements govern ComEd's provision of network service to serve retail load under the terms of ComEd's Open Access Transmission Tariff (OATT).

ComEd requests an effective date of November 1, 2001, and therefore, seeks waiver of the Commission's notice requirements. Copies of this filing were served on MidAmerican.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

23. Southern California Edison Company

[Docket No. ER02–243–000]

Take notice, that on November 1, 2001, Southern California Edison Company (SCE) tendered for filing with the Federal Energy Regulatory Commission (Commission) a revised Service Agreement between SCE and Southern California Water Company (SCWC) for Wholesale Distribution Service under the terms and conditions of SCE's Wholesale Distribution Access Tariff (WDAT), FERC Rate Schedule Original Volume No. 5. The purpose of this revision is to reflect the charge for such service which formerly had been reflected as a component of SCE's demand charge under its Partial Requirements Tariff with SCWC. The Partial Requirements Tariff terminates effective at midnight on December 31, 2001.

SCE requests that the revised WDAT Service Agreement become effective on January 1, 2002. Copies of this filing were served upon the Public Utilities Commission of the State of California and SCWC.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

24. Idaho Power Company

[Docket No. ER02–244–000]

Take notice that on November 1, 2001, Idaho Power Company filed a notice with the Federal Energy Regulatory Commission (Commission) of cancellation of its Generator Interconnection and Operating Agreement with Watts United Power, L.L.C., under its open access transmission tariff in the above-captioned proceeding.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

25. North American Energy, L.L.C.

[Docket No. ER02–245–000]

Take notice that on November 1, 2001, North American Energy, L.L.C. (North American) petitioned the Federal Energy Regulatory Commission (Commission) for acceptance of North

American Rate Schedule FERC No. 1; the granting of certain blanket approvals, including the authority to sell electricity at market-based rates; and the waiver of certain Commission regulations.

North American intends to engage in wholesale electric power and energy purchases and sales as a marketer.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

26. Boston Edison Company, Cambridge Electric Light Company, Commonwealth Electric Company

[Docket No. ER02–246–000]

Take notice that on November 1, 2001, Boston Edison Company (BECo), Cambridge Electric Light Company (Cambridge) and Commonwealth Electric Company (Commonwealth) (collectively, the NSTAR Companies), tendered for filing with the Federal Energy Regulatory Commission (Commission) new market-based rate tariffs, including a form of umbrella service agreement (Tariffs).

The NSTAR Companies request waiver of the Commission's notice of filing requirements to allow the Tariffs to become effective on November 2, 2001, the day after filing. Alternatively, the NSTAR Companies ask the Commission to allow each of the new Tariffs to become effective on January 1, 2002, which is sixty days from now. The NSTAR Companies state that they served copies of the filing on the Massachusetts Department of Telecommunications and Energy.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

27. Alliant Energy Corporate Services, Inc.

[Docket No. ER02–247–000]

Take notice that on November 1, 2001, Alliant Energy Corporate Services, Inc. tendered for filing with the Federal Energy Regulatory Commission (Commission) Service Agreement with GEN-SYS establishing GEN-SYS as a Short-Term Firm -Point-To-Point transmission customer under the terms of the Alliant Energy Corporate Services, Inc. Open Access Transmission Tariff.

Alliant Energy Corporation Services, Inc. requests an effective date of June 1, 2001, and accordingly, seeks waiver of the Commission's notice requirements. A copy of this filing has been served upon the Illinois Commerce Commission, the Minnesota Public Utilities Commission, the Iowa Department of Commerce, and the Public Service Commission of Wisconsin.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

28. Cinergy Services, Inc.

[Docket No.ER02–248–000]

Take notice that on November 1, 2001, Cinergy Services, Inc. (Cinergy) tendered for filing with the Federal Energy Regulatory Commission (Commission) a Notice of Name Change from FirstEnergy Services Corp. to FirstEnergy Solutions Corp. Cinergy respectfully requests waiver of notice to permit the Notice of Name Change to be made effective as of the date of the Notice of Name Change.

A copy of the filing was served upon FirstEnergy Solutions Corp.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

29. ISO New England Inc.

[Docket No. ER02–249–000]

Take notice that on November 1, 2001, ISO New England Inc. (ISO) made a filing under section 205 of the Federal Power Act of revised tariff sheets for recovery of its administrative costs for 2002. The ISO requests that these sheets be allowed to go into effect on January 1, 2002.

Copies of the transmittal letter were served upon all Participants in the New England Power Pool (NEPOOL) and all non-Participant entities that are customers under the NEPOOL Open Access Transmission Tariff, as well as on the governors and utility regulatory agencies of the six New England States, and NECPUC. Participants were also served with the entire filing electronically. The entire filing is posted on the ISO's website (*www.iso-ne.com*).

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

30. Allegheny Energy Service Corporation, on behalf of Monongahela Power Company, The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. ER02–253–000]

Take notice that on November 1, 2001, Allegheny Energy Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), filed Service Agreement Nos. 361 and 362 to add Dominion Nuclear Marketing II, Inc. to Allegheny Power's Open Access Transmission Service Tariff which has been accepted for filing by the Federal Energy Regulatory Commission (Commission) in Docket No. ER96–58–000.

The proposed effective date under the Service Agreements is October 31, 2001 or a date ordered by the Commission. Copies of the filing have been provided to all parties of record.

Comment date: November 23, 2001, in accordance with Standard Paragraph E at the end of this notice.

31. Mississippi Power Company

[Docket No. ER02–259–000]

Take notice that on October 30, 2001, Mississippi Power Company filed with the Federal Energy Regulatory Commission (Commission) a notice of cancellation of Mississippi Power Company Rate Schedule FERC No. 145. The rate schedule concerns a transmission facilities agreement with Alabama Power Company dated September 30, 1994 under which certain transmission facilities would be built by Mississippi Power Company from its Plant Daniel facility for use by Alabama Power Company for reliability purposes. This agreement terminated pursuant to its own terms. A termination effective as of May 31, 2001 has been requested. Notice of the proposed cancellation has been served upon Alabama Power Company and the Mississippi Public Service Commission.

Comment date: November 20, 2001, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraph

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, NE., Washington, DC 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). 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 this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket #'' and follow the instructions (call 202–208–2222 for assistance). Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the

instructions on the Commission's web site under the ''e-Filing'' link.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28423 Filed 11–13–01; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. CP02–11–000,CP02–12–000 andCP02–13–000]

Western Frontier Pipeline, L.L.C.; Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Western Frontier Pipeline Project, Request for Comments on Environmental Issues, and Notice of Public Scoping Meetomgs amd Site Visit

November 7, 2001.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental impact statement (EIS) that will discuss the environmental impacts of the Western Frontier Pipeline, L.L.C. (Western Frontier) Western Frontier Pipeline Project in Colorado, Kansas, and Oklahoma.[1] These facilities would consist of about 409 miles of pipeline and 20,000 horsepower (hp) of compression. This EIS will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity.

If you are a landowner on Western Frontier's proposed route and receive this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with state law.

A fact sheet prepared by the FERC entitled ''An Interstate Natural Gas Facility On My Land? What Do I Need To Know?'' was attached to the project notice Western Frontier provided to landowners along and adjacent to the proposed route. This fact sheet addresses a number of typically asked questions, including the use of eminent domain and how to participate in the Commission's proceedings. It is available for viewing on the FERC Internet website (*www.ferc.gov*).

This notice is being sent to landowners of property crossed by and adjacent to Western Frontier's proposed route; Federal, state, and local agencies; elected officials; environmental and public interest groups; and local libraries and newspapers. Additionally, with this notice we are asking those Federal, state, local and tribal agencies with jurisdiction and/or special expertise with respect to environmental issues to cooperate with us in the preparation of the EIS. These agencies may choose to participate once they have evaluated the proposal relative to their agencies' responsibilities. Agencies who would like to request cooperating agency status should follow the instructions for filing comments described below.

Summary of the Proposed Project

Western Frontier proposes to build new natural gas pipeline and compression facilities to transport 540,000 dekatherms per day (Dth/d) of natural gas from the Cheyenne Hub in northwest Weld County, Colorado to growing markets in the mid-continent United States. Western Frontier requests Commission authorization, to construct, install, own, operate, and maintain the following facilities:

- About 398.5 miles of 30-inch-diameter pipeline in Weld, Adams, Arapahoe, Elbert, Lincoln, Cheyenne, Kiowa, and Prowers Counties, Colorado; Hamilton, Kearny, Grant, Haskell, and Seward Counties, Kansas; and Beaver County, Oklahoma (Western Frontier Pipeline);
- About 9.7 miles of 16-inch-diameter lateral pipeline in Adams, Colorado (Wattenberg Lateral);
- A total of about 0.8 mile of 30- and 16-inch-diameter pipelines in Weld County, Colorado to interconnect the Western Frontier Pipeline with the Wyoming Interstate Company, Ltd. and Colorado Interstate Gas Company;
- Nine meter/regulating stations including two stations in Weld County and one station in Adams County, Colorado, one station in Grant County and two stations in Seward County, Kansas, and three stations in Beaver County, Oklahoma;
- Two compressor stations Weld and Adams Counties, Colorado with 10,000 hp each; and
- Associated pipeline facilities, including 4 pig launchers, 4 pig receivers, and 20 mainline block valves.

The general location of Western Frontier's proposed project facilities is shown on the map attached as appendix 1.[2]

Land Requirements for Construction

Western Frontier would construct a total of about 409 miles of new pipeline of which about 289 miles would be in Colorado, 109 miles would be in Kansas, and 11 miles would be in Oklahoma. Construction of the Western Frontier Pipeline Project would require about 5,708 acres of land including extra workspace and aboveground facilities. Of this total, about 4,920 acres would be disturbed by construction of the pipeline right-of-way, 740 acres would be disturbed by extra workspace and contractor/pipe yards, and 48 acres would be disturbed by the aboveground facilities.

Western Frontier proposes to generally use a 100-foot-wide construction right-of-way along the Western Frontier Pipeline and an 80–foot-wide construction right-of-way along the Wattenberg Lateral. Smaller construction right-of-way widths would be used in wetlands. Following construction and restoration of the right-of-way and temporary work spaces, Western Frontier proposes to retain a 50–foot-wide permanent pipeline right-of-way along both the Western Frontier Pipeline and the Wattenberg Lateral. Total land requirements for the permanent right-of-way would be about 2,474 acres with an additional 24 acres required for the operation of the new or modified aboveground facilities.

The EIS Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us [3] to discover and address concerns the public may have about proposals. We call this ''scoping.'' The main goal of the scoping process is to focus the analysis in the EIS on the important

[1] Western Frontier Pipeline, L.L.C.'s application in Docket Nos. CP02–11–000, CP02–12–000 and CP02–13–000 was filed with the Commission under section 7(c) of the Natural Gas Act.

[2] The appendices referenced in this notice ar enot being printed in the **Federal Register**. Copies are available on the Commission's website at the ''RIMS'' link or from the Commission's Public Reference and files Maintenance Branch, 888 First Street, NE, Room 2A, Washington, DC 20426, or call (2020)208–1371. For instructions on connecting to RIMS refer to the last page of this notice. Copies of the appendices were sent to all those receiving this notice in the mail.

[3] ''We'', ''us'', ''our'' refer to the environmental staff of the Office of Energy Projects (OEP).

environmental issues. By this Notice of Intent, the Commission requests public comments on the scope of the issues it will address in the EIS. All comments received are considered during the preparation of the EIS. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

Our independent analysis of the issues will be published in the draft EIS which will be mailed to Federal, state, and local agencies, public interest groups, affected landowners and other interested individuals, newspapers, libraries, and the Commission's official service list for this proceeding. A 45–day comment period will be allotted for review of and comment on the draft EIS. We will consider all comments on the draft EIS and revise the document, as necessary, before issuing a final EIS. The final EIS will include our response to each comment received on the draft EIS and will be used by the Commission in its decision-making process to determine whether to approve the project.

Currently Identified Environmental Issues

The EIS will discuss impacts that could occur as a result of the construction and operation of the proposed project. We have already identified a number of issues that we think deserve attention based on a preliminary review of the proposed facilities and the environmental information provided by Western Frontier. These issues are listed below. This is a preliminary list of issues and may be changed based on your comments and our analysis.

- Geology and Soils
  - —Impact on prime farmland soils.
  - —Mixing of topsoil and subsoil during construction.
  - —Compaction of soil by heavy equipment.
  - —Erosion control and right-of-way restoration.
  - —Potential geologic hazards, including subsidence.
- Water Resources and Wetlands
  - —Potential effects on groundwater resources, including wellhead protection areas and private water supply wells.
  - —Effects on 3 perennial waterbodies.
  - —Crossing of 4 historic ditches/canals.
  - —Effects on 9.7 acres of wetlands.
- Biological Resources
  - —Short- and long-term effects of right-of-way clearing and maintenance on grasslands, wetlands, riparian areas, and vegetation communities of special concern.
  - —Effects on wildlife and fishery habitats.
  - —Potential impact on federally threatened species such as the Arkansas River shiner and Bald eagle and proposed federally threatened species such as the Mountain plover.
  - —Potential impact on state-listed sensitive species.
- Cultural Resources
  - —Effects on historic and prehistoric sites.
  - —Native American concerns.
- Socioeconomics
  - —Effects of the construction workforce on demands for services in surrounding areas.
- Land Use
  - —Effects on crop production.
  - —Potential impacts on residential areas.
  - —Effects of construction on about 381.7 acres of Conservation Reserve Program land.
  - —Effects on 279.9 acres of public lands.
  - —Potential impacts on future land uses and consistency with local land use plans and zoning.
  - —Visual effects of the aboveground facilities on surrounding areas.
- Air Quality and Noise
  - —Construction impacts on local air quality and noise environment.
  - —Impact on local air quality and noise environment as a result of operation of the compressor stations.
- Pipeline Reliability and Safety
  - —Assessment of public safety factors associated with natural gas pipelines.
- Cumulative Impact
  - —Effects of Western Frontier Project combined with that of other projects that have been or may be proposed in the same region and similar time frames.
- Alternatives
  - —Assessment of alternative routes, systems or energy sources to lessen or avoid impacts on the various resource areas.

Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EIS and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal (including alternative routes), and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- If you mail your comments, please send an original and two copies of your letter to: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Room 1A, Washington, DC 20426.
- Label one copy of the comments for the attention of the Environmental Gas Branch I, PJ–11.1;
- Reference Docket Nos. CP02–11–000, CP02–12–000 and CP02–13–000;
- Submit your comments so that they will be received in Washington, DC on or before December 10, 2001.

Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site at *http://www.ferc.gov* under the ''e-Filing'' link and link to the User's Guide. Before you can file comments you will need to create an account which can be created by clicking on ''Login to File'' and then ''New User Account.''

Everyone who responds to this notice or comments throughout the EIS process will be retained on our mailing list. If you do not want to send comments at this time but still want to remain on our mailing list, please return the Information Request (appendix 3). If you do not return the Information Request, you will be taken off the mailing list.

Due to current events, we cannot guarantee that we will receive mail on a timely basis from the U.S. Postal Service, and we do not know how long this situation will continue. However, we continue to receive filings from private mail delivery services, including messenger services in a reliable manner. The Commission encourages electronic filing of any comments or interventions or protests to this proceeding. We will include all comments that we receive within a reasonable time frame in our environmental analysis of this project.

Public Scoping Meetings and Site Visit

In addition to or in lieu of sending written comments, we invite you to attend the public scoping meetings that we will conduct in the project area. The locations and times for these meetings are listed below.

Schedule of Public Scoping Meetings for the Western Frontier Pipeline Project Environmental Impact Statement

November 27, 2001, 7:00 p.m.—Greeley, Colorado, Aims Community College,

Corporate Education Center, 5590 W. 11th Street, (970) 330–8008

November 27, 2001, 7:00 p.m.—Limon, Colorado, Limon Junior-Senior High School, Warren Mitchell Events Center, 874 F Avenue,(719) 775–2350

November 27, 2001, 7:00 p.m.—Ulysses, Kansas, Ulysses Middle School, Kepley Auditorium, 113 N. Colorado, (620) 356–3025

November 28, 2001, 7:00 p.m.—Aurora, Colorado, Community College of Aurora, Forum Building, 16000 E. Center Tech Parkway,(303) 360–4771

November 28, 2001, 7:00 p.m.—Lamar, Colorado, Lamar Community College, Bowman Building, 2401 S. Main Street, (719) 336–1525

November 28, 2001, 7:00 p.m.—Liberal, Kansas, Seward Community College, Humanities Building, 1801 N. Kansas, (800) 373–9951

The public scoping meetings are designed to provide you with more detailed information and another opportunity to offer your comments on the proposed project. Western Frontier representatives will be present at the scoping meetings to describe their proposal. Interested groups and individuals are encouraged to attend the meetings and to present comments on the environmental issues they believe should be addressed in the draft EIS. A transcript of each meeting will be made so that your comments will be accurately recorded.

On the dates of the meetings, we will also be conducting limited site visits to the project area. Anyone interested in participating in the site visit may contact the Commission's Office of External Affairs at (202) 208–1088 for more details. Participants must provide their own transportation.

Becoming an Intervenor

In addition to involvement in the EIS scoping process, you may want to become an official party to the proceeding or become an ''intervenor.'' Intervenors play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must provide 14 copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) (see appendix 2).[4] Only intervenors have the right to seek rehearing of the Commission's decision.

Affected landowners and parties with environmental concerns may be granted intervenor status upon showing good cause by stating that they have a clear and direct interest in this proceeding that would not be adequately represented by any other parties. You do not need intervenor status to have your environmental comments considered.

Availability of Additional Information

Copies of this filing are on file with the Commission and are available for public inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (call 202–208–2222 for assistance).

Similarly, the ''CIPS'' link on the FERC Internet website provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings. From the FERC Internet website, click on the ''CIPS'' link, select ''Docket #'' from the CIPS Menu, and follow the instructions. For assistance with access to CIPS, the CIPS helpline can be reached at (202) 208–2474.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28463 Filed 11–13–01; 8:45 am]

BILLING CODE 6117–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Temporary Variance Request and Soliciting Comments, Motions To Intervene, and Protests

November 7, 2001.

Take notice that the following application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Request for Continued Temporary Variance.

b. *Project No:* 2210–071.

c. *Date Filed:* October 31, 2001.

d. *Applicant:* Appalachian Power Company/dba American Electric Power.

e. *Name of Project:* Smith Mountain Project.

f. *Location:* The project is located on the Roanoke River in Bedford, Franklin, Campbell, Pittsylvania, and Roanoke Counties, Virginia.

g. *Filed Pursuant to:* 18 CFR 4.200.

h. *Applicant Contact:* Frank M. Simms, American Electric Power, 1 Riverside Plaza, Columbus, OH 43215–2373, (614) 223–2918.

i. *FERC Contact:* Any questions on this notice should be addressed to Mr. Robert Fletcher at (202) 219–1206, or e-mail address: robert.fletcher@ferc.fed.us.

j. *Deadline for filing comments and or motions:* (December 3, 2001).

All documents (original and seven copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426. Comments, protests and interventions may be filed electronically via the Internet in lieu of paper. See, 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site under the ''e-Filing'' link.

Please include the project number (P–2210–071) on any comments or motions filed.

k. *Description of Request:* The licensee is requesting to extend the 45-day variance to the minimum flow requirements of article 29 of its license for the Smith Mountain Project currently in effect through midnight on April 15, 2002. The licensee is concerned that adequate water may not be available from the project to provide the increased releases necessary for the upcoming spring striped bass spawning season and correspondingly maintain reservoir levels in the Smith Mountain reservoir for the recreation season given the current drought situation in the area. The licensee continues to consult with the various resource agencies, non-governmental organizations and the various stakeholders upstream and downstream of the project regarding the flows that should be released during the variance period.

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 also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link, select ''Docket#'' and follow the instructions (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.

n. Comments, Protests, or Motions to Intervene—Anyone may submit comments, a protest, or a motion to

[4] Interventions may also be filed electronically via the Internet in lieu of paper. See the previous discussion on filing comments electronically.

intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, 385.211, 385.214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

o. 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. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

p. Agency Comments—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28469 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application Tendered for Filing With the Commission, Soliciting Additional Study Requests, and Establishing Procedures for Relicensing and a Deadline for Submission of Final Amendments

November 7, 2001.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection.

a. *Type of Application:* New Minor License.

b. *Project No.:* 2782–006.

c. *Date Filed:* October 30, 2001.

d. *Applicant:* Parowan City.

e. *Name of Project:* Red Creek Hydroelectric Project.

f. *Location:* On Red Creek near the town of Paragonah, City of Paragonah, in Iron County, Utah. The project occupies 19.06 acres of lands of the U.S. Department of the Interior, Bureau of Land Management.

g. *Filed Pursuant to:* Federal Power Act 16 U.S.C. 791 (a)–825(r).

h. *Applicant Contact:* Travis S. Taylor, P.E., Sunrise Engineering, Inc., 25 East 500 North, Fillmore, Utah 84631, (435) 743–6151.

i. *FERC Contact:* Gaylord W. Hoisington, (202) 219–2756 or *gaylord.hoisington@FERC.fed.us.*

j. *Deadline for filing additional study requests:* December 30, 2001.

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.

The Commission's Rules of Practice require all intervenors filing documents with the Commission to serve a copy of that document on each person on the official service list for the project. Further, if an intervenor files comments or documents with the Commission relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

Additional study requests may be filed electronically via the internet in lieu of paper. See 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's web site (*http://www.gov*) under the ''e-Filing'' link.

k. This application is not ready for environmental analysis at this time.

l. The existing Red Creek Hydroelectric Project consists of: (1) (a) The South Fork 8-foot high, 29-foot-long concrete overflow type diversion dam; a radial gate and trash racks incorporating an intake structure connected to a 4,263-foot-long, 10-inch-diameter steel penstock extending from the diversion structure to a pump-house located at the junction of the South Fork and the Red Creek Canyon penstock; and (b) the Red Creek Canyon 8-foot-high, 48-foot-long concrete overflow type diversion dam; a radial gate and trash racks incorporating an intake structure connected to a 16,098-foot-long steel penstock that consists of 7,838-foot, 18-inch-diameter 12 gauge; 1,408-foot, 18-inch-diameter 10-gauge; 2,620-foot, 16-inch-diameter 10-gauge; and 4,232-foot, 16-inch-diameter 7-gauge steel pipe, (2) a pump station, at the junction of the South Fork penstock and the Red Creek penstock, housing a 15 horsepower and a 20 horsepower pump with control equipment, (3) a 27-foot by 32-foot concrete block powerhouse housing a 500-kilowatt generator having a total installed capacity of 500 kW; and (3) appurtenant facilities.

m. A copy of the application is available for inspection. This filing may also be viewed on the web at *http://www.ferc.gov* using the ''RIMS'' link-select ''Docket #'' and follow the instructions (call 202–208–2222 for assistance). A copy is also available for inspection and reproduction at the address in item h above.

n. With this notice, we are initiating consultation with the *UTAH STATE HISTORIC PRESERVATION OFFICER (SHPO),* as required by § 106, National Historic Preservation Act, and the regulations of the Advisory Council on Historic Preservation, 36 CFR 800.4.

o. *Procedural schedule and final amendments:* The application will be processed according to the following milestones, some of which may be combined to expedite processing:

Notice of application has been accepted for filing

Notice of NEPA Scoping (unless scoping has already occurred)

Notice of application is ready for environmental analysis

Notice of the availability of the draft NEPA document

Notice of the availability of the final NEPA document

Order issuing the Commission's decision on the application

Final amendments to the application must be filed with the Commission no later than 30 days from the issuance date of the notice of ready for environmental analysis.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 01–28470 Filed 11–13–01; 8:45 am]

BILLING CODE 6717–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7103–3]

Agency Information Collection Activities: Proposed Collection; Comment Request; Information Requirements for Locomotives and Locomotive Engines

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that EPA is planning to submit the following continuing Information Collection Request (ICR) to the Office of

Management and Budget (OMB): Information Requirements for Locomotives and Locomotive Engines, OMB Control Number 2060–0392, EPA ICR Number 1800.02, expiration date, December 31, 2001. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

DATES: Comments must be submitted on or before December 14, 2001.

ADDRESSES: Send comments, referencing EPA ICR No. 1800.02 and OMB Control No. 2060–0392 to the following addresses: Susan Auby, U.S. Environmental Protection Agency, Collection Strategies Division (Mail Code 2822), 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0001; and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: Desk Officer for EPA, 725 17th Street, NW., Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: For a copy of the ICR contact Susan Auby at EPA by phone at (202) 260–4901, by e-mail at *auby.susan@epa.gov*, or download off the Internet at *http://www.epa.gov/icr* and refer to EPA ICR No. 1800.02. For technical questions about the ICR contact: Nydia Yanira Reyes-Morales, tel.: (202) 564–9264; fax: (202) 565–2057; or e-mail: *reyes-morales.nydia@epa.gov.*

SUPPLEMENTARY INFORMATION:

Title: Information Requirements for Locomotives and Locomotive Engines, OMB Control Number 2060–0392, EPA ICR Number 1800.02, expiration date: December 31, 2001. This is a request for extension of a currently approved collection.

Abstract: The Clean Air Act requires manufacturers and remanufacturers of locomotives and locomotive engines to obtain a certificate of conformity with applicable emission standards before they can legally introduce their products into commerce. To apply for a certificate of conformity, respondents are required to submit descriptions of their planned production, including detailed descriptions of emission control systems and test data. This information is organized by ''engine family'' groups expected to have similar emission characteristics and is submitted every year, at the beginning of the model year. Respondents electing to participate in the Averaging, Banking and Trading (AB&T) Program are also required to submit information regarding the calculation, actual generation and usage of credits in quarterly reports, and an end-of-the-year report. Under the Production-line Testing (PLT) Program, manufacturers are required to test a sample of engines as they leave the assembly line. The Installation Audit Program requires remanufacturers to audit the installation of a sample of remanufactured engines. These self-audit programs (collectively referred to as the ''PLT Program'') allow manufacturers and remanufacturers to monitor compliance with statistical certainty and minimize the cost of correcting errors through early detection. Under the In-use Testing Program, manufacturers and remanufacturers are required to test locomotives after a number of years of use to verify that they comply with emission standards throughout their useful lives. There are recordkeeping requirements in all programs.

Confidentiality of proprietary information is granted in accordance with the Freedom of Information Act, EPA regulations at 40 CFR 2, and class determinations issued by EPA's Office of General Counsel.

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. The **Federal Register** document required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on May 8, 2001, (66 FR 89). No comments were received.

Burden Statement: The annual public reporting and recordkeeping burden associated with the certification program is estimated to average 203 hours per manufacturer and 159 per remanufacturer. Respondents electing to participate in the AB&T program spend 278 hours per year on average. The annual burden associated with participation in the PLT Program is 183 hours for manufacturers and 155 for remanufacturers. In-use testing burden is 155 hours for manufacturers and 60 hours for remanufacturers. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

Respondents/Affected Entities: Locomotives and locomotive engine manufacturers and remanufacturers.

Estimated Number of Respondents: 7.

Frequency of Response: Annually and Quarterly.

Estimated Total Annual Hour Burden: 11,121 hours.

Estimated Total Annualized Capital, O&M Cost Burden: $388,158.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to the addresses listed above. Please refer to EPA ICR No. 1800.02 and OMB Control No. 2060–0392 in any correspondence.

Dated: October 30, 2001.

Oscar Morales,

Director, Collection Strategies Division.

[FR Doc. 01–28521 Filed 11–13–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00439L; FRL–6808–3]

Pesticide Program Dialogue Committee, Inert Disclosure Stakeholder Workgroup; Notice of Public Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces a conference call meeting of the Inert Disclosure Stakeholder Workgroup. The workgroup was established to advise the Pesticide Program Dialogue Committee (PPDC) on ways of making information on inert ingredients more available to the public while working within the mandates of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and related Confidential Business Information (CBI) concerns.

DATES: The meeting will be held by conference call on Tuesday, November 13, 2001, from noon to 3 p.m., eastern standard time.

Written public statements, identified by docket control number OPP–00439A, may be submitted before or after the conference call.

ADDRESSES: Members of the public may listen to the meeting discussions on site

at Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA; conference room 1123. Seating is limited and will be available on a first come first serve basis.

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 OPP–00439A in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Cameo Smoot, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Office location: 11th floor, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA; telephone number: (703) 305–5454; e-mail smoot.cameo@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general and to persons interested in the availability of public information regarding inert or ''other'' ingredients in pesticide products regulated under FIFRA.

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,'' ''Regulations and Proposed Rules,'' 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 general background information about the Inert Disclosure Stakeholder Workgroup, its mission and a list of its members, go to http://www.epa.gov/pesticides/ppdc/inert/.

2. *In person*. The Agency has established an administrative record for this workgroup under docket control number OPP–00439A. The administrative record consists of the workgroup documents including discussion papers, meeting agenda, as well as comments submitted to the workgroup by members of the public. This administrative 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 administrative 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 Public Information and Records Integrity Branch (PIRIB), Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., 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 OPP–00439A 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 Hwy., 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 and/or data electronically by e-mail to: opp-docket@epa.gov, or you can submit a computer disk as described in Units III.A.1. and 2. Do not submit any information electronically that you consider to be CBI. Electronic comments must be submitted as an ASCII file avoiding 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 OPP–00439A. 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 listed 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. Offer alternative ways to improve the notice.

7. Make sure to submit your comments by the deadline in this document.

8. 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. Background

The Inert Disclosure Stakeholder Workgroup was established to advise the EPA, through the PPDC, on potential measures to increase the availability to the public of information about inert ingredients (also called ''other ingredients'') under FIFRA. Among the factors the workgroup has been asked to consider in preparing its recommendations are: Existing law regarding inert ingredients and CBI;

current Agency processes and policies for disseminating inert ingredient information to the public, including procedures for the protection of CBI; informational needs for a variety of stakeholders; and business reasons for limiting the disclosure of inert ingredient information.

The Inert Disclosure Stakeholder Workgroup is composed of participants from the following sectors: Environmental/public interest and consumer groups; industry and pesticide users; Federal, State, and local governments; the general public; academia and public health organizations.

The Inert Disclosure Stakeholder Workgroup meeting is open to the public. Written public statements are also welcome and should be submitted to the OPP Docket. Any person who wishes to file a written statement can do so before or after the conference call. These statements will become part of the permanent file and will be provided to the Workgroup members for their information. If you have any questions about the workgroup, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

List of Subjects

Environmental protection, Inerts, Pesticides and pests.

Dated: November 22, 2001.

James Jones,

Acting Director, Office of Pesticide Programs.

[FR Doc. 01–28200 Filed 11–13–01; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–34203J; FRL–6810–6]

Organophosphate Pesticide; Availability of Chlorpyrifos Interim Risk Management Decision Document

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces the availability of the interim risk management decision document for chlorpyrifos. In addition, this notice starts a 60–day public participation period during which the public is encouraged to submit comments on the chlorpyrifos interim risk management decision document. This decision document has been developed as part of the public participation process that EPA and United States Department of Agriculture (USDA) are now using for involving the public in the reassessment of pesticide tolerances under the Food Quality Protection Act (FQPA), and the reregistration of individual organophosphate pesticides under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

DATES: Comments, identified by docket control number OPP–34203G, must be received by EPA on or before January 14, 2002. Comments on the requested cancellation requests must be submitted to the address provided below and identified by docket control number OPP–34203G.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit III. of the **SUPPLEMENTARY INFORMATION**. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–34203G in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: Tom Myers, Special Review and Reregistration Division (7508C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–8589; e-mail *address: myers.tom@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. Does this Action Apply to Me?

This action is directed to the public in general, nevertheless, a wide range of stakeholders will be interested in obtaining the chlorpyrifos interim risk management decision document and submitting comments on chlorpyrifos, including environmental, human health, and agricultural advocates; the chemical industry; pesticide users; and members of the public interested in the use of pesticides on food. As such, the Agency has not attempted to specifically describe all the entities potentially affected by this action. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

II. How Can I Get Additional Information, Including Copies of this Document or Other Related Documents?

1. *Electronically*. You may obtain electronic copies of this document and other related documents from the EPA Internet homepage at *http://www.epa.gov/*. To access this document, on the homepage select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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 about organophosphate pesticides and obtain electronic copies of the revised risk assessments and related documents mentioned in this notice, you can also go directly to the Home Page for the Office of Pesticide Programs (OPP) at *http://www.epa.gov/pesticides/op/*.

2. *In person*. The Agency has established an official record for this action under docket control number OPP–34203G. 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 Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., 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.

III. How Can I Respond to this Action?

A. 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 OPP–34203G in the subject line on the first page of your response.

1. *By mail*. Submit comments to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

2. *In person or by courier*. Deliver comments to: Public Information and Records Integrity Branch, Information Resources and Services Division, Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., 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*. Submit electronic comments by e-mail to: *opp-docket@epa.gov*, or you can submit a computer disk as described in this unit. 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 computer disks in WordPerfect 6.1/8.0 or ASCII file format. All comments in electronic form must be identified by the docket control number OPP–34203G. Electronic comments may also be filed online at many Federal Depository Libraries.

B. How Should I Handle CBI Information 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 listed under **FOR FURTHER INFORMATION CONTACT**.

C. 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. Offer alternative ways to improve the notice or collection activity.

7. Make sure to submit your comments by the deadline in this notice.

8. 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.

IV. What Action is EPA Taking in this Notice?

EPA has assessed the risks of chlorpyrifos and reached an interim risk management decision for this organophosphate pesticide. Provided that risk mitigation measures are adopted, chlorpyrifos fits into its own risk cup; its individual, aggregate risks are within acceptable levels. Used on numerous food crops (corn, beans, peas, sugar beets, cole crops, cucurbits, tree fruits, tree nuts, grapes, and berries, among others) chlorpyrifos residues in food and drinking water do not pose risk concerns. With previous mitigation eliminating homeowner's and children's exposure around the home and the phase out of the termiticide uses, chlorpyrifos fits into its own ''risk cup.'' With other mitigation measures, worker and ecological risks will be acceptable taking into account the benefits of use, except for the open pour dust formulations which are ineligible for reregistration at this time.

The interim risk management decision document for chlorpyrifos was developed as part of the organophosphate pesticide pilot public participation process, which increases transparency and maximizes stakeholder involvement in EPA's development of risk assessments and risk management decisions. The pilot public participation process was developed as part of the EPA-USDA Tolerance Reassessment Advisory Committee (TRAC), which was established in April 1998, as a subcommittee under the auspices of EPA's National Advisory Council for Environmental Policy and Technology. A goal of the pilot public participation process is to find a more effective way for the public to participate at critical junctures in the Agency's development of organophosphate pesticide risk assessments and risk management decisions. EPA and USDA began implementing this pilot process in August 1998, to increase transparency and opportunities for stakeholder consultation. EPA worked extensively with affected parties to reach the decisions presented in the interim risk management decision document for chlorpyrifos.

In addition, this notice starts a 60–day public participation period during which the public is encouraged to submit written comments on the interim risk management decision document for chlorpyrifos. Failure to participate or comment as part of this opportunity will in no way prejudice or limit a commenter's opportunity to participate fully in any later notice and comment processes. Comments submitted will become part of the Agency record for chlorpyrifos. The preliminary risk assessments for chlorpyrifos were released to the public on October 27, 1999 (64 FR 57876) (FRL–6389–3), through a notice published in the **Federal Register**. The revised risk assessments for chlorpyrifos were released to the public on August 16, 2000 (65 FR 49982) (FRL–6595–7), through a notice published in the **Federal Register**.

EPA's next step under FQPA is to consider the cumulative risks of the organophosphate pesticides, which share a common mechanism of toxicity. The interim risk management decision document on chlorpyrifos cannot be considered final until this consideration of organophosphate cumulative risks is complete.

When the cumulative risks of the organophosphate pesticides have been considered, EPA will issue its final tolerance reassessment decision for chlorpyrifos and further risk mitigation measures may be needed.

List of Subjects

Environmental protection, Chemicals, Pesticides and pests.

Dated: November 5, 2001.

Lois A. Rossi,

Director, Special Review and Reregistration Division, Office of Pesticide Programs.

[FR Doc. 01–28525 Filed 11–13–01; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[PF–1048; FRL–6806–6]

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–1048, must be received on or before December 14, 2001.

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–1048 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Cynthia Giles-Parker, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305–7740; e-mail address: giles-parker.cynthia@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:

Categories	NAICS codes	Examples of potentially affected entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

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,'' ''Regulations and Proposed Rules,'' 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–1048. 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–1048 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–1048. 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: October 30, 2001.

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

Summary of Petition

The petitioner's 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 it 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.

Bayer Corporation

0F6121

EPA has received a pesticide petition (0F6121) from Bayer Corporation, 8400 Hawthorn Road, P.O. Box 4913, Kansas City, MO 64121–0013 proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180, by establishing a tolerance for residues of trifloxystrobin in or on the raw agricultural commodities (RACs) barley grain at 0.05 parts per million (ppm), straw at 0.05 ppm, barley hay at 0.2 ppm; citrus fruits crop group at 0.3 ppm, citrus oil at 7.0 ppm; corn grain at 0.05 ppm, corn forage at 0.05 ppm, corn stover at 7.0 ppm; aspirated grain fractions at 0.1 ppm, popcorn grain at 0.05 ppm, popcorn stover at 7.0 ppm; rice grain at 3.5 ppm, rice straw at 7.5 ppm; tree nuts crop group at 0.05 ppm; stone fruits crop group at 2.0 ppm; poultry (fat, kidney, liver, meat by-products, meat) at 0.05 ppm; and pistachio at 0.05 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 trifloxystrobin in plants (cucumbers, apples, wheat, sugar beets, and peanuts) is well understood. Identified metabolic pathways are substantially similar in plants and animals (goat, rat, and hen). EPA has determined that trifloxystrobin parent and its metabolite CGA–321113 are the residue of concern for tolerance setting purposes.

2. *Analytical method*. A practical methodology for detecting and measuring levels of trifloxystrobin in or on raw agricultural commodities has been submitted. The limit of detection (LOD) for each analyte of this method is 0.08 ng injected, and the limit of quantitation (LOQ) is 0.02 ppm. The method is based on crop specific cleanup procedures and determination by gas chromotography with nitrogen-phosphorus detection.

3. *Magnitude of residues*. Residue trials were performed for trifloxystrobin on a full geography of citrus fruits crop group (with oranges, lemons, and grapefruit as representative citrus fruit crops); field corn; popcorn, and rice as representative crops from the cereal grain group; tree nuts crop group including pistachio (with almonds and pecans as representative nut crops); and stone fruits crop group (with peaches, plums, tart and sweet cherries as representative stone fruit crops). A study was conducted on indicator crops to assay for secondary residues in rotational crops. A three-level ruminant and poultry study was completed to determine the rate of residues of trifloxystrobin from residues in animal feed to ruminant and poultry commodities.

B. Toxicological Profile

1. *Acute toxicity*. Studies conducted with the technical material of trifloxystrobin:

- Rat acute oral toxicity study with a LD_{50} >5,000 milligram/kilogram (mg/kg).
- Mouse acute oral toxicity study with a LD_{50} >5,000 mg/kg.
- Rabbit acute dermal toxicity study with a LD_{50} >2,000 mg/kg.
- Rat acute dermal toxicity study with a LD_{50} >2,000 mg/kg.
- Rat acute inhalation toxicity study with a LC_{50} >4.65 milligram/Liter (mg/L).
- Rabbit eye irritation study showing slight irritation (Category III).
- Rabbit dermal irritation study showing slight irritation (Category IV).
- Guinea pig dermal sensitization study with the Buehler's method showing negative findings.
- Guinea pig dermal sensitization study with the maximization method showing some positive findings.

2. *Genotoxicity*. No genotoxic activity is expected of trifloxystrobin under *in vivo* or physiological conditions. The compound has been tested for its potential to induce gene mutation and chromosomal changes in 5 different test systems. The only positive finding was seen in the *in vitro* test system ((CHO) Chinese hamster V79 cells) as a slight increase in mutant frequency at a very narrow range (250–278 µg/ml) of cytotoxic and precipitating concentrations (compound solubility in water was reported to be 0.61 µg/ml; precipitate was visually noted in culture medium at 150 µg/ml). The chemical was found to be non-mutagenic in the *in vitro* systems. Consequently, the limited gene mutation activity in the V79 cell line is considered a nonspecific effect under non-physiological *in vitro* conditions and not indicative of a real mutagenic hazard.

3. *Reproductive and developmental toxicity*. FFDCA section 408 provides that EPA may apply an additional safety factor for infants and children in the case of threshold effects to account for prenatal and postnatal toxicity and the completeness of the data base. Based on the current toxicological data requirements, the data base on trifloxystrobin relative to prenatal and postnatal effects for children is complete.

In assessing the potential for additional sensitivity of infants and children to residues of trifloxystrobin, data were considered from teratogenicity studies in the rat and the rabbit and a 2–generation reproduction studies in the rat. The teratogenicity studies are designed to evaluate adverse effects on the developing embryo as a result of chemical exposure during the period of organogenesis. Reproduction studies provide information on effects from chemical exposure on the reproductive capability of mating animals and systemic and developmental toxicity from *in utero* exposure.

In the rat teratology study, reductions in body weight (bwt) gain and food

consumption were observed in the dam at ≥100 mg/kg. No teratogenic effects or any other effects were seen on pregnancy or fetal parameters except for the increased incidence of enlarged thymus, which is a type of variation, at 1,000 mg/kg. The developmental no observed adverse effect level (NOAEL) was 100 mg/kg.

In the rabbit teratology study, body weight loss and dramatically reduced food consumption were observed in the dam at ≥250 mg/kg. No teratogenic effects or any other effects were seen on pregnancy or fetal parameters except for the increase in skeletal anomaly of fused sternebrae-3 and sternebrae-4 at the top dose level of 500 mg/kg. This finding is regarded as a marginal effect on skeletal development that could have resulted from the 40–65% lower food intake during treatment at this dose level. The developmental NOAEL was 250 mg/kg.

In the 2–generation rat reproduction study, body weight gain and food consumption were decreased at ≥750 ppm, especially in females during lactation. Consequently, the reduced pup weight during lactation (≥750 ppm) and the slight delay in eye opening (1,500 ppm) are judged to be a secondary effect of maternal toxicity. No other fetal effects or any reproductive changes were noted. The low developmental NOAEL, 50 ppm (5 mg/kg), seen in this study was probably due to the lack of intermediate dose levels between 50 and 750 ppm. Based on an evaluation of the dose-response relationship for pup weight at 750 ppm and 1,500 ppm, the NOAEL should have been nearly ten–fold higher if such a dose was available.

Based on all these teratology and reproduction studies, the lowest NOAEL for developmental toxicity is 5 mg/kg while the lowest NOAEL in the subchronic and chronic studies is 2.5 mg/kg/day (from the rat chronic study). Therefore, no additional sensitivity for infants and children to trifloxystrobin is suggested by the data base.

4. *Subchronic toxicity*. In subchronic studies, several mortality related changes were reported for the top dose in dogs (500 mg/kg) and rats (800 mg/kg). At these dose levels, excessive toxicity has resulted in body weight loss and mortality with the associated and non-specific changes in several organs (such as atrophy in the thymus, pancreas, bone marrow, lymph node, and spleen) which are not considered specific target organs for the test compound. In the dog, specific effects were limited to hepatocellular hypertrophy at ≥150 mg/kg and hyperplasia of the epithelium of the gall bladder at 500 mg/kg. Target organ effects in the rat were noted as hepatocellular hypertrophy (≥200 mg/kg) and the related liver weight increase (≥50 mg/kg). In the mouse, target organ effects included single cell necrosis (≥300 mg/kg) and hypertrophy (1,050 mg/kg) in the liver and extramedullary hematopoiesis (≥300 mg/kg) and hemosiderosis in the spleen (1,050 mg/kg).

In general, definitive target organ toxicity, mostly in the liver, was seen at high feeding levels of over 100 mg/kg for an extended treatment period. At the lowest observed adverse effect level (LOAEL), no serious toxicity was observed other than mostly non-specific effects including a reduction in body weight and food consumption or liver hypertrophy.

5. *Chronic toxicity*. The liver appears to be the major primary target organ based on the chronic studies conducted in mice, rats, and dogs. It was identified as a target organ in both the mouse and the dog studies with trifloxystrobin. However, no liver effect was seen in the chronic rat study which produced the lowest NOAEL of 2.5 mg/kg based on reduced body weight gain and food consumption seen at higher dose levels.

The compound did not cause any treatment-related increase in general tumor incidence, any elevated incidence or rare tumors, or shortened time to the development of palpable or rapidly lethal tumors in the 18–month mouse and the 24–month rat studies. Dosages in both studies were sufficient for identifying a cancer risk. In the absence of carcinogenicity, a reference dose (RfD) approach is appropriate for quantitation of human risks.

6. *Animal metabolism*. Trifloxystrobin is moderately absorbed from the gastrointestinal tract of rats and is rapidly distributed. Subsequent to a single oral dose, the half-life of elimination is about 2 days and excretion is primarily via bile. Trifloxystrobin is extensively metabolized by the rat into about 35 metabolites, but the primary actions are on the methyl ester (hydrolysis into an acid), the methoxyimino group (O-demethylation), and the methyl side chain (oxidation to a primary alcohol). Metabolism is dose dependent as it was almost complete at low doses but only about 60% complete at high doses.

In the goat, elimination of orally administered trifloxystrobin is primarily via the feces. The major residues were the parent compound and the acid metabolite (CA–321113) plus its conjugates. In the hen, trifloxystrobin is found as the major compound in tissues and in the excreta, but hydroxylation of trifluormethyl-phenyl moiety and other transformations, including methyl ester hydrolysis and demethylation of methoxyimino group, are also seen. In conclusion, the major pathways of metabolism in the rat, goat, and hen are the same.

7. *Metabolite toxicology*. Metabolism of trifloxystrobin has been well characterized in plants, soil, and animals. In plants and soil, photolytically induced isomerization results in a few minor metabolites not seen in the rat; however, most of the applied materials remained as parent compound as shown in the apple and cucumber studies. All quantitatively major plant and/or soil metabolites were also seen in the rat. The toxicity of the major acid metabolite, CGA–321113 (formed by hydrolysis of the methyl ester), has been evaluated in cultured rat hepatocytes and found to be 20–times less cytotoxic than the parent compound. Additional toxicity studies were conducted for several minor metabolites, including (CGA–357261, CGA–373466, and NOA–414412, are not mutagenic to bacteria and are of low acute toxicity (LD_{50} >2,000 mg/kg). In conclusion, the metabolism and toxicity profiles support the use of an analytical enforcement method that accounts for parent trifloxystrobin.

8. *Endocrine disruption*. CGA–279202 does not belong to a class of chemicals known for having adverse effects on the endocrine system. Developmental toxicity studies in rats and rabbits and reproduction study in rats gave no indication that CGA–279202 might have any effects on endocrine function related to development and reproduction. The subchronic and chronic studies also showed no evidence of a long-term effect related to the endocrine system.

C. Aggregate Exposure.

1. *Dietary exposure*—i. Acute and chronic dietary exposure assessments were performed on the crops that are the subject of this petition using field trial residue values on the citrus and stone fruit crop groups, corn, rice, barley, and tree nuts crop group including pistachio. In addition, established uses on sugar beets, almonds, fruiting vegetable (crop group), pome fruit (crop group), cucurbits (crop group), bananas, grapes, peanuts, potatoes, hops, and wheat were included in the assessment. All residues were generated from field trials conducted with a minimum pre-harvest interval (PHI) and maximum application rate. In addition, if market share data were available, residues were adjusted for the percent crop treated. The residues in processed potatoes, sugar beets (molasses), tomatoes,

oranges (juice), apples (juice), corn, rice, wheat fractions, peanuts, and grapes (juice) were adjusted using experimentally determined processing factors generated from processing studies. For all other processed fractions, United States Department of Agriculture (USDA) default processing factors were utilized. Residues in animal commodities were calculated from theoretical dietary burden calculations and transfer factors obtained from livestock and poultry feeding studies. Assessments were conducted utilizing the Dietary Exposure Evaluation Model (DEEM™) from Novigen Sciences and the 1994–96 Continuing all population subgroups were compared to an acute reference dose (aRfD) of 2.5 mg/kg/day based on a developmental NOAEL in rabbits and a 100–fold uncertainty factor (UF). Although this endpoint is applicable to females only in the strictest sense, the developmental NOAEL was used for all populations due to the lack of a suitable toxicological endpoint. Chronic exposure was compared to a chronic RfD of 0.05 mg/kg/day based on a chronic toxicity study in dogs and a 100–fold uncertainty factor. Both acute and chronic toxicological endpoints were taken from (40 CFR part 180) (64 FR 51901) (FRL–6382–5) dated September 27, 1999.

Both acute and chronic exposure was minimal in all population subgroups. The acute results were obtained from a probabilistic, 1,000-iteration Monte Carlo assessment. Acute exposure was expressed at the 9.9th percentile of exposure and ranged from 0.17% to 0.80% of the aRfD with non-nursing infants (less than 1 year old) as the most sensitive population subgroup (0.80%) of the RfD). The chronic exposure assessment was conducted by taking the mean field trial residue values and comparing to average daily consumption values. Chronic exposure ranged from 0.2% to 1.2% of the chronic RfD and the most sensitive population was non-nursing infants (less than 1 year old).

ii. *Drinking water*. Estimated surface drinking water concentrations (SDWA): The generic expected environmental concentration (GENEEC) estimated surface water concentrations for trifloxystrobin uses contributed little to the overall exposure. These estimated concentrations were not adjusted for the estimated market share or percentage of use area. The highest day–56 estimated environmental concentration (EEC) values were 0.27 parts per billion (ppb) provided by the established trifloxystrobin turf use. According to EPA ''OPP's Interim Approach for Addressing Drinking Water Exposure,'' the average day–56 value is divided by 3 when correcting for overestimation of the GENEEC model. EPA has accepted that the average day–56 EEC value is divided by 6 in the case when the product is applied to turf and accounts for the effects of grass/turf in decreasing runoff (EPA, 1998, EPA–730–F–97–002, PB97–137806, page 15). This division by 6 was used to calculate the potential exposure via surface water from the trifloxystrobin turf application, 0.27 ppb/6 = 0.045 ppb.

Estimated ground water concentrations: The screening concentration in ground water (SCI-GROW) estimated ground water concentrations for trifloxystrobin uses also contributed little to the overall exposure. The estimated concentrations were not adjusted for the estimated market share or percentage of use area. In each use scenario, the concentration of trifloxystrobin in ground water was predicted to be below 1 part per trillion (ppt). The highest estimated concentration of trifloxystrobin in ground water was 0.000859 ppb provided by the trifloxystrobin turf use.

iii. *Drinking water levels of concern*—a. *Acute exposure*. Based on the EPA's ''Interim Guidance for Conducting Drinking Water Exposure and Risk Assessments'' document (drafted December 2, 1997), acute drinking water levels of comparison ($DWLOC_{acute}$) were calculated for trifloxystrobin. The lowest acceptable margin of exposure (MOE) for any pesticide is 100. This value was used in the drinking water levels of concern (DWLOC) calculations. Based on this analysis, the maximum estimated trifloxystrobin surface water at peak day–0 (2.54 ppb) and ground water (0.000859 ppb) concentrations, human drinking water exposures do not exceed the calculated acute DWLOC values (µg/L: 24,800 to 87,325). Therefore, acute human drinking water exposures to trifloxystrobin from the existing and newly proposed uses would not exceed the exposure allowable by the risk cup. From the acute dietary exposure analysis provided for the trifloxystrobin dietary assessment, the $DWLOC_{acute}$ were calculated for CGA–321113. Based on this analysis, the maximum estimated CGA–321113 in surface water at Peak Day–0 (38.73 ppb) and ground water (4.944316 ppb) concentrations, human drinking water exposures do not exceed the calculated acute DWLOC values (µg/L: 24800 to 87150). Therefore, acute human drinking water exposures to CGA–321113 from the existing and newly proposed trifloxystrobin uses would not exceed the exposure allowable by the risk cup.

b. *Chronic exposure*. The chronic drinking water levels of comparison ($DWLOC_{chronic}$) were calculated for trifloxystrobin. The maximum estimated trifloxystrobin surface water (0.09 ppb) and ground water (0.000859 ppb) concentrations do not exceed the calculated chronic DWLOC values (µg/L: 494 to 1747). Therefore, chronic human drinking water exposures to the existing and newly proposed trifloxystrobin uses would not exceed the exposure allowable by the risk cup. From the chronic dietary exposure analysis provided for the trifloxystrobin dietary assess, the chronic drinking water levels of comparison ($DWLOC_{chronic}$) were calculated for CGA–321113. Based on this analysis, the maximum estimated CGA–321113 in surface water at Day–56/3 (12.24 ppb) and ground water (0.989 ppb) concentrations, human drinking water exposures do not exceed the calculated chronic DWLOC values (µg/L: 494 to 1745). Therefore, chronic human drinking water exposures to the existing and newly proposed trifloxystrobin uses would not exceed the exposure allowable by the risk cup.

2. *Non-dietary exposure*. Non-dietary exposure to trifloxystrobin is considered negligible as the chemical is intended primarily for commercial and agricultural use. Post-application re-entry exposure to homeowners from professional use on residential ornamentals is considered negligible. For workers handling this chemical, acceptable margins of exposure (in the range of thousands) have been obtained for both acute and chronic scenarios.

D. Cumulative Effects

Considerations of a common mechanism of toxicity is not appropriate at this time since there is no information to indicate that toxic effects produced by trifloxystrobin would be cumulative with those of any other types of chemicals. Furthermore, the oximinoacetate is a new type of fungicide and no compound in this general chemical class currently has significant market share. Consequently, aggregate risk is the only potential exposure to trifloxystrobin.

E. Safety Determination

1. *U.S. determination*. To calculate acute aggregate risk, high-end exposures from food and drinking water sources are compared to the acute PAD. Exposure to trifloxystrobin residues and the free form of its acid metabolite, CGA–321113 in food will occupy, <1% of the acute PAD for females 13+ years

old (nursing). Acute dietary risk was calculated for females 13+ years old because the endpoint upon which the acute PAD is based on developmental effects. Estimated drinking water levels were calculated using drinking water models (SCI-GROW and GENEEC), and the values are considered overestimates due to the conservative assumptions built into the models. Estimated concentrations for trifloxystrobin residues in surface and ground water are lower than EPA's DWLOCs. Therefore, it is not expected that acute aggregate risk to trifloxystrobin residues from acute food and drinking water sources will exceed EPA's level of concern for acute aggregate risk.

Exposure to trifloxystrobin and the free form of its acid metabolite, CGA–321113 residues in food will occupy less than 0.5% of the chronic PAD for adult population subgroups (females 13+/nursing) and no more than 2.0% of the chronic PAD for infant/children subgroups (highest subgroup: non-nursing infants). Estimated concentrations of trifloxystrobin residues in surface and ground water are lower than EPA's DWLOCs. Estimated drinking water levels were calculated using drinking water models, and the values are considered overestimates due to the conservative assumptions built into the models. EPA has previously determined chronic residential exposure of trifloxystrobin is not expected. The established and pending uses of trifloxystrobin when combined in a chronic aggregate risk assessment for food, water, and residential sources will not exceed EPA's level of concern for chronic aggregate risk. Bayer concludes that there is a reasonable certainty that no harm will result from aggregate exposure to trifloxystrobin residue.

2. *Infants and children.* On June 21, 1999, EPA FQPA safety factor committee determined the 10x safety factor for the protection of infants and children should be removed for trifloxystrobin. The Committee's rationale for removing the FQPA safety factor is as follows:

i. The trifloxystrobin toxicology data base is complete for FQPA assessment.

ii. There is no indication of increased susceptibility of rat or rabbits to trifloxystrobin. In the development and reproductive toxicity studies, effects in the fetuses/offspring were observed only at or above treatment levels which resulted in evidence of parental toxicity.

Using the same exposure assumptions as employed for the determination in the general population, it has been calculated that the percent of the RfD that will be utilized by aggregate exposure to residues of trifloxystrobin is <2.0% for non-nursing infants (<1 year) (the most impacted sub-population). Therefore, based on the completeness and reliability of the toxicity data base and the conservative exposure assessment, Bayer concludes that there is a reasonable certainty that no harm will result to infants and children from aggregate exposure to trifloxystrobin residues.

F. International Tolerances

No Codex MRLs have been established for residues of trifloxystrobin.

[FR Doc. 01–28199 Filed 11–13–01; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[PF–1055; FRL–6809–7]

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–1055, must be received on or before December 14, 2001.

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–1055 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Dennis McNeilly, Insecticide Rodenticide Branch, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–6742; e-mail address: *mcneilly.dennis@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:

Categories	NAICS Codes	Examples of Potentially Affected Entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

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 homepage at *http://www.epa.gov/*. To access this document, on the homepage select ''Laws and Regulations,'' ''Regulations and Proposed Rules,'' 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–1055. 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–1055 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–1055. 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: November 2, 2001.

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 views of the petitioner. EPA is publishing the petition summary verbatim without editing it 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.

Bayer Corporation

1F6315

EPA has received a pesticide petition (1F6315) from Bayer Corporation, 8400 Hawthorn Road, Kansas City, MO 64120 proposing, pursuant to section 408(d) of the FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing a tolerance for residues of clothianidin in or on the raw agricultural commodity canola, seed; corn, grain; corn, fodder; corn, forage; meat and meat by-products, and milk at 0.01, 0.01, 0.10, 0.10, 0.02, and 0.01 parts per million (ppm), respectively. 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*. In plants, the metabolism of clothianidin is adequately understood for the purposes of establishing these proposed tolerances. Unchanged parent clothianidin was the predominant residue in all crop matrices (14.4% to 64.5% in corn, 66.1% to 96.6% in tomatoes, 4.3% to 24.4% in sugar beets, and 24.3% to 63.3% in apples), with the exception of sugar beet leaves. In sugar beet leaves, the main components were the methylguanidine and thiazolylmethylguanidine metabolites, accounting for 28.6% and 27.7%, respectively. All metabolites found in plants were also found in the animal metabolism studies. In animals, parent clothianidin was the major component in liver, muscle and fat. Based on the

available metabolism data, parent clothianidin, thiazolyl-guanidine (TZG), thiazolyl-urea (TZU), and aminothiazol methylguanidine-pyridine (ATMG-Pyr) are proposed to be considered as the residues of concern in livestock matrices.

2. *Analytical method*. In plants and plant products, the residue of concern, parent clothianidin, can be determined using high performance liquid chromotography (HPLC) with Electrospray MS/MS detection. In an extraction efficency testing, the plant residues method has also demonstrated the ability to extract aged clothianidin residue.

In anamial matrices, the residues parent clothianidin, TZG, TZU, and ATMG-Pyr can also be determined using HPLC with Electrospray MS/MS detection. In an extraction efficiency testing, the animal residues method has also demonstrated the ability to extract aged clothianidin, TZG, TZU, and ATMG-Pyr residues.

Although the plant and animal residues LC-MS/MS method is highly suitable for enforcement method, an LC-UV method has also been developed which is suitable for enforcement (monitoring) purposes in all relevant matrices.

3. *Magnitude of residues–i. Corn*. A total of 27 field trials were conducted to evaluate the quantity of clothianidin in field, pop, and sweet corn. Corn seed was treated with clothianidin at a rate of 2 mg active ingredient (a.i.)/seed. The highest average field trial was 0.06 ppm in sweet corn forage with ears at 75 days pre-harvest interval (PHI), 0.03 ppm in late dough-stage corn forage at 85 days PHI, and 0.05 ppm in corn fodder at 136 days PHI. All grain and sweet corn ear samples contained<0.01 ppm clothianidin residue. The corn processing study indicated no concentration in any corn processed-commodities following the proposed seed treatment use.

ii. *Canola*. A total of 22 field trials was conducted to determine the residue level in canola following the planting of canola seed treated with clothianidin at a rate of 600 g a.i./100 kg seed. All canola seed samples contained <0.01 ppm clothianidin residue. The canola processing study indicated no concentration in any canola processed commodities following the proposed seed treatment use.

B. Toxicological Profile

1. *Acute toxicity*. The acute oral LD_{50} was >5,000 milligrams/kilograms/body weight (mg/kg bw) for both male and female rats. The acute dermal LD_{50} was greater than 2,000 mg/kg bw in rats. The 4–hour inhalation LC_{50} was 6.14 mg/L for male and female rats. Clothianidin was not irritating to rabbit skin or eyes and did not cause skin sensitization in guinea pigs.

2. *Genotoxicty*. Extensive mutagenicity studies were conducted with clothianidin. Based on the weight of evidence, clothianidin was considered negative for genotoxicity.

3. *Reproductive and developmental toxicity*. In a 2-generation reproduction study, rats were administered dietary levels of 0, 150, 500, and 2,500 ppm. The no observed adverse effect level (NOAEL) for reproductive parameters was 2,500 ppm. The NOAEL for developmental effects was 500 ppm, based on decreased pup weights. The parental NOAEL was 150 ppm, based on the decreased body weights.

A developmental toxicity study was conducted in rats with clothianidin using dose levels of 0, 10, 50, and 125 mg/kg bw by gavage. The NOAEL for maternal toxicity was established at 10 mg/kg bw and for developmental effects it was >125 mg/kg bw. Additionally, a developmental toxicity was conducted with rabbits treated orally by gavage at 0, 10, 25, 75, and 100 mg/kg bw. The NOAEL for maternal toxicity was 10 mg/kg bw and for developmental toxicity it was 75 mg/kg bw.

Developmental toxicity studies showed no primary developmental toxicity and no teratogenic potential was evident.

4. *Subchronic toxicity*. Ninety–day feeding studies were conducted in rats and dogs. The rat study was conducted at dietary levels of 0, 150, 500, and 3,000 ppm, and the dog study was conducted at 0, 325, 650, and 1,500 ppm. The NOAELs were established at 500 ppm for rat and 650 ppm for the dog.

5.*Chronic toxicity*. A 2–year combined rat chronic/oncogenicity conducted at dietary levels of 0, 150, 500, 1,500, and 3,000 ppm demonstrated a NOAEL of 150 ppm based on reduced weight gains and non-neoplastic histomorphological changes. A 78–week mouse oncogenicity study conducted at dose levels of 0, 100, 350, 1,250, and 2,000, and 1,800 ppm for males and females, respectively, revealed a NOAEL of 350 ppm based on reduced body weight gains and increased incidence of hypercellular hypertrophy. No evidence of oncogenicity was seen in the rat or the mice. A 52–week chronic toxicity study in dogs conducted at dietary levels of 0, 325, 650, 1,500, and 2,000 ppm revealed an overall NOAEL of 325 ppm and NOAEL of 650 ppm based on slight decrease in alanine aminotransferase activity (ALT).

6. *Animal metabolism*. The nature of the clothianidin residue in livestock is adequately understood. In animals, parent clothianidin was the major component in liver, muscle and fat. Based on the available metabolism data, parent clothianidin, TZG, TZU, and ATMG-Pyr are proposed to be considered as the residues of concern in livestock matrices.

7. *Metabolite toxicology*. Eight *in vivo* metabolites of clothianidin identified in the rat were investigated for acute oral endpoint mutagenic activity. None of the metabolites were mutagenic either with or without activation, and the LD_{50} values range from <500 to >2,000 mg/kg, showing low to moderate toxicity.

8. *Endocrine disruption*. All guideline studies conducted to characterize toxicological profile showed no endocrine related toxicity or tumorgenicity. No effects on triiodothyronine (T3), throxine (T4) or thyroid stimulating hormone (TSH) were observed in the subchronic rat study. In a 2-generation reproduction study in the rat, rat and rabbit teratology studies clothianidin did not show reproductive or teratogenic effects. The extensive data base shows that clothianidin has no endocrine properties.

C. Aggregate Exposure

1. *Dietary exposure*. The acute reference dose (aRfD) of 0.6 mg/kg bw/day (acute NOAEL with a uncertainty factor) was used to assess acute dietary exposure. Bayer has conducted an acute dietary exposure Tier 2 assessment estimating the percent of the aRfD and corresponding margins of exposure (MOE) for the overall U.S. population (all seasons) and the following subpopulations: All infants (<1–year), non-nursing infants (<1–year), children (1–6 years), children (7–12 years), females (13–19 years), females (13–50 years), males (13–19 years), males (>20 years), and seniors (>55 years). In this refined Tier 2 analysis, all evaluated population subgroups had an exposure equal to 0% of the aRfD with a corresponding MOE of >1,000,000 at the 95th percentile.

The chronic reference dose (cRfD) of 0.097 mg/kg bw/day (chronic NOAEL with a 100-fold uncertainty factor) was used to assess chronic dietary exposure. Bayer's chronic dietary analysis estimated the percent of the cRfD and corresponding margins of exposure (MOE) for the overall U.S. population (all seasons) and the following subpopulations: All infants (<1–year), non-nursing infants (<1–year), children

(1–6 years), children (7–12 years), females (13–19 years), females (13–50 years), males (13–19 years), males (>20 years), and seniors (>55 years). In this analysis, all evaluated population subgroups had an exposure equal to 0% of the cRfD. The corresponding MOE was >1,000,000.

i. *Food.* Since clothianidin is not currently registered, projected percent crop treated values were used for the chronic and acute dietary analyses.

ii. *Drinking water.* For drinking water, the models SCI-GROW (ground water), and FIRST (surface water), were selected to calculate the potential exposure of clothianidin in drinking water. Each model generated an acute water concentration, and the higher of the two concentrations was selected to represent the acute exposure, and similarly for the chronic exposure. The acute environmental exposure was determined to be 3.24 µg/L (from surface water), and the chronic environmental exposure was 0.724 µg/L (from ground water). Both exposures result from clothianidin used as a seed treatment on corn. Based on the standard exposure scenarios for drinking water (70 kg adult - 2 L/day; 10 kg child - 1 L/day), the human exposure and risk can be estimated. Using the acute (0.60 mg/kg/day) and chronic (0.097 mg/kg/day) RfDs, the human risk from exposure to clothianidin in drinking water was determined to be less than 0.03% of the RfD in adults, and less than 0.08% of the RfD in children (the maximum human exposure was 0.32 µg/kg/day, for acute exposure for children).

2. *Non-dietary exposure.* Clothianidin is currently not registered for use on any residential non-food site. Therefore, residential exposure to clothianidin residues will be through dietary exposure only.

D. Cumulative Effects

There is no information available to indicate that toxic effects produced by clothianidin are cumulative with those of any other compound.

E. Safety Determination

1. *U.S. population.* Using the conservative exposure assumptions described above and based on the completeness of the toxicity data, it can be concluded that total aggregate exposure to clothianidin from all proposed uses will equal to 0% of the RfD for the overall U.S. population. All evaluated population subgroups had an expousre equal to 0% of the RfD. EPA generally has no concerns for exposures below 100% of the RfD, because the RfD represents the level at or below which daily aggregate exposure over a lifetime will not pose appreciable risks to human health. Thus, it can be concluded that there is a reasonable certainty that no harm will result from aggregate exposure to clothianidin residues.

2. *Infants and children.* In assessing the potential for additional sensitivity of infants and children to residues of clothianidin, the data from developmental toxicity studies in both the rat and rabbit, a 2-generation reproduction study in rats and a developmental neurotoxicity study in rats have been considered.

The developmental toxicity studies evaluate potential adverse effects on the developing animal resulting from pesticide exposure of the mother during prenatal development. The reproduction study evaluates effects from exposure to the pesticide on the reproductive capability of mating animals through two generations, as well as any observed systemic toxicity.

The developmental neurotoxicity studies evaluate the neurobehavioral and neurotoxic effects on the developing animal resulting from the exposure of the mother. FFDCA section 408 provides that EPA may apply an additional uncertainty factor for infants and children based on the threshold effects to account for prenatal and postnatal effects and the completeness of the toxicity data base. Based on the current toxicological data requirements the toxicology data base for clothianidin relative to prenatal and postnatal development is complete, including the developmental neurotoxicity study. None of the studies indicated the offsprings to be more sensitive. All effects were secondary to severe maternal toxicity. The RfD for clothianidin was calculated using the NOAEL of 9.7 mg/kg bw/day from the 2–year chronic/oncogenicity study. This NOAEL is lower than the NOAEL from the 2-generation reproduction study, the developmental studies, and the developmental neurotoxicity study. Moreover, using a toxicologically justified UF of 100, the RfD for a non-oncogenic clothiandin was established at a level 0.097 mg/kg/day, a value that offers a measure of safety that is still 1.7-fold higher than the highest RfD (imidacloprid at 0.057 mg/kg/day) of the 10 competitive compounds compared in this report.

F. International Tolerances

No CODEX Maximum Residue Levels have been established for residues of clothianidin on any crops at this time.

[FR Doc. 01–28524 Filed 11–13–01; 8:45 am]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[PF–1052; FRL–6808–9]

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–1052, must be received on or before December 14, 2001.

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–1052 in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: By mail: Hoyt Jamerson, Registration Support Branch, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–9368; e-mail address: jamerson.hoyt@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:

Categories	NAICS codes	Examples of potentially affected entities
Industry	111 112 311 32532	Crop production Animal production Food manufacturing Pesticide manufacturing

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**.

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2. *In person*. The Agency has established an official record for this action under docket control number PF–1052. 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?

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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–1052. Electronic comments may also be filed online at many Federal Depository Libraries.

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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.

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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: October 30, 2001.

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 views of the petitioner. EPA is publishing the petition summary verbatim without editing it 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.

Interregional Research Project Number 4 (IR-4)

9E5037, and 1E6326, and 1E6345

EPA has received three pesticide petitions (9E5037 (canola), 1E6326 (dill), and 1E6345 (safflower)) from Interregional Research Project Number 4 (IR-4) 681 U.S. Highway # 1, South, North Brunswick, NJ 08902–3390 proposing, pursuant to section 408(d) of FFDCA, 21 U.S.C. 346a(d), to amend 40 CFR part 180 by establishing tolerances for residues of ethalfluralin in or on the raw agricultural commodities (RACs) canola, safflower and dill at 0.05 parts per million (ppm).

EPA has determined that this petition contain 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*. Nature of residue studies with $_{14}$C ethalfluralin have demonstrated very low terminal residues and that ethalfluralin *per se* is the residue of concern in plants grown in soil treated with this compound and that there are no significant metabolic products. These studies indicate that it is appropriate to base a tolerance on residues of the parent compound, ethalfluralin.

2. *Analytical method*. A residue method has been developed and validated at a limit of quantitation (LOQ) of 0.02 µg/g for the determination of ethalfluralin in canola seed which utilizes capillary gas chromatography with mass selective detection (GC)/MSD. Validation data were generated using this method during the analysis of the canola seed field samples from the magnitude of residue studies.

For safflower, adequate residue analytical methods are available for purposes of registration based upon the analytical method for sunflower. A GC method, Method I, with electron capture detection is listed in the Pesticide Analytical Manual ((PAM), Vol. II, Section 180.416), for tolerance enforcement. Method I is applicable for analysis of ethalfluralin residues in/on sunflower seed. The limit of detection is 0.01 ppm.

Dill was analyzed by the method ''Determination of Ethalfluralin in Agricultural Crops and Soil.'' Residue method number AM-AA-CA-R025-AB-755, Lilly Research Laboratories, Greenfield, IN (Currently Dow AgroSciences). The LOQ was 0.050 ppm by a GC with a Ni^{63} electron capture detector. Method validation was performed both prior to and concurrently with sample analysis.

3. *Magnitude of residues*. In the magnitude of residue field studies, herbicides containing the active ingredient ethalfluralin [*N*-ethyl-*N*-(2-methyl-2-propenyl)-2,6-dinitro-4-(trifluoromethyl) benzenamine] were applied in 1996 at eight sites as a preplant incorporated application. Sonalan l0G herbicide was applied directly to the soil surface and Sonalan HFP herbicide was diluted in water and applied in a spray volume of 16–23 gallons/acre. The applications were made to field plots of canola at the rate of 1.25 lb active ingredient/acre at all sites except Georgia and Washington, and at the rate of 0.75 lb active ingredient/acre (Georgia and Washington). Three to five days after application a second incorporation was done and canola seeds were planted. Samples of canola seed were collected at normal harvest, 87–216 days after the last application. Residues in canola seed collected at normal harvest were non-detectable based on a method lower limit of detection of 0.004 ppm.

For safflower, the magnitude of residue data from sunflower are surrogate data for safflower. The registered uses of ethalfluralin on sunflowers along with the established tolerances on these commodities are supported by acceptable field residue data from trials reflecting the maximum registered use patterns. In all cases, the residues were <0.01ppm. The reregistration requirements for processing studies were fulfilled. Adequate processing studies have been conducted on sunflower seed. Field residue data resulting from up to 5X label rates showed non-detectable (<0.01ppm) residues of ethalfluralin in sunflower seed.

In dill the magnitude of residue field studies, herbicides containing the active ingredient ethalfluralin [*N*-ethyl-*N*-(2-methyl-2-propenyl)-2,6-dinitro-4-(trifluoromethyl) benzenamine] were applied in 1997 at three sites. Ethalfluralin formulated as Curbit EC was applied directly to the soil surface diluted in water and applied in a spray volume of 36 gallons/acre. The applications were made to field plots of canola at the rate of 1.5 lb active ingredient/acre and incorporated by sprinkler irrigation. Samples of dill were collected at normal harvest, 91–100 days after the last application. Residues in fresh and dried dill collected at normal harvest were non-detectable based on a method lower limit of detection of 0.05 ppm.

B. Toxicological Profile

1. *Acute toxicity*. Ethalfluralin is of relatively low toxicity. The rat oral LD_{50} is >10,000 milligrams/kilograms (mg/kg). The acute dermal LD_{50} in rabbits is >2,000 mg/kg and the acute rat inhalation LC_{50} is >0.94 milligrams/Liter (mg/L) air. Ethalfluralin produced slight eye irritation and slight dermal irritation in rabbits. A guinea pig dermal sensitization study conducted by the modified Buehler method found no sensitization, whereas a study conducted by the Magnusson and Kligman maximization method showed a positive sensitization reaction. The signal word for the technical grade active ingredient is Caution.

2. *Genotoxicty*. Ethalfluralin was weakly mutagenic in activated strains TA1535 and TA100 of *Salmonella typhimurium*,but not in strains TA1537, TA1538, and TA98 in an Ames assay. In a modified Ames assay with *Salmonella typhimurium* and *Escherichia coli*, ethalfluralin was weakly mutagenic in strains TA1535 and TA100, with and without activation, and in strain TA98 without activation, at the highest dose. No mutagenicity was found in the mouse lymphoma assay for forward mutation. Ethalfluralin did not induce unscheduled DNA synthesis in rat hepatocytes. In chinese hamster ovary cells, ethalfluralin was negative without S9 activation, but it was clastogenic with activation.

3. *Reproductive and developmental toxicity*. The maternal no observed adverse effect level (NOAEL) of ethalfluralin in rats was 50 mg/kg/day. The maternal lowest observed adverse effect level (LOAEL) was 250 mg/kg/day, based on decreased body weight (bwt) gain and dark urine. In this rat study there was no observable developmental toxicity. The developmental NOAEL in rats was 1,000 mg/kg/day, the highest dose. In rabbits the NOAELs for maternal and developmental toxicity were 75 mg/kg/day. The maternal LOAEL at 150 mg/kg/day was based on abortions and decreased food consumption. These effects as well as decreased weight gain, enlarged liver, and orange urine were found at 300 mg/kg/day. In this study developmental toxicity was observed. The developmental LOAEL in rabbits was 150 mg/kg/day, based on slightly increased resorptions, abnormal cranial development, and increased sternal variants. In a three-generation rat reproduction study, the parental NOAEL was 12.5 mg/kg/day. The parental LOAEL was 37.5 mg/kg/day, based on depressed mean body weight gains in males in all generations. No

treatment-related effects were noted on reproductive parameters and the NOAEL was 37.5 mg/kg/day or greater. A 7–month multigeneration bridging study was conducted with doses equivalent to 0, 8, 20, or 61 mg/kg/day in the diet of Fischer 344 rats. The parental NOAEL was 20 mg/kg/day. The parental LOAEL was 61 mg/kg/day, based on increased liver weights. No treatment-related effects were noted on reproductive parameters and the reproductive NOAEL was equal to or greater than 61 mg/kg/day.

4. *Subchronic toxicity*. Ethalfluralin was evaluated in five subchronic dietary studies which showed NOAELs of 560 ppm in a 3–month mouse study, 12 mg/kg/day in a 1–year mouse study, 29 mg/kg/day in a 3–month rat study, 3.9 mg/kg/day in male rats and 4.9 mg/kg/day in female rats in a 1–year study, and 27.5 mg/kg/day in a 3–month dog study. A 21–day dermal study in rabbits showed no systemic toxicity, while slight to severe dermal irritation was observed.

5. *Chronic toxicity*. Ethalfluralin was administered to Fisher 344 rats in the diet for 2 years in combined chronic toxicity and carcinogenicity replicate studies. The doses were equivalent to 0, 4.2, 10.7, or 32.3 mg/kg/day. The NOAEL for systemic effects was 32.3 mg/kg/day. Mammary gland fibroadenomas were found in dosed female rats at statistically significant incidences in the mid and high doses. Ethalfluralin was administered to B6C3F1 mice in the diet for 2 years in combined chronic toxicity and carcinogenicity replicate studies. The doses were equivalent to 0, 10.3, 41.9, or 163.3 mg/kg/day. No increased incidence of neoplasms was attributed to the treatment. The NOAEL was 10.3 mg/kg/day. The mid dose (LOAEL) and high dose showed focal hepatocellular hyperplasia in both sexes. There were increased relative liver, kidney, and heart weights in females. Some blood changes were found also, including decreased hematocrit, hemoglobin, and erythrocyte count accompanied by increased mean corpuscular hemoglobin concentration in high dose females. Alkaline phosphatase values were increased at the high dose in both sexes. Body weight gain decreased at the high dose.

Beagle dogs were given 0, 4, 20, or 80 mg/kg/day orally, by capsule, for 1–year. The NOAEL was 4 mg/kg/day. The LOAEL was 20 mg/kg/day, based on increased urinary bilirubin, variations in erythrocyte morphology, increased thrombocyte count, and increased erythroid series of the bone marrow. Elevated alkaline phosphatase levels were found at the two higher doses and siderosis of the liver at the high dose.

EPA's Office of Pesticide Program's Carcinogenicity Peer Review Committee concluded that ethalfluralin should be classified as Group C, a possible human carcinogen, based on increased mammary gland fibroadenomas and adenomas/fibroadenomas combined in female rats. The tumor incidences were statistically significant at both the mid and high dose, and exceeded of the upper range of historical controls. Based on a low dose extrapolation, the Q_1* of 8.9×10^{-2} $(mg/kg/day)^{-1}$ has been calculated.

6. *Animal metabolism*. Fischer 344 rats were treated orally with a single low dose, a single high dose, or repeated low doses of radiolabeled ethalfluralin. Absorption of ethalfluralin was estimated at 79–87% of the dose for all dose levels. Ethalfluralin was rapidly and extensively metabolized, and 95% of the chemical was excreted in urine and feces by 7 days. The major route of elimination for the radiolabel was in the feces, 50.9–63.2%, and the levels remaining in the tissues after 72 hours were negligible. The major metabolites in urine and feces were identified.

7. *Metabolite toxicology*. The residue of concern is ethalfluralin *per se*, as specified in 40 CFR 180.416. Thus there is no need to address metabolite toxicity.

8. *Endocrine disruption*. There is no evidence to suggest that ethalfluralin has an effect on any endocrine system.

C. Aggregate Exposure

1. *Dietary exposure*. Acute dietary risk assessments are performed for a food-use pesticide if a toxicological study has indicated the possibility of an acute effect of concern occurring as a result of a 1–day or single exposure. EPA has previously used a NOAEL of 75 mg/kg/day from a rabbit developmental toxicity study as the toxicity endpoint for assessing acute dietary risk in females 13–50 years of age. An acute reference dose (RfD) of 0.75 mg/kg/day was calculated, based on a NOAEL of 75 mg/kg/day and an uncertainty factor (UF) of 100 (10 for interspecies extrapolation and 10 for intraspecies variation). EPA has previously added a 3X FQPA safety factor, resulting in an acute population adjusted dose (aPAD) of 0.25 mg/kg/day. Likewise, in this assessment, acute dietary risk to females 13–50 years old was based on an aPAD of 0.25 mg/kg/day.

Chronic dietary exposure to ethalfluralin is possible due to the potential presence of ethalfluralin residue in certain foods. Chronic dietary risk was evaluated using a chronic RfD of 0.04 mg/kg/day, which is based on a NOAEL of 4 mg/kg/day from a chronic dog study along with an UF of 100. EPA previously concluded that an FQPA safety factor of 1X is appropriate for assessing chronic dietary risk.

EPA has concluded that ethalfluralin should be classified as group C, a possible human carcinogen, based on increased mammary gland fibroadenomas and adenomas/fibroadenomas combined in female rats. Therefore, a cancer risk assessment was included. Based on a low dose extrapolation, the Q_1* of 8.9×10^{-2} $(mg/kg/day)^{-1}$ has been calculated and was used in this cancer risk assessment.

i. *Food*. The dietary exposure assessment was based on all commodities with tolerances for ethalfluralin established at 40 CFR 180.416 together with the proposed tolerances of 0.05 ppm each for canola, dill, and safflower. The dietary exposure evaluation model, which is produced by Novigen Sciences, Inc. and licensed to Dow AgroSciences, was used to estimate dietary exposure. This software used the food consumption data for the 1989–1991 United States Department of Agriculture Continuing Surveys of Food Intake by Individuals (CSFII 1989–1991).

a. *Acute*. An acute dietary risk assessment was conducted with the conservative assumptions of 100% crop treated and tolerance level residues for all crops. These assumptions result in a very conservative estimate of human exposure and risk. Acute dietary risk for females 13+ years old was assessed using an aPAD of 0.25 mg/kg/day. Even with conservative assumptions used in this analysis, acute dietary exposure was estimated to occupy only 0.05% of the aPAD for females 13+ years old. Adverse effects are not expected for exposures occupying 100% or less of the aPAD. Therefore, acute exposure and risk from food is well within acceptable levels.

b. *Chronic*. Chronic dietary exposure and risk was estimated with the conservative assumptions of 100% crop treated and tolerance level residues for all crops. The estimate of potential chronic exposure and risk is very conservative and estimated risk would be substantially reduced with further refinement to the exposure estimate. Even with the conservative assumptions used in this analysis, chronic exposure is estimated to occupy only 0.1% of the RfD for the general U.S. population. Chronic dietary exposure is estimated to occupy 0.4% of the RfD for non-nursing infants, the population subgroup estimated to have highest potential exposure. Therefore, chronic exposure

and risk from food is well within acceptable levels.

c. *Cancer*. Cancer risk was estimated based on percent crop treated and anticipated residues as provided in EPA's Reregistration Eligibility Decision (RED) for ethalfluralin. Exposure to ethalfluralin from food is estimated to result in a lifetime cancer risk of 7.11 x 10^{-7}. Cancer risks of less than 1 x 10^{-6} are generally considered to be negligible.

ii. *Drinking water*. There are no established maximum contaminant levels for residues of ethalfluralin in drinking water and health advisory levels for ethalfluralin have not been established. EPA has previously used modeling for a screening level assessment of potential ethalfluralin exposure through drinking water. The Agency has used EPA's pesticide root zone model/exposure analysis modeling systems and screening concentrations in ground water to provide a screening level assessment for surface water and ground water, respectively. Based on these models, EPA has indicated the estimated environmental concentrations (EECs) for acute exposures are estimated to be 2.3 parts per billion (ppb) for surface water and 0.02 ppb for ground water. The EECs for chronic exposures are estimated to be 0.052 ppb for surface water and 0.02 ppb for ground water. Estimated concentrations of a pesticide are compared to a drinking water level of comparison (DWLOC) as a surrogate estimate of exposure and risk. The DWLOC is the concentration of a pesticide in drinking water that would be acceptable as an upper limit in light of total aggregate exposure to that pesticide.

a. *Acute*. As indicated previously, EPA has used surface water and ground water EECs of 2.3 ppb and 0.02 ppb, respectively, for comparison with the DWLOC in an acute assessment. The DWLOC for acute exposure in females 13+ years old was based on an aPAD of 0.25 mg/kg/day and was calculated to be 7,500 ppb. Therefore, the acute DWLOC for ethalfluralin is over 3,000 fold greater than the EEC for surface water or ground water, indicating that potential acute exposure and risk from drinking water is well within acceptable levels.

b. *Chronic*. As indicated previously, EPA has used surface water and ground water EECs of 0.052 ppb and 0.02 ppb, respectively, for comparison with the DWLOC in a chronic assessment. The chronic DWLOC was calculated based on a chronic RfD of 0.04 mg/kg/day and accounted for potential chronic exposure to ethalfluralin through residues in food. The chronic DWLOC for the general U.S. population and non-nursing infants was calculated to be 1,400 ppb and 400 ppb, respectively. Therefore, chronic DWLOCs are substantially greater than estimated residue concentration in surface water or ground water over a chronic exposure period, indicating that chronic exposure and risk from drinking water are well with acceptable levels.

c. *Cancer*. The DWLOC for the cancer risk assessment was calculated to be 0.12 ppb. Surface water and ground water EECs of 0.052 ppb and 0.02 ppb, respectively, were used for comparison with the DWLOC. The EECs are below the DWLOC, indicating that the cancer risk would generally be considered negligible.

2. *Non-dietary exposure*. Ethalfluralin is not currently registered for use on any residential non-food sites, and thus, it is not expected that non-occupational, non-dietary exposures will occur.

D. Cumulative Effects

EPA at this time has not established methodologies to resolve the complex issues concerning common mechanism of toxicity in a meaningful way. Although ethalfluralin is a member of the dinitroaniline class of herbicides, there is no information available, at this time to determine whether ethalfluralin has a common mechanism of toxicity with other substances or how to include this pesticide in a cumulative risk assessment. Based on the metabolic profile, ethalfluralin does not appear to produce a toxic metabolite produced by other substances. Therefore, only aggregate exposure and risk were considered.

E. Safety Determination

1. *U.S. population*. Using conservative exposure assumptions previously described, chronic dietary exposure to residues of ethalfluralin from current and proposed uses was estimated to occupy only 0.1% of the RfD for the general U.S. population. EPA generally has no concern for exposures below 100% of the RfD since the RfD represents the level at or below which daily exposure over a lifetime will not pose appreciable risks to human health. Additionally, the chronic DWLOC was found to be substantially greater than EECs for ethalfluralin in surface water or ground water, indicating risk is well within acceptable levels. Cancer risk resulting from potential exposure to ethalfluralin through food and drinking water was estimated. Cancer risk from potential dietary and drinking water exposure for the general U.S. population was found to be within a range that EPA has generally considered negligible. Thus, based on the completeness and reliability of the toxicity data and the conservative exposure assessment, it is concluded that there is a reasonable certainty that no harm will result to the general U.S. population from aggregate exposure to ethalfluralin residues from current and proposed uses.

2. *Infants and children*. Risk for developmental toxicity from acute exposure to ethalfluralin was evaluated for females 13+ years old. As indicated in the previous discussion, risk from aggregate acute exposure to ethalfluralin through food and drinking water is well within acceptable levels. It can be concluded that there is a reasonable certainty that no harm will result for both females 13+ years old, and for the prenatal development of infants, from aggregate acute exposure to ethalfluralin.

Chronic aggregate exposure and risk was evaluated for non-nursing infants, the population subgroup predicted to be most highly exposed. As indicated previously, risk from aggregate chronic exposure through food and drinking water is well within acceptable levels. Thus, based on the completeness and reliability of the toxicity data and the conservative exposure assessment, it can be concluded with reasonable certainty that no harm will result to infants and children from chronic aggregate exposure to ethalfluralin based on current and proposed uses.

F. International Tolerances

There are no Codex, Canadian or Mexican maximum residue limits established for ethalfluralin.

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ENVIRONMENTAL PROTECTION AGENCY

[OPP–181082; FRL–6810–4]

Pesticide Emergency Exemptions; Agency Decisions and State and Federal Agency Crisis Declarations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted or denied emergency exemptions under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) for use of pesticides as listed in this notice. The exemptions or denials were granted during the period December 2000 to October 2001 to control unforseen pest outbreaks.

FOR FURTHER INFORMATION CONTACT: See each emergency exemption or denial for the name of a contact person. The

following information applies to all contact persons: Emergency Response Team, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 308–9366.

SUPPLEMENTARY INFORMATION: EPA has granted or denied emergency exemptions to the following State and Federal agencies. The emergency exemptions may take the following form: Crisis, public health, quarantine, or specific. EPA has also listed denied emergency exemption requests in this notice.

I. General Information

A. Does this Action Apply to Me?

You may be potentially affected by this action if you petition EPA for authorization under FIFRA section 18 to use pesticide products which are otherwise unavailable for a given use. Potentially affected categories and entities may include, but are not limited to:

Categories	NAICS codes	Examples of potentially affected entities
Federal Government	9241	Federal agencies that petition EPA for FIFRA section 18 pesticide use authorization
State and Territorial government agencies charged with pesticide authority	9241	State agencies that petition EPA for FIFRA section 18 pesticide use authorization

This listing is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. Other types of entities not listed in the table in this unit could also be regulated. The North American Industrial Classification System (NAICS) codes have been provided to assist you and others in determining whether or not this action applies to certain entities. To determine whether you or your business is affected by this action, you should carefully examine the applicability provisions in 40 CFR part 166. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed under **FOR FURTHER INFORMATION CONTACT**.

B. How Can I Get Additional Information or Copies of this Document or Other 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,'' ''Regulations and Proposed Rules,'' 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 OPP–181082. The official record consists of the documents specifically referenced in this action, 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 Hwy., 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.

II. Background

Under FIFRA section 18, EPA can authorize the use of a pesticide when emergency conditions exist. Authorizations (commonly called emergency exemptions) are granted to State and Federal agencies and are of four types:

1. A ''specific exemption'' authorizes use of a pesticide against specific pests on a limited acreage in a particular State. Most emergency exemptions are specific exemptions.

2. ''Quarantine'' and ''public health'' exemptions are a particular form of specific exemption issued for quarantine or public health purposes. These are rarely requested.

3. A ''crisis exemption'' is initiated by a State or Federal agency (and is confirmed by EPA) when there is insufficient time to request and obtain EPA permission for use of a pesticide in an emergency.

EPA may deny an emergency exemption: If the State or Federal agency cannot demonstrate that an emergency exists, if the use poses unacceptable risks to the environment, or if EPA cannot reach a conclusion that the proposed pesticide use is likely to result in ''a reasonable certainty of no harm'' to human health, including exposure of residues of the pesticide to infants and children.

If the emergency use of the pesticide on a food or feed commodity would result in pesticide chemical residues, EPA establishes a time-limited tolerance meeting the ''reasonable certainty of no harm standard'' of the Federal Food, Drug, and Cosmetic Act (FFDCA).

In this document: EPA identifies the State or Federal agency granted the exemption or denial, the type of exemption, the pesticide authorized and the pests, the crop or use for which authorized, number of acres (if applicable), and the duration of the exemption. EPA also gives the **Federal Register** citation for the time-limited tolerance, if any.

III. Emergency Exemptions and Denials

A. U. S. States and Territories

Alabama

Department of Agriculture and Industries

Specific: EPA authorized the use of norflurazon on bermudagrass to control annual grassy weeds; March 6, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; April 18, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of azoxystrobin on watercress to control cercospora leaf spot disease; April 26, 2001 to April 26, 2002. Contact: (Libby Pemberton)

EPA authorized the use of fludioxonil on peaches to control brown rot; August 24, 2001 to September 30, 2001. Contact: (Andrew Ertman)

Arizona

Department of Agriculture

Specific: EPA authorized the use of coumaphos in beehives to control varroa

mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of buprofezin on cotton to control silverleaf whiteflies; June 20, 2001 to September 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of metolachlor on spinach to control weeds; August 24, 2001 to May 15, 2002. Contact: (Andrew Ertman)

Arkansas
State Plant Board

Crisis: On May 11, 2001, for the use of tebufenozide on pastures and hay fields to control armyworms. This program is expected to end on November 30, 2001. Contact: (Barbara Madden)

On August 16, 2001, for the use of methoxyfenozide on soybeans to control saltmarsh caterpillars. This program ended on September 30, 2001. Contact: (Barbara Madden)

Quarantine: EPA authorized the use of paraformaldehyde in poultry health facilities to control disease causing organisms; June 15, 2001 to June 15, 2004. Contact: (Libby Pemberton)

Specific: EPA authorized the use of imazapic plus 2,4-D on bermudagrass pastures and hayfields to control grassy weeds; March 2, 2001 to May 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 21, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; April 4, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of fomesafen on snap beans to control broadleaf weeds; April 10, 2001 to September 15, 2001. Contact: (Shaja Brothers)

EPA authorized the use of fenoxaprop-*p*-ethyl and its safener AE F122006 on rice to control barnyard grass; May 1, 2001 to July 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of diuron and its metabolites convertible to 3,4-dichloroaniline on catfish ponds to control blue-green algae; June 1, 2001 to September 30, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of carbofuran on cotton to control cotton aphids; June 1, 2001 to September 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of tebufenozide on pasture and rangeland to control armyworms; June 26, 2001 to November 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworm and tobacco budworm; June 26, 2001 to September 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of methoxyfenozide on soybeans to control saltmarsh caterpillars; September 27, 2001 to September 30, 2001. Contact: (Barbara Madden)

California
Environmental Protection Agency, Department of Pesticide Regulation

Crisis: On January 22, 2001, for the use of carboxin on onion seed to control onion smut. This program ended on January 23, 2001. Contact: (Dan Rosenblatt)

Specific: EPA authorized the use of avermectin on avocado to control thrips; November 9, 2000 to November 9, 2001. Contact: (Dan Rosenblatt)

EPA authorized the use of avermectin on spinach to control leafminers; December 27, 2000 to October 31, 2001. Contact: (Dan Rosenblatt)

EPA authorized the use of carboxin on onion seed to control onion smut; January 17, 2001 to May 31, 2001. Contact: (Dan Rosenblatt)

EPA authorized the use of maneb on walnuts to control walnut bacterial blight; February 1, 2001 to December 15, 2001. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 7, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of imidacloprid on citrus to control the glassy-winged sharpshooter; March 1, 2001 to December 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of metolachlor on tomatoes to control weeds; March 1, 2001 to July 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of hexythiazox on dates to control banks grass mites; March 14, 2001 to June 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of tebufenozide on grapes to control grape leafroller and omnivorous leafroller; April 1, 2001 to September 1, 2001. Contact: (Barbara Madden)

EPA authorized the use of fludioxonil on stone fruit to control brown rot, gray mold rot, and rhizopus rot; April 20, 2001 to November 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of avermectin on basil to control leafminers; May 9, 2001 to October 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of buprofezin on cotton to control silverleaf whiteflies; June 15, 2001 to October 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of propamocarb hydrochloride on tomatoes (including greenhouse grown transplants for field production) to control late blight; July 17, 2001 to July 17, 2002. Contact: (Libby Pemberton)

EPA authorized the use of carbofuran on cotton to control aphid; July 20, 2001 to October 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of fludioxonil on pomegranates to control gray mold; July 26, 2001 to November 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of spinosad on sugar beets to control armyworms; August 7, 2001 to August 7, 2002. Contact: (Andrew Ertman)

EPA authorized the use of myclobutanil on peppers to control powdery mildew; August 18, 2001 to August 17, 2002. Contact: (Barbara Madden)

EPA authorized the use of myclobutanil on artichokes to control powdery mildew; September 1, 2001 to August 31, 2002. Contact: (Barbara Madden)

EPA authorized the use of paraquat on artichokes to control weeds; September 1, 2001 to August 31, 2002. Contact: (Libby Pemberton)

EPA authorized the use of imidacloprid on stone fruit to control the glassy-winged sharpshooter; September 5, 2001 to June 22, 2002. Contact: (Andrew Ertman)

EPA authorized the use of imidacloprid on almonds to control the glassy-winged sharpshooter; September 5, 2001 to June 22, 2002. Contact: (Andrew Ertman)

EPA authorized the use of imidacloprid on blueberries to control the glassy-winged sharpshooter; September 5, 2001 to June 22, 2002. Contact: (Andrew Ertman)

EPA authorized the use of fenhexamid on pears to control gray mold; September 7, 2001 to October 31, 2001. Contact: (Dan Rosenblatt)

EPA authorized the use of imidacloprid on table beets to control aphids; September 12, 2001 to September 11, 2002. Contact: (Andrew Ertman)

Colorado
Department of Agriculture

Specific: EPA authorized the use of imidacloprid on sweet corn seed to control the corn flea beetle; December 11, 2000 to December 10, 2001. Contact: (Andrew Ertman)

EPA authorized the use of difenoconazole on sweet corn seed to control fungal pathogens; January 31, 2001 to January 30, 2002. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 7, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on spinach to control weeds; March 6, 2001 to September 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of sulfentrazone on sunflowers to control broadleaf weeds; March 16, 2001 to July 1, 2001. Contact: (Beth Edwards)

EPA authorized the use of lambda-cyhalothrin on barley to control the Russian wheat aphid; April 15, 2001 to July 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of dimethenamid on sugar beets to control weeds; April 30, 2001 to July 10, 2001. Contact: (Barbara Madden)

EPA authorized the use of tebuconazole on sunflowers to control rust; May 9, 2001 to August 25, 2001. Contact: (Beth Edwards)

EPA authorized the use of imazamox on dry beans to control weeds; June 1, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of tetraconazole on sugar beets to control cercospora leafspot (*Cercospora Beticola*); June 15, 2001 to September 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of propiconazole on dry beans to control rust; July 1, 2001 to August 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of imazapic-ammonium on pasture and rangeland (including land in the Conservation Reserve Program) to control leafy spurge; August 1, 2001 to December 31, 2001. Contact: (Libby Pemberton)

Connecticut
Department of Environmental Protection

Crisis: On July 13, 2001, for the use of tebufenozide on pasture to control armyworms. This program ended on October 31, 2001. Contact: (Barbara Madden)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of imidacloprid on strawberries to control root feeding beetles; July 1, 2001 to August 7, 2001. Contact: (Andrew Ertman)

EPA authorized the use of tebufenozide on pasture to control armyworms; August 6, 2001 to October 31, 2001. Contact: (Barbara Madden)

Delaware
Department of Agriculture

Specific: EPA authorized the use of chlorpropham on spinach to control chickweed; March 2, 2001 to April 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of terbacil on watermelons to control broadleaf weeds; March 8, 2001 to June 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of fomesafen on snap bean to control weeds; March 15, 2001 to October 10, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of imidacloprid on stone fruit to control aphids; April 1, 2001 to October 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of dimethomorph on squash, cantaloupes, watermelons, and cucumbers to control Phytophthora blight; April 27, 2001 to September 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; April 30, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on peaches and nectarines to control weeds that serve as alternate hosts for plum pox virus or are refugia for the green peach aphid, the vector of this virus; May 17, 2001 to December 1, 2001. Contact: (Barbara Madden)

EPA authorized the use of propyzamide on cranberries to control dodder; June 29, 2001 to December 15, 2001. Contact: (Andrew Ertman)

Florida
Department of Agriculture and Consumer Services

Crisis: On June 14, 2001, for the use of azoxystrobin on lychee to control anthracnose. This program is expected to end on May 1, 2002. Contact: (Libby Pemberton)
Specific: EPA authorized the use of imidacloprid in legume vegetables to control whiteflies; November 17, 2000 to November 16, 2001. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; January 19, 2001 to January 18, 2002. Contact: (Barbara Madden)

EPA authorized the use of pyriproxyfen in legume vegetables, except soybeans to control whiteflies; February 4, 2001 to February 4, 2002. Contact: (Andrea Conrath)

EPA authorized the use of bifenthrin on citrus to control diaprepes root weevil; March 2, 2001 to March 2, 2002. Contact: (Shaja Brothers)

EPA authorized the use of fenbuconazole on grapefruit to control greasy spot disease; May 4, 2001 to November 11, 2001. Contact: (Shaja Brothers)

EPA authorized the use of buprofezin on tomatoes to control Silverleaf whiteflies; June 1, 2001 to June 1, 2002. Contact: (Andrew Ertman)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; September 11, 2001 to May 31, 2002. Contact: (Libby Pemberton)

Georgia
Department of Agriculture

Specific: EPA authorized the use of fenbuconazole on blueberries to control mummy berry disease; December 15, 2000 to July 1, 2001. Contact: (Dan Rosenblatt)

EPA authorized the use of diuron in catfish ponds to control blue-green algae; December 26, 2000 to November 30, 2001. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; January 19, 2001 to January 18, 2002. Contact: (Barbara Madden)

EPA authorized the use of norflurazon on bermudagrass to control annual grassy weeds; March 6, 2001 to July 1, 2001. Contact: (Libby Pemberton)

EPA authorized the use of fludioxonil on peaches and nectarines to control brown rot; April 20, 2001 to September 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of azoxystrobin on brassica leafy vegetables to control cercospora leaf spot disease; August 27, 2001 to December 27, 2001. Contact: (Libby Pemberton)

EPA authorized the use of pyriproxyfen on succulent beans to control silverleaf whiteflies; August 30, 2001 to October 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; September 5, 2001 to June 30, 2002. Contact: (Libby Pemberton)

Hawaii
Department of Agriculture

Specific: EPA authorized the use of sodium 2-(3-chlorophenoxy) propionate (cloprop) on pineapple for fruit enlargement on the Island of Oahu; April 18, 2001 to April 18, 2002. Contact: (Barbara Madden)

EPA authorized the use of hydramethylnon on pineapples to control big-headed and Argentine ants; May 15, 2001 to May 15, 2002. Contact: (Libby Pemberton)

EPA authorized the use of caffeine (1,3,7-trimethylxanthine) on floriculture and nursery crops, outdoor ornamental plants in residential areas, parks, hotels and resorts, and forest habitats to

control tropical frogs; September 27, 2001 to September 27, 2002. Contact: (Barbara Madden)

Idaho
Department of Agriculture

Crisis: On June 1, 2001, for the use of azoxystrobin on chickpeas to control ascochyta blight. This program ended on August 31, 2001. Contact: (Libby Pemberton)
Denial: On June 26, 2001, EPA denied the use of triflumizole on sweet cherries to control powdery mildew. This request was denied because the claim of resistance to registered alternatives was not fully substantiated. Contact: (Andrew Ertman).

On September 27, 2001, EPA denied the use of azoxystrobin on chickpeas to control ascochyta blight. This request was denied because it was not demonstrated that an urgent and non-routine situation exists due to the presence of ascochyta blight in chickpeas. Contact: (Libby Pemberton).
Specific: EPA authorized the use of pendimethalin on mint to control kochia and redroot pigweed; January 29, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of oxytetracyline on apples to control fire blight; January 31, 2001 to August 31, 2001. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of tebuconazole and myclobutanil on hops to control powdery mildew; April 15, 2001 to September 22, 2001. Contact: (Barbara Madden)

EPA authorized the use of imazamox on canola to control wild mustard; April 16, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of zinc phosphide on potatoes, sugarbeets, wheat, and barley to control meadow voles and field mice; April 27, 2001 to October 1, 2001. Contact: (Libby Pemberton)

EPA authorized the use of halosulfuron-methyl on asparagus to control nutsedge; May 1, 2001 to July 31, 2001. Contact: (Meredith Laws)

EPA authorized the use of lambda-cyhalothrin on barley to control Russian wheat aphids and cereal leaf beetles; May 2, 2001 to July 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fluroxypyr on field corn to control volunteer potatoes; May 3, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fluroxypyr on sweet corn to control volunteer potatoes; May 3, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of carfentrazone-ethyl on hops to control hop sucker growth to indirectly control powdery mildew; May 10, 2001 to September 22, 2001. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on canola to control Canada thistle; May 11, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of cymoxanil on hops to control downy mildew; May 24, 2001 to September 15, 2001. Contact: (Meredith Laws)

EPA authorized the use of paraquat dichloride on green and dry peas grown for seed as a desiccant; June 15, 2001 to November 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of bifenazate on hops to control two-spotted spider mites; June 22, 2001 to September 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of fenpyroximate on hops to control two-spotted spider mites; June 22, 2001 to September 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of imazapic on pasture and rangeland (including land in the Conservation Reserve Program) to control leafy spurge; July3, 2001 to July 3, 2002. Contact: (Libby Pemberton)

EPA authorized the use of myclobutanil on sugar beets to control powdery mildew; July 5, 2001 to September 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of difenoconazole on sweet corn seeds to control damping off and die-back diseases in corn; August 10, 2001 to September 1, 2002. Contact: (Dan Rosenblatt)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

Illinois
Department of Agriculture

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 9, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of dimethomorph on squash, cantaloupes, watermelons, and cucumbers to control phytophthora capsici; April 20, 2001 to November 1, 2001. Contact: (Libby Pemberton)

Indiana
Office of Indiana State Chemist

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 21, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on tomatoes to control nightshade; May 3, 2001 to July 1, 2002. Contact: (Andrew Ertman)

EPA authorized the use of fomesafen on snap beans to control broadleaf weeds; May 10, 2001 to September 1, 2001. Contact: (Shaja Brothers)

Iowa
Department of Agriculture and Land Stewardship

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 7, 2001 to February 1, 2002. Contact: (Barbara Madden)

Kansas
Department of Agriculture

Crisis: On May 24, 2001, for the use of spinosad on alfalfa to control beet armyworms. This program ended on October 10, 2001. Contact: (Andrew Ertman)
Specific: EPA authorized the use of metsulfuron-methyl on sorghum to control triazine-resistant pigweed; January 12, 2001 to August 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of sulfentrazone on sunflowers to control kochia; March 15, 2001 to June 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of spinosad on alfalfa to control beet armyworms; May 24, 2001 to October 10, 2001. Contact: (Andrew Ertman)

EPA authorized the use of propiconazole on dry beans to control rust; June 1, 2001 to August 15, 2001. Contact: (Barbara Madden)

Kentucky
Department of Agriculture

Crisis: On May 24, 2001, for the use of tebufenozide on pastures and hay fields to control armyworms. This program ended on June 7, 2001. Contact: (Barbara Madden)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

Louisiana
Department of Agriculture and Forestry

Crisis: On March 2, 2001, for the use of azoxystrobin on strawberries to control

anthracnose. This program ended on March 17, 2001. Contact: (Libby Pemberton)

On May 19, 2001, for the use of fipronil on wood structures to control Formosan termites. This program ended on May 19, 2001. Contact: (Andrew Ertman)

On June 11, 2001, for the use of methoxyfenozide on field corn to control southwestern corn borer. This program ended on June 27, 2001. Contact: (Barbara Madden)

Denial: On April 3, 2001, EPA denied the use of bispyribac-sodium on rice to control perennial barnyardgrass and resistant barnyardgrass. This request was denied because there are still data that need to be evaluated by the Agency for this new, unregistered chemical, and EPA is not able, at this time, to reach a ''reasonable certainty of no harm'' finding regarding human health effects which may result if use of this pesticide use was to occur, nor is EPA is also unable at this time to conclude that use of this product will not result in unacceptable adverse effects to the environment, including non-target organisms, endangered species, and ground water resources. Contact: (Andrew Ertman).

On August 3, 2001, EPA denied the use of flumioxazin on sugarcane to control red morning glory species. This request was denied based on the fact that it was not demonstrated that an urgent and non-routine situation exists due to the presence of red morning glory species. Additionally, the economic data were not sufficient to demonstrate that significant economic losses could be expected. Contact: (Libby Pemberton).

On August 9, 2001, EPA denied the use of flumioxazin on cotton to control pigweed and other weeds. This request was denied based on the fact that it was not demonstrated that an urgent and non-routine situation exists due to the presence of pigweed and other weeds in cotton. Contact: (Libby Pemberton).

Specific: EPA authorized the use of 3-chloro-4-methylbenzenamine hydrochloride on fallow land to control various birds; February 15, 2001 to April 15, 2001. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 20, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of imazapic plus 2,4-D on bermudagrass pastures and hayfields to control grassy weeds; March 9, 2001 to May 31, 2001. Contact: (Beth Edwards)

EPA authorized the use of sulfentrazone on sugarcane to control morning glory; March 14, 2001 to December 31, 2001. Contact: (Beth Edwards)

EPA authorized the use of fenoxaprop-*p*-ethyl and its safener AE F122006 on rice to control sprangletop; March 15, 2001 to June 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworm and tobacco budworm; April 13, 2001 to September 31, 2001. Contact: (Beth Edwards)

EPA authorized the use of carbofuran on cotton to control cotton aphids; June 1, 2001 to September 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of lambda-cyhalothrin on sugarcane to control sugarcane borers; June 15, 2001 to September 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of tebufenozide on sweet potatoes to control armyworms; September 5, 2001 to October 31, 2001. Contact: (Andrew Ertman)

Maine

Department of Agriculture, Food, and Rural Resources

Specific: EPA authorized the use of fomesafen on dry beans to control various broadleaf weeds; January 26, 2001 to July 15, 2001. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 21, 2001 to February 1, 2002. Contact: (Barbara Madden)

Maryland

Department of Agriculture

Specific: EPA authorized the use of metolachlor on tomatoes to control weeds; February 23, 2001 to July 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of terbacil on watermelons to control broadleaf weeds; March 28, 2001 to June 25, 2001. Contact: (Beth Edwards)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; April 12, 2001 to October 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of imidacloprid on stone fruit to control aphids; April 15, 2001 to July 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fomesafen on snap beans to control broadleaf weeds; May 15, 2001 to September 15, 2001. Contact: (Shaja Brothers)

EPA authorized the use of dimethomorph on squash, cantaloupes, watermelons, and cucumbers to control phytophthora blight; June 20, 2001 to September 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of metolachlor on spinach to control weeds; August 1, 2001 to April 30, 2002. Contact: (Andrew Ertman)

Massachusetts

Massachusetts Department of Food and Agriculture

Crisis: On July 10, 2001, for the use of imidacloprid on cranberries to control cranberry weevils. This program ended on October 1, 2001. Contact: (Andrew Ertman)

Specific: EPA authorized the use of clopyralid on cranberries to control various weeds; February 23, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of spinosad on cranberries to control spargonothis fruit worm; February 23, 2001 to October 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of propyzamide on cranberries to control dodder; March 30, 2001 to June 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of imidacloprid on cranberries to control cranberry weevils; July 10, 2001 to October 1, 2001. Contact: (Andrew Ertman)

Michigan

Michigan Department of Agriculture

Crisis: On May 25, 2001, for the use of tebuconazole on asparagus to control rust. This program ended on November 1, 2001. Contact: (Barbara Madden)

On July 19, 2001, for the use of imidacloprid on blueberries to control Japanese beetle grubs and adults. This program ended on October 1, 2001. Contact: (Andrew Ertman)

Specific: EPA authorized the use of clopyralid on cranberries to control various broadleaf weeds; March 14, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 21, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on tomatoes to control

nightshade; April 1, 2001 to July 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of oxytetracycline on apples to control fire blight; April 2, 2001, 2001 to June 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of dimethomorph on squash, cantaloupes, watermelons, and cucumbers to control Phytophthora capsici; April 20, 2001 to November 1, 2001. Contact: (Libby Pemberton)

EPA authorized the use of halosulfuron-methyl on asparagus to control nutsedge; May 1, 2001 to July 15, 2001. Contact: (Meredith Laws)

EPA authorized the use of fomesafen on snap beans to control broadleaf weeds; May 5, 2001 to August 30, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of mancozeb on ginseng to control stem and leaf blight; May 17, 2001 to October 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of tebuconazole on wheat to control fusarium head blight; May 25, 2001 to June 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of fomesafen on dry beans to control broadleaf weeds; June 1, 2001 to August 15, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of imidacloprid on blueberries to control Japanese beetle grubs and adults; July 19, 2001 to October 1, 2001. Contact: (Andrew Ertman)

Minnesota

Department of Agriculture

Specific: EPA authorized the use of imidacloprid on sweet corn seed to control the corn flea beetle; December 11, 2000 to December 10, 2001. Contact: (Andrew Ertman)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 16, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of sulfentrazone on sunflowers to control kochia; March 15, 2001 to June 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of 2,4-D on cultivated wild rice to control water plantain; March 15, 2001 to July 31, 2001. Contact: (Beth Edwards)

EPA authorized the use of clopyralid on canola to control Canada thistle and perennial sowthistle; April 3, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of ethalfluralin on canola to control kochia; April 13, 2001 to December 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of imazamox on dry beans to control weeds; May 1, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of dimethenamid on sugar beets to control waterhemp; May 1, 2001 to August 1, 2001. Contact: (Barbara Madden)

EPA authorized the use of imazamox on imidazolinone-tolerant canola to control wild mustard; May 1, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of fomesafen in dry bean to control weeds; June 1, 2001 to August 15, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of propiconazole on dry beans to control rust; June 15, 2001 to August 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of tetraconazole on sugar beets to control cercospora leafspot; June 15, 2001 to September 30, 2001. Contact: (Andrea Conrath)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

Mississippi

Department of Agriculture and Commerce

Crisis: On May 9, 2001, for the use of tebufenozide on pasture and rangeland to control armyworms. This program ended on October 15, 2001. Contact: (Barbara Madden)

On June 26, 2001, for the use of methoxyfenozide on soybean to control saltmarsh caterpillar. This program ended on September 30, 2001. Contact: (Barbara Madden)

On July 2, 2001, for the use of methoxyfenozide on field corn to control Southwestern corn borer. This program ended on September 30, 2001. Contact: (Barbara Madden)

Denial: On April 3, 2001, EPA denied the use of bispyribac-sodium on rice to control resistant barnyardgrass, johnsongrass, and Northern and Indian Jointvetch. This request was denied because there are both registered alternatives and a FIFRA section 18 chemical that control all three weed species. Furthermore, there are still data that need to be evaluated by the Agency for this new, unregistered chemical, and EPA is not able, at this time, to reach a ''reasonable certainty of no harm'' finding regarding human health effects which may result if use of this pesticide use was to occur, nor is EPA is also unable at this time to conclude that use of this product will not result in unacceptable adverse effects to the environment, including non-target organisms, endangered species, and ground water resources. Contact: (Andrew Ertman).

On August 9, 2001, EPA denied the use of flumioxazin on cotton to control pigweed and other weeds. This request was denied based on the fact that it was not demonstrated that an urgent and non-routine situation exists due to the presence of pigweed and other weeds in cotton. Contact: (Libby Pemberton).

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; March 1, 2001 to October 15, 2001. Contact: (Libby Pemberton)

EPA authorized the use of imazapic plus 2,4-D on bermudagrass hay meadows and pastures to control vaseygrass; March 1, 2001 to May 31, 2001. Contact: (Beth Edwards)

EPA authorized the use of carbofuran on cotton to control cotton aphids; March 30, 2001 to September 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of fenoxaprop-*p*-ethyl and its safener AE F122006 on rice to control barnyardgrass and johnsongrass; April 1, 2001 to July 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of diuron and its metabolites convertible to 3,4-dichloroaniline on catfish ponds to control blue-green algae; June 1, 2001 to November 30, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of tebufenozide on pasture and rangeland to control armyworms; June 26, 2001 to October 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of methoxyfenozide on field corn to control Southwestern corn borer; September 27, 2001 to September 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of methoxyfenozide on soybean to control saltmarsh caterpillars; September 27, 2001 to September 30, 2001. Contact: (Barbara Madden)

Missouri

Department of Agriculture

Crisis: On May 15, 2001, for the use of tebufenozide on pasture and rangeland to control armyworms. This program ended on October 15, 2001. Contact: (Barbara Madden)

Specific: EPA authorized the use of sulfentrazone on sunflowers to control broadleaf weeds; March 28, 2001 to July 31, 2001. Contact: (Beth Edwards)

EPA authorized the use of fenoxaprop-*p*-ethyl and its safener AE

F122006 on rice to control barnyardgrass; May 1, 2001 to June 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fomesafen on snap bean to control weeds; May 15, 2001 to September 10, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of tebufenozide on pasture and rangeland to control armyworms; June 26, 2001 to October 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of carbofuranl on cotton to control aphid; July 1, 2001 to September 30, 2001. Contact: (Barbara Madden)

Montana
Department of Agriculture

Crisis: On April 26, 2001, for the use of sulfentrazone on chickpeas and dried peas to control wild buckwheat. This program ended on June 30, 2001. Contact: (Meredith Laws)

On June 22, 2001, for the use of azoxystrobin on chickpeas to control ascochyta blight. This program ended on August 15, 2001. Contact: (Libby Pemberton)
Denial: On September 27, 2001, EPA denied the use of azoxystrobin on chickpeas to control ascochyta blight. This request was denied because it was not demonstrated that an urgent and non-routine situation exists due to the presence of ascochyta blight in chickpeas. Contact: (Libby Pemberton).
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 16, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of sulfentrazone on sunflowers to control kochia; March 15, 2001 to June 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of lambda-cyhalothrin on barley to control cutworms; March 20, 2001 to July 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of clopyralid on canola to control Canada thistle and perennial sowthistle; April 3, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of ethalfluralin on canola to control kochia; April 13, 2001 to December 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of sulfentrazone on chickpeas and dry peas to control wild buckwheat; April 26, 2001 to June 30, 2001. Contact: (Meredith Laws)

EPA authorized the use of dimethenamid on sugar beets to control hairy nightshade and Redroot pigweed; May 1, 2001 to July 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of imazamox on dry beans to control various nightshade species and velvetleaf; May 1, 2001 to June 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of lambda-cyhalothrin on barley to control the Russian wheat aphid; May 1, 2001 to July 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of imazamox on canola to control wild mustard; May 11, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of tetraconazole on sugar beets to control cercospora leafspot (*Cercospora Beticola*); June 15, 2001 to September 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of sethoxydim on safflower to control wild oat; June 20, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of paraquat dichloride on green and dry peas grown for seed as a desiccant; June 26, 2001 to November 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of imazapic-ammonium on pasture/rangeland to control leafy spurge; August 1, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

Nebraska
Department of Agriculture

Crisis: July 17, 2001, for the use of azoxystrobin on chickpeas to control ascochyta blight. This program ended on August 1, 2001. Contact: (Libby Pemberton)

On August 16, 2001, for the use of tebuconazole on sunflowers to control rust. This program ended on August 31, 2001. Contact: (Barbara Madden)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 16, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of sulfentrazone on sunflowers to control broadleaf weeds; March 16, 2001 to July 1, 2001. Contact: (Beth Edwards)

EPA authorized the use of dimethenamid on sugar beets to control weeds; April 30, 2001 to August 1, 2001. Contact: (Barbara Madden)

EPA authorized the use of imazamox on dry beans to control various nightshade species; June 1, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of metsulfuron-methyl on sorghum to control triazine-resistant pigweed; June 15, 2001 to July 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of tetraconazole on sugar beets to control cercospora leafspot (*Cercospora Beticola*); July 1, 2001 to September 30, 2001. Contact: (Barbara Madden) EPA authorized the use of propiconazole on grain sorghum and sorghum planted for seed production to control sorghum ergot; July 1, 2001 to August 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of imazapic on pasture and rangeland (including land in the Conservation Reserve Program) to control leafy spurge; August 31, 2001 to December 31, 2001. Contact: (Libby Pemberton)

Nevada
Department of Agriculture

Crisis: On May 4, 2001, for the use of bromoxynil on timothy to control weeds. This program ended on May 20, 2001. Contact: (Barbara Madden)
Specific: EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

New Jersey
Department of Environmental Protection

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; April 9, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of imidacloprid on blueberries to control blueberry aphids; April 10, 2001 to August 10, 2001. Contact: (Andrew Ertman)

EPA authorized the use of imidacloprid on stone fruit to control aphids; April 20, 2001 to November 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of clopyralid on peaches and nectarines to control weeds that serve as alternate hosts for plum pox virus or are refugia for the green peach aphid, the vector of this virus; May 1, 2001 to December 1, 2001. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on spinach to control weeds; May 3, 2001 to November 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of propyzamide on cranberries to control dodder; May 9, 2001 to December 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of clopyralid on cranberries to control wild bean; May 9, 2001, to December 1, 2001. Contact: (Libby Pemberton)

EPA authorized the use of imidacloprid on blueberries to control oriental beetles; May 15, 2001 to

September 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of metolachlor on tomatoes to control yellow nutsedge and nightshade species; May 16, 2001 to December 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of dimethomorph on squash, cantaloupes, watermelons, and cucumbers to control phytophthora blight; May 22, 2001 to October 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of fludioxonil on stone fruit to control brown rot, gray mold, and rhizopus rot; June 6, 2001 to September 30, 2001. Contact: (Andrew Ertman)

New Mexico
Department of Agriculture

Specific: EPA authorized the use of propiconazole on grain sorghum and sorghum planted for seed production to control sorghum ergot; June 1, 2001 to September 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworm; June 1, 2001 to October 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of metsulfuron-methyl on sorghum to control triazine-resistant pigweed; June 1, 2001 to September 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of spinosad on peanuts to control lepidopteran larvae; June 15, 2001 to October 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of spinosad on alfalfa to control beet armyworms; June 22, 2001 to November 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of myclobutanil on peppers to control powdery mildew; July 15, 2001 to October 15, 2001. Contact: (Barbara Madden)

New York
Department of Environmental Conservation

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 16, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of dimethenamid on dry bulb onions to control yellow nutsedge and other broadleaf weeds; April 1, 2001 to July 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of imidacloprid on stone fruit to control aphids; April 20, 2001 to October 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of dimethomorph on squash, cantaloupes, watermelons, and cucumbers to control phytophthora blight; May 22, 2001 to October 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of fomesafen in snap bean to control weeds; June 1, 2001 to August 15, 2002. Contact: (Shaja R. Brothers)

EPA authorized the use of fomesafen in dry bean to control weeds; June 1, 2001 to August 15, 2002. Contact: (Shaja R. Brothers)

North Carolina
Department of Agriculture

Crisis: On May 3, 2001, for the use of azoxystrobin on strawberries to control anthracnose. This program ended on October 31, 2001. Contact: (Libby Pemberton)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 16, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of fluazinam on peanuts to control sclerotinia blight; May 17, 2001 to October 1, 2001. Contact: (Barbara Madden)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; June 7, 2001 to October 15, 2001. Contact: (Libby Pemberton)

EPA authorized the use of diuron on catfish ponds to control blue-green algae; August 7, 2001 to November 30, 2001. Contact: (Shaja Brothers)

North Dakota
Department of Agriculture

Crisis:April 24, 2001, for the use of sulfentrazone on chickpeas and dry peas to control wild buckwheat. This program ended on June 30, 2001. Contact: (Meredith Laws)

June 19, 2001, for the use of azoxystrobin on chickpeas to control Ascochyta blight. This program ended on August 15, 2001. Contact: (Libby Pemberton)
Denial: On September 27, 2001 EPA denied the use of azoxystrobin on chickpeas to control ascochyta blight. This request was denied because it was not demonstrated that an urgent and non-routine situation exists due to the presence of ascochyta blight in chickpeas. Contact: (Libby Pemberton).
Specific: EPA authorized the use of sulfentrazone on sunflowers to control kochia; March 15, 2001 to June 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of clopyralid on flax to control Canada thistle and perennial sowthistle; March 28, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; April 9, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of ethalfluralin on canola to control kochia; April 13, 2001 to December 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of sulfentrazone on chick peas and dry peas to control wild buckwheat; April 24, 2001 to June 30, 2001. Contact: (Meredith Laws)

EPA authorized the use of imazamox on imidazolinone-tolerant canola to control wild mustard; May 1, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of imazamox on dry beans to control various night shade species; May 1, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on canola to control Canada thistle and perennial sowthistle; May 1, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of fomesafen in dry bean to control weeds; June 1, 2001 to August 15, 2002. Contact: (Shaja R. Brothers)

EPA authorized the use of tetraconazole on sugar beets to control cercospora leafspot; June 15, 2001 to September 30, 2001. Contact: (Andrea Conrath)

EPA authorized the use of propiconazole on dry beans to control rust; June 15, 2001 to August 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of sethoxydim on safflower to control wild oat; June 20, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of tebuconazole on sunflowers to control rust; July 5, 2001 to September 5, 2001. Contact: (Andrea Conrath)

EPA authorized the use of paraquat dichloride on green and dry peas grown for seed as a desiccant; July 11, 2001 to November 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of imazapic-amonium on pasture and rangeland (including land in the Conservation Reserve Program) to control leafy spurge; August 1, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

Ohio
Department of Agriculture

Denial: On August 22, 2001, EPA denied the use of pendimethalin on green onions to control common purslane.

This request was denied because the Agency made a determination that is was not possible to refine the residential risk assessment so that a safety finding could be made on this chemical in time to meet the growers' use season. Contact: (Dan Rosenblatt).
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 9, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on tomatoes to control nightshade; April 15, 2001 to July 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of sulfentrazone on strawberries to control common groundsel; June 20, 2001 to December 15, 2001. Contact: (Barbara Madden)

Oklahoma
Department of Agriculture

Crisis: On April 20, 2001, for the use of azoxystrobin on strawberries to control anthracnose. This program is expected to end on December 31, 2001. Contact: (Libby Pemberton)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of fomesafen on snap bean to control weeds; March 30, 2001 to September 10, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworm; April 13, 2001 to October 31, 2001. Contact: (Beth Edwards)

EPA authorized the use of sulfentrazone on sunflowers to control broadleaf weeds; May 3, 2001 to July 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; May 9, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of metsulfuron-methyl on sorghum to control weeds; June 15, 2001 to August 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of carbofuran on cotton to control cotton aphids; July 1, 2001 to October 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of tebufenozide on peanuts to control beet armyworm; July 15, 2001 to October 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of bifenthrin on peanuts to control spider mites; July 15, 2001 to October 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fluazinam on peanuts to control Sclerotinia blight; July 15, 2001 to October 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on spinach to control weeds; August 15, 2001 to March 31, 2001. Contact: (Andrew Ertman)

Oregon
Department of Agriculture

Denial: On February 1, 2001, EPA denied the use of triflumizole on hazelnut to control Eastern Filbert Blight (EFB). This request was denied because the submission did not meet the criteria for an urgent, non-routine situation based on the availability of an effective alternative, tebuconazole, available under a FIFRA section 18 exemption. Contact: (Andrea Conrath).

On April 18, 2001, EPA denied the use of folpet on hops to control downy mildew. This request was denied because the submission did not meet the criteria for an urgent, non-routine situation based on the availability of an effective alternative. Contact: (Libby Pemberton).

On June 26, 2001, EPA denied the use of triflumizole on sweet cherries to control powdery mildew. This request was denied because the claim of resistance to registered alternatives was not fully substantiated. Contact: (Andrew Ertman).
Specific: EPA authorized the use of oxyfluorfen on strawberry to control broadleaf weeds; December 15, 2000 to January 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on cranberries to control lotus, Douglas aster, and clover; January 1, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of pendimethalin on mint to control kochia and redroot pigweed; January 29, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of tebuconazole on hazelnuts to control EFB; February 15, 2001 to May 30, 2001. Contact: (Andrea Conrath)

EPA authorized the use of ethoprop on baby and idle hops to control garden symphylans; February 15, 2001 to May 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of oxytetracycline on apples to control fire blight; March 15, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of cymoxanil on hops to control downy mildew; March 21, 2001 to September 15, 2001. Contact: (Libby Pemberton)

EPA authorized the use of tebuconazole and myclobutanil on hops to control powdery mildew; April 15, 2001 to September 22, 2001. Contact: (Barbara Madden)

EPA authorized the use of halosulfuron-methyl on asparagus to control nutsedge; May 1, 2001 to October 31, 2001. Contact: (Meredith Laws)

EPA authorized the use of fluroxypyr on field corn to control volunteer potatoes; May 4, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fluroxypyr on sweet corn to control volunteer potatoes; May 4, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of carfentrazone-ethyl on hops to control hop sucker growth to indirectly control powdery mildew; May 10, 2001 to September 22, 2001. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on canola to control Canada thistle; May 11, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of imazamox on canola to control wild mustard; May 11, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of triazamate on Christmas trees to control root aphid; May 21, 2001 to October 31, 2001. Contact: (Steve Schaible)

EPA authorized the use of fludioxonil on peaches to control brown rot, gray mold and Rhizopus rot; June 6, 2001 to September 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of paraquat dichloride on green and dry peas grown for seed as a desiccant; June 15, 2001 to November 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of bifenazate on pears to control two-spotted spider mites; June 15, 2001 to September 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of myclobutanil on sugar beets to control powdery mildew; July 5, 2001 to September 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of ethoprop on mint to control garden symphylans; July 17, 2001 to September 15, 2001. Contact: (Dan Rosenblatt)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

Pennsylvania
Department of Agriculture

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 7, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of imidacloprid on stone fruit to control aphids; April 15, 2001 to October 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of metolachlor on spinach to control weeds; April 20, 2001 to August 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fomesafen on snap bean to control weeds; May 1, 2001 to August 30, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of metolachlor on tomatoes to control weeds; May 1, 2001 to June 30, 2001. Contact: (Andrew Ertman)

Rhode Island
Department of Environmental Management

Specific: EPA authorized the use of propyzamide on cranberries to control dodder; March 30, 2001 to June 1, 2001. Contact: (Andrew Ertman)

South Carolina
Clemson University

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; March 14, 2001 to June 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of fludioxonil on peaches and nectarines to control brown rot; April 20, 2001 to September 15, 2001. Contact: (Andrew Ertman)

South Dakota
Department of Agriculture

Crisis: On April 19, 2001, for the use of sulfentrazone on chickpeas and dried peas to control kochia. This program ended on June 30, 2001. Contact: (Meredith Laws)

On April 20, 2001, for the use of pendimethalin on mint to control kochia and pigweed. This program is expected to end on April 20, 2002. Contact: (Libby Pemberton)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 9, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of imazapic-ammonium on pasture and rangeland (including land in the Conservation Reserve Program) to control leafy spurge; March 15, 2001 to March 15, 2002. Contact: (Libby Pemberton)

EPA authorized the use of sulfentrazone on sunflowers to control kochia; March 16, 2001 to June 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of sulfentrazone on chickpeas and dried peas to control kochia; April 19, 2001 to June 30, 2001. Contact: (Meredith Laws)

EPA authorized the use of pendimethalin on mint to control kochia and redroot pigweed; April 27, 2001 to April 27. 2002. Contact: (Libby Pemberton)

EPA authorized the use of tebuconazole on wheat to control fusarium head blight; June 12, 2001 to August 31, 2001. Contact: (Beth Edwards)

EPA authorized the use of tebuconazole on barley to control fusarium head blight; June 12, 2001 to August 31, 2001. Contact: (Beth Edwards)

Tennessee
Department of Agriculture

Crisis: On September 13, 2000, for the use of imidacloprid on legume vegetables to control whiteflies. This program ended on September 28, 2000. Contact: (Andrea Conrath)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 7, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of azoxystrobin on strawberries to control anthracnose; March 20, 2001 to October 15, 2001. Contact: (Libby Pemberton)

EPA authorized the use of tebufenozide on pasture land to control armyworms; March 30, 2001 to December 15, 2002. Contact: (Barbara Madden)

EPA authorized the use of azoxystrobin on watercress to control cercospora leaf spot disease; April 15, 2001 to April 15, 2002. Contact: (Libby Pemberton)

EPA authorized the use of sulfentrazone on lima bean to control hophornbeam copperleaf; April 16, 2001 to September 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of sulfentrazone on cowpea to control hophornbeam copperleaf; April 16, 2001 to September 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of carbofuranl on cotton to control aphid; July 1, 2001 to September 30, 2001. Contact: (Barbara Madden)

Texas
Department of Agriculture

Crisis: On August 21, 2000, for the use of tebufenozide on legume vegetables to control beet armyworms. This program ended on September 5, 2000. Contact: (Andrew Ertman)

On August 21, 2000, for the use of tebufenozide on sunflowers to control beet armyworms. This program ended on September 5, 2000. Contact: (Andrew Ertman)

On September 18, 2001, for the use of azoxystrobin on cabbage to control alternaria leafspot and cercospora leafspot. This program ended on/is expected to end on September 18, 2002. Contact: (Libby Pemberton)
Specific: EPA authorized the use of imazapic plus 2,4-D on bermudagrass hay meadows and pastures to control grassy weeds; January 8, 2001 to October 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of metsulfuron-methyl on sorghum to control triazine-resistant pigweed; January 12, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 20, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of carbofuran on cotton to control cotton aphids; March 23, 2001 to October 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of sulfentrazone on sunflowers to control broadleaf weeds; March 28, 2001 to June 30, 2001. Contact: (Beth Edwards)

EPA authorized the use of emamectin benzoate on cotton to control beet armyworm; April 13, 2001 to October 1, 2001. Contact: (Beth Edwards)

EPA authorized the use of fluazinam on peanuts to control sclerotinia blight; June 1, 2001 to May 31, 2002. Contact: (Barbara Madden)

EPA authorized the use of bifenazate on greenhouse grown tomatoes to control spider mites; June 13, 2001 to June 12, 2002. Contact: (Barbara Madden)

EPA authorized the use of spinosad on peanuts to control lepidopteran larvae; June 15, 2001 to October 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of spinosad on alfalfa to control beet armyworms; June 22, 2001 to November 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of bifenthrin on sorghum grown for seed to control Banks grass mite; August 1, 2001 to August 1, 2002. Contact: (Shaja R. Brothers)

EPA authorized the use of fenbuconazole on grapefruit to control greasy spot; August 8, 2001 to March 31, 2002. Contact: (Dan Rosenblatt)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

Utah

Department of Agriculture

Denial: On June 26, 2001, EPA denied the use of triflumizole on cherries to control powdery mildew. This request was denied because the claim of resistance to registered alternatives was not fully substantiated. Contact: (Andrew Ertman).
Quarantine: EPA authorized the use of chlorine dioxide on various items/surfaces to control foot and mouth disease; June 15, 2001 to June 15, 2004. Contact: (Beth Edwards)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 16, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of oxytetracycline on apples to control fire blight; April 1, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of myclobutanil on sugar beets to control powdery mildew; May 21, 2001 to September 15, 2001. Contact: (Barbara Madden)

Vermont
Department of Agriculture

Crisis: On July 11, 2001, for the use of tebufenozide on pasture to control armyworms. This program ended on October 31, 2001. Contact: (Barbara Madden)
Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; April 9, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of tebufenozide on pasture to control armyworms; July 26, 2001 to October 31, 2001. Contact: (Barbara Madden)

Virginia
Department of Agriculture and Consumer Services

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on spinach to control weeds; February 15, 2001 to December 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of metolachlor on tomatoes to control nutsedge, nightshade and annual grasses; March 6, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of terbacil on watermelons to control broadleaf weeds; March 28, 2001 to July 10, 2001. Contact: (Beth Edwards)

EPA authorized the use of imidacloprid on stone fruit to control aphids; April 20, 2001 to October 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fomesafen on snap bean to control weeds; April 20, 2001 to September 20, 2001. Contact: (Shaja R. Brothers)

EPA authorized the use of bifenazate on greenhouse grown tomatoes to control spider mites; June 13, 2001 to June 12, 2002. Contact: (Barbara Madden)

EPA authorized the use of fluazinam on peanuts to control sclerotinia blight; June 15, 2001 to October 1, 2001. Contact: (Barbara Madden)

EPA authorized the use of azoxystrobin on peppers to control anthracnose fruit rot; June 26, 2001 to November 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of tebufenozide on grape to control grape berry moth; July 17, 2001 to October 1, 2001. Contact: (Shaja R. Brothers)

Washington
Department of Agriculture

Crisis: On June 1, 2001, for the use of azoxystrobin on chickpeas to control ascochyta blight. This program ended on August 31, 2001. Contact: (Libby Pemberton)
Denial: On June 26, 2001, EPA denied the use of triflumizole on sweet cherries to control powdery mildew. This request was denied because the claim of resistance to registered alternatives was not fully substantiated. Contact: (Andrew Ertman).

On September 27, 2001, EPA denied the use of azoxystrobin on chickpeas to control ascochyta blight. This request was denied because it was not demonstrated that an urgent and non-routine situation exists due to the presence of ascochyta blight in chickpeas. Contact: (Libby Pemberton).
Specific: EPA authorized the use of oxyfluorfen on strawberry to control broadleaf weeds; December 15, 2000 to January 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on cranberries to control lotus, Douglas aster, and clover; January 1, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of pendimethalin on mint to control kochia and redroot pigweed; January 29, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of oxytetracycline on apples to control fire blight; January 31, 2001 to August 31, 2001. Contact: (Andrea Conrath)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of fenpropathrin on currants to control cane borer and stem girdler; March 7, 2001 to June 14, 2001. Contact: (Libby Pemberton)

EPA authorized the use of tebuconazole and myclobutanil on hops to control powdery mildew; April 15, 2001 to September 22, 2001. Contact: (Barbara Madden)

EPA authorized the use of halosulfuron-methyl on asparagus to control nutsedge; May 1, 2001 to July 31, 2001. Contact: (Meredith Laws)

EPA authorized the use of fluroxypyr on field corn to control volunteer potatoes; May 4, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fluroxypyr on sweet corn to control volunteer potatoes; May 4, 2001 to August 1, 2001. Contact: (Andrew Ertman)

EPA authorized the use of carfentrazone-ethyl on hops to control hop sucker growth to indirectly control powdery mildew; May 10, 2001 to September 22, 2001. Contact: (Barbara Madden)

EPA authorized the use of clopyralid on canola to control Canada thistle; May 11, 2001 to July 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of triazamate on Christmas trees to control root aphid; May 21, 2001 to October 31, 2001. Contact: (Steve Schaible)

EPA authorized the use of paraquat dichloride on green and dry peas grown for seed as a desiccant; June 15, 2001 to November 30, 2001. Contact: (Libby Pemberton)

EPA authorized the use of bifenazate on pears to control two-spotted spider mites; June 15, 2001 to September 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of bifenazate on hops to control two-spotted spider mites; June 22, 2001 to September 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of fenpyroximate on hops to control two-spotted spider mites; June 22, 2001 to September 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of zinc phosphide on timothy and timothy/alfalfa and timothy/clover mixtures produced for hay and timothy produced for seed to control meadow vole; August 30, 2001 to May 1, 2002. Contact: (Libby Pemberton)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

West Virginia
Department of Agriculture

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 16, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of imidacloprid on peaches and nectarines to control aphids; April 1, 2001 to November 30, 2001. Contact: (Andrew Ertman)

EPA authorized the use of azoxystrobin on watercress to control cercospora leaf spot disease; May 1, 2001 to May 1, 2002. Contact: (Libby Pemberton)

Wisconsin
Department of Agriculture, Trade, and Consumer Protection

Crisis: June 13, 2001, for the use of chlorothalonil on ginseng to control leaf and stem blight. This program ended on October 1, 2001. Contact: (Dan Rosenblatt)
Specific: EPA authorized the use of clopyralid on cranberries to control various weeds; January 18, 2001 to December 31, 2001. Contact: (Libby Pemberton)

EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; February 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of metolachlor on spinach to control weeds; April 1, 2001 to August 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of dimethenamid on dry bulb onions to control yellow nutsedge and other broadleaf weeds; April 1, 2001 to July 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of propiconazole on cranberries to control cottonball disease; April 15, 2001 to July 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of dimethomorph on pumpkins and cucumbers to control phytophthora capsici; April 20, 2001 to October 1, 2001. Contact: (Libby Pemberton)

EPA authorized the use of imazamox on dry beans to control various nightshade species and velvetleaf; May 1, 2001 to July 31, 2001. Contact: (Barbara Madden)

EPA authorized the use of mancozeb on ginseng to control stem and leaf blight; May 17, 2001 to October 15, 2001. Contact: (Beth Edwards)

EPA authorized the use of fluroxypyr on field corn to control volunteer potatoes; June 7, 2001 to July 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of fluroxypyr on sweet corn to control volunteer potatoes; July 27, 2001 to August 15, 2001. Contact: (Andrew Ertman)

EPA authorized the use of chlorine dioxide on stored potatoes to control late blight; September 12, 2001 to August 31, 2002. Contact: (Andrew Ertman)

Wyoming
Department of Agriculture

Specific: EPA authorized the use of coumaphos in beehives to control varroa mites and small hive beetles; March 2, 2001 to February 1, 2002. Contact: (Barbara Madden)

EPA authorized the use of sulfentrazone on sulflowers to control broadleaf weeds; March 30, 2001 to July 1, 2001. Contact: (Beth Edwards)

EPA authorized the use of dimethenamid on sugar beets to control hairy nightshade and Redroot pigweed; May 1, 2001 to August 1, 2001. Contact: (Barbara Madden)

EPA authorized the use of lambda-cyhalothrin on barley to control Russian wheat aphids; May 2, 2001 to July 31, 2001. Contact: (Andrew Ertman)

EPA authorized the use of imazamox on dry beans to control various night shade species; June 1, 2001 to July 15, 2001. Contact: (Barbara Madden)

EPA authorized the use of tetraconazole on sugar beets to control cercospora leafspot (*Cercospora Beticola*); June 15, 2001 to September 30, 2001. Contact: (Barbara Madden)

EPA authorized the use of imazapic-amonium on pasture and rangeland (including land in the Conservation Reserve Program) to control leafy spurge and dalmation toadflax; August 1, 2001 to December 31, 2001. Contact: (Libby Pemberton)

B. Federal Departments and Agencies

Agriculture Department
Animal and Plant Health Inspector Service

Quarantine: EPA authorized the use of brodifacoum and bromethalin on Palmyra Atoll, Line Islands, Pacific Ocean. for the eradication of black rats (*Rattus Rattus*); June 11, 2001 to June 11, 2004. Contact: (Barbara Madden)

EPA authorized the use of paraformaldehyde in animal laboratories to control various diseases; August 7, 2001 to August 7, 2004. Contact: (Libby Pemberton)

Interior Department
Fish and Wildlife Service

Quarantine: EPA authorized the use of brodifacoum on islands of the Alaska Maritime National Wildlife Refuge with seabird populations that do not have existing exotic rodent populations to control Norway rats (*Rattus Norvegicus*) and house mice (*Mus Musculus*) introduced as a result of shipwrecks; March 23, 2001 to March 23, 2004. Contact: (Barbara Madden)

National Park Service

Quarantine: EPA authorized the use of brodifacoum on Anacapa Island, Channel Islands National Park to eradicate roof rats (*Rattus Rattus*), Norway rats (*Rattus Norvegicus*), and house mice (*Mus Musculus*); December 12, 2000 to December 12, 2003. Contact: (Barbara Madden)

List of Subjects

Environmental protection, Pesticides and pest.

Dated: November 2, 2001.

Peter Caulkins,

Acting Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 01–28526 Filed 11–13–01; 8:45 am]
BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[OPP–00730A; FRL–6811–3]

Draft Guidance for Pesticide Registrants on New Labeling Statements for Spray and Dust Drift Mitigation; Extension of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Extension of comment period.

SUMMARY: On August 22, 2001, the Agency announced the availability of, and sought public comment on, the draft PR Notice titled ''Spray and Dust Drift Label Statements for Pesticide Products.'' In response to a request from the public, EPA is extending the comment period for 60 days, until January 19, 2002. PR Notices are issued by the Office of Pesticide Programs (OPP) to inform pesticide registrants and other interested persons about important policies, procedures and registration-related decisions, and serve to provide guidance to pesticide registrants and OPP personnel. This particular draft PR Notice provides guidance on drift label statements for pesticide products. The purpose of this new labeling is to provide pesticide registrants and applicators and other individuals responsible for pesticide applications with improved and more consistent product label statements for controlling pesticide drift from spray and dust applications in order to be protective of human health and the environment. The Agency invites comments on any aspect of the draft PR Notice as well as the specific issues

addressed under **SUPPLEMENTARY INFORMATION.**

DATES: Comments, identified by the docket control number OPP–00730A, must be received on or before January 19, 2002.

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** of the August 22, 2001 **Federal Register**. To ensure proper receipt by EPA, it is imperative that you identify docket control number OPP–00730A in the subject line on the first page of your response.

FOR FURTHER INFORMATION CONTACT: Jay Ellenberger, Field and External Affairs Division (7506C), Office of Pesticide Programs, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (703) 305–7099, fax number: (703) 305–6244; and e-mail address: ellenberger.jay@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does this Action Apply to Me?

This action is directed to the public in general. It may be of particular interest, however, to those persons who hold pesticide registrations, apply pesticides, or regulate the use of pesticides for states, territories, or tribes. 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 information in this notice, consult the person listed under **FOR FURTHER INFORMATION CONTACT.**

B. How Can I Get Additional Information, Including Copies of this Document?

1. *Electronically.* You may obtain electronic copies of this document and the draft PR Notice from the Office of Pesticide Programs' Home Page at http://www.epa.gov/pesticides/. You can also go directly to the listings from 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'' or go directly to the **Federal Register** listings at http://www.epa.gov/fedrgstr/. A copy of the draft PR Notice is also available at http://www.epa.gov/opppmsd1/PR—Notices/prdraft-spraydrift801.htm.

2. *Fax-on-demand.* You may request a faxed copy of the draft PR Notice titled ''Spray and Dust Drift Label Statements for Pesticide Products'' by using a faxphone to call (202) 401–0527 and selecting item 6142. You may also follow the automated menu.

3. *In person.* The Agency has established an official record for this action under docket control number OPP–00730A. 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.

II. What Action is EPA Taking?

In the **Federal Register** of August 22, 2001 (66 FR 44141) (FRL–6792–4), EPA announced the availability of a draft PR Notice titled ''Spray and Dust Drift Label Statements for Pesticide Products.'' The Agency provided a 90–day comment period, which was scheduled to end November 20, 2001. EPA is extending the comment period for the draft PR Notice for an additional 60 days, until January 19, 2002.

List of Subjects

Environmental protection, pesticides.

Dated: November 5, 2001.

Marcia E. Mulkey,

Director, Office of Pesticide Programs.

[FR Doc. 01–28523 Filed 11–8–01; 3:21 pm]

BILLING CODE 6560–50–S

ENVIRONMENTAL PROTECTION AGENCY

[FRL–7103–1]

Notice of Availability for Public Review and Comment of EPA Staff White Paper That Explores a Number of Options for Addressing Boutique Fuels

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The President's National Energy Policy issued on May 17, 2001, directed EPA to * * * study opportunities to maintain or improve the environmental benefits of state and local ''boutique'' clean fuel programs while exploring ways to increase the flexibility of the fuels distribution infrastructure, improve fungibility, and provide added gasoline market liquidity * * *

In response to this directive, EPA prepared a report that discusses the actions that EPA will take in the near term to ensure a smoother transition from winter to summer grade reformulated gasoline (RFG). That report, entitled: ''Study of Boutique Fuels and Issues Relating to Transition from Winter to Summer Gasoline'' has been sent to the President and has been made publicly available, as noted below.

In addition, EPA staff also prepared a White Paper that addresses boutique fuels in the longer term. This White Paper, for which today EPA is announcing its availability, explores a number of options that could reduce the total number of fuels and lays the groundwork for further study. The Staff White Paper is entitled: ''Study of Unique Gasoline Fuel Blends (''Boutique Fuels''), Effects on Fuel Supply and Distribution and Potential Improvements.''

EPA is publishing this notice of availability of and requesting public review and comment on the Staff White Paper. The public comment period will end December 31, 2001. The Staff White Paper, as well as the Study of Boutique Fuels and Issues Relating to Transition from Winter to Summer Gasoline, are both available in the public docket A–2001–20. The docket is located at U.S. Environmental Protection Agency, 401 M St., SW., Room 1500, Washington, DC 20460. The telephone number of the docket office is (202) 260–7548.

Both documents are also available on EPA's web site at *http://www.epa.gov/otaq/fuels.htm.*

FOR FURTHER INFORMATION CONTACT: Julia Macallister, Office of Air Quality and

Transportation, (734) 214–4131, or by e-mail at *macallister.julia@epa.gov*.

Dated: November 7, 2001.

Jeffrey R. Holmstead,

Assistant Administrator, Office of Air and Radiation.

[FR Doc. 01–28522 Filed 11–13–01; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL COMMUNICATIONS COMMISSION

[CC Docket No. 92–237; DA 01–2593]

Next Meeting of the North American Numbering Council

AGENCY: Federal Communications Commission.

ACTION: Notice.

SUMMARY: On November 8, 2001, the Commission released a public notice announcing the November 27–28, 2001 meeting and agenda of the North American Numbering Council (NANC). The intended effect of this action is to make the public aware of the NANC's next meeting and its agenda.

FOR FURTHER INFORMATION CONTACT: Deborah Blue, Special Assistant to the Designated Federal Officer (DFO) at (202) 418–2320 or *dblue@fcc.gov*. The address is: Network Services Division, Common Carrier Bureau, Federal Communications Commission, The Portals II, 445 12th Street, SW, Suite 6A207, Washington, DC 20554. The fax number is: (202) 418–2345. The TTY number is: (202) 418–0484.

SUPPLEMENTARY INFORMATION: *Released:* November 8, 2001.

The North American Numbering Council (NANC) has scheduled a meeting to be held Tuesday, November 27, 2001, from 8:30 a.m. until 5 p.m., and on Wednesday, November 28, 2001, from 8:30 a.m., until 12 noon (if required). The meeting will be held at the Federal Communications Commission, Portals II, 445 12th Street, SW, Room TW–C305, Washington, DC.

SUPPLEMENTARY INFORMATION: This meeting is open to members of the general public. The FCC will attempt to accommodate as many participants as possible. The public may submit written statements to the NANC, which must be received two business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting. Requests to make an oral statement or provide written comments to the NANC should be sent to Deborah Blue at the address under **FOR FURTHER INFORMATION CONTACT**, stated above.

Proposed Agenda

1. Announcements and Recent News
2. Approve Minutes

—Meeting of October 16–17, 2001

3. Report of North American Numbering Plan Administrator (NANPA)
4. Report of NANPA Oversight Working Group
5. Report of National Thousands-Block Pooling Administrator
6. Report of NANP Expansion/Optimization IMG
7. Status of Industry Numbering Committee activities
8. Report of the Local Number Portability Administration (LNPA) Working Group

—Wireless Number Portability Operations (WNPO) Subcommittee

9. Report of NAPM LLC
10. Report from NBANC
11. Report of Cost Recovery Working Group
12. Steering Committee

—Table of NANC Projects

13. Report of Steering Committee
14. Action Items
15. Public Participation (5 minutes each)
16. Other Business

Wednesday, November 28, 2001 (if required)

17. Complete any unfinished Agenda Items
18. Other Business

Federal Communications Commission.

Diane Griffin Harmon,

Acting Chief, Network Services Division, Common Carrier Bureau.

[FR Doc. 01–28452 Filed 11–13–01; 8:45 am]

BILLING CODE 6712–01–P

FEDERAL RESERVE SYSTEM

Meeting; Sunshine Act

AGENCY HOLDING THE MEETING: Board of Governors of the Federal Reserve System.

TIME AND DATE: 11 a.m., Monday, November 19, 2001.

PLACE: Marriner S. Eccles Federal Reserve Board Building, 20th and C Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Michelle A. Smith, Assistant to the Board; 202–452–3204.

SUPPLEMENTARY INFORMATION: You may call 202–452–3206 beginning at approximately 5 p.m. two business days before the meeting for a recorded announcement of bank and bank holding company applications scheduled for the meeting; or you may contact the Board's Web site at *http://www.federalreserve.gov* for an electronic announcement that not only lists applications, but also indicates procedural and other information about the meeting.

Dated: November 9, 2001.

Robert deV. Frierson,

Deputy Secretary of the Board.

[FR Doc. 01–28600 Filed 11–9–01; 11:33 am]

BILLING CODE 6210–01–P

FEDERAL TRADE COMMISSION

Granting of Request for Early Termination of the Waiting Period Under the Premerger Notification Rules

Section 7A of the Clayton Act, 15 U.S.C. 18a, as added by Title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, requires persons contemplating certain mergers or acquisitions to give the Federal Trade Commission and the Assistant Attorney General advance notice and to wait designated periods before consummation of such plans. Section 7A(b)(2) of the Act permits the agencies, in individual cases, to terminate this waiting period prior to its expiration and requires that notice of this action be published in the **Federal Register**.

The following transactions were granted early termination of the waiting period provided by law and the premerger notification rules. The grants were made by the Federal Trade Commission and the Assistant Attorney General for the Antitrust Division of the Department of Justice. Neither agency intends to take any action with respect to these proposed acquisitions during the applicable waiting period.

Trans #	Acquiring	Acquired	Entities
TRANSACTIONS GRANTED EARLY TERMINATION—10/01/2001			
20012387	Fortis (B)	Protective Life Corporation	Protective Life Insurance Company.
20012442	Adventist Health System Sunbelt Healthcare Corporation.	PorteCare Adventist Health System	PorteCare Adventist Health System.
20012444	Constellation Brands, Inc	Derek Benham	Codera Production Group, LLC. Codera Wine Group, Inc
20012445	BRL Hardy Ltd	Derek Benham	Coderal Production Group, LLC. Coderal Wine Group, Inc
20012449	Constellation Brands, Inc.	Courtney Benham	Codera Production Group, LLC. Codera Wine Group, Inc
20012450	BRL Hardy Ltd	Courtney Benham	Codera Production Group, LLC. Codera Wine Group, Inc.
20012461	Hewlett-Packard Company	Indigo N.V	Indigo N.V.
TRANSACTIONS GRANTED EARLY TERMINATION—10/04/2001			
20012303	Trinity Industries, Inc	Thrall Car Management Company, Inc	Thrall Car Manufacturing Company.
20012304	Thrall Car Management Company, Inc	Trinity Industries, Inc	Trinity Industries, Inc.
20012419	Capital One Financial Corporation	PeopleFirst Inc	PeopleFirst Inc.
20012452	NTELOS Inc	Conesoga Enterprises, Inc	Conestoga Enterprises, Inc.
TRANSACTIONS GRANTED EARLY TERMINATION—10/05/2001			
20012405	American Water Works Company, Inc	Enron Corp	Azurix Industries Corp. Azurix North America Corp.
20012406	American Water Works Company, Inc	Marlin Water Trust	Azurix Industries Corp. Azurix North America Corp
20012447	Joseph Littlejohn & Levy Fund III, L.P	LaQuinta Properties, Inc	Meditrust Healthcare Corporation.
20012465	Warburg Pincus Private Equity VIII L.P	MSN Holdings, Inc	MSN Holdings, Inc.
20012470	GS Capital Partners 2000, L.P.	Apple American Midwest, Inc.	Apply American Limited Partnership of Indiana. Apple American Limited Partnership of Ohio.
20012472	Madison Dearborn Capital Partners IV, L.P.	Focal Communications Corporation	Focal Communications Corporation.
20012483	Verizon Communications Inc	Gregory A. Neely	Alabama Wireless, Inc.
TRANSACTIONS GRANTED EARLY TERMINATION—10/09/2001			
20012404	Fisher Scientific International Inc	Cole-Parmer Instrument Company	Cole-Parmer Instrument Company.
20020003	Marriott International, Inc	Scottish Power plc	Birmingham Syn Fuel I, Inc. Birmingham SynFuel II, Inc. Brimingham SynFuel, LLC. PacificCorp Financial Services, Inc. PacificCorp SynFuel, LLC.
TRANSACTIONS GRANTED EARLY TERMINATION—10/10/2001			
20012178	Koninklijke Philips Electronics N.V	Marconi plc	Marconi Medical Systems, Inc.
20012460	ESL Partners, L.P	AutoNation, Inc	AutoNation, Inc.
20012484	Cadbury Schweppes plc	Pernod Ricard S.A	Yoo-Hoo Industries Inc.
TRANSACTIONS GRANTED EARLY TERMINATION—10/11/2001			
20012468	H&CB	Kookmin Bank	Kookmin Bank.
20012469	Kookmin Bank	H&CB	H&CB
20012474	Ivax Corporaiton	Elan Corporation plc	Elan Pharma International Limited.
20012477	Warburg, Pincus Ventures, L.P	BEA Systems, Inc	BEA Systems, Inc.
TRANSACTIONS GRANTED EARLY TERMINATION—10/12/2001			
20012437	Deutsche Telekom AG	NTELOS Inc	NTELOS Acquisition Corp., Conestoga Wireless Company.
20012448	CSR Limited	Cemex, S.A. de C.V	Cemex, S.A. de C.V.
20012451	Curtiss-Wright Corporation	Lau Massachusetts Business Trust	Lau Defense Systems, LLC.
20012454	Smithfield Foods, Inc	Packerland Holdings, Inc	Packerland Holdings, Inc.
20012482	Tyco International Ltd	SBC Communications Inc	Alarm Holdings, Inc.
20020002	AT&T Wireless Services, Inc	MetroPCS, Inc	GWI PCS8, Inc., PCS81, LLC.

FOR FURTHER INFORMATION CONTACT: Sandra M. Peay, or Parcellena P. Fielding, Contact Representatives. Notification Office, Bureau of Federal Trade Commission, Permerger

Competition, Room 303, Washington, DC 20580, (202) 326–3100.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 01–28446 Filed 11–13–01; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 012 3051]

A&S Pharmaceutical Corporation; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before December 6, 2001.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Joni Lupovitz or Laura Koss, FTC/S–4302, 600 Pennsylvania Ave., NW., Washington, DC 20580. (202) 326–3743 or 326–2890.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC homepage (for November 6, 2001), on the World Wide Web, at *http://www.fc.gov/os/2001/11/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondent A&S Pharmaceutical Corporation (''A&S'').

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns ''Made in U.S.A'' claims on packaging and labeling for A&S's aspirin tablets sold at retail bearing private brand names. The Commission's complain alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Food Lion, Price Chopper, and BJ's Wholesale Club, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredient, bulk aspirin compound, that respondent processed into aspirin tablets is or was made outside the United States. The imported bulk aspirin compound comprises a substantial percentage of total manufacturing costs and imparts the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of A&S's private label aspirin brands or products are mislabeled, but only that certain products for certain customers have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits A&S from misrepresenting the extent to which any over-the-counter drug product is made in the United States. The proposed order would allow A&S to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part IV of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 01–28441 Filed 11–13–01; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 012 3039]

Leiner Health Products, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before December 6, 2001.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Joni Lupovitz or Laura Koss, FTC/S–4302, 600 Pennsylvania Ave., NW., Washington, DC 20580. (202) 326–3743 or 326–2890.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the compliant. An electronic copy of the full text of the consent agreement package can be obtained from the FTC homepage (for November 6, 2001), on the World Wide Web, at *http://www.ftc.gov/os/2001/11/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondent Leiner Health Products, Inc. (''Leiner'').

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns ''Made in U.S.A.'' claims on packaging and labeling for Leiner's acetaminophen tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Wal-Mart, Costco, Target, and Safeway, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredient, bulk acetaminophen compound, that respondent processed into acetaminophen tablets, is or was made outside the United States. The imported bulk acetaminophen comprises a substantial percentage of total manufacturing costs and imparts the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of Leiner's private label acetaminophen brands or products are mislabeled, but only that certain products for certain customers have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Leiner from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States. The order defines ''analgesic'' as an agent used to alleviate pain. The proposed order would allow Leiner to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The proposed order also would allow Leiner to represent that a product containing imported active ingredient(s) is ''Processed in the United States with Foreign Ingredients'' when describing a product that has been ''significantly processed'' in the United States.

The draft order also includes a provision that would allow Leiner to use its current packaging inventory until December 31, 2001.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 01–28442 Filed 11–13–01; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 012 3058]

LNK International, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before December 6, 2001.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Joni Lupovitz or Laura Koss, FTC/S–4302, 600 Pennsylvania Ave., NW., Washington, DC 20580. (202) 326–3743 or 326–2890.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been

filed with and accepted by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC homepage (for November 6, 2001), on the World Wide Web, at *http://www.ftc.gov/os/2001/11/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with Section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondent LNK International, Inc. (''LNK'').

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns ''Made in U.S.A.'' claims on packaging and labeling for LNK's aspirin and acetaminophen tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Compass Foods (A&P), Eckerd Company, and Stop & Shop Supermarket Company, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredients, bulk aspirin and acetaminophen compounds, that respondent processed into aspirin and acetaminophen tablets, are or were made outside the United States. The imported bulk aspirin and acetaminophen comprise a substantial percentage of total manufacturing costs and impart the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of LNK's private label aspirin and acetaminophen brands or products are mislabeled, but only that certain products for certain customers have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits LNK from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States. The order defines ''analgesic'' as an agent used to alleviate pain. The proposed order would allow LNK to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The proposed order also would allow LNK to represent that a product containing imported active ingredient(s) is ''Processed in the United States with Foreign Ingredients'' when describing a product that has been ''significantly processed'' in the United States.

The draft order also includes a provision that would allow LNK to use its current packaging inventory until December 31, 2001.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

By Direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 01–28443 Filed 11–13–01; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 012 3121]

Perrigo Company; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint that accompanies the consent agreement and the terms of the consent order—embodies in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before December 6, 2001.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Joni Lupovitz or Laura Koss, FTC/S–4302, 600 Pennsylvania Ave., NW., Washington, DC 20580. (202) 326–3743 or 326–2890.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC homepage (for November 6, 2001), on the World Wide Web, at *http://www.ftc.gov/os/2001/11/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Avenue, NW., Washington, DC 20580,

either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania, Ave., NW., Washington, DC 20580. Two paper copies of each comment should be filed, and should be accompanied, if possible, by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with section 4.9(b)(6)(ii) of the Commission's Rules of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondent Perrigo Company. (''Perrigo'').

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns ''Made in U.S.A.'' claims on packaging and labeling for Perrigo's aspirin, acetaminophen, and ibuprofen tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Kmart, Wal-Mart, Target, and Safeway, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredients, bulk aspirin, acetaminophen, or ibuprofen compounds, that respondent processed into aspirin, acetaminophen, or ibuprofen tablets, are or were made outside the United States. The imported bulk compounds comprise a substantial percentage of total manufacturing costs and impart the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of Perrigo's private label aspirin, acetaminophen, and ibuprofen brands or products are mislabeled, but only that certain products have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits Perrigo from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States. The order defines ''analgesic'' as an agent used to alleviate pain. The proposed order would allow Perrigo to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The proposed order also would allow Perrigo to represent that a product containing imported active ingredient(s) is ''Processed in the United States with Foreign Ingredients'' when describing a product that has been ''significantly processed'' in the United States.

The draft order is effective on December 31, 2001, for OTC products containing an imported analgesic and on March 31, 2001, for all other OTC products containing an analgesic. These dates take into consideration the number of different products Perrigo produces and the time it will take to convert its stock without disrupting its supply of store brand goods to its retailer customers. Thus, the order is designed to end the mislabeling quickly while minimizing unnecessary burdens on Perrigo, its customers, and consumers of these products.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 01–28444 Filed 11–13–01; 8:45 am]

BILLING CODE 6750–01–M

FEDERAL TRADE COMMISSION

[File No. 012 3059]

Pharmaceutical Formulations, Inc.; Analysis To Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair or deceptive acts or practices or unfair methods of competition. The attached Analysis to Aid Public Comment describes both the allegations in the complaint that accompanies the consent agreement and the terms of the consent order—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before December 6, 2001.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Joni Lupovitz or Laura Koss, FTC/S–4302, 600 Pennsylvania Ave., NW., Washington, DC 20580. (202) 326–3743 or 326–2980.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's Rules of Practice (16 CFR 2.34), notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis to Aid Public Comment describes the terms of the consent agreement, and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC homepage (for November 6, 2001), on the World Wide Web, at *http:/www.ftc.gov/os/2001/11/index.htm.*A paper copy can be obtained from the FTC Public Reference Room, Room H–130, 600 Pennsylvania Ave., NW., Washington, DC 20580, either in person or by calling (202) 326–3627.

Public comment is invited. Comments should be directed to: FTC/Office of the Secretary, Room 159, 600 Pennsylvania Ave., NW., Washington, DC 20580. Two

paper copies of each comment should be filed, and should be accompanied, if possible by a 3½ inch diskette containing an electronic copy of the comment. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with section 4.9(b)(6)(ii) of the Commission's Rule of Practice (16 CFR 4.9(b)(6)(ii)).

Analysis of Proposed Consent Order To Aid Public Comment

The Federal Trade Commission has accepted an agreement, subject to final approval, to a proposed consent order from respondent Pharmaceutical Formulations, Inc.(''PFI'').

The proposed consent order has been placed on the public record for thirty (30) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement and take other appropriate action or make final the agreement's proposed order.

This matter concerns ''Made in U.S.A.'' claims on packaging and labeling for PFI's aspirin and acetaminophen tablets sold at retail bearing private brand names. The Commission's complaint alleges that respondent misrepresented on packaging and labeling that certain of these products, manufactured for customers such as Kmart, Duane Reade, Eckerd, and Harris Teeter, are all or virtually all made in the United States. According to the complaint, these products are actually made with significant foreign content. The products' active ingredients, bulk aspirin and acetaminophen compounds, that respondent processed into aspirin and acetaminophen tablets, are or were made outside the United States. The imported bulk aspirin and acetaminophen comprise a substantial percentage of total manufacturing costs and impart the crucial analgesic quality to the OTC products at issue. The Commission's complaint does not allege that all of PFI's private label aspirin and acetaminophen brands or products are mislabeled, but only that certain products for certain customers have been improperly labeled.

The proposed consent order contains a provision that is designed to remedy the charges and to prevent the respondent from engaging in similar acts and practices in the future. Part I of the proposed order prohibits PFI from misrepresenting the extent to which any non-prescription drug product containing an analgesic is made in the United States. The order defines ''analgesic'' as an agent used to alleviate pain. The proposed order would allow PFI to represent that such products are made in the United States as long as all, or virtually all, of the ingredients or component parts of such products are made in the United States and all, or virtually all, of the labor in manufacturing such products is performed in the United States. The proposed order also would allow PFI to represent that a product containing imported active ingredient(s) is ''Processed in the United States with Foreign Ingredients'' when describing a product that has been ''significantly processed'' in the United States.

The draft order also includes a provision that would allow PFI to use its current packaging inventory until December 31, 2001.

Part II of the proposed order requires the respondent to maintain materials relied upon in disseminating any representation covered by the order. Part III of the proposed order requires the respondent to distribute copies of the order to certain company officials and employees. Part IV of the proposed order requires the respondent to notify the Commission of any change in the corporation that may affect compliance obligations under the order. Part V of the proposed order requires the respondent to file one or more compliance reports. Part VI of the proposed order is a provision whereby the order, absent certain circumstances, terminates twenty years from the date of issuance.

The purpose of this analysis is to facilitate public comment on the proposed consent order. It is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

By direction of the Commission

Donald S. Clark,

Secretary

[FR Doc. 01–28445 Filed 11–13–01; 8:45 am]

BILLING CODE 6750–01–M

OFFICE OF GOVERNMENT ETHICS

Updated OGE Senior Executive Service Performance Review Board

AGENCY: Office of Government Ethics (OGE).

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members of the updated OGE Senior Executive Service (SES) Performance Review Board.

EFFECTIVE DATE: November 14, 2001.

FOR FURTHER INFORMATION CONTACT: Dan D. Dunning, Deputy Director for Administration and Information Management, Office of Government Ethics, Suite 500, 1201 New York Avenue, NW., Washington, DC 20005–3917; Telephone: 202–208–8000; TDD: 202–208–8025; FAX: 202–208–8037.

SUPPLEMENTARY INFORMATION: 5 U.S.C. 4314(c) requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management at 5 CFR part 430, subpart C and § 430.310 thereof in particular, one or more Senior Executive Service performance review boards. As a small executive branch agency, OGE has just one board. In order to ensure an adequate level of staffing and to avoid a constant series of recusals, the designated members of OGE's SES Performance Review Board are being drawn, as in the past, primarily from the SES ranks of other agencies because OGE itself currently has four SES members. The board shall review and evaluate the initial appraisal of each OGE senior executive's performance by his or her supervisor, along with any recommendations in each instance to the appointing authority relative to the performance of the senior executive. This notice updates the membership of OGE's SES Performance Review Board as it was last published at 61 FR 30927 (June 18, 1996).

Approved: November 7, 2001.

Amy L. Comstock,

Director, Office of Government Ethics.

The following have been selected as regular members of the SES Performance Review Board of the Office of Government Ethics:

Dan D. Dunning [Chair], Deputy Director for Administration and Information Management, Office of Government Ethics;

Joseph E. Gangloff, Senior Counsel, Office of International Affairs, Department of Justice;

James H. Thessin, Deputy Legal Adviser, Department of State;

Steven Y. Winnick, Deputy General Counsel, Department of Education.

[FR Doc. 01–28528 Filed 11–13–01; 8:45 am]

BILLING CODE 6345–01–U

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

Disease, Disability, and Injury Prevention and Control Special Emphasis Panel (SEP): Sexually Transmitted Disease (STD) Faculty Expansion Program, Program Announcement #02005

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): Sexually Transmitted Disease (STD) Faculty Expansion Program, Program Announcement #02005.

Times and Date: 9 a.m.–9:30 a.m., November 29, 2001 (Open). 9:30 a.m.–4:30 p.m., November 29, 2001 (Closed).

Place: Centers for Disease Control and Prevention, National Center for HIV, STD, and TB Prevention, 10 Corporate Square Blvd, Conference Room 1304, Atlanta, Georgia 30329.

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 Deputy Director for Program Management, CDC, pursuant to Pub. L. 92–463.

Matters to be Discussed: The meeting will include the review, discussion, and evaluation of applications received in response to Program Announcement 02005.

CONTACT PERSON FOR MORE INFORMATION: Elizabeth A. Wolfe, Prevention Support Office, National Center for HIV, STD, and TB Prevention, CDC, Corporate Square Office Park, 8 Corporate Square Boulevard, M/S E07, Atlanta, Georgia 30329, telephone 404/639–8025.

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: November 2, 2001.

John C. Burckhardt,

Acting Director, Management Analysis and Services Office, Centers for Disease Control and Prevention CDC.

[FR Doc. 01–28436 Filed 11–13–01; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institutes of Health Guidelines for Research Using Human Pluripotent Stem Cells

ACTION: Notice; withdrawal of NIH Guidelines for Research Using Pluripotent Stem Cells Derived from Human Embryos (published August 25, 2000, 65 FR 51976, correctedNovember 21, 2000, 65 FR 69951).

SUMMARY: The National Institutes of Health (NIH) announces the withdrawal of those sections of the NIH Guidelines for Research Using Human Pluripotent Stem Cells, *http://www.nih.gov/news/stemcell/stemcellguidelines.htm.* (NIH Guidelines), that pertain to research involving human pluripotent stem cells derived from human embryos that are the result of *in vitro* fertilization, are in excess of clinical need, and have not reached the stage at which the mesoderm is formed.

The President has determined the criteria that allow Federal funding for research using existing embryonic stem cell lines, *http://www.whitehouse.gov/news/releases/2001/08/print/20010809-1.html.* Thus, the NIH Guidelines as they relate to human pluripotent stem cells derived from human embryos are no longer needed.

FOR FURTHER INFORMATION CONTACT: NIH Office of Extramural Research, NIH, 1 Center Drive, MSC 0152, Building 1, Room 146, Bethesda, MD 20892, or e-mail *DDER@nih.gov.*

Dated: November 2, 2001.

Ruth L. Kirschstein,

Acting Director, National Institutes of Health.

[FR Doc. 01–28426 Filed 11–13–01; 8:45 am]

BILLING CODE 4140–01–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Invasive Species Advisory Committee; Notice

AGENCY: Office of the Secretary, Interior.

ACTION: Request for nominations for the Invasive Species Advisory Committee—Extension of Deadline for Nomination Submissions.

SUMMARY: This is an extension of the deadline for nomination submissions due to ongoing delays in surface mail processing in the Washington, DC Metropolitan Area.

DATES: Extended Deadline—Tuesday, November 27, 2001 (6 p.m. EST).

ADDRESSES: Nominations should be sent to Lori Williams, Executive Director, National Invasive Species Council, 1951 Constitution Ave., NW., Room 320, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Kelsey Passé, Program Analyst, at (202) 208–6336, fax: (202) 208–1526, or by e-mail at *Kelsey_Passe@ios.doi.gov.*

SUPPLEMENTARY INFORMATION:

Advisory Committee Scope and Objectives

The purpose and role of the ISAC are to provide advice to the Invasive Species Council (Council), as authorized by Executive Order 13112, on a broad array of issues including preventing the introduction of invasive species, providing for their control, and minimizing the economic, ecological, and human health impacts that invasive species cause. The Council is Co-chaired by the Secretaries of the Interior, Agriculture, and Commerce. The duty of the Council is to provide national leadership regarding invasive species issues. Pursuant to the Executive Order, the Council developed a National Invasive Species Management Plan. The Plan is available on the web at *www.invasivespecies.gov.* The Council is responsible for effective implementation of the Plan. The Council coordinates Federal agency activities concerning invasive species; prepares, revises and issues the National Invasive Species Management Plan; encourages planning and action at local, tribal, State, regional and ecosystem-based levels; develops recommendations for international cooperation in addressing invasive species; facilitates the development of a coordinated network to document, evaluate, and monitor impacts from invasive species; and facilitates establishment of an information-sharing system on invasive species that utilizes, to the greatest extent practicable, the Internet.

The role of ISAC is to maintain an intensive and regular dialogue regarding the aforementioned issues. ISAC provides advice in cooperation with stakeholders and existing organizations addressing invasive species. The ISAC meets up to four (4) times per year.

Terms for current members of the ISAC expire at the end of 2001. Current members of the ISAC are eligible for reappointment. The Secretary of the Interior will appoint members to ISAC in consultation with the Secretaries of Agriculture and Commerce. The Secretary of Interior actively solicits

new nominees to the ISAC. Members of ISAC should be knowledgeable in and represent one or more of the following communities of interests: weed science; fisheries science; rangeland management; forest science; entomology; nematology; plant pathology; veterinary medicine; the broad range of farming or agricultural practices; biodiversity issues; applicable laws and regulations relevant to invasive species policy; risk assessment; biological control of invasive species; public health/epidemiology; industry activities, structure, and international trade; environmental education; ecosystem monitoring; natural resource database design and integration; internet-based management of conservation issues.

Members should also have practical experience in one or more of the following areas: representing sectors of the national economy that are significantly threatened by biological invasions (e.g. agriculture, fisheries, public utilities, recreational users, tourism, etc.); representing sectors of the national economy whose routine operations may pose risks of new or expanded biological invasions (e.g. shipping, forestry, horticulture, aquaculture, pet trade, etc.); developing natural resource management plans on regional or ecosystem-level scales; addressing invasive species issues, including prevention, control and monitoring, in multiple ecosystems and on multiple scales; integrating science and the human dimension in order to create effective solutions to complex conservation issues including education, outreach, and public relations experts; coordinating diverse groups of stakeholders to resolve complex environmental issues and conflicts; and complying with NEPA and other federal requirements for public involvement in major conservation plans. Members will be selected in order to achieve a balanced representation of viewpoints, so to effectively address invasive species issues under consideration. No member may serve on the ISAC for more than three (3) consecutive terms of two years. Reappointment terms will be staggered within stakeholder groups (2 or 3 years) to minimize turnover.

Members of the ISAC and its subcommittees serve without pay. However, while away from their homes or regular places of business in the performance of services of the ISAC, members shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the government service, as authorized by section 5703 of Title 5, United States Code.

Submitting Nominations

Nominations should be typed and should include the following:

1. A brief summary of no more than two (2) pages explaining the nominee's suitability to serve on the ISAC.
2. A resume or curriculum vitae.
3. Letters of reference.

Nominations should be sent no later than Tuesday, November 27, 2001 (6 p.m. EST) to Lori Williams, National Invasive Species Council, 1951 Constitution Ave, NW., Room 320 Washington, DC, 20240. Due to the delays in processing mail, faxed nominations will also be accepted and may be sent to (202) 208–1526. However, all faxed nominations and letters of support *must have signatures in order to be considered.* Please fax ONE COPY ONLY to avoid congestion of the NISC office fax line.

To ensure that recommendations of the ISAC take into account the needs of the diverse groups served, the Department of the Interior is actively soliciting nominations of qualified minorities, women, persons with disabilities and members of low-income populations.

Dated: November 8, 2001.

James Tate, Jr.,

Science Advisor to the Secretary of the Interior.

[FR Doc. 01–28518 Filed 11–13–01; 8:45 am]

BILLING CODE 4310–RK–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Availability of Draft Comprehensive Conservation Plan and Environmental Assessment for Salinas River National Wildlife Refuge, Monterey County, California

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: The U.S. Fish and Wildlife Service announces that a Draft Comprehensive Conservation Plan and Environmental Assessment (CCP/EA) for Salinas River National Wildlife Refuge (Refuge) is available for review and comment. This CCP/EA, prepared pursuant to the National Wildlife Refuge System Improvement Act of 1997 and the National Environmental Policy Act of 1969, describes how the U.S. Fish and Wildlife Service intends to manage the Refuge for the next 15 years. Also available for review with the CCP/EA are draft compatibility determinations for waterfowl hunting, surf fishing, wildlife observation and photography, environmental education and interpretation, research, and mosquito control.

DATES: Please submit comments on the Draft CCP/EA on or before December 14, 2001.

ADDRESSES: Comments on the Draft CCP/EA should be addressed to: Mark Pelz, Planning Team Leader, U.S. Fish and Wildlife Service, CA/NV Refuge Planning Office, 2800 Cottage Way, Room W–1916, Sacramento, CA 95825. Comments may also be submitted via electronic mail to *FW1PlanningComments@fws.gov*. Please type ''Salinas River NWR'' in the subject line.

FOR MORE INFORMATION CONTACT: Mark Pelz, U.S. Fish and Wildlife Service, California/Nevada Refuge Planning Office, Room W–1916, 2800 Cottage Way, Sacramento, California, 95825; (916) 414–6504; fax (916) 414–6512; or Ivette Loredo, Refuge Manager, Salinas River National Wildlife Refuge, PO Box 524, Newark, CA 94560–0524; (510) 792–0222.

SUPPLEMENTARY INFORMATION:

Availability of Documents

Copies of the Draft CCP/EA may be obtained by writing to U.S. Fish and Wildlife Service, Attn: Mark Pelz, California/Nevada Refuge Planning Office, Room W–1916, 2800 Cottage Way, Sacramento, California, 95825. Copies of the plan may be viewed at this address or at the San Francisco Bay NWR Complex Headquarters, #1 Marshlands Road, Fremont, California. The Draft CCP/EA will also be available for viewing and download online at *http://pacific.fws.gov/planning*.

Background

The Salinas River Refuge encompasses 366 acres located 11 miles north of Monterey, California, where the Salinas River empties into Monterey Bay. The Refuge is part of the San Francisco Bay National Wildlife Refuge Complex, which has its headquarters in Fremont, California. Refuge lands include a range of terrestrial and aquatic habitats, including coastal dunes and beach, grasslands, wetlands, and riparian scrub. Because of its location within the Pacific Flyway, the Refuge is used by a variety of migratory birds during breeding, wintering, and migration periods. It also provides habitat for several threatened and endangered species, including western snowy plover, California brown pelican, Smith's blue butterfly, Monterey gilia,

and Monterey spineflower. Approximately 40 species that occur or are suspected to occur on the Refuge are considered sensitive by Federal or State agencies. Current recreational uses on the Refuge include wildlife observation and photography, waterfowl hunting, and access to surf fishing.

This Draft CCP/EA identifies and evaluates four alternatives for managing Salinas River National Wildlife Refuge in Monterey County, California for the next 15 years.

Under the No Action Alternative, the Refuge would continue to be managed as it has been in the recent past (approximately the last ten years). Existing recreational uses would continue. For example, the Refuge would continue to provide limited hunting opportunities and surf fishing access. Similarly, wildlife observation and photography would occur on the Refuge. However, there would be no guided tours or docent program and no facilities would be built or improved. Recreational use would likely increase due to population growth in the area and a greater awareness of the existence of the Refuge. The Refuge is currently fenced along its southern boundary only. No new fencing would be added under the No Action Alternative. Under the No Action Alternative, resource management would include: removing and controlling invasive plants; managing mammalian predators to reduce predation on western snowy plovers; monitoring and managing snowy plover; conducting limited species inventories; mowing grasslands; planting native riparian trees and shrubs (mostly along the Salinas River); and managing mosquitos. The Service would rely primarily on partnerships with local and State agencies, organizations, universities, and adjacent landowners to accomplish many of its resource protection and monitoring goals. The level of staffing and funding currently devoted to the Refuge would remain the same under this alternative.

Under Alternative 2, the Refuge would focus exclusively on protecting, enhancing, and restoring natural resources. The rationale for this alternative is that there are few other public lands in the Monterey Bay area whose primary mission is to protect endangered species and other wildlife. The Refuge supports a regionally important population of the western snowy plover, which is federally listed as threatened. More intensive management of this snowy plover population and control of public use may be required to increase the size of the population and maintain its long-term viability on the Refuge. Under this alternative, the Refuge would be closed to all public use except guided tours offered by Service staff for wildlife observation, photography, and environmental interpretation and education. The Refuge would be fenced along most of its borders to prevent unauthorized access. The beach below mean high water would remain open for public use, including surf fishing, because the Refuge does not control lands below mean high water. However, beach access through the Refuge would be stopped; users would be permitted to access the beach only from the public beaches adjacent to the Refuge. In addition, the Service would pursue a long-term lease with the State Lands Commission to manage the beach and tidelands below mean high water. Alternative 2 would redirect most of the limited resources currently devoted to public use management to support increasing the intensity of natural resources management. All of the current resource management activities would continue under this alternative. New management tools and techniques would include: using prescribed fire to augment mowing and herbicide use in the grassland/shrubland habitat; conducting comprehensive inventories of all species on the Refuge; translocating problem avian predators of the western snowy plover; and creating a Geographic Information System (GIS) database to track vegetation and population trends. Full implementation of this alternative would require increased staffing and funding.

Alternative 3 represents the Service's preferred management scenario/proposed action. Under Alternative 3, public use of the Refuge would be improved but not substantially expanded. For example, informational signs and interpretive exhibits would be installed on the Refuge and a wheelchair-accessible trail to the Salinas River would be constructed. In addition, the existing parking lot would be improved (e.g., graded, paved, or covered with gravel). The area in which seasonal waterfowl hunting is permitted would be reduced by approximately 15 percent to protect roosting California brown pelicans. All of the current management activities would continue under this alternative. Some activities, such as special-status species inventories, would be substantially expanded. New management tools and techniques would include: using prescribed fire to augment mowing and herbicide use in the grassland/shrubland habitat; conducting inventories of all habitats on the Refuge; translocating problem avian predators of the western snowy plover; and creating a GIS database to track vegetation and population trends. In addition, the Service would pursue a long-term lease with the State Lands Commission to manage the beach and tidelands below mean high water. Full implementation of this alternative would require increased staffing and funding.

Under Alternative 4, public use of the Refuge would be improved and expanded. For example, informational signs and interpretive exhibits would be installed on the Refuge, a wheelchair-accessible trail to the Salinas River and to the beach (on a boardwalk) would be constructed, hunting blinds would be built along the Salinas River, and a restroom would be installed near the parking lot. In addition, the existing parking lot and privately owned access road would be improved (e.g., paved or covered with gravel), greatly improving access to the Refuge, particularly during the rainy season. The seasonal hunt area would be reduced, as in Alternative 3. All of the current management activities would continue under this alternative. New management tools and techniques would include: using prescribed fire to augment mowing and herbicide use in the grassland/shrubland habitat; conducting inventories of all habitats on the Refuge; translocating problem avian predators of the western snowy plover; and creating a GIS database to track vegetation and population trends. In addition, the Service would pursue a long-term lease with the State Lands Commission to manage the beach and tidelands below mean high water. Full implementation of this alternative and management of the expected increase in public use and the potential conflicts between this use and protection of natural resources would require substantially increased staffing and funding.

Dated: November 6, 2001.

Steve Thompson,

Acting Manager, California/Nevada Operations Office, Fish and Wildlife Service, Sacramento, California.

[FR Doc. 01–28437 Filed 11–13–01; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[ID–070–01–1610–DO–050D]

Notice of Intent To Prepare a Resource Management Plan (RMP) and Environmental Impact Statement (EIS) for the Pocatello/Malad Planning Area of the Upper Snake River District in Southeastern Idaho

AGENCY: Pocatello Field Office, Bureau of Land Management (BLM), Interior.

SUMMARY: This document provides notice that the BLM intends to prepare an RMP with an associated EIS for the Pocatello Field Office. The new RMP will replace the Malad Management Framework Plan (MFP), approved in 1981, and will revise the Pocatello RMP, approved in 1988. This planning activity encompasses approximately 621,500 acres of public land. The planning process will comply with the Federal Land Policy and Management Act of 1976 (FLPMA) the National Environmental Policy Act of 1969 (NEPA) and BLM policies. The BLM will work closely with interested parties to identify the management decisions that are best suited to the needs of the public. This collaborative process will take into account local, regional, and national needs and concerns. This notice initiates the public scoping process to identify planning issues and to develop planning criteria. The scoping process will include an evaluation of the existing RMP and MFP in the context of the needs and interests of the public.

DATES: The scoping comment period will commence with the publication of this notice. Formal scoping will end 60 days after publication of this notice. Comments on issues and planning criteria should be received on or before the end of the scoping period at the address listed below.

Public meetings will be held throughout the plan scoping and preparation period. In order to ensure local community participation and input, public meetings will be held in Fort Hall, Pocatello, Soda Springs, Montpelier and Malad, Idaho. Specific meeting dates and locations for public participation will be published in the Sho-Ban News, Caribou County Sun, Idaho State Journal, News Examiner, and Idaho Enterprise newspapers at a later date. The public will be given opportunities to participate through workshops and open house meetings throughout the planning process to work collaboratively with BLM in identifying the full range of issues to be addressed in the RMP/EIS and developing alternatives to be analyzed in the EIS.

ADDRESSES: Comments should be sent to: Bureau of Land Management, Pocatello Field Office, 1111 N. 8th Avenue, Pocatello Idaho 83201 for the Pocatello RMP. Comments, including names and street addresses of respondents, will be available for public review at the above address during regular business hours 7:45 a.m. to 4:30 p.m., Monday through Friday, except holidays, and may be published as part of the EIS. Individual respondents may request confidentiality. If you wish to withhold your name or street address from public review or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your written comment. Such requests will be honored to the extent allowed by law. All submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, will be made available for public inspection in their entirety.

FOR FURTHER INFORMATION CONTACT: Jeff S. Steele, Field Manager, Pocatello Field Office, 1111 N. 8th Avenue, Pocatello Idaho 83201, (208) 478–6340. Existing documents concerning the Pocatello/Malad planning area can be seen at the above addresses.

SUPPLEMENTARY INFORMATION: The planning process for this RMP/EIS will utilize an open collaborative approach allowing the public, Tribes, State and Federal agencies, local elected officials, and BLM subject matter specialists to fully develop, and analyze alternatives for management of the public lands. Public scoping to identify specific issues to be addressed in the plan will be an early opportunity for the public to provide input. Subsequent opportunities for public involvement will occur at specific stages in the planning process.

Preliminary issues that have been identified and that may be addressed in the plan are air, soil, and water resources; vegetation (including noxious weeds); riparian areas; forestry management (including juniper woodlands); wildlife and fishery habitat; special status species (including threatened, endangered, candidate, and BLM sensitive species); livestock grazing; fire management; lands (including tenure adjustments and rights-of-way); locatable, leasable, and salable minerals; recreation (including wild and scenic rivers); wilderness; visual resources; cultural resources; hazardous materials; and areas of critical environmental concern.

After gathering public comments on what issues the plan should address, the suggested issues will be placed in one of three categories:

1. Issues to be resolved in the plan;
2. Issues resolved through policy or administrative action; or
3. Issues beyond the scope of this plan.

Rationale will be provided in the plan for each issue placed in category two or three. In addition to these major issues, a number of management questions and concerns will be addressed in the plan. The public is encouraged to help identify these questions and concerns during the scoping phase.

An interdisciplinary approach will be used to develop the plan in order to consider the variety of resource issues and concerns identified. Disciplines corresponding to these issue areas will be represented and used during the planning process.

Agency representatives and interested persons are invited to visit with Pocatello Field Office officials at any time during the EIS process. In addition, two specific time periods are identified for the receipt of formal comments. The two comment periods are, (1) during the scoping process December 14, 2001 and, (2) during the formal review period of the Draft EIS.

Dated: August 20, 2001.

James E. May,

Upper Snake River District Manager.

[FR Doc. 01–28449 Filed 11–13–01; 8:45 am]

BILLING CODE 4310–GG–P

INTERNATIONAL TRADE COMMISSION

Sanctions for Breach of Commission Administrative Protective Order

AGENCY: International Trade Commission.

ACTION: Sanction for breaches of Commission administrative protective order.

SUMMARY: Notice is hereby given of the sanction imposed by the Commission for breaches of the administrative protective orders (''APO'') issued in *Bulk Acetylsalicylic Acid from China (Aspirin)*, Inv. No. 731–TA–828 (Final) (APOB Inv. #210); *Synthetic Indigo from the People's Republic of China*, Inv. No. 731–TA–851 (Final) (APOB Inv. #211); and *Furfuryl Alcohol from China and Thailand*, Inv. Nos. 731–TA–703 and 705 (Review) (APOB Inv. #230). The Commission determined that attorneys

Bruce Aitken and Kieran Sharpe breached the APO in APOB Inv. #210 by filing a pre-hearing brief with the Department of Commerce that contained business proprietary information (''BPI'') obtained under the APO in the Commission's preliminary *Aspirin* investigation. Aitken and Sharpe also breached the APO by serving a copy of the same brief on a law firm that was not on the APO of either the Commission or the Department of Commerce. The Commission found that Bruce Aitken and Kieran Sharpe breached the APO in APOB Inv. #211 by failing to delete BPI from two pages in the public version of the Final Comments filed with the Commission in the *Synthetic Indigo* investigation. The Commission found that Kieran Sharpe breached the APO in APOB Inv. #230 by failing to redact BPI from the public version of the Final Comments filed with the Commission in the Furfuryl Alcohol review investigation. This public reprimand is being issued because the breaches in APOB Inv. #210 and APOB Inv. #211 were the second and third breaches for Aitken within a two-year period, and the breaches in APOB Inv. #210, APOB Inv. #211, and APOB Inv. #230 were the second, third, and fourth breaches for Sharpe occurring within a two-year period.

FOR FURTHER INFORMATION CONTACT: Carol McCue Verratti, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–3088. Hearing impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal at 202–205–1810. General information concerning the Commission can also be obtained by accessing its Internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION: In connection with the three investigations, *Aspirin, Synthetic Indigo*, and *Furfuryl Alcohol*, Messrs. Aitken and Sharpe filed applications for access to APO information with the Commission. In the applications, they swore (i) Not to disclose without written permission any of the information obtained under the APO except to certain enumerated categories of approved persons, (ii) to serve all materials containing BPI disclosed under the APO as directed by the Secretary, and (iii) to otherwise comply with the terms of the APO and the Commission's regulations regarding access to BPI. They also acknowledged in the APO that violation of the APO could subject them, and their firm, to disbarment from practice before the Commission, referral to the U.S. Attorney or appropriate professional association, or ''[s]uch other administrative sanctions as the Commission determines to be appropriate * * * '' 19 CFR 207.7(d). The Commission granted their applications.

The firm with which Aitken and Sharpe are affiliated, Aitken Irvin Berlin & Vrooman, LLP, is very experienced in Commission practice as are attorneys Aitken and Sharpe. Both attorneys appear regularly before the Commission and have sought access to APO information on a regular basis. Both Aitken and Sharpe were found to have previously breached an APO in recent prior investigations. Neither of these prior breaches were egregious enough to warrant a public reprimand when considered separately, and were instead dealt with through private reprimands. However, the several current breaches and the recent prior breaches demonstrate a disturbing and unacceptable pattern of overall failure to safeguard information released under APO. Business proprietary information received from private parties plays an important role in Commission investigations. The Commission's ability to obtain such information depends on the confidence of the submitting parties that their proprietary information will be protected.

Bruce Aitken is reprimanded for breaching the APOs in the *Aspirin* and *Synthetic Indigo* investigations as stated above and for committing multiple APO breaches over a relatively short period of time. Kieran Sharpe is reprimanded for breaching the APOs in the *Aspirin*, the *Synthetic Indigo*, and the *Furfuryl Alcohol* investigations as stated above and for committing multiple APO breaches over a relatively short period of time.

The Commission has decided to suspend Sharpe's access to APO information for a period of six months commencing with the date of the publication of this notice in the **Federal Register**. In addition, the Commission has directed the law firm of Aitken Irvin Berlin & Vrooman to have at least two attorneys review all documents to be filed with the Commission for APO compliance for two years commencing with the date of the publication of this notice in the **Federal Register**.

The authority for this action is conferred by section 207.7(d) of the Commission's Rules of Practice and Procedure (19 CFR 207.7(d)).

Issued: November 7, 2001.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 01–28447 Filed 11–13–01; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 337–TA–447]

Certain Aerospace Rivets and Products Containing Same; Notice of a Commission Determination not to Review an Initial Determination Terminating the Investigation on the Basis of a Consent Order; Issuance of Consent Order

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the initial determination (''ID'') of the presiding administrative law judge (''ALJ'') granting the joint motion of complainant Allfast Fastening Systems, Inc. (''Allfast'') and respondent Ateliers De La Haute Garonne Ets Auriol Et Cie., S.A. (''AHG'') to terminate the above-captioned investigation on the basis of a consent order.

FOR FURTHER INFORMATION CONTACT: Michael K. Haldenstein, Esq., Office of the General Counsel, U.S. International Trade Commission, telephone (202) 205–3041. Copies of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on (202) 205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS–ON–LINE) at *http://dockets.usitc.gov/eol/public.*

SUPPLEMENTARY INFORMATION: On January 25, 2001, the Commission instituted this investigation based on a complaint filed by Allfast alleging violations of section 337 of the Tariff Act of 1930 in the importation into the United States, the sale for importation, and the sale within the United States

after importation of certain aerospace rivets and products containing same by reason of infringement of common law trademarks ''BRFR'' and ''BRFZ'' dilution of the ''BRFR'' and ''BRFZ'' trademarks, infringement of claims 1–6 of U.S. Letters Patent 5,580,202, and unfair competition by means of false designation of origin and false description. The complaint further alleges that there exists in the United States an industry as required by subsections (a)(1)(A) and (a)(2) of section 337. 66 FR 7782 (January 25, 2001). AHG was the only respondent.

On August 31, 2001, complainant Allfast and respondent AHG filed a joint motion to terminate the investigation on the basis of a consent order stipulation and proposed consent order. The Commission investigative attorney supported the motion.

On October 15, 2001, the ALJ issued an ID (Order No. 6) terminating the investigation based on the joint stipulation and proposed consent order. No party petitioned for review of the ID pursuant to 19 CFR 210.43(a), and the Commission found no basis for ordering a review on its own initiative pursuant to 19 CFR 210.44. The ID thus became the determination of the Commission pursuant to 19 CFR 210.42(h)(3).

This action is taken under the authority of section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and Commission rule 210.42, 19 CFR 210.42.

Issued: November 7, 2001.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 01–28430 Filed 11–13–01; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 731–TA–925 (Final)]

Greenhouse Tomatoes From Canada

AGENCY: United States International Trade Commission.

ACTION: Scheduling of the final phase of an antidumping investigation.

SUMMARY: The Commission hereby gives notice of the scheduling of the final phase of antidumping investigation No. 731-TA–925 (Final) under section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act) to determine whether an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of less-than-fair-value imports from Canada of greenhouse tomatoes, provided for in subheadings 0702.00.20, 0702.00.40, and 0702.00.60 of the Harmonized Tariff Schedule of the United States.[1]

For further information concerning the conduct of this phase of the investigation, hearing procedures, and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A and C (19 CFR part 207).

EFFECTIVE DATE: October 5, 2001.

FOR FURTHER INFORMATION CONTACT: Elizabeth Haines (202–205–3200), Office of Investigations, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS-ON-LINE) at *http://dockets.usitc.gov/eol/public.*

SUPPLEMENTARY INFORMATION:

Background

The final phase of this investigation is being scheduled as a result of an affirmative preliminary determination by the Department of Commerce that imports of greenhouse tomatoes from Canada are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. § 1673b). The investigation was requested in a petition filed on March 28, 2001, by Carolina Hydroponic Growers, Inc., Leland, NC; Eurofresh, Willcox, AZ; Hydro Age, Cocoa, FL; Sun Blest Management, Fort Lupton, CO; Sun Blest Farms, Peyton, CO; and Village Farms, LP, Eatontown, NJ.

Participation in the Investigation and Public Service List

Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of this investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigation need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation.

Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of this investigation available to authorized applicants under the APO issued in the investigation, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigation. A party granted access to BPI in the preliminary phase of the investigation need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff Report

The prehearing staff report in the final phase of this investigation will be placed in the nonpublic record on February 6, 2002, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing

The Commission will hold a hearing in connection with the final phase of this investigation beginning at 9:30 a.m. on February 21, 2002, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before February 13, 2002. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on February 15,

[1] For purposes of this investigation, the Department of Commerce has defined the subject merchandise as ''all fresh or chilled tomatoes grown in greenhouses in Canada, *e.g.,* common round tomatoes, cherry tomatoes, plum or pear tomatoes, and cluster or 'on-the-vine' tomatoes.'' Specifically excluded from the scope of this investigation are all field-grown tomatoes.

2002, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written Submissions

Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is February 13, 2002. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is February 28, 2002; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before February 28, 2002. On March 19, 2002, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before March 21, 2002, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigation must be served on all other parties to the investigation (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

Issued: November 7, 2001.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 01–28448 Filed 11–13–01; 8:45 am]

BILLING CODE 7020–02–P

NATIONAL CREDIT UNION ADMINISTRATION

Notice of Meetings; Sunshine Act

TIME AND DATE: 10 a.m., Thursday, November 15, 2001.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428.

STATUS: Open.

MATTERS TO BE CONSIDERED:

1. Request from a Federal Credit Union to Convert to a Community Charter.
2. request from a Federal Credit Union to Expand its Community Charter.
3. Request from a Federal Credit Union to Add an Underserved Area to its Field of Membership.
4. Maryland Member Business Loan Rule.
5. Request from a Corporate Federal Credit Union for a Waiver under Part 704 of NCUA's Rules and Regulations.
6. NCUA Operating Budget for 2002–2003.
7. NCUA Overhead Transfer Rate for 2002.
8. NCUA Operating Fee Scale for 2002.
9. Petition for a Rulemaking on the Overhead Transfer Rate.
10. Final Rule: Part 742 and Amendment to Part 722, NCUA's Rules and Regulations, Regulatory Flexibility Program.

RECESS: 11:30 a.m.

TIME AND DATE: 12:30 p.m., Thursday, November 15, 2001.

PLACE: Board Room, 7th Floor, Room 7047, 1775 Duke Street, Alexandria, VA 22314–3428..

STATUS: Closed..

MATTERS TO BE DISCUSSED:

1. Administrative Action under Part 709 of NCUA's Rules and Regulations. Closed pursuant to exemptions (6) and (8).
2. One (1) Personnel Matter. Closed pursuant to exemptions (2) and (6)

FOR FURTHER INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone 703–518–6304.

Becky Baker,

Secretary of the Board.

[FR Doc. 01–28576 Filed 11–8–01; 5:09 pm]

BILLING CODE 7535–01–M

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance of this collection. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than 3 years.

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 of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; 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.

DATES: Written comments should be received by January 14, 2002 to be assured of consideration. Comments received after that date would be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *splimpto@nsf.gov.*

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send email to *splimpto@nsf.gov.* Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: The National Science Foundation's Graduate Research Traineeship Program's Follow Up Study.

OMB Control No.: 3145–NEW.

Expiration Date of Approval: Not applicable.

Type of Request: Intent to seek approval to carry out a new information collection.

1. Abstract

This document has been prepared to support the clearance of data collection instruments to be used in the follow up study of the National Science Foundation's (NSF) Graduate Research Traineeship (GRT) Program. GRT supported graduate students in peer-review selected institutions to achieve a doctorate (PhD) in critical or emerging areas of science, mathematics, and engineering. The study addresses the following questions: What positions do graduates obtain following completion of the doctorate? What academic awards or private/public sector attainments do graduates receive? What impacts do traineeships have on the sponsoring institution, faculty, and colleagues? How do GRT trainees who stopped their pursuit of a PhD characterize their GRT experience? Is there a relationship between the average time of GRT funding support for a trainee and the average number of years requir4ed for completing a PhD? Despite not completing the doctorate, did former GRT recipients find the traineeships?

The data to address these questions will be gathered via two survey instruments. The first instrument is an Institutional Impact Survey that GRT project Principal Investigators (PI) will complete 2 years after their final year of funding. The second instrument is an individual survey that all trainees who have received doctorates or withdrawn from the GRT program will be asked to complete.

2. Expected Respondents

The expected respondents are the Principal Investigators and GRT funding recipients (trainees) from GRT projects funded by NSF since 1993.

3. Burden on the Public

The total annual burden hours for this collection are 290 for a maximum of 373 respondents, assuming an 80–100% response rate. The average annual reporting burden is one hour or less per respondent. The burden on the public is limited because the study is limited to GRT project participant and no other individuals.

Dated: November 7, 2001.

Suzanne H. Plimpton,

NSF Reports Clearance Officer.

[FR Doc. 01–28424 Filed 11–13–01; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection, Comment Request

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance of this collection. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than 3 years.

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 of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; 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.

DATES: Written comments should be received by January 14, 2002, to be assured of consideration. Comments received after that date would be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests for copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *splimpo@nsf.gov.*

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send mail to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: An Evaluation of the Impact of Adoption and Use of the Office of Science Education Curriculum Supplements on Students' Scientific Knowledge.

OMB Control No.: 3145–NEW.

Expiration Date of Approval: Not applicable.

Type of Request: Intent to seek approval to carry out a new information collection.

1. Abstract

The National Science Foundation (NSF) has provided funding for systematically developed, research-based curriculum materials beginning in the 1960s. NSF has the responsibility of coordinating evaluations of mathematics and science education programs across government, including agencies such as the National Institutes of Health (NIH). Since its establishment as part of NIH, the Office of Science Education (OSE) has engaged in the development of science curriculum supplements and other educational materials related to medicine and research. NSF and NIH will partner in this evaluation because both desire information on the effectiveness of curriculum materials and the effective means to collect this information. Over the years, there have been changes in the levels of funding for such instructional materials, reflecting changes in public support and concerns for such endeavors. However, concerns about student achievement in science have focused attention on the need for strong curriculum materials to support ''systemic reform'' (O'Day & Smith, 1993). NSF has responded to these needs by increasing support to research-based instructional materials that have been reviewed by content experts and found to be of high quality and meet the demands of the National Science Education Standards (NSES).

The proposed evaluation's study questions to be addressed are: Do the curriculum supplements promote better science education? Do the curriculum supplements reduce academic inequity? Do the curriculum supplements deepen students' understanding of the importance of basic research to advances in medicine and health? Do the curriculum supplements foster student analysis of the direct and indirect effects of scientific discoveries on their individual and public health? Do the curriculum supplements encourage students to take more responsibility for their own health?

The data to address these questions will be gathered using mixed methods. In addition to assessing student achievement data and using surveys, the mixed-methods evaluation model will include pre-observation questionnaires, observations, and interviews of teachers. Interviews and observations, for example, will enable research evaluators to clarify vague responses in surveys or

confirm findings. As part of the evaluation, pre- and post-assessment will be used for NIH Curriculum Supplement Series for Grades 9–12 to compare students' learning of scientific concepts and skills when a supplement of NIH materials will be used, with students who do not receive the NIH materials. Teacher and student surveys, interviews, site visits, document reviews, standardized performance measures, and student work samples will provide the basis for comparison.

2. Expected Respondents

The expected respondents and observation subjects are pre-college teachers and students.

3. Burden on the Public

The total annual burden hours for this collection are 2,632 for a maximum of 3744 respondents, assuming an 80–100% response rate. The average annual reporting burden is one hour or less per respondent. The burden on the general public is small because the study is limited to a 10 percent random sample of the 12,000 teachers who have requested the materials being studied, a sample of impacted students, and 60 treatment and 60 comparison teachers.

Dated: November 7, 2001.

Suzanne H. Plimpton,

NSF Reports Clearance Officer.

[FR Doc. 01–28431 Filed 11–13–01; 8:45 am]

BILLING CODE 7555–01–M

NATIONAL SCIENCE FOUNDATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Science Foundation.

ACTION: Notice.

SUMMARY: The National Science Foundation (NSF) is announcing plans to request clearance of this collection. In accordance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995, we are providing opportunity for public comment on this action. After obtaining and considering public comment, NSF will prepare the submission requesting OMB clearance of this collection for no longer than 3 years.

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 of the proposed collection of information; (c) ways to enhance the quality, utility, and clarity of the information on respondents, including through the use of automated collection techniques or other forms of information technology; 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.

DATES: Written comments should be received by January 14, 2002 to be assured of consideration. Comments received after that date would be considered to the extent practicable.

ADDRESSES: Written comments regarding the information collection and requests of copies of the proposed information collection request should be addressed to Suzanne Plimpton, Reports Clearance Officer, National Science Foundation, 4201 Wilson Blvd., Rm. 295, Arlington, VA 22230, or by e-mail to *spplimpto@nsf.gov.*

FOR FURTHER INFORMATION CONTACT: Suzanne Plimpton on (703) 292–7556 or send e-mail to splimpto@nsf.gov. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Title of Collection: Survey of Colleges, Universities Providing Graduate Degrees and Specializations in Evaluation, and Providers of Professional Development Offerings.

OMB Control No.: 3145–NEW.

Expiration Date of Aprpoval: Not applicable.

Type of Request: Intent to seek approval to carry out a new information collection.

1. Abstract

This document has been prepared to support the clearance of data collection instruments to be used in the Surveys of Colleges and Universities Providing Graduate Degrees and Specializations in Evaluation, and Providers of Evaluation Professional Development Offerings. A major problem that NSF faces is the lace of qualified evaluators to serve as resources to NSF-funded projects. Therefore, the Evaluation Program has set as part of its mission the building of capacity in the field of evaluation. NSF's efforts will serve both to guarantee that there will be adequate numbers of trained evaluators to meet NSF's needs and to aid in creating a solid knowledge base for this relatively new professional field. Fundamental to both of these purposes is the collection of data on current capacity in the evaluation field to conduct training. This includes both formal education that leads to the granting of degrees, and informal education that fosters the acquisition of specific knowledge and skills through short courses, workshops, or Internet offerings. The approach encompasses two surveys. One is of university and college-based formal evaluation training programs leading to a major or minor course of graduate degree studies; the other is of professional training activities in evaluation that are regularly provided and may result in continuing education certificates.

2. Expected Respondents

The expected respondents are twofold. Those responding to the college and university degree programs will be those institutions that offer formal degree or specialization programs in the field of evaluation. Those receiving the second type of survey will be institutions, companies and organizations that provide regular, short-term, intensive training programs, such as institutes and short courses for both current and novice evaluators.

3. Burden on the Public

The total elements for these two collections are 32 burden hours for a maximum of 120 participants annually, assuming an 80–100% response rate. The average annual reporting burden is under 20 minutes per respondent. The burden on the public is negligible, as the survey is limited to colleges, universities and other entities that provide degrees, areas of specialization, and professional development in the field of evaluation.

Dated: November 7, 2001.

Suzanne H. Plimpton,

NSF Reports Clearance Officer.

[FR Doc. 01–28484 Filed 11–13–01; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–331]

Nuclear Management Company, LLC; Notice of Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 243 to Facility Operating License No. DPR–49 issued to Nuclear Management Company, LLC (the licensee), which revised the Operating License and Technical Specifications (TS) for operation of the Duane Arnold Energy Center (DAEC) located in Linn County, Iowa. The

amendment is effective as of the date of issuance.

The amendment modified the Operating License and TS to allow an increase of the authorized operating power level from 1658 megawatts thermal (MWt) to 1912 MWt at DAEC. The change represents an increase of 15.3 percent above the current rated thermal power and is considered an extended power uprate.

The application for the amendment complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License and Opportunity for a Hearing in connection with this action was published in the **Federal Register** on September 27, 2001 (66 FR 49426). No request for a hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of the amendment will not have a significant effect on the quality of the human environment (66 FR 55703).

Further details with respect to the action see (1) the application for amendment dated November 16, 2000, as supplemented April 16 (two letters) and 17; May 8 (two letters), 10, 11 (two letters), 22, and 29; June 5, 11, 18, 21, and 28; July 11, 19, and 25; August 1, 10, 16, and 21; and October 17, 2001, (2) Amendment No. 243 to License No. DPR–49, (3) the Commission's related Safety Evaluation, and (4) the Commission's Environmental Assessment. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC Web site, *http://www.nrc.gov/NRC/ADAMS/index.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC Public Document Room Reference staff by telephone at 1–800–397–4209, 301–415–4737 or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 6th day of November 2001.

For the Nuclear Regulatory Commission.

Brenda L. Mozafari,

Project Manager, Section 1, Project Directorate III, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 01–28510 Filed 11–13–01; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Meetings; Sunshine Act

AGENCY HOLDING THE MEETING: Nuclear Regulatory Commission.

DATE: Weeks of November 12, 19, 26, December 3, 10, 17, 2001.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of November 12, 2001

Wednesday, November 14, 2001

8:55 a.m.—Affirmation Session (Public Meeting) (if needed)

9:00 a.m.—Discussion of Intragovernmental and Security Issues (Closed-Ex. 1 & 9)

Thursday, November 15, 2001

2:00 p.m.—Discussion of Intragovernmental Issues (Closed-Ex. 1)

Week of November 19, 2001—Tentative

There are no meetings scheduled for the Week of November 19, 2001.

Week of November 26, 2001—Tentative

There are no meetings scheduled for the Week of November 26, 2001.

Week of December 3, 2001—Tentative

Monday, December 3, 2001

2:00 p.m.—Briefing on Status of Steam Generator Action Plan (Public Meeting) (Contact: Maitri Banerjee, 301–415–2277)

Wednesday, December 5, 2001

1:25 p.m.—Affirmation Session (Public Meeting) (if needed)

1:30 p.m.—Meeting with Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting) (Contact: John Larkins, 301–415–7360)

Week of December 10, 2001—Tentative

There are no meetings scheduled for the Week of December 10, 2001.

Week of December 17, 2001—Tentative

There are no meetings scheduled for the Week of December 10, 2001.

* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415–1292. Contact person for more information: David Louis Gamberoni (301) 415–1651.

Additional Information: By a vote of 5–0 on November 2, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Discussion of Intragovernmental and Security Issues (Closed-Ex. 1 & 9)'' be held on November 6, and on less than one week's notice to the public.

The NRC Commission Meeting Schedule can be found on the Internet at: http//www.nrc.gov

This notice is distributed by mail to several hundred subscribers; if you no longer wish to receive it, or would like to be added to the distribution, please contact the Office of the Secretary, Washington, DC 20555 (301–415–1969). In addition, distribution of this meeting notice over the Internet system is available. If you are interested in receiving this Commission meeting schedule electronically, please send an electronic message to dkw@nrc.gov.

Dated: November 8, 2001.

David Louis Gamberoni,

Technical Coordinator, Office of the Secretary.

[FR Doc. 01–28644 Filed 11–9–01; 2:19 pm]

BILLING CODE 7590–01–M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

Note: The publication date for this notice will change from every other Wednesday to every other Tuesday, effective January 8, 2002. The notice will contain the same information and will continue to be published biweekly.

I. Background

Pursuant to Public Law 97–415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Public Law 97–415 revised section 189 of the Atomic Energy Act of 1954, as amended (the Act), to require the Commission to publish notice of any amendments issued, or proposed to be issued, under a new provision of section 189 of the Act. This provision grants the Commission the authority to issue and

make immediately effective any amendment to an operating license upon a determination by the Commission that such amendment involves no significant hazards consideration, notwithstanding the pendency before the Commission of a request for a hearing from any person.

This biweekly notice includes all notices of amendments issued, or proposed to be issued from October 22, 2001 through November 3, 2001. The last biweekly notice was published on October 31, 2001 (66 FR 557007).

Notice of Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination, and Opportunity for a Hearing

The Commission has made a proposed determination that the following amendment requests involve no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendment would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. The basis for this proposed determination for each amendment request is shown below.

The Commission is seeking public comments on this proposed determination. Any comments received within 30 days after the date of publication of this notice will be considered in making any final determination.

Normally, the Commission will not issue the amendment until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendment before the expiration of the 30-day notice period, provided that its final determination is that the amendment involves no significant hazards consideration. The final determination will consider all public and State comments received before action is taken. Should the Commission take this action, it will publish in the **Federal Register** a notice of issuance and provide for opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

Written comments may be submitted by mail to the Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to Room 6D22, Two White Flint North, 11545 Rockville Pike, Rockville, Maryland from 7:30 a.m. to 4:15 p.m. Federal workdays. Copies of written comments received may be examined at the NRC Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. The filing of requests for a hearing and petitions for leave to intervene is discussed below.

By December 14, 2001, the licensee may file a request for a hearing with respect to issuance of the amendment to the subject facility operating license and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's ''Rules of Practice for Domestic Licensing Proceedings'' in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the NRC's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852. Publicly available records will be accessible electronically from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC web site, *http://www.nrc.gov/NRC/ADAMS/index.html.* If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of a hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors: (1) The nature of the petitioner's right under the Act to be made a party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to 15 days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than 15 days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene which must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendment under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendment request involves no significant hazards consideration, the Commission may issue the amendment and make it immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendment.

If the final determination is that the amendment request involves a significant hazards consideration, any hearing held would take place before the issuance of any amendment.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, Attention: Rulemaking and Adjudications Branch, or may be delivered to the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland 20852, by the above date. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and to the attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for a hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment which is available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Assess and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC web site, *http://www.nrc.gov/NRC/ADAMS/index.html.* If you do not have access to ADAMS or if there are problems in accessing the documents located in ADAMS, contact the NRC Public Document room (PDR) Reference staff at 1–800–397–4209, 304–415–4737 or by email to *pdr@nrc.gov.*

AmerGen Energy Company, LLC, Docket No. 50–461, Clinton Power Station, Unit 1, DeWitt County, Illinois

Date of amendment request: August 21, 2001.

Description of amendment request: The proposed amendment would revise the actions taken for an inoperable battery charger, revise battery charger testing criteria, and relocate certain safety-related battery surveillance requirements from the Technical Specifications to a licensee-controlled program.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration which is presented below:

Does the change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed changes restructure the TS [Technical Specifications] for the DC Electrical Power system. The proposed changes add actions to specifically address battery charger inoperability with increased completion times. This change will rely upon the capability of providing the battery charger function by an alternate means, (e.g., a spare battery changer that will function as a qualified backup) to take advantage of the proposed increased completion time. The CD power System or associated battery chargers are not initiators to any accident sequence analyzed in the Updated Safety Analysis Report (USAR). Operation in accordance with the proposed TS ensures that the DC Power System is capable of performing function as described in the USAR, therefore the mitigative functions supported by the DC Power System will continue to provide the protection assumed by the analysis.

The relocation of preventive maintenance surveillance, and certain operating limits and actions to a newly-created, licensee-controlled TS 5.5.14, ''Battery Monitoring and Maintenance Program,'' will not challenge the ability of the DC Power System to perform its design function. The maintenance and monitoring required by current TS, which are based on industry standards, will continue to be performed. In addition, the DC Power System is within the scope of 10 CFR 50.65, ''Requirements for monitoring the effectiveness of maintenance at nuclear power plants,'' which will ensure the control of maintenance activities associated with the DC Power System.

In summary, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed changes involve restructuring the TS for the DC Electrical Power system. This change will rely upon the capability of providing the battery charger function by an alternate means, (*e.g.,* a spare battery charger that will function as a qualified backup) to take advantage of the proposed increased completion time. The DC Power System or associated battery chargers are not initiators to any accident sequence analyzed in the Updated Safety Analysis Report (USAR).

Allowing the use of a spare battery charger will increase the reliability of the DC Electrical Power system. The mitigative functions supported by the DC Power System will continue to provide the protection assumed by the safety analysis described in the USAR. Therefore, there are no new types of failures that could be created by a failure of the spare battery charger. As such, no new or different kind of accident or transient is expected by these changes.

Therefore, these proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

Does the change involve a significant reduction in a margin of safety?

The proposed changes will not adversely affect operation of plant equipment. These changes will not result in a change to the setpoints at which protective actions are initiated. Sufficient DC capacity to support operation of mitigation equipment is ensured. The changes associated with the new Battery Maintenance and Monitoring Program will ensure that the station batteries are maintained in a highly reliable manner. The use of a spare battery charger will increased the reliability of the DC system during periods of normal battery charger inoperability. The equipment fed by the DC Electrical Sources will continue to provide adequate power to safety related loads in accordance with analysis assumptions.

Therefore, the proposed changes do not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Robert Helfrich, Mid-West Regional Operating Group, Exelon Generation Company, LLC, 4300 Winfield Road, Warrenville, IL 60555.

NRC Section Chief: Anthony J. Mendiola.

AmerGen Energy Company, LLC, Docket No. 50–289, Three Mile Island Nuclear Station, Unit 1 (TMI–1), Dauphin County, Pennsylvania

Date of amendment request: September 20, 2000, as supplemented August 2 and September 28, 2001.

Description of amendment request: The proposed Technical Specification (TS) change would (1) delete the requirements for hydrogen monitoring instrumentation from TS sections 3.5.5.2, 3.6, and Tables 3.5–3 and 4.1–4 and correct a typographical error in item 8 of Table 4.1–4; (2) delete the requirements for hydrogen recombiners in TS section 4.4.4; and (3) delete the reference to the hydrogen purge system and hydrogen recombiners from the Bases of TS section 4.12.2.

Basis for proposed no significanthazards consideration determination: As required by 10 CFR

50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The Nuclear Regulatory Commission (NRC) staff reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The NRC staff's analysis, which is based on the representation made by the licensee in the September 20, 2001, application as supplemented August 2 and September 28, 2001, is presented below:

1. Will operation of the facility in accordance with this proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

No. This change has no effect on plant equipment provided for the reactor coolant system, reactor building heat removal, or the equipment provided for mixing of the reactor building atmosphere following an accident. This proposed change does not alter the design or configuration of the plant beyond that of the containment combustible gas control systems. The containment combustible gas control systems are currently classified as safety systems. The containment combustible gas control systems are composed of two hydrogen monitors and two hydrogen recombiners, backed up by a portion of the reactor building purge system that can be used to vent the reactor building. Hydrogen control components (hydrogen monitors, hydrogen recombiners, and hydrogen vents) do not affect any accident initiation sequence previously identified. Therefore, this change does not increase the probability of an accident previously evaluated.

The containment combustible gas control systems are provided to ensure that reactor building hydrogen concentration is maintained below the lower flammability limit of 4.0 percent. The NRC staff has found hydrogen combustion to be a small contributor to containment failure for large, dry containment designs due to the robustness of these containment types and the likelihood of a spurious ignition source. The containment combustible gas control systems are not credited in the TMI Unit 1 probability risk assessment (PRA).

Therefore, this change would not result in a significant increase the consequence of accidents previously evaluated.

2. Will operation of the facility in accordance with the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

No. This proposed change does not alter the design or configuration of the plant beyond that of the containment combustible gas control systems. Hydrogen generation following a design basis loss-of-coolant accident (LOCA) has been evaluated in accordance with regulatory requirements. Deletion of the containment combustible gas control system from the TSs does not alter the hydrogen generation processes post-LOCA. The NRC staff has found hydrogen combustion to be a small contributor to containment failure for large, dry containment designs due to the robustness of these containment types and the likelihood of a spurious ignition source. The containment combustible gas control systems are not credited in the TMI Unit 1 level 2 PRA.

Therefore, since the accident evaluation does not credit these systems or assume that they operate during an accident, operation of the facility in accordance with this proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Will operation of the facility in accordance with this proposed change involve a significant reduction in a margin of safety?

No. This change has no effect on plant equipment provided for the reactor coolant system, reactor building heat removal, or the equipment provided for mixing of the reactor building atmosphere following an accident. This change only involves the deletion of requirements for containment combustible gas control equipment, (hydrogen monitors, hydrogen recombiners, and containment hydrogen vents). The NRC staff has found hydrogen combustion to be a small contributor to containment failure for large, dry containment designs due to the robustness of these containment types and the likelihood of a spurious ignition source. Use of the containment combustible gas control systems are not credited in the TMI Unit 1 PRA. TMI Unit 1 utilizes a large open containment design that precludes the buildup of hydrogen pockets that might be formed if the reactor building were of a compartmentalized design. The TMI–1 PRA concluded that the containment would remain intact for severe accidents which included hydrogen burns for which no credit was taken for the combustible gas control system as long as the containment heat removal systems (reactor building emergency cooling and reactor building sprays) remain functional.

The proposed change will relax certain special treatment requirements associated with hydrogen monitors. As discussed in Regulatory Guide 1.97, ''Instrumentation for Light-Water-Cooled Nuclear Power Plants to Assess Plant and Environs Conditions During and Following an Accident,'' Revision 3, dated May 1983, the NRC staff believes that the revised treatment is appropriate for instrumentation needed to assess the degree of core damage and confirm that spurious ignition of hydrogen has taken place.

Therefore, operation of the facility in accordance with this proposed change will not involve a significant reduction in a margin of safety.

Based on the NRC staff's analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Edward J. Cullen, Jr., Vice President and General Counsel, Exelon Generation Company, LLC, 300 Exelon Way, KSB 3-W, Kennett Square, PA 19348.

NRC Section Chief: L. Raghavan, Acting.

Dominion Nuclear Connecticut, Inc., et al., Docket No. 50–423, Millstone Nuclear Power Station, Unit No. 3, New London County, Connecticut

Date of amendment request: August 27, 2001.

Description of amendment request: The proposed amendment changes the Millstone Nuclear Power Station, Unit No. 3 (MP3) Technical Specifications (TSs) action and surveillance requirements associated with the containment air lock. The Bases of the affected TSs will be modified to address the proposed changes.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The NRC staff's analysis, which is based on the representation made by the licensee in the August 27, 2001, application, is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes will not revise the operability requirements for the containment air lock. As a result, the design-basis accidents will remain the same postulated events, and the consequences of the design-basis accidents will remain the same. Also, the containment air lock is not an accident initiator. Therefore, the proposed change will not involve any increase in the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

Since the containment air lock is not an accident initiator, these proposed changes do not introduce any new failure modes. Therefore, the proposed changes will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

Since the operability requirements for the containment air lock will not change, and the containment air lock will continue to function as assumed in the safety analysis, the proposed change will not result in a reduction in a margin of safety.

Based on this analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Nuclear Counsel, Dominion Nuclear Connecticut, Inc., Waterford, CT 06141–5127.

NRC Section Chief: James W. Clifford.

Dominion Nuclear Connecticut Inc., et al., Docket No. 50–423, Millstone Nuclear Power Station, Unit No 3, New London County, Connecticut

Date of amendment request: September 26, 2001.

Description of amendment request: The proposed amendment modifies the Millstone Nuclear Power Station, Unit No. 3 (MP3) Technical Specifications (TSs) to relocate MP3 TSs related to the position indication system to the respective Technical Requirements Manual (TRM). The Bases of the affected TSs will be modified to address the proposed changes. Also, index pages will be revised to reflect the relocation.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The NRC staff's analysis, which is based on the representation made by the licensee in the September 26, 2001, application, is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed requirements remain the same except that the requirements will be relocated to the TRM. Since the proposed requirements are the same, this proposed change will not increase the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

Since the requirements remain the same, these proposed changes do not alter the way any system, structure, or component functions and do not alter the manner in which the plant is operated. The proposed changes do not introduce any new failure modes. Therefore, the proposed changes will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

Since the proposed changes are solely to relocate the existing requirements, it does not affect plant operation in any way. Therefore, the proposed change will not result in a reduction in a margin of safety.

Based on this analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Nuclear Counsel, Dominion Nuclear Connecticut, Inc., Waterford, CT 06141–5127.

NRC Section Chief: James W. Clifford.

Dominion Nuclear Connecticut Inc., et al., Docket No. 50–423, Millstone Nuclear Power Station, Unit No. 3, New London County, Connecticut

Date of amendment request: October 1, 2001.

Description of amendment request: The proposed amendment modifies the Millstone Nuclear Power Station, Unit No. 3 (MP3) Technical Specifications (TS) to change TS 3.4.6.2 ''Reactor Coolant System—Operational Leakage''. The Bases for this TS will also be modified to reflect this change.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes to Technical Specification 3.4.6.2 for [reactor coolant systems] RCS PIVs [pressure isolation valve] in the RHR [residual heat removal] flow path will not cause an accident to occur and will not result in any change in the operation of associated accident mitigation equipment. The ability of the RHR System to remove core decay heat will not be affected. The proposed changes will not affect the ability of the RCS or the RHR System to mitigate any design basis event. The design basis accidents will remain the same postulated events described in the Millstone Unit No. 3 Final Safety Analysis Report (FSAR), and the consequences of the design basis accidents will remain the same. Therefore, the proposed changes will not increase the probability or consequences of an accident previously evaluated.

The proposed changes to delete SRs 4.4.6.2.1.a and 4.4.6.2.1.b and revise SR [Surveillance Requirement] 4.4.6.2.1.d will not cause an accident to occur and will not result in any change in the operation of associated accident mitigation equipment. The ability to measure RCS operational leakage will not be affected. The proposed changes will not affect the ability to mitigate any design basis event. The design basis accidents will remain the same postulated events described in the Millstone Unit No. 3 FSAR, and the consequences of the design basis accidents will remain the same. Therefore, the proposed changes will not increase the probability or consequences of an accident previously evaluated.

The proposed change to remove SR 4.4.6.2.2.c to perform post maintenance testing of the RCS PIVs will not cause an accident to occur and will not result in any change in the operation of the associated accident mitigation equipment. The proposed change will not revise the operability requirements (*e.g.,* valve leakage limits) for the RCS PIVs. Proper operation of the RCS PIVs will still be verified, as appropriate, following maintenance activities. As a result, the design basis accidents will remain the same postulated events described in the Millstone Unit No. 3 FSAR, and the consequences of the design basis accidents will remain the same. Therefore, the proposed change will not increase the probability or consequences of an accident previously evaluated.

2. Create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not alter the plant configuration (no new or different type of equipment will be installed) or require any new or unusual operator actions. The proposed changes do not alter the way any structure, system, or component functions and do not alter the manner in which the plant is operated. The proposed changes do not introduce any new failure modes. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Involve a significant reduction in a margin of safety.

The proposed changes will not reduce the margin of safety since they have no impact on any accident analysis assumption. The proposed changes do not decrease the scope of equipment currently required to be operable or subject to surveillance testing, nor do the proposed changes affect any instrument setpoints or equipment safety functions. The effectiveness of Technical Specifications will be maintained since the changes will not alter the operation of any component or system, nor will the proposed

changes affect any safety limits or safety system settings. Therefore, there is no reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Lillian M. Cuoco, Senior Nuclear Counsel, Dominion Nuclear Connecticut, Inc., Waterford, CT 06141–5127.

NRC Section Chief: James W. Clifford.

Entergy Nuclear Generation Company, Docket No. 50–293, Pilgrim Nuclear Power Station, Plymouth County, Massachusetts

Date of amendment request: August 22, 2001.

Description of amendment request: The proposed amendment would change the Technical Specification (TS) Surveillance Requirement 3/4.7.B.1.a.2 for the Standby Gas Treatment (SBGT) System by increasing the SBGT inlet heaters minimum output testing requirement from 14 kW to 20 kW. The associated TS Bases 3/4.7.B.1 would also be revised as a result of the proposed TS change. The proposed change is based upon the licensee's revised design-basis calculations for the SBGT inlet heaters and by a modification that replaces the existing SBGT system inlet heaters with heaters of higher output capability.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff has reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The NRC staff's review is presented below:

1. The proposed TS change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed change affects only the surveillance requirement for the SBGT inlet heaters output capability. The SBGT heaters are not the initiators of any accidents described in the safety analysis report (SAR). The proposed higher inlet heater output capability test is needed to ensure that the SBGT will continue to function as currently designed to decrease the relative humidity (RH) of the inlet air stream to 70% RH. The higher inlet heater output capability test does not change the consequences of an accident previously analyzed in the SAR. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed TS change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change to the SBGT inlet heaters capacity surveillance testing requirement is needed to continue to ensure that the SBGT will function to decrease the RH of the inlet air stream to 70% RH, as assumed in the current analysis. The SBGT heaters are not the initiators of any accidents described in the SAR. The proposed change in the surveillance testing requirement does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed TS change does not involve a significant reduction in the margin of safety.

The proposed higher testing acceptance criteria for the inlet heater ensures that the SBGT will continue to function as currently designed to decrease the RH of the inlet air steam to 70% RH. The margin of safety is unaffected by this change. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: J. M. Fulton, Esquire, Assistant General Counsel, Pilgrim Nuclear Power Station, 600 Rocky Hill Road, Plymouth, Massachusetts 02360–5599.

NRC Section Chief: James W. Clifford.

Florida Power and Light Company, et al., Docket Nos. 50–335 and 50–389, St. Lucie Plant, Unit Nos. 1 and 2, St. Lucie County, Florida

Date of amendment request: October 17, 2001.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TS) actions regarding inoperable redundant components when an Emergency Diesel Generator (EDG) becomes inoperable. TS 3.8.1.1 would be revised to require actions based on the TS for the inoperable redundant component(s). The proposed revision is consistent with NUREG–1432, Rev.2, ''Standard Technical Specifications, Combustion Engineering Plant.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Would operation of the facility in accordance with the proposed amendments involve a significant increase in the probability or consequences of an accident previously evaluated?

Neither the steam driven auxiliary feedwater pump nor the EDGs are accident initiators, but are accident mitigators. The proposed changes to the EDG TS do not affect the operation nor availability of the EDGs, the motor or steam driven auxiliary feedwater pumps, nor TS required redundant features. For those conditions that would require a unit shutdown, once the four hour completion time had expired, the shutdown would be performed in the manner and timeframe supported by the existing redundant feature TS. Therefore, the probability or consequences of any accident previously evaluated have not been significantly increased.

2. Would operation of the facility in accordance with the proposed amendments create the possibility of a new or different kind of accident from any accident previously evaluated?

No new failure modes are introduced by the proposed TS changes and single failure considerations are adequately addressed by following the established conventions of NUREG–1432. The proposed four hour completion time from the discovery of inoperable redundant features and an EDG takes into account the operability of the redundant counterpart to the inoperable required feature, the capacity and capability of the remaining AC sources, a reasonable time for repairs, and the low probability of a DBA [design-basis accident] occurring during this period. The TS change required reformatting and moving the steam driven auxiliary feedwater pump operability requirements to the redundant feature(s) actions to be comparable with and meet the intent of the BASES requirements contained in NUREG–1432. Without creation of a new interaction of materials, operating configuration, or operating interfaces, there is no possibility that the proposed changes can introduce a new or different kind of accident.

3. Would operation of the facility in accordance with the proposed amendments involve a significant reduction in a margin of safety?

The margin of safety as defined in the basis for any Technical Specification or in any licensing document has not been reduced. The proposed changes remove the unconditional unit shutdown requirement should an EDG be inoperable while required features on the opposite train are inoperable. Instead, any TS required actions are appropriately based on the inoperability of the required feature. The proposed four hour completion time from the discovery of inoperable redundant features and an EDG takes into account the operability of the redundant counterpart to the inoperable required feature, the capacity and capability of the remaining AC sources, a reasonable time for repairs, and the low probability of

a DBA occurring during this period. For those conditions that would require a unit shutdown, once the four hour completion time had expired, the shutdown would be performed in the manner and timeframe supported by the existing redundant feature TS. Additionally, the TS requirements to assure that steam driven auxiliary feedwater pump operability is considered as part of the redundant features requirements remains and is comparable to the intent of the BASES of STS 3.8.1. Based on the preceding discussion, FPL concludes that the margin of safety will not be significantly reduced by operation of the facility in accordance with the proposed amendments.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: M.S. Ross, Attorney, Florida Power & Light, P.O. Box 14000, Juno Beach, Florida 33408–0420.

NRC Section Chief: Richard P. Correia.

Nuclear Management Company, LLC, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of amendment request: October 17, 2001.

Description of amendment request: The proposed amendment would revise the Technical Specification (TS) multiplier values for single-loop operation (SLO) average planar linear heat generation rate (APLHGR).

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed APLHGR multipliers, and their use to determine the Cycle 21 thermal limits, have been derived using NRC approved methods and uncertainties. These methods do not change operation of the plant, and have no effect on the probability of an accident initiating event or transient. The purpose of the APLHGR limit is to assure that the fuel will not exceed a peak cladding temperature (PCT) of 2200 °F during a Loss of Coolant Accident [LOCA], as required by 10 CFR 50.46. Specifying appropriate APLHGR multipliers ensures that a LOCA in SLO will not produce a PCT any greater than the PCT produced by a LOCA in dual loop operation. These changes ensure that the appropriate SLO APLHGR multiplier, required for GE14 fuel, is incorporated into the Monticello TS. These changes do not alter the method of operating the plant.

Therefore, the proposed TS changes do not involve an increase in the probability or consequences of an accident previously evaluated.

2. The proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes result only from different inputs, including use of GE14 fuel, for the Cycle 21 core reload. These methods and uncertainties have been reviewed and approved by the NRC, and do not involve any new or unapproved methods for operating the facility. No new initiating events or transients result from these changes.

The single-loop operation APLHGR multiplier values are designed to ensure that the PCT resulting from a LOCA while operating in SLO are bounded by the PCT from a LOCA while operating in dual loop operation. This multiplier update results from application of GE Nuclear Energy's (GE's) current standard methodology for this analysis.

Therefore, the proposed TS changes do not create the possibility of a new or different kind of accident, from any accident previously evaluated.

3. The proposed amendment will not involve a significant reduction in the margin of safety.

The APLHGR limits are set appropriately below the value where significant fuel damage could occur in a Loss of Coolant Accident (LOCA). Application of new SLO APLHGR multiplier values ensure that SLO LOCA results are bounded by those for dual loop operation and thus maintain or improve the margin of safety for LOCA analyses.

Therefore, the proposed TS changes do not involve a reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jay E. Silberg, Esq., Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: William D. Reckley.

PPL Susquehanna, LLC, Docket No. 50–387, Susquehanna Steam Electric Station, Unit 1, Luzerne County, Pennsylvania

Date of amendment request: September 19, 2001.

Description of amendment request: The proposed amendment would revise the Unit 1 reactor pressure vessel (RPV) material surveillance program to defer the withdrawal of the second surveillance capsule for one operating cycle. Deferral is requested to support PPL Susquehanna, LLC's, participation in the Boiling Water Reactor Vessel and Internals Project Integrated Surveillance Program.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

A. Does the proposed change involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated?

Pressure-temperature (P/T) limits are imposed on the reactor coolant system to ensure that adequate safety margins against non-ductile or rapidly propagating failure exist during normal operation, anticipated operational occurrences, and system hydrostatic tests. The P/T limits are related to the nil-ductility reference temperature, RTndt. Changes in the fracture toughness properties of the Reactor Pressure Vessel (RPV) beltline materials, resulting from neutron irradiation and the thermal environment, are monitored by a surveillance program in compliance with the requirements of 10 CFR 50, Appendix H. The effect of neutron fluence on the shift in the nil-ductility reference temperature of pressure vessel steel is predicted by methods given in Regulatory Guide (RG) 1.99, Revision 2 and Regulatory Guide 1.190, Revision 0. The Susquehanna SES [Steam Electric Station] Unit 1 current P/T limits were established based on adjusted reference temperatures developed in accordance with the procedures prescribed in RG 1.99, Revision 2. Calculation of adjusted reference temperature by these procedures includes a margin term to ensure upperbound values are used for the calculation of the P/T limits. Revision of the second capsule withdrawal schedule will not affect the P/T limits, because they will continue to be established in accordance with NRC approved methodology in accordance with RG 1.190 Revision 0 commitments. The existing P/T limits are based on 32 EFPY rather than for the planned withdrawal at 15 EFPY. This change is not related to any accidents previously evaluated. The proposed change will not affect reactor pressure vessel performance because no physical changes are involved and the RPV vessel P/T limits will remain in accordance with RG 1.99, Revision 2 commitments. The proposed change will not cause the reactor pressure vessel or

interfacing safety systems to be operated outside of their design or testing limits. Also, the proposed change will not alter any assumptions previously made in evaluating the radiological consequences of accidents.

Therefore, this proposed amendment does not involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated.

B. Does the proposed change create the possibility of a new or different kind of accident from any accident previously analyzed?

The proposed change defers the second RPV material surveillance capsule withdrawal for one fuel cycle. This proposed change does not involve a modification of the design of plant structures, systems, or components. The proposed change will not impact the manner in which the plant is operated as plant operating and testing procedures will not be affected by the change. The proposed change will not degrade the reliability of structures, systems, or components important-to-safety because equipment protection features will not be deleted or modified, equipment redundancy or independence will not be reduced, supporting system performance will not be downgraded, the frequency of operation of equipment important-to-safety will not be increased, and more severe testing of equipment important-to-safety will not be imposed. No new accident types or failure modes will be introduced as a result of the proposed change.

Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from previously analyzed.

C. Does the proposed change involve a significant reduction in a margin of safety?

Appendix G to 10 CFR 50 describes the conditions that require P/T limits and provide the general bases for these limits. Until the results from the reactor vessel surveillance program become available, RG 1.99, Revision 2 is used to predict the amount of neutron irradiation damage. The use of operating limits based on these criteria, as defined by applicable regulations, codes, and standards, provide reasonable assurance that nonductile or rapidly propagating failure will not occur. The P/T limits are not derived from Design Basis Accident (DBA) analyses. They are prescribed during normal operation to avoid encountering pressure, temperature, and temperature rate of change conditions that might cause undetected flaws to propagate and cause nonductile failure of the reactor coolant pressure boundary (RCPB). Since the P/T limits are not derived from any DBA, there are no acceptance limits related to the P/T limits. Rather, the P/T limits are acceptance limits themselves since they preclude operation in an unanalyzed condition. The proposed change will not affect any safety limits, limiting safety system settings, or limiting conditions of operation. The proposed change does not represent a change in initial conditions, or in a system response time, or in any other parameter affecting the course of an accident analysis supporting the Bases of any Technical Specification. The proposed change does not involve revision of the P/T limits, but rather a revision of the withdrawal time for the second surveillance capsule. The current P/T limits were established based on adjusted reference temperatures for vessel beltline materials calculated in accordance with RG 1.99, Revision 2. P/T limits will continue to be revised, as necessary, for changes in adjusted reference temperature due to changes in fluence when two or three credible surveillance data sets become available. When two or more credible surveillance data sets become available, P/T limits will be revised as prescribed in RG 1.190, Revision 0.

Therefore, the proposed changes do not involve a significant reduction in any margins of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bryan A. Snapp, Esquire, Assoc. General Counsel, PPL Services Corporation, 2 North Ninth St., GENTW3, Allentown, PA 18101–1179.

NRC Section Chief: L. Raghavan, Acting.

PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania

Date of amendment request: July 30, 2001, as supplemented August 7, and October 16, 2001.

Description of amendment request: The proposed amendment would revise Technical Specification 5.5.12, ''Primary Containment Leakage Rate Testing Program,'' to allow a one-time deferral of the Type A containment integrated leakage rate test (ILRT) at the Susquehanna Steam Electric Station (SSES), Units 1 and 2. The Unit 1 test would be deferred to no later than May 3, 2007, and the Unit 2 test would be deferred to no later than October 30, 2007, resulting in an extended interval of 15 years for performance of the next ILRT at each unit.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated?

The frequency of Type A testing does not change the probability of an event that results in core damage or vessel failure. Primary containment is the engineered feature that contains the energy and fission products from evaluated events. The SSES IPE [Individual Plant Examination] documents events that lead to containment failure. The frequency of events that lead to containment failure does not change because it is not a function of the Type A test interval. Containment failure is a function of loss of safety systems that shutdown the reactor, provide adequate core cooling, provide decay heat removal, and drywell sprays.

The consequences of the evaluated accidents are the amount of radioactivity that is released to secondary containment and subsequently to the public. Normally, extending a test interval increases the probability that a Structure System or Component will be failed. However, NUREG–1493, Performance-Based Containment Leak-Test Program, states that calculated risks in BWR's is very insensitive to the assumed leakage rates. The remaining testing and inspection programs provide the same coverage as the Type A test. These other programs will maintain containment leakage low. Any leakage path problems will be identified and repairs will be made. Additionally the containment is continuously monitored during power operation. Anomalies are investigated and resolved. Thus there is a high confidence that containment integrity will be maintained independent of the Type A test frequency.

Therefore, this proposed amendment does not involve a significant increase in the probability of occurrence or consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any previously analyzed?

Primary containment is designed to contain energy and fission products during and after an event. The SSES IPE identifies events that lead to containment failure. Revision to the Type A test interval does not change this list of events. There are no physical changes being made to the plant and there are no changes to the operation of the plant that could introduce a new failure mode creating an accident or affecting mitigation of an accident.

Therefore, this proposed amendment does not involve a possibility of a new or different kind of accident from any previously analyzed.

3. Does the proposed change involve a significant reduction in a margin of safety?

The proposed revision to Technical Specifications adds a one time extension to the current interval for Type A testing. The current level of 10 years, based on past performance, would be extended on a one time basis to 15 years from the last Type A test. The NUREG–1493 generic study of the effects of extending containment leakage testing found that a 20-year interval in Type A leakage testing resulted in an imperceptible increase in risk to the public. NUREG–1493 found that, generically, the design containment leakage rate contributes about 0.1% to the individual risk and that increasing the Type A test interval would have minimal affect on this risk since 95% of the potential leakage paths are detected by Type B and Type C testing. Technical Specifications require that maximum allowable primary containment leakage rate is less than 1% primary containment air

weight per day. During unit startup following Type B and Type C testing, leakage rate acceptance criteria must be less than 0.6% primary containment air weight per day. (TS 5.5.12) Therefore, Type B and Type C testing combined with visual inspection programs will maintain containment leakage low.

Therefore, these changes do not involve a significant reduction in margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Bryan A. Snapp, Esquire, Assoc. General Counsel, PPL Services Corporation, 2 North Ninth St., GENTW3, Allentown, PA 18101–1179.

NRC Section Chief: L. Raghavan, Acting.

PSEG Nuclear LLC, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of amendment request: April 16, 2001, as supplemented on July 5, 2001.

Description of amendment request: The proposed Technical Specifications (TSs) change would modify required actions and surveillance requirements (SR) associated with the 28 Volt Direct Current (VDC) Battery System. The proposed changes are consistent with TS and SR requirements for the 125 VDC Battery System, and NUREG–1431, ''Standard Technical Specifications—Westinghouse Plants.''

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff has reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The NRC staff's review is presented below:

1. Will not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes to TS limiting conditions for operation (LCOs) and surveillance requirements (SRs) will not alter the plant's physical configuration or the operation of the 28 VDC Battery System. As a result, the parameters assumed in the Salem Updated Final Safety Analysis Report (UFSAR) Design Basis Accident or Transient Analyses remain unchanged. Therefore, the probability or consequences of an accident previously evaluated are not increased by the proposed change.

2. Does not create the possibility of a new or different kind of accident from any accident previously analyzed.

The proposed changes to the 28 VDC Battery System TS LCOs and SRs do not modify the facility's design or physical configuration or change the method by which any safety-related system performs its function. Therefore, the proposed changes will not increase the possibility of a new or different kind of accident from any accident previously identified.

3. The proposed changes do not involve a significant reduction in the margin of safety.

The proposed changes do not alter the manner in which safety limits or limiting safety system setpoints are determined. As a result, margins of safety are not changed. Therefore, the proposed changes do not involve a significant reduction in any margin of safety.

Based on the NRC staff's analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Section Chief: James W. Clifford.

PSEG Nuclear LLC, Docket Nos. 50–272 and 50–311, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of amendment request: September 24, 2001.

Description of amendment request: The proposed amendment would revise Technical Specification (TS) 3/4.9, ''Refueling Operations,'' by relocating requirements for boron concentration to the Core Operating Limits Report (COLR). The proposed amendment will revise Limiting Condition for Operation (LCO) 3.9.1 by stating that, while the plant is in Mode 6, boron concentration of the Reactor Coolant System (RCS), refueling canal, and the refueling cavity shall be maintained within the limits specified in the COLR. LCO 3.9.1 required actions will also be revised to reference the COLR, and associated surveillance requirements will be changed to state that boron concentration shall be verified to be within the limits provided in the COLR every 72 hours.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration. The NRC staff has reviewed the licensee's analysis against the standards of 10 CFR 50.92(c). The NRC staff's review is presented below:

1. Will not involve a significant increase in the probability or consequences of an accident previously evaluated.

Relocating the minimum required boron concentration values from the TSs to the COLR does not change boron concentration requirements. Specifying the required minimum boron concentration in the COLR will continue to ensure that the proper boron concentration will be maintained in accordance with all the assumptions of appropriate accident analyses. Therefore, the proposed change will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does not create the possibility of a new or different kind of accident from any accident previously analyzed.

The proposed change relocates the minimum required boron concentration values from the TSs to the COLR. Moreover, the proposed change does not physically change the facility, plant operations, or the manner and frequency at which associated boron concentration testing is conducted. Therefore, the proposed change to relocate the required boron concentration to the COLR does not create the possibility of a new or different kind of accident from any previously analyzed.

3. The proposed changes do not involve a significant reduction in the margin of safety.

Minimum boron concentration limits are established to ensure that sufficient margins exist to prevent criticality in the RCS, refueling canal, and the refueling cavity during refueling operations. Since the COLR is prepared as part of each core reload safety evaluation to ensure that current safety analysis limits are met, relocating the minimum boron concentration from the TSs to the COLR will not reduce safety margins. Therefore, the new proposed change to relocate the required boron concentration to the COLR does not involve a significant reduction in the margin of safety.

Based on the NRC staff's analysis, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, P.O. Box 236, Hancocks Bridge, NJ 08038.

NRC Section Chief: James W. Clifford.

South Carolina Electric & Gas Company (SCE&G), South Carolina Public Service Authority, Docket No. 50–395, Virgil C. Summer Nuclear Station, Unit No. 1, Fairfield County, South Carolina

Date of amendment request: June 19, 2001.

Description of amendment request: South Carolina Electric & Gas Company (SCE&G) proposes a change to the Virgil C. Summer Nuclear Station (VCSNS) Technical Specifications (TS) Surveillance Requirements to revise Table 3.7–1. This change will identify maximum allowable power range neutron flux high setpoints based on the plant safety analysis or conservatively derived values calculated in accordance with NRC Information Notice 94–60 and Westinghouse Nuclear Safety Advisory Letter NSAL–94–001.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

The proposed changes to Technical Specification 3.7.1 and its associated bases do not contribute to the initiation of any accident previously evaluated. Supporting factors are as follows:

All NSSS components are compatible with the revised core power limits and resulting operating conditions. Their structural integrity is maintained during all proposed plant conditions through compliance with the ASME code.

Other systems important to safety are not adversely impacted and will continue to perform their design functions.

The revised core power limits and resulting operating conditions remain within the design envelope of the plant.

Therefore, since the reactor coolant pressure boundary integrity and system functions are not adversely impacted, the probability of occurrence of an accident previously evaluated will be no greater than the existing design basis of the plant. The revised method to derive allowable power levels with inoperable main steam safety valves results in lower High Flux Trip Setpoints. When implemented, the revised trip setpoints ensure that secondary system pressure will be limited to within 110% (1305 psig) of its design pressure of 1185 psig during the most severe anticipated system operational transients. Since the ASME and regulatory limits on secondary side overpressurization will be met, the proposed changes will not create the potential for an increase in offsite releases or doses for any accident. Therefore, there is no increase in the consequences of an accident previously evaluated.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed changes to Technical Specification 3.7.1 and its associated bases do not introduce any new accident initiator mechanisms. Structural integrity of the RCS and the secondary side is maintained during the allowed operating conditions, and ASME code limits continue to be met during all anticipated operating conditions. In addition, no new failure modes or limiting single failure or new design requirements for auxiliary systems are being introduced. Since the safety and design requirements continue to be met and the integrity of the primary and secondary pressure boundary is maintained, no new accident scenarios have been created. Therefore, the types of accidents previously defined continue to represent the credible spectrum of events to be analyzed. A new or different kind of accident is thus not created.

3. Does this change involve a significant reduction in margin of safety?

The proposed changes to Technical Specification 3.7.1 and its associated bases preserve the results and conclusions of plants safety analyses presented in the FSAR. The proposed changes address an identified deficiency with the current Technical Specification and, when implemented, restores the margin of safety intended. Specifically, the proposed changes ensures overpressure ensure that the secondary system pressure will be limited to within 110% (1305 psig) of its design pressure of 1185 psig during the most severe anticipated system operational transient. Therefore, there is no reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Thomas G. Eppink, South Carolina Electric & Gas Company, Post Office Box 764, Columbia, South Carolina 29218.

NRC Section Chief: Richard L. Emch, Jr.

Southern Nuclear Operating Company, Inc., Georgia Power Company, Oglethorpe Power Corporation, Municipal Electric Authority of Georgia, City of Dalton, Georgia, Docket Nos. 50–321 and 50–366, Edwin I. Hatch Nuclear Plant, Units 1 and 2, Appling County, Georgia

Date of amendment request: September 19, 2001.

Description of amendment request: The proposed amendments would revise surveillance requirement 3.6.1.3.8 which currently requires verification of the actuation capability of each reactor instrumentation excess flow check valve (EFCV) every 18 months. The proposed amendments would state that a representative sample of the EFCVs will be tested every 18 months such that each EFCV will be tested at least once every 10 years. The proposed amendments are consistent with Technical Specification Task Force-334.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. Does the change involve a significant increase in the probability or consequences of a previously evaluated event?

The Excess Flow Check Valves are designed to limit the flow from an instrument line break downstream of the check valve itself. Thus the previously analyzed event is the instrument line break, documented in the Unit 2 FSAR, section 15.4.13, for both units. This proposed revision does not alter the operation or maintenance of any instrument lines; the revision is made to reduce the surveillance requirements for the EFCVs. This revision does nothing which jeopardizes the integrity of the instrument lines and thus increase the probability of a line break.

The line break analysis does not take credit for operation of the excess flow check valves, therefore, the radiological consequences of this event are not affected by this proposed TS revision.

This amendment request does not affect any other previously evaluated line or pipe break analsis.

For the above reasons, the probability of occurrence, or the consequences of a previously evaluated event are not increased by this proposed change.

2. Do the proposed changes create the possibility of a new type event different from any previously evaluated?

No changes are being made to the way in which the EFCVs are operated, or maintained; they will continue to be operated within the conditions for which they were designed. Since no new operational modes are proposed, no new failure modes are introduced.

Furthermore, no changes to any systems designed for the prevention of transients or accidents are being made as a result of this proposed Technical Specification change.

For the above reasons, this proposed change does not introduce the possibility of a different type event from any previously evaluated.

3. Do the proposed changes involve a significant reduction in the margin of safety?

The reactor coolant pressure boundary line break analysis documented in Unit 2 FSAR section 15.4.13 does not assume credit for the EFCVs. Additionally, the failure rate of the Unit 1 and 2 EFCVs has been small, as verified by the failure rate analysis done for this proposed revision. Accordingly, reducing the frequency of the surveillance is justified and will not significantly reduce the margin of safety with respect to EFCV failure.

Additionally, General Electric has performed a generic radiological evaluation of an instrument line break, with EFCV failure, which concluded that the dose

consequences would not exceed 10 CFR 100 guidelines. This analysis is documented in NEDO–32977–A, ''Excess Flow Check Valve relaxation'', a report commissioned by the Boiling Water Reactors Owners' Group (BWROG). Because the Hatch EFCV design is similar to the EFCV designs assumed in the NEDO, it is reasonable to conclude that the results of this generic analysis are bounding for Plant Hatch.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Ernest L. Blake, Jr., Esquire, Shaw, Pittman, Potts and Trowbridge, 2300 N Street, NW., Washington, DC 20037.

NRC Section Chief: Richard J. Laufer, Acting.

Tennessee Valley Authority, Docket Nos. 50–259, 50–260 and 50–296, Browns Ferry Nuclear Plant, Units 1, 2 and 3, Limestone County, Alabama

Date of amendment request: August 10, 2001.

Description of amendment request: The proposed amendment would revise Technical Specification (TS) 3.9.1, ''Refueling Equipment Interlocks,'' to provide alternative actions when the refueling equipment interlocks are inoperable.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The operation of refueling interlocks is explicitly assumed in the analyses of the control rod removal error and fuel loading error during refueling. Inadvertent criticality is prevented during the loading of fuel provided all control rods are fully inserted. The refueling interlocks accomplish this by preventing the loading of fuel into the core with any control rod withdrawn, or by preventing withdrawal of a rod from the core during fuel loading. Under existing TS when the refueling interlocks are inoperable, the current method of preventing fuel loading with control rods withdrawn is to prevent fuel movement. An alternate method to ensure that fuel is not loaded into a cell with a control rod withdrawn is to prevent control rods from being withdrawn and to verify that all control rods are fully inserted. The proposed TS Required Actions will require that a control rod block be placed in effect, thereby ensuring that control rods are not subsequently inappropriately withdrawn, and that all required control rods be verified to be fully inserted. This verification is in addition to the requirements to periodically verify control rod position by other TS requirements.

The proposed actions will ensure that control rods are not withdrawn and cannot be inappropriately withdrawn, because a control rod withdrawal block is in place. Like the current TS requirements, the proposed actions will ensure that unacceptable operations are blocked. Hence, the proposed additional Required Actions provide an equivalent level of assurance that fuel will not be loaded into a core cell with a control rod withdrawn as does the current TS Required Action. Therefore, the proposed change does not significantly increase the probability or consequences of an accident previously evaluated.

2. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The change in the TS requirements does not involve a change in plant design or to the analyzed condition of the reactor core during refueling. The proposed new Required Actions will ensure that control rods are not withdrawn and cannot be inappropriately withdrawn, because a block to control rod withdrawal is in place. Therefore, no new failure modes are introduced, and the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed amendment does not involve a significant reduction in a margin of safety.

As discussed in the Bases for the affected TS requirements, inadvertent criticality is prevented during the loading of fuel provided all control rods are fully inserted during the fuel insertion. The refueling interlocks function to support the refueling procedures by preventing control rod withdrawal during fuel movement and the inadvertent loading of fuel when a control rod is withdrawn. The proposed change will allow the refueling interlocks to be inoperable and fuel movement to continue only if a control rod withdrawal block is in effect and all control rods are verified to be fully inserted. These proposed Required Actions provide an equivalent level of protection as the refueling interlocks by preventing a configuration that could lead to an inadvertent criticality event. The refueling procedures will continue to be supported by the proposed Required Actions because control rods cannot be withdrawn and as a result, fuel cannot be inadvertently loaded when a control rod is withdrawn. Therefore, the proposed changes do not result in a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET l0H, Knoxville, Tennessee 37902.

NRC Section Chief: Richard P. Correia.

Tennessee Valley Authority, Docket Nos. 50–260 and 50–296, Browns Ferry Nuclear Plant, Units 2 and 3, Limestone County, Alabama

Date of amendment request: August 17, 2001.

Description of amendment request: The proposed amendment would revise Technical Specification (TS) Table 3.3.1.1–1, ''Reactor Protection System [RPS] Instrumentation,'' to remove one RPS function and modify another.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

A. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Modifications to the Scram Discharge Instrument Volume (SDIV) System are being implemented to ensure that the SDIV high water level instrumentation will respond adequately to provide redundant, diverse trip functions for a Scram Discharge Volume (SDV) inleakage event. Since the scram function will be successfully performed, the removal of the low scram pilot air header pressure trip function does not involve a significant increase in the probability or consequences of any accident previously evaluated.

B. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The design criteria for the Scram Discharge System is contained in the Safety Evaluation Report on the BWR Scram Discharge System, which was transmitted by NRC letter dated December 9, 1980, to all BWR licensees. Modifications to the SDV System have been evaluated to demonstrate that the high water level instrumentation in the SDIV will respond adequately to provide the required trip function. No new system failure modes are created as a result of removing the low scram pilot air header trip, since the redundant and diverse SDIV high water level instruments will initiate a successful reactor scram. Therefore, the removal of the low scram pilot air header trip function does not create the possibility of a new or different kind of accident from any accident previously evaluated.

C. The proposed amendment does not involve a significant reduction in a margin of safety.

The water level in the SDIV is monitored by both resistance-temperature type detectors and float switches. Redundancy and diversity in the instrumentation that initiates the

scram signal is maintained even with the removal of the low scram pilot air header pressure trip function. Modifications to the SDIV System have been evaluated to demonstrate that the high water level instrumentation will respond adequately to provide the required trip function for an inleakage event. Therefore, the proposed amendment does not involve a significant reduction in the margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET l0H, Knoxville, Tennessee 37902.

NRC Section Chief: Richard P. Correia.

Tennessee Valley Authority, Docket No. 50–327, Sequoyah Nuclear Plant, Unit 2, Hamilton County, Tennessee

Date of application for amendments: October 9, 2001 (TS 01–10).

Brief description of amendments: The proposed amendment would change the Sequoyah (SQN) Unit 2 Operating License Technical Specifications (TSs), specifically TS 6.8.4.h, ''Containment Leakage Rate Testing Program,'' to allow a one-time 5-year extension to the current 10-year test interval for the containment performance-based leakage rate test program.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), Tennessee Valley Authority (TVA), the licensee, has provided its analysis of the issue of no significant hazards consideration, which is presented below:

A. The proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed extension to Type A testing does not increase the probability of an accident previously evaluated since the change is not a modification to plant systems, nor a change to plant operation that could initiate an accident.

TVA performed an evaluation of the risk significance for the proposed increase to the Sequoyah Unit 2 Type A test frequency. The results of the TVA evaluation indicate that the increase in Large Early Release Frequency (LERF) remains below the level of risk significance defined in NRC Regulatory Guide (RG) 1.174, ''An Approach for Using Probabilistic Risk Assessment In Risk-Informed Decisions On Plant-Specific Changes to the Licensing Basis.'' TVA's evaluation indicates that the increase in frequency for all releases (small, large, early and late) and the increase in radiation dose to the population is non-risk significant (3.5E–7/reactor year and 7.72 person-rem, respectively).

The proposed test interval extension does not involve a significant increase in the consequences of an accident because research documented in NUREG–1493 determined that generically, very few potential containment leakage paths fail to be identified by Type A tests. An analysis of 144 Type A test results, including 23 failures, found that no failures were due to containment liner breach. The NUREG concluded that reducing the Type A test frequency to once per 20 years would lead to an imperceptible increase in risk. Furthermore, the NUREG concluded that Type B and C testing provides assurance that containment leakage from penetration leak paths (*i.e.,* valves, flanges, containment air-locks) identify any leakage that would otherwise be detected by the Type A tests.

In addition to the NUREG conclusions, TVA's American Society of Mechanical Engineers (ASME) IWE program performs containment inspections periodically in order to detect evidence of degradation that may affect either the containment structural integrity or leak tightness. Accordingly, TVA's proposed extension of the Type A test interval does not [significantly] increase the probability or consequences of an accident previously evaluated.

B. The proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change to extend the Type A test interval does not create the possibility of a new or different type of accident since there are no physical changes made to the plant. There are no changes to the operation of the plant that would introduce a new failure mode creating the possibility of a new or different kind of accident.

C. The proposed amendment does not involve a significant reduction in a margin of safety.

The proposed change to extend the Type A test interval will not significantly reduce the margin of safety. A generic study documented in NUREG–1493 indicates that extending the Type A leak test interval to 20 years would result in an imperceptible increase in risk to the public. The NUREG also found that, generically, the containment leakage rate contributes a very small amount to the individual risk and that the decrease in the Type A test frequency would have a minimal affect on risk because most potential leakage paths are detected by Type C testing.

Previous Type A leakage tests conducted on Sequoyah Unit 2 indicate that leakage from Unit 2 containment has been less than the 10 CFR 50 Appendix J leakage limit of 1.0 L_a. A review of previous Unit 2 Type A test results indicate at least a 10 percent margin exists below the 1.0 L_a leakage limit. These test results provide assurance that the proposed extension to the Type A test interval would not significantly reduce the margin of safety.

The NRC has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: General Counsel, Tennessee Valley Authority, 400 West Summit Hill Drive, ET 10H, Knoxville, Tennessee 37902.

NRC Section Chief: Richard P. Correia.

Notice of Issuance of Amendments to Facility Operating Licenses

During the period since publication of the last biweekly notice, the Commission has issued the following amendments. The Commission has determined for each of these amendments that the application complies with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR Chapter I, which are set forth in the license amendment.

Notice of Consideration of Issuance of Amendment to Facility Operating License, Proposed No Significant Hazards Consideration Determination, and Opportunity for A Hearing in connection with these actions was published in the **Federal Register** as indicated.

Unless otherwise indicated, the Commission has determined that these amendments satisfy the criteria for categorical exclusion in accordance with 10 CFR 51.22. Therefore, pursuant to 10 CFR 51.22(b), no environmental impact statement or environmental assessment need be prepared for these amendments. If the Commission has prepared an environmental assessment under the special circumstances provision in 10 CFR 51.12(b) and has made a determination based on that assessment, it is so indicated.

For further details with respect to the action see (1) the applications for amendment, (2) the amendment, and (3) the Commission's related letter, Safety Evaluation and/or Environmental Assessment as indicated. All of these items are available for public inspection at the Commission's Public Document Room, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland. Publicly available records will be accessible from the Agencywide Documents Access and Management Systems (ADAMS) Public Electronic Reading Room on the internet at the NRC web site, *http://www.nrc.gov/NRC/ADAMS/index.html.* If you do not have access to ADAMS or if there are problems in accessing the

documents located in ADAMS, contact the NRC Public Document Room (PDR) Reference staff at 1–800–397–4209, 301–415–4737 or by email to pdr@nrc.gov.

AmerGen Energy Company, LLC, Docket No. 50–289, Three Mile Island Nuclear Station, Unit 1, Dauphin County, Pennsylvania

Date of application for amendment: May 31, 2001, as supplemented September 14, 2001.

Brief description of amendment: The amendment revised the TMI–1 Technical Specifications (TSs) to incorporate Cycle 14 specific limits for the variable low reactor coolant system pressure-temperature core protection safety limits. These changes are reflected in revisions to Figures 2.1–1 and 2.1–3 of the TSs and the related Bases.

Date of issuance: October 23, 2001.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment No.: 238.

Facility Operating License No. DPR–50.: Amendment revised the TSs.

Date of initial notice in ***Federal Register:*** July 11, 2001 (66 FR 36337).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 23, 2001.

No significant hazards consideration comments received: No.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of application for amendment: October 30, 2000, as supplemented by letter dated September 13, 2001.

Brief description of amendment: The amendment modified the Final Safety Analysis Report (FSAR) to reflect analysis of a HI-STORM 100 spent fuel cask system, spent fuel pool description and crane operations.

Date of issuance: October 26, 2001.

Effective date: October 26, 2001, and shall be implemented in the next periodic update to the FSAR in accordance with 10 CFR 50.71(e).

Amendment No.: 174.

Facility Operating License No. NPF–21: The amendment revised the Final Safety Analysis Report.

Date of initial notice in **Federal Register:** March 21, 2001 (66 FR 15918). The September 13, 2001, supplemental letter provided additional clarifying information, did not expand the scope of the original **Federal Register** notice, and did not change the staff's original proposed no significant hazards consideration determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 26, 2001.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–368, Arkansas Nuclear One, Unit No. 2, Pope County, Arkansas

Date of application for amendment: August 23, 2001, as supplemented by letter dated September 25, 2001.

Brief description of amendment: The amendment revised the Technical Specifications to eliminate the requirement to move control element assembly #43 for the remainder of Cycle 15.

Date of issuance: October 22, 2001.

Effective date: As of the date of issuance to be implemented within 30 days from the date of issuance.

Amendment No.: 235.

Facility Operating License No. NPF–6: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 5, 2001 (66 FR 46478). The September 25, 2001, supplemental letter provided clarifying information that was within the scope of the original **Federal Register** notice and did not change the staff's initial no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 22, 2001.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: July 18, 2001.

Brief description of amendment: The amendment changes Technical Specifications (TS) Definitions 1.12 and 1.25, the effect of which will be to allow either an allocated or a measured response time to be utilized for the sensors in the Reactor Protective System and Engineered Safety Features Actuation System instrument loops.

Date of issuance: October 29, 2001.

Effective date: As of the date of issuance and shall be implemented 60 days from the date of issuance.

Amendment No.: 175.

Facility Operating License No. NPF–38: The amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 5, 2001 (66 FR 46479).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 29, 2001.

No significant hazards consideration comments received: No.

Entergy Operations, Inc., System Energy Resources, Inc., South Mississippi Electric Power Association, and Entergy Mississippi, Inc., Docket No. 50–416, Grand Gulf Nuclear Station, Unit 1, Claiborne County, Mississippi

Date of application for amendment: October 24, 2000, as supplemented by letters dated June 18 and August 21, 2001.

Brief description of amendment: The amendment revises Technical Specification 3.8.3 regarding the lube oil inventories for the Grand Gulf Nuclear Station, Unit 1, Divisions I, II, and III emergency diesel generators (EDGs), and will result in additional margins for lube oil availability to provide for EDG operability for seven days following a postulated design basis accident.

Date of issuance: October 23, 2001.

Effective date: As of the date of issuance and shall be implemented within 90 days of issuance.

Amendment No: 149.

Facility Operating License No. NPF–29: The amendment revises the Technical Specifications.

Date of initial notice in ***Federal Register:*** January 24, 2001 (66 FR 7680).

The June 18 and August 21, 2001 supplemental letters did not change the scope of the original **Federal Register** notice or the initial no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 23, 2001.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, Docket Nos. STN 50–454 and STN 50–455, Byron Station, Unit Nos. 1 and 2, Ogle County, Illinois, Docket Nos. STN 50–456 and STN 50–457, Braidwood Station, Unit Nos. 1 and 2, Will County, Illinois

Date of application for amendments: October 1, 2001, as supplemented by letters dated October 9, 2001, and October 18, 2001. The supplemental letters provided clarifying information only and did not change the original proposed no significant hazards determination.

Brief description of amendments: The amendments revise Byron and Braidwood technical specifications (TS) surveillance requirement (SR) 3.7.2.1 and SR 3.7.2.2 to add a note stating that these surveillances are not required to be met until the first startup after September 27, 2001. This change is

applicable to Byron Station Units 1 and 2, and Braidwood Unit 2 only. This change is not applicable to Braidwood Station, Unit 1, due to the recent restart of the unit after the refueling outage.

Date of issuance: November 1, 2001.

Effective date: November 1, 2001.

Amendment Nos.: 124, 124, 119, and 119.

Facility Operating License Nos. NPF–37, NPF–66, NPF–72 and NPF–77: The amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** October 23, 2001 (66 FR 53643).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 1, 2001.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, Docket No. 50–346, Davis-Besse Nuclear Power Station, Unit 1, Ottawa County, Ohio

Date of application for amendment: December 2, 2000, as supplemented by letters dated September 4 and September 28, 2001.

Brief description of amendment: This amendment increases the spent fuel pool (SFP) storage capability, as a result of the SFP re-racking project, from the current capacity of 735 fuel assemblies to a new capacity of 1624 fuel assemblies. The amendment also approves additional temporary storage of up to 90 fuel assemblies in the fuel transfer pit to support a complete re-racking of the SFP. The increase in SFP storage capacity will provide a full core offload capability during the plant's Cycle 13 operation and enable the Davis-Besse facility to meet its storage needs through April 22, 2017, which is the expiration date for the current operating license.

Date of issuance: October 19, 2001.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment No.: 247.

Facility Operating License No. NPF–3: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 6, 2001 (66 FR 46656).

The supplemental letters contained clarifying information and did not change the initial no significant hazards consideration determination and did not expand the scope of the original **Federal Register** notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 19, 2001.

No significant hazards consideration comments received: No.

FirstEnergy Nuclear Operating Company, Docket No. 50–346 Davis-Besse Nuclear Power Station, Unit 1, Ottawa County, Ohio

Date of application for amendment: April 4, 2001.

Brief description of amendments: This license amendment request: Deletes Technical Specification (TS) 1.7, Definitions-Reportable Event, and TS 6.6, Reportable Event—Action; Revise TS 6.5.3, Technical Review and Control—Activities, and TS Bases 4.0.3, Applicability.

Date of issuance: November 2, 2001.

Effective date: As of the date of issuance and shall be implemented within 120 days.

Amendment No.: 248.

Facility Operating License No. NPF–3: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** February 12, 2001 (66 FR 31708).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 2, 2001.

No significant hazards consideration comments received: No.

Florida Power and Light Company, et al., Docket No. 50–389, St. Lucie Plant, Unit No. 2, St. Lucie County, Florida

Date of application for amendment: June 22, 2001, as supplemented August 24, 2001.

Brief description of amendment: Revised Technical Specifications to allow the containment equipment door and airlock doors to be open during core alterations and fuel movement under administrative controls.

Date of Issuance: October 22, 2001.

Effective Date: As of the date of issuance and shall be implemented within 60 days of issuance.

Amendment No.: 120.

Facility Operating License No. NPF–16: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 19, 2001 (66 FR 48287).

The August 24, 2001, supplement did not affect the original proposed no significant hazards determination, or expand the scope of the request as noticed in the **Federal Register**.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 22, 2001.

No significant hazards consideration comments received: No.

Indiana Michigan Power Company, Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of application for amendments: October 24, 2000, as supplemented June 29, 2001.

Brief description of amendments: The amendments would approve changes to the updated final safety analysis report to incorporate a supplemental methodology into the analysis of steam generator overfill following a steam generator tube rupture.

Date of issuance: October 24, 2001.

Effective date: As of the date of issuance and shall be implemented within 30 days.

Amendment Nos.: 256 and 239.

Facility Operating License Nos. DPR–58 and DPR–74: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** January 24, 2001 (66 FR 7682). The supplemental letter contained clarifying information and did not change the initial no significant hazards consideration determination and did not expand the scope of the original **Federal Register** notice. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 24, 2001.

No significant hazards consideration comments received: No.

Indiana Michigan Power Company, Docket Nos. 50–315 and 50–316, Donald C. Cook Nuclear Plant, Units 1 and 2, Berrien County, Michigan

Date of application for amendments: June 12, 2000, as supplemented by letters dated November 7, 2000, June 19, and August 17, 2001.

Brief description of amendments: The amendments revised the technical specifications to change the standard by which you test charcoal used in engineered safeguard features systems to American Society for Testing and Materials D3808–1989. These revisions are made in accordance with Generic Letter 99–02, ''Laboratory Testing of Nuclear-grade Activated Charcoal.''

Date of issuance: October 24, 2001.

Effective date: As of the date of issuance and shall be implemented within 90 days.

Amendment Nos.: 257 and 240.

Facility Operating License Nos. DPR–58 and DPR–74: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** August 23, 2000 (65 FR 51356). The supplemental letters contained clarifying information and did not change the initial no significant hazards consideration determination

and did not expand the scope of the original **Federal Register** notice. The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 24, 2001.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: February 28, 2001, as supplemented by letters dated September 14, 18, and 27, 2001. The letters dated September 14, 18, and 27, 2001, provided clarifying information, and did not alter the NRC staff's conclusions regarding finding of no significant hazards consideration.

Brief description of amendment: The amendment evaluates the licensee's revised calculation methodology for assessment of consequences of design basis accidents, and revises Technical Specifications.

Date of issuance: October 23, 2001.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment No.: 187.

Facility Operating License No. DPR–46: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 19, 2001 (66 FR 48288).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 23, 2001.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: April 12, 2001.

Brief description of amendment: The Amendment revises the Technical Specifications Bases Control Program to incorporate revisions to 10 CFR 50.59.

Date of issuance: October 25, 2001.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment No.: 188.

Facility Operating License No. DPR–46: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 19, 2001 (66 FR 48289).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 25, 2001.

No significant hazards consideration comments received: No.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: April 12, 2001.

Brief description of amendment: The amendment revises the Technical Specifications surveillance test requirement SR 3.6.1.3.8, for excess flow check valves (EFCVs), to relax the 18-month EFCV surveillance frequency by limiting the number of tests to a ''representative sample'' every 18 months, such that each EFCV will be tested at least once every 10 years.

Date of issuance: October 26, 2001.

Effective date: As of the date of issuance and shall be implemented within 30 days from the date of issuance.

Amendment No.: 189.

Facility Operating License No. DPR–46: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 19, 2001 (66 FR 48289).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 26, 2001.

No significant hazards consideration comments received: No.

North Atlantic Energy Service Corporation, et al., Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: June 12, 2001.

Description of amendment request: The amendment changes Technical Specification (TS) 4.4.10 to incorporate alternative reactor coolant pump flywheel inspections and makes administrative wording changes to TSs 6.4.1.7.b, 6.4.2.2.d, and 6.4.2.3.

Date of issuance: October 22, 2001.

Effective date: As of its date of issuance, and shall be implemented within 60 days.

Amendment No.: 79.

Facility Operating License No. NPF–86: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** July 25, 2001 (66 FR 38764).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 22, 2001.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: May 18, 2001, as supplemented October 10, 2001.

Brief description of amendment: The amendment (1) deletes a redundant requirement for valving out control rod drives, (2) revises control rod accumulator operability requirements, (3) adds the option to hydraulically isolate control rod drives, and (4) corrects an inconsistency describing when source range monitors are required to be operable during core monitoring.

Date of issuance: October 26, 2001.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 123.

Facility Operating License No. DPR–22: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** June 12, 2001 (66 FR 31711).

The supplement provided clarifying information to the application that was within the scope of the original **Federal Register** notice and did not change the staff's initial proposed no significant hazards considerations determination. The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 26, 2001.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket No. 50–263, Monticello Nuclear Generating Plant, Wright County, Minnesota

Date of application for amendment: August 15, 2001.

Brief description of amendment: The amendment revises the Technical Specifications (TSs) to (1) reflect the replacement of Monticello's licensed operator initial and requalification training programs with an accredited systems-approach-to-training program and (2) relocate the existing TS requirements for procedures, records, and reviews to the Operational Quality Assurance Plan.

Date of issuance: October 30, 2001.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment No.: 124.

Facility Operating License No. DPR–22: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** September 19, 2001 (66 FR 48290).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 30, 2001.

No significant hazards consideration comments received: No.

PPL Susquehanna, LLC, Docket Nos. 50–387 and 50–388, Susquehanna Steam Electric Station, Units 1 and 2, Luzerne County, Pennsylvania

Date of application for amendments: August 31, 2001.

Brief description of amendments: The amendments extend the implementation date for Amendment No. 184 for Unit 1 and Amendment No. 158 for Unit 2 from November 1, 2001, to November 1, 2003. Amendment Nos. 184 and 158 approved technical specification changes to incorporate requirements related to oscillation power range monitoring (OPRM) instrumentation. The implementation date extension is needed to provide additional time to address software deficiencies with the OPRM system identified in a June 29, 2001, General Electric report filed pursuant to part 21 of Title 10 of the Code of Federal Regulations.

Date of issuance: October 29, 2001.

Effective date: As of date of issuance and shall be implemented within 30 days.

Amendment Nos.: 196 and 172.

Facility Operating License Nos. NPF–14 and NPF–22: The amendments revised the license.

Date of initial notice in ***Federal Register:*** September 19, 2001 (66 FR 48291).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated October 29, 2001.

No significant hazards consideration comments received: No.

Southern California Edison Company, et al., Docket No. 50–206, San Onofre Nuclear Generating Station, Unit 1, San Diego County, California

Date of application for amendment: October 30, 2000, as supplemented by letters dated May 7, June 13, 2001, and by internet memoranda dated June 28, July 3, July 23, and October 16, 2001.

Brief description of amendments: Amendment Application No. 217 is a request to revise the San Onofre Nuclear Generating Station, Unit 1 (SONGS 1) operating license and technical specifications to remove certain requirements that have been determined to be unnecessary and modify requirements to provide flexibility during the decommissioning of SONGS 1. This change removes the need to perform activities that are not providing a benefit to safely maintain the spent fuel in the spent fuel pool. This change also provides some flexibility in the operation of the spent fuel pool during the decommissioning of SONGS 1.

Date of issuance: October 30, 2001.

Effective date: October 30, 2001, to be implemented within 30 days of issuance.

Amendment No.: Unit 1–160.

Facility Operating License No. DPR–13: The amendment revised the Operating License and the Technical Specifications.

Date of initial notice in ***Federal Register:*** December 13, 2000 (65 FR 77924).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 30, 2001.

No significant hazards consideration comments received: No.

Tennessee Valley Authority, Docket Nos. 50–327 and 50–328, Sequoyah Nuclear Plant, Units 1 and 2, Hamilton County, Tennessee

Date of application for amendments: August 6, 2001 (TS 01–05).

Brief description of amendments: The amendments revised the SQN Unit 1 and 2 Technical Specifications (TSs) by changing the surveillance requirements for verifying that containment isolation valves to be closed. More specifically, valves in high radiation areas may be verified by administrative means. In addition, valves which are locked sealed or otherwise secured do not need to be reverified closed and are eliminated from the scope of the surveillance.

Date of issuance: October 24, 2001.

Effective date: As of the date of issuance and shall be implemented within 45 days of issuance.

Amendment Nos.: 271 and 260.

Facility Operating License Nos. DPR–77 and DPR–79: Amendments revise the TSs.

Date of initial notice in ***Federal Register:*** August 22, 2001 (66 FR 44177). The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 24, 2001.

No significant hazards consideration comments received: No.

Vermont Yankee Nuclear Power Corporation, Docket No. 50–271, Vermont Yankee Nuclear Power Station, Vernon, Vermont

Date of application for amendment: April 23, 2001.

Brief description of amendment: The amendment updates the license by deleting obsolete information, correcting errors, and making administrative changes to enhance the context and provide consistency.

Date of Issuance: October 22, 2001.

Effective date: As of the date of issuance, and shall be implemented within 60 days.

Amendment No.: 206.

Facility Operating License No. DPR–28: Amendment revised the License.

Date of initial notice in ***Federal Register:*** May 30, 2001 (66 FR 29363).

The Commission's related evaluation of this amendment is contained in a Safety Evaluation dated October 22, 2001.

No significant hazards consideration comments received: No.

Note: The publication date for this notice will change from every other Wednesday to every other Tuesday, effective January 8, 2002. The notice will contain the same information and will continue to be published biweekly.

Dated at Rockville, Maryland, this 6th day of November 2001.

For the Nuclear Regulatory Commission.

John A. Zwolinski,

Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 01–28399 Filed 11–13–01; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF MANAGEMENT AND BUDGET

Public Availability of Year 2001 Agency Inventories Under the Federal Activities Inventory Reform Act of 1998 (Public Law 105–270) (''FAIR Act'')

AGENCY: Office of Management and Budget, Executive Office of the President.

ACTION: Notice of public availability of agency inventories of activities that are not inherently governmental.

SUMMARY: Agency Inventories of Activities that are not Inherently Governmental are now available to the public from the agencies listed below, in accordance with the ''Federal Activities Inventory Reform Act of 1998'' (Public Law 105–270) (''FAIR Act''). This is the second release of the 2001 FAIR Act inventories. In addition, the Office of Federal Procurement Policy has prepared and has made available a summary FAIR Act User's Guide through its Internet site: *http://www.whitehouse.gov/OMB/procurement/index.html.* This User's Guide will help interested parties review 2001 FAIR Act inventories, and will also include the Website addresses to access agency inventories.

The FAIR Act requires that OMB publish an announcement of public

availability of agency Inventories of Activities that are not Inherently Governmental upon completion of OMB's review and consultation process concerning the content of the agencies' inventory submissions. OMB has now completed this process for the year 2001.

The attached Inventories of Activities that are not Inherently Governmental are now available.

Mitchell E. Daniels, Jr.,

Director.

Attachment

Agency	Contact
Armed Forces Retirement Home	Rick Coleman, 202–730–3504Website: www.afrh.com
Barry Goldwater Scholarship Education Foundation	Gerald Smith, 703–756–6012Website: www.act.org/goldwater
Christopher Columbus Fellowship Foundation	Judith Shellenberger, 315–258–0090Website: www.columbusfdn.org
Committee Purchase People Who Are Blind or Severely Disabled	Dr. Rita Wells, 703–603–7740Website: www.jwod.gov
Commerce	Edna Campbell, 202–482–0585Website: www.doc.gov/oebam/fair
Consumer Product Safety Commission	Edward Quist, 301–504–0029 ext. 2240Website: www.cpsc.gov/businfo/businfo.html
Council on Environmental Quality	Ted Boling, 202–395–3449Website: www.whitehouse.gov/CEQ
Education	Gary Weaver, 202–401–3848Website: www.ed.gov
Environmental Protection Agency OIG)	Lisa Karpf, 202–260–8380Website: www.epa.gov/oigearth
Environmental Protection Agency	George Ames, 202–564–4998Website: www.epa.gov/efinpage
Equal Employment Opportunity Commission	George Betters, 202–663–4266Website: www.eeoc.gov
Federal Communications Commission	Michelle Sutton, 202–418–0100Website: www.fcc.gov
Farm Credit Administration	Phillip Shebest, 703–883–4146Website: www.fca.gov
Federal Labor Relations Authority	Harold Kessler, 202–482–6690 ext. 440Website: www.flra.gov
Federal Retirement Thrift Investment Board	Richard White, 202–942–1633Website: www.frtib.gov/eread.html
Federal Maritime Commission	Bruce Dombrowski, 202–523–5800Website: www.fmc.gov
Federal Energy Regulatory Commission	Donald Chamblee, 202–208–1088Website: www.ferc.fed.gov
Federal Mine Safety and Health Review Commission	Richard Baker, 202–653–5625Website: www.fmshrc.gov
Health and Human Services	Michael Colvin, 202–690–7887Website: www.hhs.gov/ogam
Interior	Jennings Wong, 202–208–6704Website: www.doi.gov/pam
Interior (OIG)	Richard Farr, 202–208–4599Website: www.oig.doi.gov
Japan-United States Friendship Commission	Eric Ganloff, 202–418–9800 Website: www.jusfc.gov
Marine Mammal Commission	Suzanne Montgomery, 301–504–0087Website: www.whitehouse.gov/OMB/procurement
Morris Udall Foundation	Chris Helms, 520–670–5299Website: www.Udall.gov
National Commission on Libraries and Information Science	Judith Russell, 202–606–9200 Website: www.nclis.gov
National Mediation Board	June King, 202–692–5010Website: www.nmb.gov
National Endowment for the Arts	Mike Burke, 202–682–5497Website: www.arts.gov/learn
Office of Science & Technology Policy	Barbara Ferguson, 202–456–6001 Website: www.ostp.gov
Office of Government Ethics	Sean Donohue, 202–208–8000 ext. 1217Website: www.usoge.gov
Office of Personnel Management	Kenneth McMahill, 202–606–2424Website: www.opm.gov/procure
Patent and Trademark Office	Daniel Haigler, 703–305–8175Website: www.uspto.gov
Railroad Retirement Board (OIG)	Martin Dickman, 312–751–4690Website: www.rrb.gov/oig/fairinven.html
Railroad Retirement Board	Henry M. Valiulis, 312–751–4520Website: www.rrb.gov/pdf/cainventory.pdf
Securities and Exchange Commission	Jayne Seidman, 202–942–4000Website: www.sec.gov

[FR Doc. 01–28517 Filed 11–13–01; 8:45 am]

BILLING CODE 3110–01–P

POSTAL SERVICE

United States Postal Service Board of Governors; Sunshine Act Meeting; Notification of Item Added to Meeting Agenda

DATE OF MEETING: November 5, 2001.

STATUS: Closed.

PREVIOUS ANNOUNCEMENTS: 66 FR 54305, October 26, 2001; and 66 FR 55712, November 2, 2001.

Addition

1. Experimental Delivery Confirmation.

At its meeting on November 5, 2001, the Board of Governors of the United States Postal Service voted unanimously to add this item to the agenda of its closed meeting and that no earlier announcement was possible. The General Counsel of the United States Postal Service certified that in her opinion discussion of this item could be properly closed to public observation.

FOR FURTHER INFORMATION CONTACT: David G. Hunter, Secretary of the Board, U.S. Postal Service, 475 L'Enfant Plaza, SW., Washington, DC.

David G. Hunter,

Secretary.

Certification Regarding Closed Meeting of the United States Postal Service Board of Governors

Pursuant to 5 U.S.C. Section 552b(f)(1) and 39 CFR 7.6(a), I, Mary Anne Gibbons, General Counsel of the United States Postal Service, hereby certify that in my opinion the meeting of the Board of Governors that was held on November 5, 2001, was properly closed to the public pursuant to the provisions of section 552b(c)(10) of title 5, United States Code; and section 7.3(j) of title 39, Code of Federal Regulations.

The members considered: (1) Experimental Delivery Confirmation.

Dated: November 7, 2001.

Mary Anne Gibbons,

General Counsel.

[FR Doc. 01–28575 Filed 11–8–01; 4:53 pm]

BILLING CODE 7710–12–M

SECURITIES AND EXCHANGE COMMISSION

[File No. 1–368]

Issuer Delisting; Notice of Application To Withdraw From Listing and Registration on the Chicago Stock Exchange, Inc. (Chevron Texaco Corporation, Common Stock, $0.75 par Value)

November 7, 2001.

Chevron Texaco Corporation, a Delaware corporation (''Issuer''), has filed an application with the Securities and Exchange Commission (''Commission''), pursuant to Section 12(d) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 12d2–2(d) thereunder,[2] to withdraw its Common Stock, $0.75 par value (''Security''), from listing and registration on the Chicago Stock Exchange, Inc. (''CHX'' or ''Exchange'').

The Issuer states in its application that it has met the requirements of the Exchange by complying with Exchange's rules governing an issuer's voluntary withdrawal of a security from listing and registration. The Issuer states that, in making the decision to withdraw the Securities from listing on the Exchange, a study conducted by management concluded that there was no longer a perceived benefit from the continued listing of the Security on the Exchange. The Issuer will continue to list its Security on the New York Stock Exchange, Inc. (''NYSE'') and the Pacific Exchange, Inc. (''PCX''). The Issuer's application relates solely to the withdrawal of the Securities from the CHX and shall have no affect upon its listing on the NYSE and PCX or its registration under Section 12(b) of the Act.[3]

Any interested person may, on or before November 30, 2001 submit by letter to the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609, facts bearing upon whether the application has been made in accordance with the rules of the CHX and what terms, if any, should be imposed by the Commission for the protection of investors. The Commission, based on the information submitted to it, will issue an order granting the application after the date mentioned above, unless the Commission determines to order a hearing on the matter.

[1] 15 U.S.C. 78*l*(d).

[2] 17 CFR 240.12d2–2(d)

[3] 15 U.S.C. 78*l*(b).

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[4]

Jonathan G. Katz,

Secretary.

[FR Doc. 01–28429 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

[4] 17 CFR 200.30–3(a)(1).

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 25253; 812–12400]

AAL Variable Product Series Fund, Inc., et al.; Notice of Application

November 6, 2001.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under sections 6(c), 12(d)(1)(J), and 17(b) of the Investment Company Act of 1940 (the ''Act'') for exemption from sections 12(d)(1)(A) and (B) and 17(a) of the Act, and under section 17(d) of the Act and rule 17d–1 under the Act to permit certain joint transactions.

SUMMARY OF THE APPLICATION: The requested order would permit certain registered management investment companies to invest uninvested cash in an affiliated money market fund in excess of the limits in sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: AAL Variable product Series Fund, Inc. (''Fund'') and AAL Capital Management Corporation (''AAL CMC'').

FILING DATES: The application was filed on January 9, 2001 and amended on November 6, 2001.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 3, 2001, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 Fifth Street, NW, Washington, DC 20549–0609.

FOR FURTHER INFORMATION CONTACT: John L. Sullivan, Senior Counsel, at (202) 942–0681, or Nadya B. Roytblat, Assistant Director, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW, Washington, DC 20549–0102 (tel. 202–942–8090).

Applicants' Representations

1. The Fund is a Massachusetts business trust registered under the Act as an open-end management investment company. The Fund currently offers twenty portfolios, including The AAL Money Market Fund which complies with rule 2a–7 under the Act (''Money Market Portfolio''). The existing and future series of the Fund (''Portfolios''), together with any other registered open-end management investment company or series thereof that is advised by AAL CMC or an entity controlling, controlled by, or under common control with AAL CMC and which is not a money market fund, are referred to as the Non-Money Market Portfolios.[1] AAL CMC is registered as an investment adviser under the Investment Advisers Act of 1940. AAL CMC serves as the investment adviser and distributor for the Portfolios.

2. Applicants state that each Investing Portfolio (as defined below) holds cash reserves from time to time that are not invested in portfolio securities (''Uninvested Cash''). Uninvested Cash may include dividend payments, interest received on portfolio securities, unsettled securities transactions, strategic reserves, matured investments, proceeds from liquidation of portfolio securities, or new investor capital. A Non-Money Market Portfolio that purchases shares of the Money Market Portfolio is referred to as an Investing Portfolio.

3. Applicants request an order to permit each of the Investing Portfolios to invest their Uninvested Cash in the Money Market Portfolio, and to permit the Money Market Portfolio to sell shares to, and redeem shares from, the Investing Portfolios. Investment of Uninvested Cash in shares of the Money Market Portfolio will be made only to the extent that such investment is consistent with each Investing

[1] Any future Non-Money Market Portfolio that may rely on the order in the future will do so only in accordance with the terms and conditions of the application.

Portfolio's investment restrictions and policies as set forth in the Investing Portfolio's prospectus and statement of additional information. Applicants state that the proposed transactions may reduce transaction costs, create more liquidity, increase returns, and diversify holdings.

Applicant's Legal Analysis

1. Section 12(d)(1)(A) of the Act provides, in pertinent part, that no registered investment company may acquire securities of another investment company if such securities represent more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, or if such securities, together with the securities of other acquired investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act, in pertinent part, provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of section 12(d)(1) if, and to the extent that, such exemption is consistent with the public interest and the protection of investors. Applicants request relief under section 12(d)(1)(J) from the limitations of sections 12(d)(1)(A) and (B) to permit the Investing Portfolios to invest Uninvested Cash in the Money Market Portfolio.

3. Applicants state that the proposed arrangement would not result in the abuses that sections 12(d)(1)(A) and (B) were intended to prevent. Applicants state that the Money Market Portfolio will maintain a highly liquid portfolio and will not be susceptible to undue control. Applicants represent that the proposed arrangement will not result in an inappropriate layering of fees because shares of the Money Market Portfolio sold to the Investing Portfolios will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b–1 under the Act, or service fee (as defined in rule 2830(b)(9) of the National Association of Securities Dealers' (''NASD'') Conduct Rules), or if such shares are subject to a service fee, AAL CMC will waive its advisory fee for each Investing Portfolio in an amount that offsets the amount of such fee incurred by the Investing Portfolio. Applicants represent that the Money Market Portfolio will not acquire securities of any other investment company in excess of the limitations contained in section 12(d)(1)(A) of the Act. Applicants also represent that if the Money Market Portfolio offers more than one class of shares, each Investing Portfolio will invest its Uninvested Cash only in the class with the lowest expense ratio at the time of investment.

4. Section 17(a) of the Act makes it unlawful for any affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, to sell or purchase any security to or from the company. Section 2(a)(3) of the Act defines an ''affiliated person'' of an investment company to include, among others, any person directly or indirectly controlling, controlled by, or under common control with the investment company. Applicants state that, because the Portfolios share a common board of trustees, each Portfolio may be deemed to be under common control with each of the other Portfolios, and thus an affiliated person of each of the other Portfolios. As a result, section 17(a) would prohibit the sale of the shares of the Money Market Portfolio to the Investing Portfolios, and the redemption of the shares by the Money Market Portfolio.

5. Section 17(b) of the Act authorizes the Commission to exempt a transaction from section 17(a) if the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, the proposed transaction is consistent with the policy of each investment company concerned, and the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt persons or transactions from any provision of the Act if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

6. Applicants submit that their request for relief to permit the purchase and redemption of shares of the Money Market Portfolio by the Investing Portfolios satisfies the standards in section 6(c) and 17(b) of the Act. Applicants note that shares of the Money Market Portfolios will be purchased and redeemed at their net asset value. Applicants state that the Investing Portfolios will retain their ability to invest their Uninvested Cash directly in money market instruments as authorized by their respective investment objectives and policies if they believe they can obtain a higher rate of return, or for any other reason. Applicants also state the Money Market Portfolio has the right to discontinue selling shares to any of the Investing Portfolios if the Money Market Portfolio's board of trustees determines that such sale would adversely affect its portfolio management or operations.

7. Section 17(d) of the Act and rule 17d–1 under the Act prohibit an affiliated person of a registered investment company, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or joint arrangement in which the investment company participates. Applicants state that each Investing Portfolio, by purchasing shares of the Money Market Portfolio, AAL CMC, by managing the assets of the Investing Portfolios investing in the Money Market Portfolio, and the Money Market Portfolio, by selling shares to the Investing Portfolios, could be deemed to be participants in a joint enterprise or arrangement within the meaning of section 17(d) of the Act and rule 17d–1 under the Act.

8. Rule 17d–1 permits the Commission to approve a proposed joint transaction covered by the terms of section 17(d) of the Act. In determining whether to approve a transaction, the Commission is to consider whether the proposed transaction is consistent with the provisions, policies, and purposes of the Act, and the extent to which the participation is on a basis different from or less advantageous than that of other participants. Applicants submit that the investment by the Investing Portfolios in shares of the Money Market Portfolio would be indistinguishable from any other shareholder of the Money Market Portfolio and that the transactions will be consistent with the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Shares of the Money Market Portfolio sold to and redeemed by the Investing Portfolios will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b–1 under the Act or a service fee (as defined in rule 2830(b)(9) of the NASD Conduct Rules), or if such shares are subject to a service fee, AAL CMC will waive its advisory fee for each Investing Portfolio in an amount that offsets the amount of such fee incurred by the Investing Portfolio.

2. Before the next meeting of the board of trustees of the Investing Portfolios (''Board'') is held for the purpose of voting on an investment advisory contract under section 15 of the Act, AAL CMC will provide the Board with specific information regarding the approximate cost to AAL CMC for, or portion of the advisory fee under the existing advisory agreement attributable to, managing the assets of each Investing Portfolio that can be expected to be invested in the Money Market Portfolio. Before approving any investment advisory contract under section 15, the Board of the Investing Portfolio, including a majority of the trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the 1940 Act, shall consider to what extent, if any, the advisory fees charged to the Investing Portfolio by AAL CMC should be reduced to account for reduced services provided to the Investing Portfolio by AAL CMC as a result of Uninvested Cash being invested in the Money Market Portfolio. The minute books of the Investing Portfolio will record fully the Board's consideration in approving the advisory contract, including the considerations referred to above.

3. Each of the Investing Portfolios will invest Uninvested Cash in, and hold shares of the Money Market Portfolio only to the extent that the Investing Portfolio's aggregate investment in the Money Market Portfolio does not exceed 25 percent of the Investing Portfolio's total assets. For purposes of this limitation, each Investing Portfolio or series thereof will be treated as a separate investment company.

4. Investment in shares of the Money Market Portfolio will be in accordance with each Investing Portfolio's respective investment restrictions and policies as set forth in its prospectus and statement of additional information.

5. Each Investing Portfolio and the Money Market Portfolio will be advised by AAL CMC or a person controlling, controlled by, or under common control with AAL CMC.

6. The Money Market Portfolio will not acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–28427 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 25254; 812–12396]

The AAL Mutual Funds, et al.; Notice of Application

November 6, 2001.

AGENCY: Securities and Exchange Commission (''Commission'').

ACTION: Notice of an application for an order under sections 6(c), 12(d)(1)(J), and 17(b) of the Investment Company Act of 1940 (the ''Act'') for exemption from sections 12(d)(1)(A) and (B) and 17(a) of the Act, and under section 17(d) of the Act and rule 17d–1 under the Act to permit certain joint transactions.

SUMMARY OF THE APPLICATION: The requested order would permit certain registered management investment companies to invest uninvested cash in an affiliated money market fund in excess of the limits in sections 12(d)(1)(A) and (B) of the Act.

APPLICANTS: The AAL Mutual Funds (''Fund'') and AAL Capital Management Corporation (''AAL CMC'').

FILING DATES: The application was filed on January 9, 2001 and amended on November 6, 2001.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission's Secretary and serving applicant with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on December 3, 2001, and should be accompanied by proof of service on applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission's Secretary.

ADDRESSES: Secretary, Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Applicants, 222 West College Avenue, Appleton, Wisconsin 54919–0007.

FOR FURTHER INFORMATION CONTACT: John L. Sullivan, Senior Counsel, at (202) 942–0681, or Nadya B. Roytblat, Assistant director, at (202) 942–0564 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the Commission's Public Reference Branch, 450 Fifth Street, NW, Washington, DC 20549–0102 (tel. 202–942–8090).

Applicants' Representations

1. The Fund is a Massachusetts business trust registered under the Act as an open-end management investment company. The Fund currently offers twenty portfolios, including The AAL Money Market Fund which complies with rule 2a–7 under the Act (''Money Market Portfolio''). The existing and future series of the Fund (''Portfolios''), together with any other registered open-end management investment company or series thereof that is advised by AAL CMC or an entity controlling, controlled by, or under common control with AAL CMC and which is not a money market fund, are referred to as the Non-Money Market Portfolios.[1] AAL CMC is registered as an investment adviser under the Investment Advisers Act of 1940. AAL CMC serves as the investment adviser and distributor for the Portfolios.

2. Applicants state that each Investing Portfolio (as defined below) holds cash reserves from time to time that are not invested in portfolio securities (''Uninvested Cash''). Uninvested Cash may include dividend payments, interest received on portfolio securities, unsettled securities transactions, strategic reserves, matured investments, proceeds from liquidation of portfolio securities, or new investor capital. A Non-Money Market Portfolio that purchases shares of the Money Market Portfolio is referred to as an Investing Portfolio.

3. Applicants requested an order to permit each of the Investing Portfolios to invest their Uninvested Cash in the Money Market Portfolio, and to permit the Money Market Portfolio to sell shares to, and redeem shares from, the Investing Portfolios. Investment of Uninvested Cash in shares of the Money Market Portfolio will be made only to the extent that such investment is consistent with each Investing Portfolio's investment restrictions and policies as set forth in the Investing Portfolio's prospectus and statement of additional information. Applicants states that the proposed transactions may reduce transaction costs, create more liquidity, increase returns, and diversify holdings.

[1] Any future Non-Money Market Portfolio that may rely on the order in the future will do so only in accordance with the terms and conditions of the application.

Applicants' Legal Analysis

1. Section 12(d)(1)(A) of the Act pvovides, in pertinent part, that no registered investment company may acquire securities of another investment company is such securities represent more than 3% of the acquired company's outstanding voting stock, more than 5% of the acquiring company's total assets, of if such securities, together with the securities of other acquired investment companies, represent more than 10% of the acquiring company's total assets. Section 12(d)(1)(B) of the Act, in pertinent part, provides that no registered open-end investment company may sell its securities to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more than 10% of the acquired company's voting stock to be owned by investment companies.

2. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction from any provision of section 12(d)(1) if, and to the extent that, such exemption is consistent with the public interest and the protection of investors. Applicant request relief under section 12(d)(1)(J) from the limitations of sections 12(d)(1)(A) and (B) to permit the Investing Portfolios to invest Uninvested Cash in the Money Market Portfolio.

3. Applicants state that the proposed arrangement would not result in the abuses that sections 12(d)(1)(A) and (B) were intended to prevent. Applicants state that the Money Market Portfolio will maintain a highly liquid portfolio and will not be susceptible to undue control. Applicants represent that the proposed arrangement will not result in an inappropriate layering of fees because shares of the Money Market Portfolio sold to the Investing Portfolios will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b–1 under the Act, or service fee (as defined in rule 2830(b)(9) of the National Association of Securities Dealers' (''NASD'') Conduct Rules), or if such shares are subject to a service fee, AAL CMC will waive its advisory fee for each Investing Portfolio in an amount that offsets the amount of such fee incurred by the Investing Portfolio. Applicants represent that the Money Market Portfolio will not acquire securities of any other investment company in excess of the limitations contained in section 12(d)(1)(A) of the Act. Applicants also represent that if the Money Market Portfolio offers more than one class of shares, each Investing Portfolios will invest its Uninvested Cash only in the class with the lowest expense ration at the time of investment.

4. Section 17(a) of the Act makes it unlawful for any affiliated person of a registered investment company, or an affiliated person of such person, acting as principal, to sell or purchase any security to or from the company. Section 2(a)(3) of the Act defines an ''affiliated person'' of an investment company to include, among others, any person directly or indirectly controlling, controlled by, or under common control with the investment company. Applicants state that, because the Portfolios share a common board of trustees, each Portfolio may be deemed to be under common control with each of the other Portfolios, and thus an affiliated person of each of the other Portfolios. As a result, section 17(a) would prohibit the sale of the shares of the Money Market Portfolio to the Investing Portfolios, and the redemption of the shares by the Money Market Portfolio.

5. Section 17(b) of the Act authorizes the Commission to exempt a transaction from section 17(a) if the terms of the proposed transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part of any person concerned, the proposed transaction is consistent with the policy of each investment company concerned, and the proposed transaction is consistent with the general purposes of the Act. Section 6(c) of the Act permits the Commission to exempt persons or transactions from any provision of the Act if the exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

6. Applicants submit that their request for relief to permit the purchase and redemption of shares of the Money Market Portfolio by the Investing Portfolios satisfies the standards in sections 6(c) and 17(b) of the Act. Applicants note that shares of the Money Market Portfolio will be purchased and redeemed at their net asset value. Applicants state that the Investing Portfolios will retain their ability to invest their Uninvested Cash directly in money market instruments as authorized by their respective investment objectives and policies if they believe they can obtain a higher rate of return, or for any other reason. Applicants also state that the Money Market Portfolio has the right to discontinue selling shares to any of the Investing Portfolios if the Money Market Portfolio's board of trustees determines that such sale would adversely affect its portfolio management or operations.

7. Section 17(d) of the Act and rule 17d–1 under the Act prohibit an affiliated person of a registered investment company, acting as principal, from participating in or effecting any transaction in connection with any joint enterprise or joint arrangement in which the investment company participates. Applicants state that each Investing Portfolio, by purchasing shares of the Money Market Portfolio, AAL CMC, by managing the assets of the Investing Portfolios investing in the Money Market Portfolio, and the Money Market Portfolio, by selling shares to the Investing Portfolios, could be deemed to be participants in a joint enterprise or arrangement within the meaning of section 17(d) of the Act and rule 17d–1 under the Act.

8. Rule 17d–1 permits the Commission to approve a proposed joint transaction covered by the terms of section 17(d) of the Act. In determining whether to approve a transaction, the Commission is to consider whether the proposed transaction is consistent with the provisions, policies, and purposes of the Act, and the extent to which the participation is on a basis different from or less advantageous than that of other participants. Applicants submit that the investment by the Investing Portfolios in shares of the Money Market Portfolio would be indistinguishable from any other shareholder of the Money Market Portfolio and that the transactions will be consistent with the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief will be subject to the following conditions:

1. Shares of the Money Market Portfolio sold to and redeemed by the Investing Portfolios will not be subject to a sales load, redemption fee, distribution fee under a plan adopted in accordance with rule 12b–1 under the Act or a service fee (as defined in rule 2830(b)(9) of the NASD Conduct Rules), or if such shares are subject to a service fee, AAL CMC will waive its advisory fee for each Investing Portfolio in an amount that offsets the amount of such fee incurred by the Investing Portfolio.

2. Before the next meeting of the board of trustees of the Investing Portfolios (''Board'') is held for the purpose of voting on an investment advisory contract under section 15 of the Act, AAL CMC will provide the Board with specific information regarding the approximate cost of AAL

CMC for, or portion of the advisory fee under the existing advisory agreement attributable to, managing the assets of each Investing Portfolio that can be expected to be invested in the Money Market Portfolio. Before approving any investment advisory contract under section 15, the Board of the Investing Portfolio, including a majority of the trustees who are not ''interested persons,'' as defined in section 2(a)(19) of the 1940 Act, shall consider to what extent, if any, the advisory fees charged to the Investing Portfolio by AAL CMC should be reduced to account for reduced services provided to the Investing Portfolio by AAL CMC as a result of Uninvested Cash being invested in the Money Market Portfolio. The minute books of the Investing Portfolio will record fully the Board's consideration in approving the advisory contract, including the considerations referred to above.

3. Each of the Investing Portfolios will invest Uninvested Cash in, and hold shares of, the Money Market Portfolio only to the extent that the Investing Portfolio's aggregate investment in the Money Market Portfolio does not exceed 25 percent of the Investing Portfolio's total assets. For purposes of this limitation, each Investing Portfolio or series thereof will be treated as a separate investment company.

4. Investment in shares of the Money Market Portfolio will be in accordance with each Investing Portfolio's respective investment restrictions and policies as set forth in its prospectus and statement of additional information.

5. Each Investing Portfolio and the Money Market Portfolio will be advised by AAL CMC or a person controlling, controlled by, or under common control with AAL CMC.

6. The Money Market Portfolio will not acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–28428 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. IC–25256; File No. 812–12526]

Kemper Investors Life Insurance Company, et al.

November 7, 2001.

AGENCY: Securities and Exchange Commission (''SEC'' or ''Commission'').

ACTION: Notice of Application for an order under section 6(c) of the Investment Company Act of 1940 (the ''1940 Act'') granting exemptions from the provisions of sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act and Rule 22c–11 thereunder.

Applicants: Kemper Investors Life Insurance Company (''KILICO''), Zurich Kemper Life Insurance Company of New York (''ZKLICONY''), KILICO Variable Annuity Separate Account (the ''Separate Account''), and Investors Brokerage Services, Inc. (''IBS'') (collectively ''Applicants''). KILICO and ZKLICONY are also referred to in this Application as the ''Insurance Company Applicants.''

Summary of Application: Applicants seek an order under section 6(c) of the 1940 Act to the extent necessary to permit the recapture, under specified circumstances, of certain credits applied to purchase payment made under the deferred variable annuity contract described herein that KILICO will issue through the Separate Account (the ''Contract(s)''), as well as other contracts that the Insurance Company Applicants may issue in the future through the Separate Account or future separate accounts of the Insurance Company Applicants (''Other Accounts'') that are substantially similar in all material respects to the Contract (''Future Contracts''). Applicants also request that the order being sought extend to any other National Association of Securities Dealers, Inc. (''NASD'') member broker-dealer controlling or controlled by, or under common control with, KILICO, whether existing or created in the future, that serves as distributor or principal underwriter for the Contract or Future Contracts (''Affiliated Broker-Dealers'') and any successors in interest to Applicants.

Filing Date: The Application was filed on May 21, 2001, and amended and restated on October 11, 2001, and amended on November 2, 2001.

Hearing or Notification of Hearing: An order granting the Application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, in person or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on December 3, 2001, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Secretary of the SEC.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Applicants, c/o Kemper Investors Life Insurance Company, 1600 McConnor Parkway, Schaumburg, Illinois 60196, Attn: Debra P. Rezabek, Esq.; Zurick Kemper Life Insurance Company of New York, 515 Madison Avenue, Suite 2302, New York, NY 10022, Attn: Debra P. Rezabek, Esq.; copies to Christopher S. Petito, Esq., Jorden Burt LLP, 1025 Thomas Jefferson Street, NW., Suite 400 East, Washington, DC 20007–0805.

FOR FURTHER INFORMATION CONTACT: Alison Toledo, Senior Counsel, or Lorna MacLeod, Branch Chief, Division of Investment Management, Office of Insurance Products, at 202–942–0670.

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch, 450 Fifth Street, NW., Washington, DC 20549–0102 ((202) 942–8090).

Applicants' Representations

KILICO was organized under the laws of the State of Illinois in 1947 as a stock life insurance company. KILICO offers annuity and life insurance products and is admitted to do business in the District of Columbia and all states except New York. KILICO is a wholly-owned subsidiary of Kemper Corporation, a non-operating holding company. Kemper Corporation is a wholly-owned Subsidiary of Zurich Group Holding (''ZGH''), a Swiss holding company, formerly known as Zurich Financial Services. ZGH is wholly-owned by Zurich Financial Services (''ZFS''), a new Swiss holding company. ZFS was formerly Zurich Allied AG, which was merged with Allied Zurich p.l.c. in October 2000.

2. ZKLICONY is a stock life insurance company organized under the laws of the State of New York in 1999. ZKLICONY offers a broad line of individual life insurance and annuity products. ZKLICONY is a wholly-owned subsidiary of KILICO, which in turn is a wholly-owned subsidiary of the Kemper Corporation. ZKLICONY may in

the future issue Future Contracts through Other Accounts.

3. KILICO established the Separate Account on May 29, 1981, pursuant to Illinois law. It is a separate investment account (segregated asset account) of KILICO used to fund the Contract and other variable annuity contracts issued by KILICO. The Separate Account and its component ''Subaccounts'' are registered with the Commission as a single unit investment trust under the 1940 Act. The Separate Account will fund the variable benefits available under the Contract. The offering of the Contract will be registered under the Securities Act of 1933 (the ''1933 Act'').

4. IBS is the principal underwriter of the Contracts. IBS is registered with the Commission as a broker-dealer under the Securities Exchange Act of 1934 and is a member of the NASD. The Contracts are sold by licensed insurance agents (where the Contracts may be lawfully sold) who are registered representatives of broker-dealers which are registered under the Securities Exchange Act of 1934 and are members of the NASD. IBS is a wholly-owned subsidiary of KILICO, which enters into selling group agreements with affiliated and unaffiliated broker-dealers.

5. The minimum initial purchase payment is $10,000. The minimum subsequent purchase payment for non-qualified Contracts is generally $500, however, if the owner authorizes automatic periodic payments the minimum subsequent payment is $100. The minimum subsequent purchase payment for qualified Contracts is $50. KILICO's prior approval is required for cumulative purchase payments of over $1,000,000.

6. If elected by an owner, KILICO will credit an extra amount to the Contract equal to 2% of each purchase payment made in the first Contract year and 2% of the owner's non-loaned Contract value on every fifth Contract anniversary (the ''Value Credit(s)''). KILICO will allocate each Value Credit pro rata among the investment options according to the owner's allocation instructions. KILICO will fund Value Credits from its general account assets. In order for the owner to elect to receive a Value Credit, the Contract must be issued prior to the owner's 81st birthday. If an owner elects to receive the Value Credit, KILICO will assess a Value Credit Rider Charge of .40% during each of the first fifteen Contract years. In addition, withdrawal charges will be higher and will apply longer than they would if an owner does not elect the Value Credit.

7. The Value Credit is not part of the amount an owner will receive if he or she exercises the Contract's free look provision. In addition, Value Credits applied within one year prior to a total withdrawal (surrender of the Contract) made after the tenth Contract year are deducted from the amount payable to the owner. With limited exceptions, if an owner makes a partial withdrawal within one year following receipt of a Value Credit after the tenth Contract year, except as part of the Contract's systematic withdrawal program, KILICO will reduce the Value Credit in the same proportion as the partial withdrawal bears to the Contract value and deduct it from the remaining value of the Contract. Regardless of whether or not the Value Credit is vested, all gains or losses attributable to that Value Credit are part of the owner's Contract value and are immediately vested.

8. The free look period is the period during which an owner may return a Contract after it has been delivered and receive a refund. The length of the free look period will vary according to state law but will be at least ten days. Depending on the laws of the state in which the Contract is issued, the amount of the refund will be equal to (i) The value of the Contract, (ii) the purchase payment(s), or (iii) the greater of the previous two values. The Value Credit, if any, will not be part of the amount an owner will receive if the free look provision is exercised. Unless the law requires that the full amount of the purchase payment(s) be refunded, the owner bears the investment risk from the time of purchase until he or she returns the Contract, and the refund amount may be more or less than the purchase payment(s) the owner made.

9. A Contract owner may make withdrawals from his or her Contract at any time before annuitization. The minimum withdrawal amount is $500 or the amount remaining in the applicable investment option, if less than $500. If an owner elects the Value Credit, any withdrawal made within one year of receiving a Value Credit after the tenth Contract year will result in a recapture by KILICO of all or part of that Value Credit (but no recapture will be made of any prior Value Credits).

10. In the care of a surrender of the Contract during or after the tenth Contract year, KILICO will recapture the entire amount of the Value Credit made within one year of the surrender. No recapture of Value Credits would occur other than during the free look period or in Contract years 11, 16, 21 and every fifth Contract year thereafter.

11. In the case of a partial withdrawal, KILICO will reduce the Value Credit by the same proportion that the amount of the partial withdrawal bears to the Contract value immediately prior to the partial withdrawal. KILICO will deduct the amount of the Value Credit recaptured upon partial withdrawal from the remaining Contract value.

12. Neither death benefit payments, nor any partial withdrawal or surrender arising under the following circumstances will result in the recapture of a Value Credit in whole or in part:

- After the owner has been confined in a skilled health care facility for at least 45 consecutive days and is confined at the time of the withdrawal request.
- Within 45 days following the owner's discharge from a skilled health care facility after a confinement of at least 45 days.
- If the owner becomes disabled after the Contract is issued and before age 65.

13. Withdrawals may be subject to a withdrawal charge depending on the contribution year in which the withdrawal is made and whether the owner has elected the Value Credit. The following table shows the amount and duration of the withdrawal charge:

Contribution year	Withdrawal charge If no value credit elected (in percent)	Withdrawal charge If value credit elected (in percent)
Less than one	7	8.5
One but less than two	6	8.5
Two but less than three	5	8.5
Three but less than four	5	8.5
Four but less than five	4	7.5
Five but less than six	3	6.5
Six but less than seven	2	5.5
Seven but less than eight	0	3.5
Eight but less than nine	0	1.5
9+	0	0

14. In calculating the withdrawal charge, KILICO treats withdrawals as coming from earnings (if any) first, and then from the oldest purchase payments first (i.e., first-in, first-out). KILICO will charge all amounts withdrawn and any applicable withdrawal charge against purchase payments in the chronological order in which KILICO received them beginning with the initial purchase payment. Each Contract Year, an owner may make a partial or total withdrawal from the Contract without incurring a withdrawal charge up to the greatest of:

- Purchase payments that are no longer subject to withdrawal charges,

minus withdrawals attributable to those purchase payments;

• Contract value, minus any purchase payments paid within the prior seven years (nine years for Contracts with the Value Credit rider), plus any withdrawals from purchase payments subject to withdrawal charges, including any withdrawal charge); or

• 10% of purchase payments that are subject to withdrawal charges, minus any purchase payments subject to a withdrawal charge previously withdrawn, including any withdrawal charges.

Any amount withdrawn that is not subject to a withdrawal charge will be considered a ''partial free withdrawal.''

15. Owners of the Contracts may allocate their purchase payments among 43 investment options—41 Subaccounts of the Separate Account, the fixed investment option, or the market value adjustment option. Each Subaccount will invest in shares of a corresponding portfolio of Scudder Variable Series I, Scudder Variable Series II, The Alger American Fund, Dreyfus Investment Portfolios, Dreyfus Socially Responsible Growth Fund, Inc., Credit Suisse Warburg Pincus Trust, and INVESCO Variable Investment Funds, Inc.

16. KILICO may in the future decide to create additional Subaccounts to invest in any additional underlying funds as may now or in the future be available. KILICO also may decide to combine or eliminate Subaccounts or transfer assets to and from Subaccounts. Similarly, the Insurance Company Applicants may offer different underlying investment options thorough the Other Accounts and add to, combine or eliminate the Subaccounts investing in those investment options from time to time.

17. The Contract provides for various death benefits, annuity benefits and annuity payout options, as well as transfer privileges among Subaccounts, dollar cost averaging, and other features. The Contract contains the following charges (in addition to the withdrawal charges and the Value Credit Rider charge described above): (i) A $30 annual records maintenance charge; (ii) a mortality and expense risk charge of 1.30%; (iii) an administrative expense charge of 0.15%; (iv) a transfer fee of $10 for each transfer after the first 12 transfers made during a contract year (which currently is intended to be waived); (v) a maximum charge of 0.45% for a guaranteed retirement income benefit (if elected); (vi) a charge of either 0.25% (attained ages 0–80) or 0.85% (attained ages 81 and higher) for an earning enhanced death benefit (if elected); and (vii) any applicable state premium tax. All of such fees and charges are described in greater detail in the Form N–4 Registration Statement for the Contract and the Separate Account.

18. Applicants seek exemption pursuant to section 6(c) form sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act and Rule 22–1 thereunder to the extent deemed necessary to permit the Insurance Company Applicants to recapture part or all of the Value Credits, as described above in the following instances: (i) When an owner exercises the Contract's free look provision; and (ii) when an owner makes a partial withdrawal or a surrender in Contract year ten or subsequent Contract years within one year of receiving a Value Credit. Applicants also request that the order being sought extend to any Affiliated Broker-Dealer that serves as a distributor or principal underwriter for the Contract or Future Contracts funded by the Separate Account or Other Accounts, and to any successors in interest to Applicants. Undertake that Future Contracts will be substantially similar in all material respects to the Contracts.

Applicants' Legal Analysis

1. Section 6(c) of the 1940 Act authorizes the Commission to exempt any person, security or transaction, or any class or classes of persons, securities or transactions from the provisions of the 1940 Act and the rules promulgated thereunder if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act. Applicants request that the Commission pursuant to section 6(c) of the 1940 Act grant the exemptions requested below with respect to the Contracts and any Future Contract funded by the Separate Account or Other Accounts that are issued by the Insurance Company Applicants and underwritten or distributed by IBS or Affiliated Broker-Dealers. Applicants undertake that Future Contracts funded by the Separate Account or any Other Account, in the future, will be substantially similar in all material respects to the Contracts. Applicants believe that the requested exemption are appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act.

Subsection (i) of section 27 of the 1940 Act provides that section 27 does not apply to any registered separate account funding variable insurance contracts, or to the sponsoring insurance company and principal underwriter of such account, except as provided in paragraph (2) of the subsection. Paragraph (2) provides that it shall be unlawful for such a separate account or sponsoring insurance company to sell a contract funded by the registered separate account unless such contract is a redeemable security. Section 2(a)(32) defines ''redeemable security'' as any security, other than short-term paper, under the terms of the which the holder, upon presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer's current net assets, or the cash equivalent thereof.

3. Applicants submit that the recapture of the Value Credit in the circumstances set forth in this Application would not deprive an owner of his or her proportionate share of the issuer's current net assets. An owner's interest in the Value Credit allocated to his or her annuity account during or after year ten is not vested until one year after that Value Credit is so allocated. Unless and until any Value Credit amount is vested, the issuing Insurance Company Applicant retains the right and interest in the Value Credit, although not in the earnings attributable to that amount. Thus, Applicants urges that when the issuing Insurance Company Applicant recaptures any Value Credit, it is merely retrieving its own assets, and the owner has not been deprived of a proportionate share of the applicable Account's assets because his or her interest in the Value Credit amount has not vested.

4. In addition, Applicants state that permitting an owner to retain a Value Credit under a Contract upon the exercise of the free look provision would not only be unfair, but would also encourage individuals to purchase a Contract with no intention of keeping it, and return it for a quick profit. Furthermore, Applicants state that the recapture of Value Credits within one year after its receipt during or after Applicants year ten is designed to provide the Insurance Company Applicants with a measure of protection against a Contract owner surrendering or making a partial withdrawal shortly after a Value credit is made thereby leaving the Insurance Company Applicants from its general account assets within a year prior to the withdrawal, and any gain on that Value Credit would remain a part of the owner's Contract value.

5. Applicants represent that it is not administratively feasible to track the Value Credit in the Separate Account or Other Account once it has been declared. Accordingly, the asset-based

charges applicable to the Separate Account or Other Account will be assessed against the entire amount held in the Separate Account or Other Account, including the Value Credit, during the free look period and the recapture periods. As a result, during such periods, the aggregate asset-based charges assessed against an owner's Contract value will be higher than if no Value Credit had been added. The Insurance Company Applicants nonetheless represent that the Contract's fees and charges, in the aggregate, are, or will be, reasonable within the meaning of section 26(e) of the 1940 Act.

6. Applicants represent that the Value Credit will be attractive to and in the interest of investors because it will permit owners to put 102% of their purchase payments in the first Contract year to work for them in the selected Subaccounts and to receive an additional 2% credit on all Contract value (even earnings) on every fifth contract anniversary thereafter. In addition, the owner will retain any earnings attributable to the Value Credits recaptured, as well as the principal of the Value credit once vested.

7. Applicants submit that the provisions for recapture of any Value Credit under the Contracts do not, and any Future Contract provisions will not, violate sections 2(a)(32) and 27(i)(2)(A) of the 1940 Act. Sections 26(e) and 27(i) were added to the 1940 ACt to implement the purposes of the National Securities Markets Improvement Act of 1996 and Congressional intent. The application of Value Credits under the Contracts should not raise any questions about the Insurance Company Applicants' compliance with the provisions of section 27(i). However, to avoid any uncertainty as to full compliance with the 1940 Act, Applicants request an exemption from sections 2(a)(32) and 27(i)(2)(A), to the extent deemed necessary, to permit the recapture of any Value Credit under the circumstances described in the Application with respect to Contracts and Future Contracts, without the loss of relief from section 27 provided by section 27(i).

8. Rule 22c–1 under the 1940 Act prohibits a registered investment company issuing any redeemable security, a person designated in such issuer's prospectus as authorized to consummate transactions in any such security, and a principal underwriter of, or dealer in, such security, from selling, redeeming, or repurchasing any such security except at a price based on the current net asset value of such security which is next computed after receipt of a tender of such security for redemption or of an order to purchase or sell such security.

9. It is possible that someone might view the Insurance Company Applicants' recapture of the Value Credit as resulting in the redemption of redeemable securities for a price other than one based on the current net asset value of the Account. Applicants contend, however, that the recapture of the Value Credit does not violate Rule 22c–1. The recapture of all or part of the Value Credit does not involve either of the evils that Rule 22c–1 was intended to eliminate or reduce as far as reasonably practicable, namely: (i) The dilution of the value of outstanding redeemable securities of registered investment companies through their sale at a price below net asset value or repurchase at a price above it, and (ii) other unfair results, including speculative trading practices. To effect a recapture of a Value Credit, the issuing Insurance Company Applicant will redeem interests in a Contract at a price determined on the basis of the current accumulation unit value(s) of the Subaccount(s) to which the owner's Contract value is allocated. The amount recaptured will equal the amount of the Value Credit that the issuing Insurance Company Applicant paid out of its general account assets. Although the owner will retain any investment gain attributable to the Value Credit or bear any loss attributable to that Value Credit, the amount of that gain or loss will be determined on the basis of the current accumulation unit values of the applicable Subaccounts. Thus, no dilution will occur upon the recapture of the Value Credit. Applicants also submit that the second harm that Rule 22c–1 was designed to address, namely speculative trading practices calculated to take advantage of backward pricing, will not occur as a result of the recapture of the Value Credit. Because neither of the harms that Rule 22c–1 was meant to address is found in the recapture of the Value Credit, Rule 22c–1 should not apply to any Value Credit. However, to avoid any uncertainty as to full compliance with the 1940 Act, Applicants request an exemption from the provisions Rule 22c–1 to the extent deemed necessary to permit them to recapture the Value Credit under the Contracts and Future Contracts.

Conclusion

Applicants submit that their request for an order that applies to the Separate Account and any Other Accounts established by the Insurance Company Applicants, in connection with the recapture of Value Credits applied under the Contract and Future Contracts, is appropriate in the public interest. Such an order would promote competitiveness in the variable annuity market by eliminating the need to file redundant exemptive applications, thereby reducing administrative expenses and maximizing the efficient use of Applicants' resources. Investors would not receive any benefit or additional protection by requiring Applicants to repeatedly seek exemptive relief that would present no issue under the 1940 Act that has not already been addressed in this Application. Having Applicants file additional applications would impair Applicants' ability to take advantage of business opportunities as they arise. Further, if Applicants were required repeatedly to seek exemptive relief with respect to the same issues addressee in this Application, investors would not receive any benefit or additional protection thereby.

Applicants submit, for the reasons summarized above, that their exemptive request meets the standards set out in section 6(c) of the 1940 Act, namely, that the exemptions requested are necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the 1940 Act, and that, therefore, the Commission should grant the requested order.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–28485 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45039; File No. SR–NSCC–2001–16]

Self-Regulatory Organizations; National Securities Clearing Corporation; Notice of Filing and Immediate Effectiveness of Proposed Rule Change Relating to Fee Schedules

November 7, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1], notice is hereby given that on October 1, 2001, National Securities Clearing Corporation (''NSCC'') filed with the Securities and Exchange Commission (''Commission'') the

[1] 15 U.S.C. 78s(b)(1).

proposed rule change as described in Items I, II, and III below, which items have been prepared primarily by NSCC. The Commission is publishing this notice to solicit comments on the proposed rule change from interested parties.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change would revise NSCC's fee schedule as it relates to NSCC's Insurance Processing Service.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, NSCC 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. NSCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of these statements.[2]

(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 (1) establish fees for the Licensing and Appointments (''L&A'') feature of NSCC's Insurance Processing Service (''IPS'') effective as to services provided on and after October 1, 2001; (2) adjust the fees that NSCC charges for the Initial Application Information (''APP'') feature of IPS effective as to services provided on and after January 1, 2001; and (3) standardize the descriptions of IPS transmissions in NSCC's fee schedule.

Pursuant to this rule change, the transaction fee for L&S will be as follows: for each transmission of L&A information designated as a periodic reconciliation, $0.15 per item; for each other transmission of L&S information referred to as L&A transactions, $0.35 per item. No file fee will be applied to files that contain L&A transmissions.

The transaction fee for APP is $7.50 per transmission or receipt. Each transmission and receipt is considered an ''item.'' This rule change sets the transaction fee for APP as follows: from 0 to 249 items per month, $7.50 per item; from 250 to 999 items per month, $4.00 per item; from 1,000 to 2,499 items per month, $2.00 per item; and for more than 2,499 items per month, $1.00 per item. The file fee of $15.00 per file per day will continue to apply to APP.

Finally, this rule change standardizes the terminology in NSCC's fee schedule so that all transmissions of information through IPS are referred to as items and makes certain other clarifying changes.

The proposed rule change is consistent with the requirements of Section 17A of the Act and the rules and regulations thereunder applicable to NSCC because it provides for the equitable allocation of dues, fees, and other charges among NSCC's participants.

(B) Self-Regulatory Organization's Statement on Burden on Competition

NSCC does not believe that the proposed rule change will have an impact on or impose a burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

No written comments relating to the proposed rule change have been solicited or received. NSCC has notified participants who use IPS of the fee changes. NSCC will notify the Commission of any written comments received by NSCC.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Act

The foregoing rule change has become effective pursuant to section 19(b)(3)(A)(ii) of the Act[3] and Rule 19b–4(f)(2)[4] thereunder because the proposed rule change is changing a due, fee, or charge imposed by NSCC. At any time within sixty days of the filing of such 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, 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 in the Commission's Public Reference Section, 450 Fifth Street, NW, Washington, DC 20549. Copies of such filing also will be available for inspection and copying at the principal office of NSCC. All submissions should refer to File No. SR–NSCC–2001–16 and should be submitted by December 5, 2001.

For the Commission, by the Division of Market Regulations, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–28490 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45028; File No. SR–OCC–2001–13]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Establishing a Clearing Fee

November 6, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on September 26, 2001, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The proposed rule change establishes a license fee and other fees that OCC will charge clearing members for the use of a new risk management software package called OCC–TIMS.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

In its filing with the Commission, OCC included statements concerning

[2] The Commission has modified the text of the summaries prepared by NSCC.

[3] 15 U.S.C. 78s(b)(3)(A)(ii)

[4] 17 CFR 240.19b–4(f)(2).

[5] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for the Proposed Rule Change

The purpose of this rule change is to establish a license fee and other fees that OCC will charge clearing members for OCC–TIMS, a risk management software package developed by OCC.

OCC–TIMS is a client server software package developed by OCC for use by clearing members to enhance their internal risk management practices. This application will provide clearing members with access to provide risk management tools as it contains TIMS [3] calculations as well as analytical tools to facilitate ''what if'' scenarios and portfolio stress testing. OCC anticipates that OCC–TIMS will be available for licensing to clearing members in the fourth quarter of 2001.[4]

To promote the wide spread use of OCC–TIMS, OCC is proposing to charge clearing members a nominal fee of $500.00 to license the application and $250.00 for each product upgrade made after the initial license. Data feeds for theoretical prices will be charged as follows: $.10/contract with a minimum monthly charge of $200.00 and a maximum monthly charge of $2,000.00. These fees are comparable to those charged to clearing members accessing risk based haircut (''RBH'') data. For users receiving both OCC–TIMS and RBH data feeds, OCC is proposing to charge a maximum combined fee of $3,000.00 per month.

The proposed rule change is consistent with the requirements of Section 17A of the Act inasmuch as it establishes nominal and reasonable fees to be charged to clearing members for access to a risk management software package.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes fees to be imposed by OCC upon clearing members, it has become effective pursuant to section 19(b)(3)(A)(ii) of the Act [5] and Rule 19b–4(f)(2).[6] At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

VI. 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 in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of OCC. All submissions should refer to the file No. SR–OCC–2001–13 and should be submitted by December 5, 2001.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–28487 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45027; File No. SR–OCC–2001–12]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Discounting Clearing Member Fees

November 6, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on September 25, 2001, The Options Clearing Corporation (''OCC'') 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 primarily by OCC. 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 proposed rule change discounts clearing fees charged for established products for the last quarter of 2001.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[2]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

OCC is proposing to discount clearing fees charged for established products for

[2] The Commission has modified parts of these statements.

[3] OCC's margin system is called the Theoretical Intermarket Margin System (TIMS).

[4] OCC intends to offer OCC–TIMS to non-clearing member users in 2002.

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240.19b–4(f)(2).

[7] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] The Commission has modified parts of these statements.

the last quarter of 2001. This discount underscores OCC's continuing commitment to the options market and market participants. Discounted clearing fees will be as follows:

Contract trade level	Current clearing fee	Proposed discounted clearing fee
1–500	$0.09/contract	$0.065/contract.
501–1000	$0.07/contract	$0.055/contract.
1001–2000	$0.06/contract	$0.045/contract.
>2000	$110.00 flat fee	$85.00 flat fee.

The discounted fee schedule will enable clearing members to benefit from reduced fees without adversely affecting OCC's ability to maintain an acceptable level of retained earnings. Commencing on January 1, 2002, the discounted clearing fees will revert to their current levels.

The proposed rule change is consistent with the requirements of section 17A of the Act because it benefits clearing members by discounting fees and allocates fees among clearing members in an equitable manner.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change, and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes fees to be imposed by OCC upon clearing members, it has become effective pursuant to section 19(b)(3)(A)(ii) of the Act [3] and Rule 19b–4(f)(2).[4] At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

VI. 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 in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of OCC. All submissions should refer to the File No. SR–OCC–2001–12 and should be submitted by December 5, 2001.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[5]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–28488 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

[3] 15 U.S.C. 78s(b)(3)(A)(ii).

[4] 17 CFR 240.19b–4(f)(2).

[5] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–5037; File No. SR–OCC–2001–03]

Self-Regulatory Organizations; The Options Clearing Corporation; Order Granting Approval of Proposed Rule Change To Rescind Concentration Restrictions on Letters of Credit Issued by Certain Non-U.S. Institutions

November 6, 2001.

On April 11, 2001, The Options Clearing Corporation (''OCC'') filed with the Securities and Exchange Commission (''Commission'') a proposed rule change (File No. SR–OCC–2001–03) pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'').[1] Notice of the proposed rule change was published in the **Federal Register** on August 24, 2001.[2] No comment letters were received. For the reasons discussed below, the Commission is granting approval of the proposed rule change.

I. Description

The purpose of the proposed rule change is to rescind the concentration restrictions placed upon the use as margin of letters of credit issued by a non-U.S. institution where the issuing institution has qualified as a financial holding company under Regulation Y of the Board of Governors of the Federal Reserve System (''Fed'') or is an institution owned by or under the control of such a financial holding company.

OCC began accepting letters of credit from non-U.S. institutions in January 1983 in response to concerns that U.S. institutions were increasing their fees to clearing members or were otherwise reducing their overall commitment to financing clearing members. A combination of factors led OCC to impose more stringent qualification standards on non-U.S. institutions than on U.S. institutions issuing letters of credit for the benefit of OCC.[3] The qualification standards generally are found in sections .01 through .08 of the Interpretations and Policies under OCC Rule 604.

OCC recently reassessed these standards to ensure that they remain appropriate and achieve their intended purposes. OCC concluded that with the enactment of the Gramm-Leach-Bliley Financial Modernization Act of 1999

[1] 15 U.S.C. 78s(b)(1).

[2] Securities Exchange Act Release No. 44723, (August 20, 2001), 66 FR 44659.

[3] Those factors included concerns about the diversity of regulatory structures, exposure to economic or political risk outside of the United States, and OCC's relative inexperience in dealing with non-U.S. institutions. Securities Exchange Act Release No. 19422 (January 12, 1983), 48 FR 2481 [File No. SR–OCC–82–8] (formalizing certain OCC criteria for approving domestic and foreign banks as issuers of letters of credit for margin purposes).

(''GLB Act'')[4] and the Fed amendments to Regulation Y implementing GLB Act, the concentration restrictions found in Interpretations and Policies .02 should be rescinded for certain non-U.S. institutions.

GLB Act created a new type of holding company called a ''financial holding company'' and specified certain eligibility requirements for such institutions.[5] To become a financial holding company, GLB Act requires a bank holding company to submit a declaration to the Fed that the company elects to be a financial holding company and a certification that all of the depositor institutions controlled by the company are well capitalized and well managed. Under GLB Act, foreign banks are specifically permitted to qualify as financial holding companies. GLB Act also requires the Fed to apply comparable capital and management standards to such banks that are comparable to those applied to U.S. banks owned by a financial holding company, giving due regard to certain enumerated principles.

The Fed amended Regulation Y in order to implement provisions of the GLB Act governing the creation and conduct of financial holding companies.[6] Section 225.90 sets forth requirements that a foreign bank must meet for purposes of qualifying as a financial holding company, including capitalization and management tests.[7] The well-capitalized test includes risk based capital assessments.[8] The well-managed test requires the foreign bank to receive satisfactory Fed regulatory ratings, to receive the consent of its home country supervisor to the expansion of its U.S. activities, and to meet management standards comparable to those required of a U.S. bank owned by a financial holding company.[9] A foreign bank's election to be treated as a financial holding company is effective on the thirty-first day after the date that the election was received by the appropriate Federal Reserve Bank unless the applicant receives prior written notice that its election is effective or the applicant is notified that the election is ineffective.[10]

OCC believes that the Fed's regulatory policies governing the qualification of foreign banks as financial holding companies provide sufficient safeguards as to the creditworthiness of such institutions and the collectibility of letters of credit issued by them to warrant rescinding the concentration restrictions currently imposed on such institutions. Letters of credit issued by non-U.S. institutions currently represent only 3.2% of total margin deposits,[11] and OCC does not believe that rescinding the concentration requirements for qualified non-U.S. financial holding companies will materially increase its exposure to letters of credit issued by non-U.S. institutions specifically or letters of credit generally.

II. Discussion

Section 17A(b)(3)(F) of the Act requires that the rules of a clearing agency be designed to assure the safeguarding of securities and funds which are in the clearing agency's custody or control or for which it is responsible. The rule change removes restrictions on the percentage of clearing member's margin of obligations that may be satisfied by letters of credit issued by non-U.S. institutions where the issuing institution has qualified as a financial holding company under Regulation Y or is an institution owned by or under the control of such a financial holding company. Removing the restrictions from such non-U.S. institutions gives clearing members a larger pool of financially sound institutions from which they may obtain letters of credit to use the satisfy their margin obligations while still providing OCC with comfort that the non-U.S. issuing financial institutions have sufficient capital and adequate management to issue letters of credit for OCC margin purposes. Therefore, the Commission finds that OCC's proposed rule change is consistent with section 17A of the Act and the rules and regulations thereunder.

III. Conclusion

On the basis of the foregoing, the Commission finds that the proposed rule change is consistent with the requirements of the Act and in particular Section 17A of the Act and the rules and regulations thereunder.

It is therefore ordered, pursuant to section 19(b)(2) of the Act, that the proposed rule change (File No. SR–OCC–2001–03) be and hereby is approved.

For the Commission, by the Division of Market Regulation pursuant to delegated authority.[12]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–28489 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

[4] Gramm-Leach-Bliley Financial Modernization Act of 1999, Pub. L. No. 106–102, 113 Stat. 1338 (1999).

[5] Qualified financial holding companies may engage in securities, insurance, and other activities that are financial in nature or incidental to a financial activity. 50 FR 14433.

[6] See 66 FR 399 (January 3, 2001) (Board of Governors of the Federal Reserve Board adopting a final rule to amend Regulation Y to implement the financial holding company provisions of the GLB Act).

[7] Section 225.93 sets forth provisions that are applicable should a foreign bank fail to meet the applicable capital and management standards and specifies the consequences of such failure. Consequences include being required to execute an agreement with the Fed providing for a schedule of actions to be taken by the foreign bank to become compliant and, if the foreign bank is unable to meet such schedule, being subjected to an order requiring the divestiture or termination of certain business in the United States. Section 12 CFR 225.93.

[8] Section 12 CFR 225.90(b).

[9] Section 12 CFR 225.90(c).

[10] Section 12 CFR 225.92. The Fed publishes a list of effective financial holding company elections on its web site. As of January 2001, 13 out of 32 non-U.S. institutions approved by OCC to issue letters of credit have qualified as financial holding companies.

[11] Letters of credit currently represent only 11.9% of total margin deposits.

[12] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45026; File No. SR–OCC–2001–10]

Self-Regulatory Organizations; The Options Clearing Corporation; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to Clearing Fees for Security Futures

November 6, 2001.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on August 10, 2001, The Options Clearing Corporation (''OCC'' 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 primarily by OCC. 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 proposed rule change provides for the fees that OCC will charge for clearing security futures contracts. OCC is proposing to charge the same clearing fees for security futures as it does for options.[2]

[1] 15 U.S.C. 78s(b)(1).

[2] A copy of the text of OCC's proposed rule change and current fee schedule for options is available at the Commission's Public Reference Room or through OCC.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, OCC 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. OCC has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[3]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of this rule change is to provide for the fees to be charged for clearing security futures contracts. OCC proposes to charge the same clearing fees for security futures as it charges for options. As with new options products, clearing fees for security futures will be abated through the first full calendar month of trading on each exchange and discounted for the second through the first full calendar month of trading on each exchange and discounted for the second and third calendar months.

The proposed rule change is consistent with Section 17A of the Act, as amended, because it provides for the equitable allocation of reasonable fees among clearing members.

(B) Self-Regulatory Organization's Statement on Burden on Competition

OCC does not believe that the proposed rule change would impose any burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Written comments were not and are not intended to be solicited with respect to the proposed rule change and none have been received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Because the foregoing rule change establishes fees to be imposed by OCC upon clearing members, it has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act[4] and Rule 19b–4(f)(2).[5] At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

VI. Solicitation of Comments

Interested persons are invited to submit written data, views, 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 in the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of OCC. All submissions should refer to the File No. SR–OCC–2001–10 and should be submitted by December 5, 2001.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 01–28492 Filed 11–13–01; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45032; File No. SR–PCX–00–05]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Amendment No. 4 to the Proposed Rule Change by the Pacific Exchange, Inc. Relating to Its Automatic Execution System

November 6, 2001.

I. Introduction

On March 8, 2000, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'' or ''SEC''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] a proposed rule change to allow broker-dealer orders to be eligible for automatic execution through the Exchange's Automatic Execution System (''Auto-Ex'') on an issue-by-issue basis. The Exchange also proposed to adopt rules to establish means of improving compliance with rules pertaining to the use of Auto-Ex. After publishing the proposal for notice and comment in the **Federal Register**,[3] the Commission partially approved the proposal and granted accelerated approval to Amendment Nos. 2 and 3.[4] Specifically, the Commission approved the portion of the proposal relating to the establishment of provisions to improve compliance with the Exchange's Auto-Ex rules; the Commission did *not* approve the portion of the proposal that would allow orders for the accounts of broker-dealers to be executed on Auto-Ex on an issue-by-issue basis.

On October 29, 2001, the PCX filed Amendment No. 4 to the proposed rule change.[5] In Amendment No. 4, PCX addressed the remaining portion of proposed rule change regarding the eligibility of broker-dealer orders for automatic execution through Auto-Ex on an issue-by-issue basis. This order grants accelerated approval to Amendment No. 4 to the proposed rule change and solicits comments from interested persons on that Amendment.

Below is the proposed text of the portion of the proposed rule change relating to the eligibility of broker-dealer orders for automatic execution through Auto-Ex, as amended by Amendment No. 4.[6] Proposed new language is *italicized*; proposed deletions are in brackets.

* * * * *

¶ 5231 Automatic Execution System

Rule 6.87(a)—No change

(b) Eligible Orders.

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[3] The Commission has modified parts of these statements.

[4] 15 U.S.C. 78s(b)(3)(A)(ii).

[5] 17 CFR 240.19b–(f)(2).

[6] 17 CFR 200.30–3(a)(12).

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 43049 (July 18, 2000), 65 FR 45810 (July 25, 2000) (''Initial Proposal'').

[4] Securities Exchange Act Release No. 43971 (February 15, 2001), 66 FR 11344 (February 23, 2001) (''Partial Approval Order'').

[5] *See* letter from Michael D. Pierson, Vice President, Regulatory Policy, PCX, to Nancy J. Sanow, Assistant Director, Division of Market Regulation (''Division''), Commission, dated October 26, 2001 (''Amendment No. 4'').

[6] The text of this rule change is based upon current PCX Rule 6.87(b). It disregards previously proposed amendments to PCX Rule 6.87(b) that were included in the Initial Proposal and approved in the Partial Approval Order.

(1) Only non-broker/dealer customer orders are eligible for execution on the Exchange's Auto-Ex System, *except that the Options Floor Trading Committee (''OFTC'') may determine, on an issue-by-issue basis, to allow the following types of orders to be executed on Auto-Ex:*

(A) Broker-dealer orders; or

(B) Broker-dealer orders that are not for the accounts of Market Makers or Specialists on an exchange who are exempt from the provisions of Regulation T of the Federal Reserve Board pursuant to Section 7(c)(2) of the Securities Exchange Act of 1934.

Broker-dealer orders entered through the Exchange's Member Firm Interface (MFI) will not be automatically executed against orders in the limit order book. Broker-dealer orders may interact with orders in the limit order book only after being re-routed to a floor broker for representation in the trading crowd. Broker-dealer orders are not eligible to be placed in the limit order book pursuant to Rule 6.52.

(2) If the OFTC permits broker-dealer orders to be automatically executed in an issue pursuant to this Rule, then it may also permit the following with respect to such orders:

(A) The maximum order size eligibility for broker-dealer orders may be less than the applicable order size eligibility for non-broker-dealer customer orders.

(B) Non-broker-dealer customer orders may be eligible for automatic execution at the NBBO pursuant to Rule 6.87(i) while broker-dealer orders are not so eligible.

(C) Broker-dealer orders may be re-routed for manual representation when the NBBO is crossed or locked pursuant to Rule 6.87(j) when non-broker-dealer customer orders would not be re-routed for manual handling in such circumstances.

(3) PCX Marker Makers must assure that orders for their own accounts are not entered on the PCX and represented or executed in violation of the following provisions: Rule 6.84(h) (concurrent representation of a joint account), Rule 6.85(a) (concurrent representation of a market maker account), and Section 9 of the Securities Exchange Act of 1934 (wash sales).

(4) For purposes of this Rule, the term ''broker/dealer'' includes foreign broker/dealers.

[(2)–(3)]–*(5)–(6)*—No change.

* * * * *

II. Description of the Proposal

In 1990, the Commission approved the Exchange's POETS system on a pilot program basis and, in 1993, POETS was approved permanently.[7] POETS is comprised of an options order routing system (''ORS''), an automatic and semi-automatic execution system, Auto-Ex, an on-line book system (''Auto-Book''), and an automatic market quote update system (''Auto-Quote'').

In its Initial Proposal, PCX had proposed, among other things, that broker-dealer orders be permitted, on an issue-by-issue basis, to be executed on Auto-Ex. Furthermore, under the Initial Proposal, only broker-dealer orders that were *not* for the accounts of registered specialists and registered market makers would be eligible for automatic execution through Auto-Ex, subject to approval by the OFTC. Pursuant to Amendment No. 4, the Exchange is now proposing to allow *all* types of broker-dealer orders to be eligible for automatic execution, subject to OFTC approval. Specifically, under the amendment, the OFTC would be permitted to approve Lead Market Makers' requests to allow either: (a) automatic execution of broker-dealer orders, regardless of type, in particular option issues; or (b) automatic execution of broker-dealer orders in particular option issues, exclusing those orders that are for the accounts of registered specialists and registered market makers.

Pursuant to Amendment No. 4, if the OFTC approves the automatic execution of broker-dealer orders, regardless of type, in a particular option issue, then any orders for the accounts of registered market makers or specialists, including orders for PCX options markets makers and PCX Lead Market Makers, would be eligible for automatic execution on the PCX in that issue. However, inbound broker-dealer orders would not be eligible to be executed against orders residing in the limit order book (as inbound ''customer'' orders are currently permitted to do). If there is a customer limit order in the PCX's limit order book that is priced at the National Best Bid or Offer (''NBBO''), then an inbound market or marketable limit order for the account of a broker-dealer will be re-routed to a Floor Broker Hand-Held Terminal for execution by a floor broker. However, in certain rare circumstances, such orders will be re-routed to a member firm booth on the trading floor.[8] Accordingly, the Exchange is adding the following provisions to the text of PCX Rule 6.87(b)(1):

Broker-dealer orders entered through the Exchange's Member Firm Interface (MFI) will not be automatically executed against orders in the limit order book. Broker-dealer orders may interact with orders in the limit order book only after being re-routed to a floor broker for representation in the trading crowd. Broker-dealer orders are not eligible to be placed in the limit order book pursuant to Rule 6.52.

The POETS system currently distinguishes between customer and non-customer orders based upon the clearing information provided as part of each order. Manual and electronic order tickets must designate, for each order, whether the order is for a ''customer'' account, a ''firm'' account or a ''market maker'' account, by the designators ''C,'' ''F'' or ''M,'' respectively. These designators are intended to assure that the orders executed on the PCX clear in the proper margin accounts at the Options Clearing Corporation. They are also intended to assure that the orders are handled in a manner that is consistent with various PCX rules on eligibility for placement in the limit order book (PCX Rule 6.52(a)), order identification requirements (PCX Rule 6.66), priority of bids and offers (PCX Rule 6.75), firm quote size guarantees (PCX Rule 6.86), and eligibility for automatic execution (PCX Rule 6.87).

The Exchange notes that orders for the accounts of PCX market makers and Lead Market Makers that are entered for automatic execution will be subject to certain limitations under PCX rules. Currently, under PCX Rule 6.85(a), a market maker and any orders represented by a floor broker on behalf of that market may not be represented concurrently at the same trading post. This prohibition against ''dual representation'' would be violated, for example, in the following situation: A market maker in the XYZ trading crowd enters an order in XYZ options for his or her own account with a floor broker (via telephone, electronically or in-

[7] *See* Securities Exchange Act Release No. 27633 (January 18, 1990), 55 FR 2466 (January 24, 1990) (approving POETS on a pilot basis); Securities Exchange Act Release No. 32703 (July 30, 1993), 58 FR 42117 (August 6, 1993), (approving POETS on a permanent basis). The Auto-Ex system permits eligible market or marketable limit orders sent from member firms to be executed automatically at the displayed bid or offering price. Participating market makers are designated as the contra side to each Auto-Ex order. Participating market makers are assigned by Auto-Ex on a rotating basis, with the first market maker selected at random from the list of signed-on market makers. Automatic executions through Auto-Ex are currently available for public customer orders of twenty contracts or less (or in certain issues, for up to one hundred contracts) in all series of options traded on the Options Floor of the Exchange.

[8] The PCX represents that such broker-dealer orders will be routed to the trading floor if a firm has specified such treatment of the order, or as a default designation if the firm has not made a specification as to where such order should be routed. Telephone conversation between Michael D. Pierson, Vice President, Regulatory Policy, PCX, and Sapna C. Patel, Division, Commission, on November 5, 2001.

person), and the floor broker then represents the order while the market maker is still present in the XYZ trading crowd. A similar violation would occur if, under the proposed rule change, a market maker in the XYZ trading crowd entered an order in XYZ options with his or her upstairs brokerage firm via the internet, and the brokerage firm then re-routed the order back to the PCX, where it was either automatically executed or defaulted for manual handling by a floor broker. In either case, the market maker will have violated PCX Rule 6.85(a) because all orders entered for automatic execution are ultimately represented by designated floor brokers, even if they are automatically executed. However, if the market maker were trading for a joint account in that situation, then that market maker would have violated PCX Rule 6.84(h), which provides a similar prohibition on concurrent representation when a market maker is trading in a joint account. Furthermore, if a market maker enters an order for his or her own account with a brokerage firm, and the order is re-routed back to the PCX where it is executed against the same market maker's account, there will be a possible ''wash sale'' violation regardless of whether the trade was subsequently nullified.

For these reasons, the Exchange is proposing to adopt new PCX Rule 6.87(b)(3), which will provide as follows:

PCX Market Makers must assure that orders for their own accounts are not entered on the PCX and represented or executed in violation of the following provisions: Rule 6.84(h) (concurrent representation of a joint account), Rule 6.85(a) (concurrent representation of a market maker account), and Section 9 of the Act (wash sales).

The Exchange notes that, pursuant to PCX Rule 6.87(e)(3), market makers may not remain on the Auto-Ex ''wheel'' unless they are present in the trading crowd, except under certain very limited circumstances.

Pursuant to Amendment No. 4 to the proposed rule change, the OFTC would also have the ability to permit certain limitations on the automatic execution of broker-dealer orders. First, broker-dealer orders may have a smaller order size eligibility parameter for automatic execution than customer orders. For example, the OFTC may approve a size limitation in a particular issue of twenty contracts for broker-dealer orders and fifty contracts for customer orders.[9] Second, broker-dealer orders in an issue may be ineligible for NBBO step-up while customer orders in that issue may be eligible for NBBO step-up pursuant to PCX Rule 6.87(i). For example, if the PCX's best bid is 5 and the national best bid is 5.10, a customer order to sell at 5.10 entered on the PCX may receive an automatic execution of 5.10, while a broker-dealer order in the same issue to sell at 5.10 would not be automatically executed, but instead would be re-routed to a floor broker for execution. Third, a customer order in a particular issue by be automatically executed even though the NBBO is crossed or locked, while a broker-dealer order in the same issue would be re-routed to a floor broker for execution if the NBBO is crossed or locked, pursuant to PCX Rule 6.87(j).

The Exchange represents that the proposed rule change is consistent with the Act and rules and regulations thereunder. In particular, the Exchange represents in its Initial Proposal that the proposed rule change is consistent with Section 6(b)[10] of the Act, in general, and furthers the objectives of Section 6(b)(5),[11] in that it is designed to promote just and equitable principles of trade, to enhance competition and to protect investors and the public interest. In addition, the Exchange represents that the proposal is consistent with Section 11(a) of the Act[12] and Rule 11a2–2(T) under the Act[13] for the reasons stated in the Exchange's letter to the Commission.[14]

The Exchange further notes that the amendment to the proposed rule change is consistent with the Commission's approval of the Options Intermarket Linkage Plan (''Linkage Plan'').[15] PCX notes that the Linkage Plan Release states:

> The * * * plan would allow eligible market makers to send proprietary orders through the linkage. [However, if] the principal order is not larger than the Firm Principal Quote Size, the exchange receiving such order through the linkage *must execute it in its automatic execution system,* if its disseminated quote is equal to or better than the reference price at the time the order arrives.[16]

The Exchange notes that the Commission found that ''allow[ing] eligible market makers to use the linkage to hit quotes on an away market [helps] to protect the priority of the better displayed price.''[17] The Exchange also believes that allowing market makers and specialists on other exchanges to promptly access the PCX's markets via the Auto-Ex system will further the goals of a national market system by assuring that quotes can be promptly accessed by other market participants. This, in turn, should serve to reduce the number of trade-throughs as well as locked and crossed quotes in the options markets.

The Exchange also notes that its rules currently permit the Exchange, or an issue-by-issue basis, to automatically execute inbound orders of registered eligible market makers on other exchanges, via Auto-Ex, pursuant to the Interim Intermarket Linkage Program. Under this program, ''two or more Participating Exchange [may] mutually agree that they will *automatically execute * * * orders sent for the principal account of a market maker,* an [Eligible Away Market Maker] or an [Eligible Away Principal Market Maker] that does not correspond to an Underlying Customer Order.''[18]

Finally, the Exchange believes that its Amendment No. 4 to the proposed rule change to allow automatic execution of all broker-dealer orders, subject to OFTC approval, is a legitimate means for the PCX to compete for orders for the accounts of broker-dealers to be executed on the PCX. The Exchange notes that another exchange already has

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[9] The Exchange notes that a Lead Market Maker's minimum Auto-Ex size guarantee in an issue is established at the time that the Options Allocation Committee (''OAC'') allocates that issue to the Lead Market Maker. Pursuant to PCX Rule 6.82(c)(2), Lead Market Makers are required to ''[h]onor guaranteed markets, including markets required by Rule 6.86 [''firm quotes''] and any markets pledged during he allocation process.'' Therefore, if a Lead Market Maker were to seek to establish an Auto-Ex size guarantee for broker-dealer orders that is less than the Auto-Ex size established during the allocation process, the Lead Market Maker would have to obtain approval of both the OFTC and the OAC for that size guarantee.

[10] 15 U.S.C. 78f.

[11] 15 U.S.C. 78f(b)(5).

[12] 15 U.S.C. 78k(a).

[13] 17 CFR 240.11a2–2(T).

[14] *See* letter to Catherine McGuire, Chief Counsel, Division, Commission, from Michael D. Pierson, Vice President, Regulatory Policy, PCX, dated October 26, 2001 (''PCX Request Letter'').

[15] *See* Securities Exchange Act Release No. 43086 (July 28, 2000), 65 FR 48023 (August 4, 2000) (''Linkage Plan Release''). The Commission notes that only proprietary orders of ''eligible market makers,'' as that term is defined in the Linkage Plan Release, and not proprietary orders of all market makers and broker-dealers, may be sent through the linkage. An eligible market maker must meet the criteria and volume requirements set forth in the Linkage Plan Release in order to utilize the linkage for proprietary orders.

[16] *Id.* (emphasis added.)

[17] *Id.* The Linkage Plan Release also stated that ''the Commission would support broader access between options markets'' than is provided for in the linkage Plan. *Id.*

[18] *See* PCX Rule 6.91(a)(9) (emphasis added); *see also* PCX Rule 6.91(b); Securities Exchange Act Release No. 43986 (February 20, 2001), 66 FR 12578 (February 27, 2001) (File No. SR–PCX–01–10) (notice of filing and immediate effectiveness of Interim Intermarket Linkage Program).

the ability to automatically execute broker-dealer orders.[19]

III. Discussion

After careful review, the Commission finds that Amendment No. 4 to the proposed rule change is consistent with the Act and the rules and regulations promulgated thereunder applicable to a national securities exchange and, in particular, with the requirements of Section 6(b).[20] Specifically, the Commission finds that approval of Amendment No. 4 is consistent with Section 6(b)(5)[21] of the Act in that it is designed to promote just and equitable principles of trade, to remove impediments and to perfect the mechanism of a free and open market and a national market system, and in general, to protect investors and the public interest. The Commission finds that it is appropriate to allow broker-dealer orders to be eligible for automatic execution through the Exchange's Auto-Ex system, subject to the approval of the OFTC.[22]

The Commission finds good cause for approving Amendment No. 4 to the proposed rule change prior to the thirtieth day after the Amendment is published for comment in the **Federal Register** pursuant to Section 19(b)(2) of the Act.[23] Amendment No. 4 allows all broker-dealer orders to be executed through Auto-Ex, subject to OFTC approval. The Commission finds that this Amendment is necessary to accomplish the intended goals of the Exchange's proposal and to allow the Exchange to compete with another exchange that currently allows the electronic execution of broker-dealer orders. The Commission therefore believes that acceleration of Amendment No. 4 to the proposed rule change is appropriate.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning Amendment No. 4, including whether the Amendment 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 in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR–PCX–00–05 and should be submitted by December 5, 2001.

V. Conclusion

For the foregoing reasons, the Commission finds that Amendment No. 4 to the proposed rule change is consistent with the Act and the rules and regulations thereunder applicable to a national securities exchange, and, in particular, with Section 6(b)(5).[24]

It Is Therefore ordered, pursuant to Section 19(b)(2) of the Act,[25] that Amendment No. 4 to the proposed rule change (SR–PCX–00–5) is approved on an accelerated basis.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[26]

Margaret H. McFarland,

Deputy Secretary.

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BILLING CODE 8010–01–M

[19] Specifically, the PCX notes that on the International Securities Exchange (''ISE''): ''If a member enters a limit order into the System that crosses trading interest already in the System, a trade will occur, to the extent that size is available, at the price of the trading interest already in the System.'' *See* Securities Exchange Act Release No. 42455 (February 24, 2000), 65 FR 11388 (March 2, 2000) (order approving ISE's application for registration as a national securities exchange) (File No. 10–127).

[20] 15 U.S.C. 78f(b). In approving this proposal, the Commission has considered the proposed rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[21] 15 U.S.C. 78f(b)(5).

[22] In response to the Exchange's request in the PCX Request Letter, Commission staff has provided interpretive guidance to the Exchange under Section 11(a) of the Act, 15 U.S.C. 78k(a). *See* letter from Paula R. Jenson, Deputy Chief Counsel, Division, Commission, to Michael D. Pierson, Vice President, Regulatory Policy, PCX, dated October 30, 2001.

[23] 15 U.S.C. 78s(b)(2).

[24] 15 U.S.C. 78f(b)(5).

[25] 15 U.S.C. 78s(b)(2).

[26] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–45029; File No. SR–SCCP–2001–10]

Self-Regulatory Organizations; Stock Clearing Corporation of Philadelphia; Notice of Filing and Immediate Effectiveness of a Proposed Rule Change Relating to the Extensions of Invoice Dates and the Associated Waiver of Late Charges

November 6, 2001.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] notice is hereby given that on October 3, 2001, the Stock Clearing Corporation of Philadelphia (''SCCP'') 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 primarily by SCCP. 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 proposed rule change waives late charges that may have resulted from the extension of SCCP's July and August invoice due dates.[2] Charges that appeared on SCCP's July and August invoices were originally due on September 14, 2001 and October 15, 2001, respectively. The due date for the July invoices was extended to October 15, 2001, and the due date for the August invoices was extended to November 14, 2001. Associated late charges that may have been imposed under SCCP Rule 25 as a result of these extensions are waived.[3]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, SCCP included statements concerning the purpose of and basis for the

[1] 15 U.S.C. 78s(b)(1).

[2] Pursuant to SCCP Rule 25, SCCP shall impose upon any participant using the facilities or services of SCCP, or enjoying any of the privileges therein, a late charge until payment is received of dues, fees, fines or other charges imposed by SCCP and not paid within thirty (30) days after notice thereof has been mailed.

[3] Late charges incurred in connection with invoices other than the July and August invoices will not be waived. In addition, late charges may be imposed on the July and August invoices if payment is received after October 15, 2001, for the July invoice and after November 14, 2001, for the August invoice.

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. SCCP has prepared summaries, set forth in sections (A), (B), and (C) below, of the most significant aspects of such statements.[4]

(A) Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The proposed rule change waives associated late charges that may have been imposed as a result of an extension of SCCP's July and August invoice due dates. SCCP's July and August invoices are being extended to promote liquidity in the trading crowds during the aftermath of the terrorist attacks in New York City, and Washington, DC that occurred on September 11, 2001. In addition, the accounting departments of some participants were displaced, which may make it difficult to pay the invoices by the due date.

The proposed rule change is consistent with the requirements of section 17A of the Act because all SCCP participants will receive a waiver of associated late charges that may have been incurred during the extension fo SCCP's July and August invoice dates.

(B) Self-Regulatory Organization's Statement on Burden on Competition

SCCP does not believe that the proposed rule change will impose any inappropriate burden on competition.

(C) Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Becuase the foregoing rule change establishes fees to be imposed by SCCP upon clearing members, it has become effective pursuant to section 19(b)(3)(A)(ii) of the Act[5] and rule 19b–4(f)(2).[6] At any time within sixty days of the filing of the proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

VI. 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 in the Commission's Public Reference Section, 450 Fifth Street NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of SCCP. All submissions should refer to the File No. SR–SCCP–2001–10 and should be submitted by December 5, 2001.

For the Commission by the Division of Market Regulation, pursuant to delegated authority.[7]

Margaret H. McFarland,

Deputy Secretary.

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[4] The Commission has modified parts of these statements.

[5] 15 U.S.C. 78s(b)(3)(A)(ii).

[6] 17 CFR 240. 19b 4(f)(2)

[7] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent To Request Renewal From the Office of Management and Budget (OMB) of Nine Current Public Collections of Information

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), the FAA invites public comment on nine currently approved public information collections which will be submitted to OMB for renewal.

DATES: Comments must be received on or before January 14, 2002.

ADDRESSES: Comments may be mailed or delivered to the FAA at the following address: Ms. Judy Street, Room 613, Federal Aviation Administration, Standards and Information Division, APF–100, 800 Independence Ave., SW., Washington, DC 20591.

FOR FURTHER INFORMATION CONTACT: Ms. Judy Street at the above address or on (202) 267–9895.

SUPPLEMENTARY INFORMATION: In accordance with 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 currently valid OMB control number. Therefore, the FAA solicits comments on the following current collections of information in order to evaluate the necessity of the collection, the accuracy of the agency's estimate of the burden, the quality, utility, and clarity of the information to be collected, and possible ways to minimize the burden of the collection in preparation for submission to renew the clearances of the following information collections.

1. *2120–0024, Dealer's Aircraft Registration Certificate Application.* An individual or company engaged in manufacturing, distributing, or selling aircraft who wants to fly those aircraft with a dealer's certificate must fill out an application to provide a basis for the issuance of such certificates. A conveyance examiner with the FAA Aircraft Registry reviews the application to ensure that it is completely and properly filled out. The current estimated annual reporting burden is 2,187 hours.

2. *2120–0042, Aircraft Registration.* The information requested is used by the FAA to register an aircraft or hold an aircraft in trust. The information required to register and prove ownership of an aircraft is required by any person wishing to register an aircraft. The current annual reporting burden is 67,153 hours.

3. *2120–0063, Certification of Airports.* To operate certain air carriers, a person must obtain and maintain an Airport Operating Certificate. The application initiates the certification process, including airport inspection and documentation of safe airport operations and equipment. The certification remains valid if safety standards are maintained as verified by inspections, records, and reports. The current estimated annual reporting burden is 174,151 hours.

4. *2120–0514, War Risk Insurance.* The FAA requires the information submitted by applicants for Chapter 443 insurance to determine the reasonableness of the terms and conditions on which commercial

insurance is available, assess the risks for which insurance coverage is being sought, and determine what risks of aircraft operators are customarily covered by insurance. The requested information is included in air carriers' applications for insurance when insurance is not available from private sources. The current estimated annual reporting burden is 68 hours.

5. *2120–0570, Simulator Rule/14 CFR Part 142, Certified Training Centers.* To determine regulatory compliance, there is a need for airmen to maintain records of certain training and recentness of experience; there is a need for training centers to maintain records of students trained, employee qualification and training, and training program approvals. Information is used to determine compliance with airmen certification and testing standards to ensure safety. The current estimated annual reporting burden is 6,000 hours.

6. *2120–0595, Federal Acquisition Administration Acquisition Management System (FAAAMS).* The collection of information requirements arise from various sections of FAAAMS. Pursuant to section 348 of Public Law 104–50, this information is required to carry out the provisions of the newly reformed FAA acquisition process. Information is used to acquire, award, and administer contracts. The current estimated annual reporting burden is 170,073 hours.

7. *2120–0641, Parachute Accident Reporting.* 14 CFR part 105 prescribes the packing of main and auxiliary parachutes used for sport jumping. This information is used by the FAA for recommendations for equipment changes, operating procedures, or training to aid aviation safety inspectors in accident prevention and surveillance. The FAA is better able to monitor trends that lead to accidents/incidents and provide the necessary guidance to avert such tragedies. The current estimated annual reporting burden is 44 hours.

8. *2120–0642, NPRM ''Security of Checked Baggage on Flights Within the United States''.* In accordance federal regulations governing the security of part 108 air carrier operations and the recommendation of the Department of Justice, air carriers provide information regarding procedures to be used in carrying out their responsibilities under the law to protect persons and property on an aircraft operating in air transportation, intrastate air transportation, and flights to and from the United States against acts of criminal violence and aircraft safety. The current estimated annual reporting burden is 5,045 hours.

9. *2120–0643, Commercial Space Transportation Reusable Launch Vehicle Reentry Licensing Regulations.* The required information, that is, data required for performing a safety review, is used to determine whether applicants satisfy requirements for obtaining a launch license to protect the public from risks associated with reentry operations from a site not operated by or situated on a Federal launch range. The respondents are those applying for a launch site license. The current estimated annual reporting burden is 4,384 hours.

Issued in Washington, DC, on November 6, 2001.

Steve Hopkins,

Manager, Standards and Information Division, APF–100.

[FR Doc. 01–28499 Filed 11–13–01; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Maritime Administration

Reports, Forms and Recordkeeping Requirements, Agency Information Collection Activity Under OMB Review

AGENCY: Maritime Administration, DOT.

ACTION: Notice and request for comments.

SUMMARY: In compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*), this notice announces that the Information Collection abstracted below has been forwarded to the Office of Management and Budget (OMB) for review and comment. The nature of the information collection is described as well as its expected burden. The **Federal Register** Notice with a 60-day comment period soliciting comments on the following collection of information was published on August 20, 2001. No comments were received.

DATES: Comments must be submitted on or before December 14, 2001.

FOR FURTHER INFORMATION CONTACT: Michael Ferris, Maritime Administration, MAR 560, 400 Seventh Street Southwest, Washington, DC 20590. Telephone: 202–366–2324. FAX: 202–366–7901.

Copies of this collection can also be obtained from that office.

SUPPLEMENTARY INFORMATION: Maritime Administration (MARAD).

Title: Subsidy Voucher-Operating Differential Subsidy (Bulk & Liner Cargo Vessels).

OMB Control Number: 2133–0024.

Type of Request: Extension of currently approved collection.

Affected Public: Operators of Bulk and Liner Vessels.

Form (s): MA 790, SF–1034 and Supporting Schedules.

Abstract: The Merchant Marine Act, 1936, authorizes the Secretary of Transportation to provide financial aid in the operation of contract vessels for bulk or liner cargo carrying services that help promote, develop, expand and maintain the foreign commerce of the United States. Vessel owners must submit documentation requesting the financial assistance to the Maritime Administration (MARAD).

Annual Estimated Burden Hours: 16 hours.

Addressee: Send comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention MARAD Desk Officer.

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 will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed information collection; (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 the use of automated collection techniques or other forms of information technology.

A comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

Issued in Washington, DC on November 7, 2001.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 01–28515 Filed 11–13–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

Maritime Administration

[Docket Number: MARAD–2001–10976]

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 *Freelance.*

SUMMARY: As authorized by Pub. L. 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 December 14, 2001.

ADDRESSES: Comments should refer to docket number MARAD–2001–10976. 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: Kathleen Dunn, U.S. Department of Transportation, Maritime Administration, MAR–832 Room 7201, 400 Seventh Street, S.W., Washington, DC 20590. Telephone 202–366–2307.

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 (no more 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: *Freelance.* Owner: Darrell and Jennifer Brand.

(2) *Size, capacity and tonnage of vessel.* According to the applicant: Freelance is a 39 foot Kadey-Krogen Trawler, Beam 14′2″, LOA 38′11″, LWL 36prime;8″;, Draft 4′3″, Displacement Weight ι35,000 * * * Approx. 25 net tons.

(3) *Intended use for vessel, including geographic region of intended operation and trade.* According to the applicant:

''The intended use for the vessel will be coastal cruising in Florida, primarily in the Atlantic and Gulf Waters of the Florida Keys from Miami to the Dry Tortugas National Park.''

(4) *Date and Place of construction and (if applicable) rebuilding.* Date of construction: July 1998. Place of construction: Kaohsiung, Taiwan.

(5) *A statement on the impact this waiver will have on other commercial passenger vessel operators.* According to the applicant: ''I feel this waiver will not have any impact on other commercial passenger vessel operators. I only know of one operator in So. Florida with captained custom cruises and his vessel is much larger. There are many exclusive commercial fishing and dive charter boats in the area and Jennifer and I will not even attempt to duplicate the magnitude of their services. ''The other reason that we will not have a major impact on existing operators is that we will limit ourselves to the occasional charter. We both have other jobs * * *.''

(6) *A statement on the impact this waiver will have on U.S. shipyards.* According to the applicant: ''US Shipyards will not have any impact by Freelance operating in the custom cruise business. This boat was previously built over three years ago for another recreational boater and will continue to be used for recreational purposes the majority of the time.''

By Order of the Maritime Administrator.

Dated: November 7, 2001.

Joel C. Richard,

Secretary, Maritime Administration.

[FR Doc. 01–28514 Filed 11–13–01; 8:45 am]

BILLING CODE 4910–81–P

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

[Docket No. NHTSA 2001–10944; Notice 1]

Advanced Bus Industries, Receipt of Application for Decision of Inconsequential Noncompliance

Advanced Bus Industries, LLC, (ABI) of Marysville, Ohio, has determined that approximately 68 Mauck Special Vehicle (MSV) vehicles with tag axles, manufactured between May 31, 1995 and February 2, 2000, do not meet the requirements of paragraph S5.1 of Federal Motor Vehicle Safety Standard (FMVSS) No. 105, ''Hydraulic and Electric Brake Systems.'' Pursuant to 49 U.S.C. 30118(d) and 30120(h), ABI has petitioned for a determination that this noncompliance is inconsequential to motor vehicle safety and has filed an appropriate report pursuant to 49 CFR part 573, ''Defect and Noncompliance Reports.''

This notice of receipt of an application is published under 49 U.S.C. 30118 and 30120 and does not represent any agency decision or other exercise of judgment concerning the merits of the application.

ABI is the original equipment manufacturer of the MSV vehicle. ABI manufactures the MSV vehicle as a complete bus, which is then purchased by city transit organizations, or as a shell, which is purchased by up-fitters that customize and sell it to a first purchaser.

The four-wheel independent suspension of the MSV vehicle is augmented by a tag axle with small wheels. The tag axle is manufactured by Dexter, has a maximum support capacity of 3,500 pounds, and is installed by ABI behind the MSV's two rear wheels. A supporting force of 1,500 pounds is provided by the tag axle via the air pressure inside the two rubber air springs installed between the tag axle and the MSV chassis.

Vehicle braking is provided by the hydraulic, caliper-disc service brakes on the four main wheels. The two small wheels of the tag axle are not fitted with brakes. The lack of brakes on the two small wheels of the tag axle does not satisfy FMVSS 105, which states that a vehicle must have service brakes at all wheels.

ABI argued that the noncompliance is inconsequential to motor vehicle safety because these vehicles exceed the current FMVSS No. 105 braking performance requirements. To support this claim ABI submitted, along with its petition for inconsequential non-

compliance, a test report compiled in August 1999. The test facility, Radlinski & Associates, tested the MSV to the procedures specified in FMVSS No. 105 and a complete Certification Test Report was generated. The FMVSS No. 105 Certification Test Report indicates that the SMV exceeded all FMVSS No. 105 performance requirements.

Interested persons are invited to submit written data, views and arguments on the application described above. Comments should refer to the docket number and be submitted to: U.S. Department of Transportation, Docket Management, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590. It is requested that two copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date, will also be filed and will be considered to the extent possible. When the application is granted or denied, the notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: December 14, 2001.

(49 U.S.C. 30118, 301120; delegations of authority at 49 CFR 1.50 and 501.8)

Issued on: November 7, 2001.

Noble N. Bowie,

Acting Associate Administrator for Safety Performance Standards.

[FR Doc. 01–28493 Filed 11–13–01; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. MC–F–20986]

Greyhound Lines, Inc.—Corporate Family Transaction Exemption-Merger of Continental Panhandle Lines, Inc., Into Texas, New Mexico & Oklahoma Coaches, Inc.

Greyhound Lines, Inc. (Greyhound),[1] a motor passenger carrier, has filed a verified notice of exemption under the Board's class exemption procedure at 49 CFR 1182.9.[2] The exempt transaction involves the merger of Continental Panhandle Lines, Inc. (Panhandle), into Texas, New Mexico & Oklahoma Coaches, Inc. (TNM&O), with TNM&O as the surviving entity.[3]

The transaction was expected to be consummated on October 31, 2001.

The transaction is intended to simplify Greyhound's corporate structure to eliminate overlapping management functions and reduce duplicating overhead and fixed costs. The transaction will permit the integration of the operations of Panhandle and TNM&O, particularly their special and charter operations, which are a significant part of the services rendered by both companies. It will also allow for integration of Panhandle's and TNM&O's schedules, resulting in increased travel options and more dependable bus service for passengers. In addition, the transaction will improve the utilization of facilities, equipment and drivers and enhance the seamless interlining of passengers.

This is a transaction within a corporate family of the type specifically exempted from prior review and approval under 49 CFR 1182.9. Greyhound states that the transaction will not result in adverse changes in service levels, significant operational changes, or a change in the competitive balance with carriers outside the corporate family. Greyhound also states that, because it directly or indirectly holds all of the stock of Panhandle and TNM&O, no contract or agreement will be entered into, except for the corporate documentation and filings required to effect the merger. Greyhound further states that there will be no significant effect upon employees because almost all of them will be retained.

If the verified notice contains false or misleading information, the Board shall summarily revoke the exemption and require divestiture. Petitions to revoke the exemption under 49 U.S.C. 13541(d) may be filed at any time. *See* 49 CFR 1182.9(c).

An original and 10 copies of all pleadings, referring to STB Docket No. MC–F–20986, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Fritz R. Kahn, 1920 N Street, NW. (8th Floor), Washington, DC 20036–1601.

Board decisions and notices are available on our website at *''www.stb.dot.gov.''*

Decided: November 2, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 01–28089 Filed 11–13–01; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34105]

Conecuh Valley Railroad Co., Inc.—Acquisition and Operation Exemption—Southern Alabama Railroad Co., Inc.

Conecuh Valley Railroad Co., Inc. (CV), a noncarrier, has filed a verified notice of exemption under 49 CFR 1150.31 to acquire from Southern Alabama Railroad Company, Inc., its rights and interests in, and to operate, an approximately 15.04-mile rail line from approximately milepost 374.96, at or near Troy, AL, to the end of the line at approximately milepost 390.00, at or near Goshen, AL.[1] CV certifies that its projected annual revenues will not exceed those that would qualify it as a Class III rail carrier and that its annual revenues are not projected to exceed $5 million.

The transaction was expected to be consummated on or after October 22, 2001, the effective date of the exemption (7 days after the notice was filed).

This transaction is related to STB Finance Docket No. 34106, *Gulf & Ohio Railways Holding Co., Inc. H. Peter Claussen and Linda C. Claussen-Continuance in Control Exemption-Conecuh Valley Railroad Co., Inc.,* wherein Gulf & Ohio Railways Holding Co., Inc. (G&O), H. Peter Claussen and Linda C. Claussen (the Claussens) have filed a notice of exemption to continue in control of CV upon its becoming a Class III rail carrier.[2]

[1] The Board previously approved the merger of Greyhound into Laidlaw Transit Acquisition Corp., a wholly owned subsidiary of Laidlaw Inc. (Laidlaw), a noncarrier, under 49 U.S.C. 14303. Greyhound is now a subsidiary of Laidlaw Transportation, Inc., a noncarrier controlled by Laidlaw. *See Laidlaw Inc. and Laidlaw Transit Acquisition Corp.-Merger-Greyhound Lines, Inc.,* STB Docket No. MC–F–20940 (STB served Dec. 17, 1998, Aug. 18 and Dec. 6, 2000).

[2] The Board exempted intra-corporate family transactions of motor carriers of passengers that do not result in significant operational changes, adverse changes in service levels, or a change in the competitive balance with carriers outside the corporate family in *Class Exemption for Motor Passenger Intra-Corporate Family Transactions,* STB Finance Docket No. 33685 (STB served Feb. 18, 2000).

[3] Greyhound (MC–1515) directly controls Panhandle (MC–8742), a regional motor passenger carrier operating in Kansas, Oklahoma, and Texas, and through its wholly owned noncarrier subsidiary, GLI Holding Company, indirectly controls TNM&O (MC–61120), a regional motor passenger carrier operating in Colorado, Kansas, New Mexico, Oklahoma, and Texas.

[1] By letter filed October 30, 2001, Anderson's Peanuts, a shipper on the line, has expressed concern due to advice attributed to representatives of CV that CV would no longer provide rail service to the shipper's Goshen plant.

[2] CV will be wholly owned by G&O, which controls seven other Class III carriers. G&O, in turn, is wholly owned by the Claussens. The Claussens

If the notice contain false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and 10 copies of all pleadings, referring to STB Finance Docket No. 34105, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, one copy of each pleading must be served on Rose-Michele Weinryb, Weiner Brodsky Sidman Kider PC, 1300 19th Street, NW., Fifth Floor, Washington, DC 20036–1609.

Board decisions and notices are available on our web site at *''WWW.STB.DOT.GOV.''*

Decided: November 7, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 01–28501 Filed 11–13–01; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Finance Docket No. 34106]

Gulf & Ohio Railways Holding Co., Inc., H. Peter Claussen and Linda C. Claussen-Continuance in Control Exemption-Conecuh Valley Railroad Co., Inc.

Gulf & Ohio Railways Holding Co., Inc. (G&O), a noncarrier, and H. Peter and Linda C. Claussen (the Claussens), have filed a notice of exemption to continue in control of Conecuh Valley Railroad Co., Inc. (CV), upon CV's becoming a Class III railroad.

This transaction was scheduled to be consummated on or after October 22, 2001, the effective date of the exemption (7 days after the notice was filed).

The transaction is related to STB Finance Docket No. 34105, *Conecuh Valley Railroad Co., Inc.-Acquisition and Operation Exemption-Southern Alabama Railroad Company, Inc.*, wherein CV seeks to acquire from Southern Alabama Railroad Company Inc., and operate approximately 15.04 miles of rail line.

At the time it filed this notice, G&O owned and controlled the following other Class III rail carriers: Knoxville & Holston River Railroad Co., Inc., which operates in East Tennessee; Laurinburg & Southern Railroad Co., Inc., which operates in North Carolina; Lexington & Ohio Railroad Co., Inc., which operates in North Central Kentucky; Piedmont & Atlantic Railroad, Inc., which operates in Northwestern North Carolina under the trade name of Yadkin Valley Railroad; Rocky Mount & Western Railroad Co., Inc., which operates in Central North Carolina; Wiregrass Central Railroad Company, Inc., which operates in Southeast Alabama; and Three Notch Railroad Co., Inc., which operates in Alabama. The Claussens, who wholly own G&O, also own and control H&S Railroad, Inc., which operates in Southeast Alabama.

G&O and the Claussens state that CV will not connect with any of the affiliates, nor is this transaction part of a series of anticipated transactions that would connect CV with any of the affiliates and the transaction does not involve a Class I carrier. Therefore, the transaction is exempt from the prior approval requirements of 49 U.S.C. 11323. *See* 49 CFR 1180.2(d)(2).

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Section 11326(c), however, does not provide for labor protection for transactions under sections 11324 and 11325 that involve only Class III rail carriers. Because this transaction involves Class III rail carriers only, the Board, under the statue, may not impose labor protective conditions for this transaction.

If the verified notice contains false or misleading information, the exemption is void *ab initio.* Petitions to revoke the exemption under 49 U.S.C. 10502(d) may be filed at any time. The filing of a petition to revoke will not automatically stay the transaction.

An original and ten copies of all pleadings referring to STB Finance Docket No. 34106, must be filed with the Surface Transportation Board, Office of the Secretary, Case Control Unit, 1925 K Street, NW., Washington, DC 20423–0001. In addition, a copy of each pleading must be served on Rose-Michele Weinryb, Weiner Brodsky Sidman Kider PC, 1300 19th Street, NW., 5th Floor, Washington, DC 20036–1609.

Board decisions and notices are available on our web site at ''*WWW.STB.DOT.GOV.*''

Decided: November 7, 2001.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 01–28500 Filed 11–13–01; 8:45 am]

BILLING CODE 4915–00–P

DEPARTMENT OF THE TREASURY

Submission for OMB Review; Comment Request

November 6, 2001.

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 December 14, 2001 to be assured of consideration.

Internal Revenue Service

OMB Number: 1545–0633.

Notice Number: IRS Notices 437, 437–A, 437–A(1), 438 and 466.

Type of Review: Extension.

Title: Notice of Intention to Disclose.

Description: Notice is required by 26 USC 6110(f). A reply is necessary if the recipient disagrees with the Service's proposed deletions. The Service uses the reply to consider the propriety of making additional deletions to the public inspection version of written determinations or related background file documents.

Respondents: Individuals or households, Business or other for-profit, Not-for-profit institutions, Farms, State, Local or Tribal Government.

Estimated Number of Respondents: 5,250.

Estimated Burden Hours Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Total Reporting Burden: 2,625 hours.

Clearance Officer: George Freeland, Internal Revenue Service, Room 5575, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Alexander T. Hunt(202) 395–7860, Office of Management and Budget, Room 10202,

also own and control another Class III railroad, H&S Railroad, Inc., which operates in Southeast Alabama.

New Executive Office Building, Washington, DC 20503.

Mary A. Able,

Departmental Reports Management Officer

[FR Doc. 01–28513 Filed 11–13–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Information Reporting Program Advisory Committee; Renewal of Charter

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Charter for the Information Reporting Program Advisory Committee will renew for a two-year period beginning November 5, 2001.

FOR FURTHER INFORMATION CONTACT: Ms. Lorenza Wilds; National Public Liaison, 202–622–6440 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), and with the approval of the Secretary of the Treasury to announce the renewal of the Information Reporting Program Advisory Committee (IRPAC). The primary purpose of the Advisory Committee is to provide an organized forum for senior Internal Revenue Service executives and representatives of the public to consider relevant information reporting issues. As such, the IRPAC: (i) Conveys the public's perception of IRS activities; (ii) advises with respect to specific information reporting administration issues; (iii) provides constructive observations regarding current or proposed IRS policies, programs, and procedures; and (iv) proposes significant improvements in information reporting operations. Because each Operating Division relies on the Information Reporting Program, the IRS must ensure application of a coordinated approach when addressing information reporting issues. Therefore, acknowledging the critical role of information reporting, emphasizing its commitment to the Information Reporting Program, and as a measure of the IRPAC's importance, a centralized coordinating mechanism, the Information Reporting Program Policy Council (IRP Policy Council) was established to formulate and coordinate strategic and crosscutting information reporting issues. A counterpart to the IRPAC consisting of IRS executives from each Operating Division, the IRP Policy Council facilitates cross-divisional consistency in information reporting and provides strategic leadership for the Service-wide direction of the Information Reporting Program. In addition, the IRP Policy Council considers and prioritizes the recommendations of the IRPAC as part of the strategic planning process, and meets regularly with Committee members to identify and recommend strategic issues for consideration.

To accomplish its objective of close alignment with the needs and strategic goals of the IRS while remaining a strong external feedback mechanism, it is essential that IRPAC members comprise a diverse group of dedicated and talented professionals who bring substantial disparate experience and backgrounds to bear on Committee activities. Membership is balanced to include, representation from the taxpaying public, the tax professional community, small and large businesses, state tax administration, and the payroll community.

Dated: November 5, 2001.

Nancy A. Thoma,

Designated Federal Official, Acting Director, National Public Liaison.

[FR Doc. 01–28537 Filed 11–13–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Internal Revenue Service Advisory Council; Renewal of Charter

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: The Charter for the Internal Revenue Service Advisory Council will renew for a two-year period beginning November 5, 2001.

FOR FURTHER INFORMATION CONTACT: Ms. Lorenza Wilds; National Public Liaison, 202–622–6440 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988), and with the approval of the Secretary of the Treasury to announce the renewal of the Internal Revenue Service Advisory Council (IRSAC). The primary purpose of the Advisory Council is to provide an organized public forum for senior Internal Revenue Service executives and representatives of the public to discuss relevant tax administration issues. As an advisory body designed to focus on broad policy matters, the IRSAC reviews existing tax policy and/or makes recommendations with respect to emerging tax administration issues. As such, the IRSAC suggests operational improvements, offers constructive observations regarding current or proposed IRS policies, programs, and procedures, and advises the Commissioner with respect to issues having substantive effect on federal tax administration. Conveying the public's perception of IRS activities to the Commissioner, the IRSAC is comprised of individuals who bring substantial, disparate experience and diverse backgrounds to bear on the IRSAC's activities. Membership is balanced to include representation from the taxpaying public, the tax professional community, small and large businesses, state tax administration, and the payroll community.

Dated: November 5, 2001.

Nancy A. Thoma,

Designated Federal Official, Acting Director, National Public Liaison.

[FR Doc. 01–28536 Filed 11–13–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of the New York Metro Citizen Advocacy Panel

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: An open meeting of the New York Metro Citizen Advocacy Panel will be held in Brooklyn, New York.

DATES: The meeting will be held Thursday December 6, 2001.

FOR FURTHER INFORMATION CONTACT: Eileen Cain at 1–888–912–1227 or 718–488–3555.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an operational meeting of the Citizen Advocacy Panel will be held Thursday December 6, 2001, 6 p.m. to 9:20 p.m. at the Internal Revenue Service, 625 Fulton Street, Brooklyn, NY 11201.

For more information or to confirm attendance, notification of intent to attend the meeting must be made with Eileen Cain. Mrs. Cain can be reached at 1–888–912–1227 or 718–488–3555. The public is invited to make oral comments from 9 p.m. to 9:20 p.m. on Thursday December 6, 2001.

Individual comments will be limited to 5 minutes. If you would like to have

the CAP consider a written statement, please call 1–888–912–1227 or 718–488–3555, or writeEileen Cain, CAP Office, P.O. Box R, Brooklyn, NY, 11201. The Agenda will include the following: various IRS issues.

Note: Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: November 7, 2001.

John Mannion,

Director, Program Planning & Quality.

[FR Doc. 01–28538 Filed 11–13–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Open Meeting of Citizen Advocacy Panel, Midwest District

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice.

SUMMARY: A meeting of the Midwest Citizen Advocacy Panel will be held in Clive, Iowa.

DATES: The meeting will be held Thursday, December 6, 2001, and Friday, December 7, 2001.

FOR FURTHER INFORMATION CONTACT: Sandra McQuin at 1–888–912–1227, or 414–297–1604.

SUPPLEMENTARY INFORMATION: Notice is hereby given pursuant to section 10(a)(2) of the Federal Advisory Committee Act, 5 U.S.C. App. (1988) that an open meeting of the Citizen Advocacy Panel (CAP) will be held Thursday, December 6, 2001, from 9 a.m. to 4 p.m. and Friday, December 7, 2001, from 8 a.m. to Noon at the Country Inn & Suites, 1350 N.W. 118th Street, Clive, Iowa. The Citizen Advocacy Panel is soliciting public comment, ideas, and suggestions on improving customer service at the Internal Revenue Service. Public comments will be welcome during the meeting, or you can submit written comments to the panel by faxing to (414) 297–1623, or by mail to Citizen Advocacy Panel, Mail Stop 1006 MIL,310 West Wisconsin Avenue, Milwaukee, WI 53203–2221.

The Agenda will include the following: Reports by the CAP sub-groups, presentation of taxpayer issues by individual members, and discussion of issues.

Note: Last minute changes to the agenda are possible and could prevent effective advance notice.

Dated: November 2, 2001.

Cathy VanHorn,

Director, CAP, Communication and Liaison.

[FR Doc. 01–28539 Filed 11–13–01; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Submission for OMB Review; Comment Request

AGENCY: Office of Thrift Supervision (OTS), Treasury.

ACTION: Notice and request for comment.

SUMMARY: The proposed information collection requirement described below has been submitted to the Office of Management and Budget (OMB) for review, as required by the Paperwork Reduction Act of 1995. OTS is soliciting public comments on the proposal.

DATES: Submit written comments on or before December 14, 2001.

ADDRESSES: Send comments, referring to the collection by title of the proposal or by OMB approval number, to OMB and OTS at these addresses: Alexander Hunt, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503, or e-mail to *ahunt@omb.eop.gov;* and Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, fax to (202) 906–6518, or e-mail to *infocollection.comments@ots.treas.gov.* OTS will post comments and the related index on the OTS Internet Site at *www.ots.treas.gov.* In addition, interested persons may inspect comments at the Public Reference Room, 1700 G Street, NW., by appointment. To make an appointment, call (202) 906–5922, send an e-mail to *publicinfo@ots.treas.gov,* or send a facsimile transmission to (202) 906–7755.

FOR FURTHER INFORMATION CONTACT: To obtain a copy of the submission to OMB, contact Sally W. Watts at *sally.watts@ots.treas.gov,* (202) 906–7380, or facsimile number (202) 906–6518, Regulations and Legislation Division, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS may not conduct or sponsor an information collection, and respondents are not required to respond to an information collection, unless the information collection displays a currently valid OMB control number. As part of the approval process, we invite comments on the following information collection.

Title of Proposal: Merger Applications.

OMB Number: 1550–0016.

Form Number: Interagency Bank Merger Application.

Regulation requirement: 12 CFR 563.22(a), 12 CFR 546, and 12 CFR 552.13.

Description: The Bank Merger Act and the OTS merger regulations require a savings association that proposes to combine with either another savings association or insured depository institution to obtain written approval from the OTS.

Type of Review: Renewal.

Affected Public: Savings Associations.

Estimated Number of Respondents: 16.

Estimated Frequency of Response: Annually.

Estimated Burden Hours per Response: 31 hours.

Estimated Total Burden: 496 hours.

Clearance Officer: Sally W. Watts, (202) 906–7380, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

OMB Reviewer: Alexander Hunt, (202) 395–7860, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, DC 20503.

Dated: November 6, 2001.

Deborah Dakin,

Deputy Chief Counsel, Regulations and Legislation Division.

[FR Doc. 01–28432 Filed 11–13–01; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0095]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed

extension of a currently approved collection and allow 60 days for public comment in response to the notice. This notice solicits comments on information needed to determine net income derived from farming.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 14, 2002.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail: *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0095'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Pension Claim Questionnaire for Farm Income, VA Form 21–4165.

OMB Control Number: 2900–0095.

Type of Review: Extension of a currently approved collection.

Abstract: A claimant's eligibility for VA pension benefits is determined, in part, by countable income. VA Form 21–4165 is used to develop the necessary income and asset information peculiar to farm operations. The information is used by VA to determine whether the claimant is eligible for VA benefits. If eligibility exists, the information is used to determine the proper rate of benefits.

Affected Public: Individuals or households and Farms.

Estimated Annual Burden: 12,500 hours.

Estimated Average Burden Per Respondent: 30 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 25,000.

Dated: November 2, 2002.

By direction of the Secretary

Genie McCully,

Management Analyst, Information Management Service.

[FR Doc. 01–28459 Filed 11–13–01; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0394]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments on the information needed to verify school attendance of Restored Entitlement Program for Survivors (REPS) child beneficiaries.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 14, 2002.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0394'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Certification of School Attendance—REPS, VA Form 21–8926.

OMB Control Number: 2900–0394.

Type of Review: Extension of a currently approved collection.

Abstract: VA Form 21–8926, Certification of School Attendance—REPS is used to verify that an individual who is receiving REPS benefits based on schoolchild status is in fact enrolled full-time in an approved school and is otherwise eligible for continued benefits. The program pays VA benefits to certain surviving spouses and children of veterans who died in service prior to August 13, 1981 or who died as a result of a service-connected disability incurred or aggravated prior to August 13, 1981.

Affected Public: Individuals or households.

Estimated Annual Burden: 300 hours.

Estimated Average Burden Per Respondent: 15 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 1,200.

Dated: November 2, 2001.

By direction of the Secretary.

Barbara H. Epps,

Management Analyst, Information Management Service.

[FR Doc. 01–28460 Filed 11–13–01; 8:45 am]

BILLING CODE 8320–01–P

DEPARTMENT OF VETERANS AFFAIRS

[OMB Control No. 2900–0496]

Proposed Information Collection Activity: Proposed Collection; Comment Request

AGENCY: Veterans Benefits Administration, Department of Veterans Affairs.

ACTION: Notice.

SUMMARY: The Veterans Benefits Administration (VBA), Department of Veterans Affairs (VA), is announcing an opportunity for public comment on the proposed collection of certain information by the agency. Under the Paperwork Reduction Act (PRA) of 1995, Federal agencies are required to publish notice in the **Federal Register** concerning each proposed collection of information, including each proposed extension of a currently approved collection, and allow 60 days for public comment in response to the notice. This notice solicits comments for information needed to authorize payment of Veterans Mortgage Life Insurance.

DATES: Written comments and recommendations on the proposed collection of information should be received on or before January 14, 2002.

ADDRESSES: Submit written comments on the collection of information to Nancy J. Kessinger, Veterans Benefits Administration (20S52), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420 or e-mail *irmnkess@vba.va.gov.* Please refer to ''OMB Control No. 2900–0496'' in any correspondence.

FOR FURTHER INFORMATION CONTACT: Nancy J. Kessinger at (202) 273–7079 or FAX (202) 275–5947.

SUPPLEMENTARY INFORMATION: Under the PRA of 1995 (Public Law 104–13; 44 U.S.C., 3501–3520), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct or sponsor. This request for comment is being made pursuant to section 3506(c)(2)(A) of the PRA.

With respect to the following collection of information, VBA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of VBA's functions, including whether the information will have practical utility; (2) the accuracy of VBA's estimate of the burden of the proposed collection of information; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or the use of other forms of information technology.

Title: Claim for Veterans Mortgage Life Insurance, VA Form 29–0549.

OMB Control Number: 2900–0496.

Type of Review: Extension of a currently approved collection.

Abstract: The form is used by the mortgage holder to claim the proceeds of Veterans Mortgage Life Insurance and to provide the information needed to authorize payment of the insurance. The information is used by VA to process the mortgage holder's claim.

Affected Public: Individuals or households.

Estimated Annual Burden: 250 hours.

Estimated Average Burden Per Respondent: 60 minutes.

Frequency of Response: On occasion.

Estimated Number of Respondents: 250.

Dated: November 2, 2001.

By direction of the Secretary.

Barbara H. Epps,

Management Analyst, Information Management Service.

[FR Doc. 01–28461 Filed 11–13–01; 8:45 am]

BILLING CODE 8320–01–P

Federal Register

Wednesday,
November 14, 2001

Part II

Environmental Protection Agency

40 CFR Part 52

Approval and Promulgation of Air Quality State Implementation Plans (SIP); Texas (8 Documents); Final Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–126–1–7477; FRL–7092–2]

Approval and Promulgation of Implementation Plans; Texas; Houston/Galveston Nonattainment Area; Ozone

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is fully approving the Texas one-hour ozone attainment demonstration State Implementation Plan (SIP) for the Houston/Galveston (HG) severe nonattainment area with an attainment date of November 15, 2007. Also, being published in today's **Federal Register** are seven additional actions, approving various measures that support the attainment demonstration.

In this action, the EPA is approving the following related SIP elements: The following local measures relied on in the attainment demonstration: speed limit reduction, voluntary mobile emission programs (VMEP) and transportation control measures (TCM); the Post 1999 Rate of Progress (ROP) plans for the time periods November 15, 1999 to November 15, 2002, November 15, 2002 to November 15, 2005 and November 15, 2005 to November 15, 2007; the Motor Vehicle Emissions Budget (MVEB) contained in the attainment demonstration SIP and the Post 1999 ROP plans; the 15% ROP Plan (Conversion of conditional interim approval to a full approval); certain enforceable commitments to adopt additional measures and perform additional analyses; revisions to the 1990 base year inventory; and the HG area's SIP as meeting the reasonably available control measures (RACM) requirement.

DATES: This final rule is effective on December 14, 2001.

ADDRESSES: Copies of documents relevant to this action are available for public inspection during normal business hours at the Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Dallas, Texas 75202–2733; and, the Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Guy R. Donaldson, Air Planning Section (6PD–L), 1445 Ross Avenue, Dallas, Texas 75202–2733. Telephone Number (214) 665–7242, E-mail Address: Donaldson.Guy@epa.gov.

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

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I. Final Action

A. What Elements of the Texas SIP Are We Approving?

We are fully approving the one-hour ozone attainment demonstration SIP for the HG nonattainment area as meeting the attainment demonstration requirements of 182(c)(2) and (d) of the Clean Air Act (the Act). We proposed this action on July 12, 2001 (66 FR 36655). This demonstration shows, through photochemical modeling and other evidence, that through a combination of adopted measures, recent legislation, and commitments to adopt additional measures the HG area will attain the one-hour ozone standard by November 15, 2007.

As an integral part of the attainment demonstration, we are approving and finding adequate the associated MVEBs only until these emission budgets have been revised pursuant to the State's enforceable commitments to use MOBILE6 and to adopt additional measures necessary for attainment and we have found the revised budgets adequate for the purposes of transportation conformity.

Before approving an attainment demonstration SIP, we must approve all of the control measures relied on in the demonstration. The majority of the control measures relied on in the attainment demonstration have been approved in other **Federal Register** notices. (See Section II for a listing of related **Federal Register** notices.) We are approving in today's action, certain measures relied upon in the attainment demonstration and which were submitted December 20, 2000: the Speed Limit Reductions, the VMEP, and the TCMs. We are also approving the following related SIP elements:

- 15% ROP Plan,
- The Post 1999 ROP Plans and their associated contingency measures;
- A demonstration that all RACM have been adopted for the HG nonattainment area; and
- Revisions to the 1990 Base Year Inventory.

The revisions to the Post 1999 ROP plans and the RACM analysis that we are approving today were parallel processed. (*See* Section I.E. for a discussion of parallel processing.)

In addition, we believe that for the HG area to be successful in attaining the one-hour ozone standard, the State must be committed to certain future actions relating to adopting additional measures and to future evaluations of the inputs to the plan. To that end, Texas has included the following enforceable commitments in their State Implementation Plan which we are approving:

- The State's enforceable commitment to perform a mid-course review (including evaluation of all modeling, inventory data, and other tools and assumptions used to develop this attainment demonstration) and to submit a mid-course review SIP revision, with any recommended mid-course corrective actions, to the EPA by May 1, 2004.
- The State's enforceable commitment to perform new mobile source modeling for the HG area, using

MOBILE6, our on-road mobile emissions factor computer model, within 24 months of the model's official release; that if a transportation conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 official release, transportation conformity will not be determined until Texas submits an MVEB which is developed using MOBILE6 and which we find adequate.

- An enforceable commitment to adopt rules that achieve at least the additional 56 tons/day of NO_X emission reductions that are needed for the area to show attainment of the one-hour ozone standard and as supported by identified measures that could potentially be adopted and could achieve the reductions without requiring additional limits on highway construction.
- An enforceable commitment to adopt and submit the EPA by December 1, 2002 measures to achieve 25% of the 56 tons/day.
- An enforceable commitment to adopt and submit to EPA by May 1, 2004 measures for the remaining needed additional NO_X reductions.
- An enforceable commitment that the rules needed for the additional NO_X reductions will be adopted as expeditiously as practicable and the compliance dates will be expeditious.
- An enforceable commitment to concurrently revise the MVEBs and submit them to EPA as a revision to the attainment SIP if additional control measures reduce the motor vehicle emissions budget (MVEB).

This action also satisfies the last two elements of section 182(d)(1)(A) of the Act to adopt TCMs as necessary to comply with the reasonable further progress and attainment demonstration requirements of the Act. The first requirement to offset growth in emissions from growth in vehicle miles traveled (VMT) or number of vehicle trips is addressed in a corresponding action published separately in today's **Federal Register**. Please see Section III.C.3 for additional discussion regarding the second and third elements. For additional discussion regarding the first element, see the corresponding separate action in today's **Federal Register** regarding the VMT Offset Plan.

For more discussion on the rationale for the actions being approved here, see the proposed approvals with their associated Technical Support Documents (TSD) and our response to comments found in Section II.

B. What Are the Motor Vehicle Emissions Budgets Being Approved in This Action?

Rate of Progress Budgets

The MVEBs established by the Post 1999 Rate of Progress plans and that we are approving today are contained in Table 1. We find the MVEBs consistent with all ROP SIP requirements. In addition, we are finding these budgets adequate for transportation conformity purposes pursuant to the criteria in 40 CFR 93.118(e)(4) as part of our action on the SIP rather than using the web posting process because we have moved forward on this SIP in a quick manner as described in *Guidance on Motor Vehicle Emissions Budgets in One-Hour Ozone Attainment Demonstrations* dated November 3, 1999.

TABLE 1.—ROP SIP MOTOR VEHICLE EMISSIONS BUDGETS

[Tons per day]

Pollutant	2002	2005	2007
VOC	100.07	68.52	79.51
NO_X	260.85	185.48	156.6

The new 2007 budgets are taken from the attainment demonstration modeling rather than directly from the ROP calculations. Emissions estimates used to demonstrate transportation conformity will be derived using the assumptions used to develop these emissions budgets for the 2007 attainment SIP MVEBs, pursuant to 40 CFR 93.122(a)(6). We find such MVEBs consistent with ROP.

Attainment Budgets

Table 2 contains the MVEBs established by the attainment plan. We are approving these budgets today and finding them adequate for transportation conformity purposes pursuant to the criteria in 40 CFR 93.118(e)(4) as limited below.

TABLE 2.—2007 ATTAINMENT YEAR MOTOR VEHICLE EMISSIONS BUDGETS

[Tons per day]

Pollutant	2007
VOC	79.51
NO_X	156.60

We find the MVEBs consistent with all pertinent SIP requirements and, as described in our proposals, the MVEBs are approved and adequate for conformity purposes only until these emission budgets have been revised pursuant to the State's enforceable commitments to use MOBILE6 and to adopt additional measures necessary for attainment and we have found the revised budgets adequate for the purposes of transportation conformity.

All States whose attainment demonstration includes the effects of EPA's Tier II/Low Sulfur program have committed to revise and resubmit their budgets after EPA releases MOBILE6.(MOBILE6 is the latest version of the EPA model for estimating mobile emissions. Its official release is expected in the near future.) The State committed in its April 2000 submission to perform new mobile source modeling for the HG area using MOBILE6 within 24 months of the model's official release. If transportation conformity analysis is to be performed between 12 and 24 months of the official release of MOBILE6, transportation conformity will not be determined until the State submits a new budget which is developed using MOBILE6 and which we find adequate. The State has informed the transportation agencies of this commitment. Texas also commits to concurrently revise the MVEB if adoption of any shortfall measure affects the MVEB and submit the revision to EPA as a revision to the attainment SIP.

We are limiting the duration of our approval as described above because we are only approving the attainment demonstrations and MVEBs because the States have committed to revise them. Therefore, once we have confirmed that revised budgets are adequate, they will be more appropriate than the budgets we are approving today.

C. What Are the Key SIP Submissions Being Approved in This Action?

There have been a number of State submissions in response to the attainment demonstration requirements of the Act. In this notice, the key State submissions being considered were provided by the Governor in letters dated December 20, 2000, and October 4, 2001. The items in the October 4, 2001 submission have been parallel processed. Parallel processing means that EPA proposes action on a state rule before it becomes final under state law. Our July 12, 2001 proposal details the history of State and EPA actions that preceded these submissions (66 FR 36655).

D. What Previous Actions Has EPA Taken?

There are three proposals related to this action. First, on December 16, 1999 (64 FR 70548), we issued a proposed approval/proposed disapproval of the HG ozone attainment demonstration plan (the 1998 plan). This action outlined the actions we believed were

necessary for the State to develop a fully approvable plan. Second, on July 28, 2000 (65 FR 46383), we issued a notice of proposed rulemaking regarding how the adequacy of attainment MVEBs would be handled for the one-hour ozone nonattainment areas. Finally, on July 12, 2001 (66 FR 36655), we proposed approval of the HG ozone attainment demonstration plan (the December 2000 plan as proposed to be revised by the State and finally adopted and submitted in a letter dated October 4, 2001) and several related actions. In today's notice, we have addressed all of the comments received on the three proposals.

E. What Changes Have Been Made in Response to Comment on EPA and TNRCC Parallel Proposals?

In a letter dated June 15, 2001, the Governor of Texas submitted several items for parallel processing. These items were: certain commitments; recent legislative changes with their impacts on and revisions to the proposed control strategy for the HG area; the corrections and modifications to the Post 1999 ROP plans; a demonstration that all RACM have been adopted for the HG nonattainment area; and a modification to the attainment demonstration and MVEB to revise the emission projection for Heavy Duty Diesel vehicles.

Under parallel processing, EPA takes final action on its proposal if the final, adopted state submission is substantially unchanged from the submission on which the proposed rulemaking was based, or if significant changes in the final submission are anticipated and adequately described in EPA's proposed rulemaking or result from needed corrections determined by the State to be necessary through review of issues described in EPA's proposed rulemaking. Several minor changes were made by the State in response to comment.

Enforceable Commitments

Texas made the following changes to the language of their enforceable commitments. Italicized text has been added.

The commission commits to adopt measures necessary to achieve at least 56 tpd of NO_X emission reductions in the HGA area *above and beyond those reductions already identified by the control measures listed in Chapter 6, Table 6.1–2.*

To demonstrate progress towards *the 56 tpd* that commitment, the commission intends to evaluate the following measures and to adopt, by November 2002, sufficient measures in order to achieve at least 25% of the estimated 56 tpd needed.

TNRCC also in response to comments now lists all of the enforceable commitments for the HG area in a single location in Chapter 7.

We agree that these changes are not significant in that they clarify the intent of the enforceable commitments and therefore, remain approvable. No further notice is necessary since these changes do not substantively change the State's proposal.

Changes to the Rate of Progress Plan

TNRCC also revised the tables in the Post 1999 Rate of Progress Plans in response to EPA comments that the Tables did not reflect the revised implementation schedules for the point source NO_X rules. This issue was discussed in our proposed approval which was based on conservative estimates of the emission reductions. The revised tables in the October 4, 2001 SIP reflect the new implementation schedule. No further notice is required since the State made changes as discussed by EPA in the proposal notice. The following summary table is based on the revised estimates.

TABLE 1.—NO_X RATE OF PROGRESS

Milestone Year	2002	2005	2007.
Target Level	1127.08	1011.33	935.67.
Projected emissions after controls	1115.76	630.05	444.04.
Measures	Tier I NLEV RFG I/M Small Engine HDDV Standards.	Tier I/II I/M HDDV Standards NO_X Point Source controls	Tier I/II HDDV Standards NO_X Point Source controls.

II. What SIP Elements Did We Need To Take Final Action on Before We Could Approve the Attainment Demonstration?

In our proposed action on July 13, 2001, we explained that we could not finalize approval of the attainment demonstration for the HG area until we finalize approval of several related actions. These actions are listed below along with the status of their final approval.

1. Vehicle I/M program (30 TAC 114). Final approval published separately in this issue of the **Federal Register**.

2. Revised emission specifications in the HG area for NO_X Point Sources (30 TAC 117). Final approval published separately in this issue of the **Federal Register**.

3. NO_X Cap and Trade program (30 TAC 101). Final approval published separately in this issue of the **Federal Register**.

4. Low emission diesel fuel (30 TAC 114). Final approval published separately in this issue of the **Federal Register**.

5. Non-Road Large Spark-Ignition (LSI) Engines (30 TAC Chapter 114). Final approval published separately in this issue of the **Federal Register**.

6. Agreed Orders with Continental and Southwest Airlines and the City of Houston. Final approval published separately in this issue of the **Federal Register**.

7. Reasonably Available Control Technology (RACT) rules regulating VOCs from Batch Processes (30 TAC 115) and Offset Lithographers (30 TAC 115). Direct final action was published July 16, 2001 (66 FR 36913). No comments were received and this action became effective September 14, 2001.

8. A determination that the HG SIP includes all Reasonably Available Control Measures. Final approval in this action.

9. The 15% ROP Plan. Final approval in this action.

10. The Post 1999 ROP Plans and contingency measures. Final approval in this action.

11. The revisions to the 1990 base year inventory. Final approval in this action.

12. The speed limit reductions, the VMEP and the TCMs. Final approval in this action.

13. Lawn service equipment operating restrictions (30 TAC 114.452–459). Final approval published separately in this issue of the **Federal Register**.

14. Vehicle Miles Traveled (VMT) Offset Plan submitted August 25, 1997 and with minor, non-substantive revisions submitted on May 17, 2001. Final approval published separately in this issue of the **Federal Register** for the first element of 182(d)(1)(A). The last two elements of 182(d)(1)(A) are satisfied by this action.

15. Motor Vehicle Idling Limitations (30 TAC 114.500–509). Final approval

published separately in this issue of the **Federal Register**.

16. Stationary Diesel Generator rule (30 TAC 117.206). Final approval published separately in this issue of the **Federal Register**.

17. The Post 1996 ROP Plan and contingency measures. Direct final action was published April 25, 2000, 66 FR 20746. No comments were received and this rule became effective June 26, 2000.

III. Comments

A. What Comments Were Received?

i. What Comments Were Received on the December 1999 Proposed Approval/ Proposed Disapproval?

The following comment letters were received on the December 1999 proposal:

(1) February 14, 2000 letter from Robert E. Yuhnke, Attorney for Environmental Defense.

(2) February 14, 2000 letter from Jeffrey Saitas, Executive Director TNRCC.

(3) July 31, 2000 letter from James O. Bartholomew, ELM Packaging.

ii. What Comments Were Received on the July 28, 2000 Supplemental Proposal Concerning MVEBs?

The following comment letter was received on this supplemental proposal.

(1) August 28, 2000 letter from Environmental Defense.

iii. What Comments Were Received on the July 12, 2001 Proposal?

We received the following 13 comment letters on the July 12, 2001 proposal.

(1) Letter from D. Marrach, M.D. dated July 2, 2001.

(2) August 10, 2001 letter from Patrick Gallagher, Sierra Club.

(3) August 13, 2001 letter from John Wilson and Frank Blake, the Galveston-Houston Association of Smog Prevention (GHASP).

(4)August 13, 2001 letter from B.C. Carmine, Reliant Energy.

(5)August 13, 2001 letter from Ramon Alvarez, PhD, Environmental Defense.

(6) August 8, 2001 letter from Jack Steele, Houston Galveston Area Council.

(7) August 13, 2001 letter from Nelly Rocha, Baker and Botts for the Business Coalition for Clean Air Appeal Group.

(8) August 10, 2001 letter from Albert Axe, Jr., Jenkens & Gilcrest for TXI Operations.

(9) August 13, 2001 letter from John R. Evans, Lyondell.

(10) August 13, 2001 letter from T. Hefgott, Enterprise Products.

(11) August 3, 2001 letter from Howard Runser, private citizen.

(12) August 8, 2001 letter from Brant Mannchen, Houston Regional Group of the Sierra Club.

(13) August 13, 2001 letter from John D. Walke, Senior Attorney, NRDC.

No comments were received on the proposed approval of the 15% ROP plan or the proposed approval of revisions to the 1990 Base Year Inventory. These actions are being approved with out further discussion.

B. Response to Comments on Attainment Demonstration

1. General Comments

Comment: Several commenters urged EPA to disapprove the attainment plan because they believe the plan does not include complete modeling, enforceable versions of all Reasonably Available Control Measures (RACM) and a control strategy sufficient to achieve attainment. One commenter went on to say because they believe the plan should be disapproved and, under the consent decree in *NRDC* v. *Browner*, Civ. No. 99–2976, EPA must commence promulgation of a Federal Implementation Plan (FIP). One commenter supported the proposed approval.

Response: In the following responses, we address the specific concerns raised by the commenters in more detail. We believe the plan provided by the State of Texas is fully approvable under the Act and will provide for attainment as expeditiously as practicable which is by November 15, 2007 and the plan includes all reasonably available control measures. Therefore, we are finalizing our approval in this action. Furthermore, because we are fully approving the plan as meeting the requirements of 182(c)(2) and (d) of the Act, it is unnecessary to commence development of a FIP.

Comment: TNRCC has not provided modeling that shows attainment in 2007. (Really 2005 since 4 exceedences in that year ensures failure to meet the three-year standard.) A commenter also states that there is no demonstration of maintenance of the ozone standard below the 0.12 ppm one-hour standard beyond 2007.

Response: EPA has taken the position that for nonattainment areas subject to the requirements of subpart 2 of part D of the Act, that the area needs to demonstrate that in the attainment year, the area will have air quality such that the area could be eligible for the two one-year extensions provided under section 181(a)(5) of the Act. Under section 181(a)(5), an area that does not have three–years of data demonstrating attainment of the ozone NAAQS, but has complied with all of the statutory requirements and that has no more than one exceedance of the NAAQS in the attainment year, may receive a one-year extension of its attainment date. Assuming those conditions are met the following year, the area may receive an additional one-year extension. If the area has no more than one exceedance in this final extension year, then it will have three-years of data indicating that it has attained the ozone NAAQS.

This position is consistent both with EPA's modeling guidance and with the structure of subpart 2 of the Act. Under EPA's modeling guidance, states model air quality for the attainment year—they do not model air quality for the three-year period preceding the attainment year. This is largely a function of how the model operates that the data produced only predicts the air quality for one year. EPA's modeling guidance has existed for many years and has been relied on by numerous areas for demonstrating attainment of the ozone standard.

Moreover, EPA believes this approach is consistent with the statutory structure of subpart 2. Under subpart 2, many of the planning obligations for areas were not required to be implemented until the attainment year. Thus, Congress did not assume that all measures needed to attain the standard would be implemented three years prior to the area's attainment date. For example, areas classified as marginal—which had an attainment date of three years following enactment of the 1990 Clean Air Act amendments were required to adopt and implement RACT and I/M ''fix-ups'' that clearly could not be implemented three years prior to their attainment date. Similarly, moderate areas were required to implement RACT by May 1995, only 18 months prior to their attainment date of November 1996. Also, the ROP requirement for moderate and above areas, including the 15% plan for reductions by November 1996, applies through the attainment year. Thus, EPA believes that Congress did not intend that these additional mandatory reductions be in excess of what is needed to achieve three-years of ''clean data.'' For these reasons, EPA does not agree with the commenter that the State's attainment demonstration needs to demonstrate that the area will have three years of data showing attainment in the attainment year. However, EPA does believe that the Act requires and that it is prudent for States to implement control as expeditiously as practicable. EPA also believes that for the HG area, all measures are being implemented as expeditiously as practicable and that the area has

demonstrated attainment consistent with EPA's modeling guidance.

A plan for maintenance of the Standard is not necessary for the attainment demonstration to be approved. A State is not required by the Act to provide a maintenance plan until the State petitions for an area to be redesignated to attainment which will not occur until the HG area has three years of data showing compliance with the Standard.

While it is not necessary for the State to provide for maintenance of the standard at this time, we do believe emissions in the HG area will continue to decrease after 2007 due to on and off road vehicle emission control programs that will continue to provide additional reductions as the fleet continues to turnover after 2007. So there is reason to believe that air quality will continue to improve after the attainment date.

Comment: Two commenters suggested the plan should address other air pollution concerns in addition to attainment of the one-hour standard. One commenter suggested the plan should provide as much progress as possible toward implementing the 8-hour standard as the requirements of the Act and EPA's implementing regulations allow. Another commenter said that ozone reduction should be used as a spur in reducing toxic emissions and particulate matter as well.

Response: As an initial matter, these comments are outside the scope of this rulemaking. EPA's review here is focused on whether the submitted plan meets the statutory requirements for attainment of the one-hour ozone standard. Nevertheless, EPA believes the reductions in ozone precursors in this plan will provide reductions both toward attainment of the one-hour standard and substantial progress toward the 8-hour standard. Furthermore, NO_X emissions are a precursor to particulate matter formation. So the large NO_X emissions reductions in the plan should provide improvements in particulate matter levels. In addition, while the focus of the plan is on reducing NO_X emissions, VOC emissions will also be reduced by approximately 40% from 1993 levels. Some of these VOCs are also air toxics. Again, while EPA believes these additional air quality benefits will result from the implementation of this plan, the approval of the plan depends, as a legal matter, only on whether the plan will result in attainment of the one-hour ozone standard.

2. Comments on the Photochemical Modeling

a. Model Performance

Comment: The photochemical modeling is fundamentally flawed and should not be used as proposed. The ozone plots prepared by TNRCC as part of its graphical performance analysis show significant subregional biases in the model with systematic under predictions and over predictions. The commenter states that the graphical analysis provides far more insight into the performance of the model than any other type of performance measure. The statistical measures distort the appearance of model performance by averaging out the subregional biases.

Response: EPA does not agree that the graphical analysis provides more insight into model performance than any other performance measures. EPA believes all model performance measures should be considered. There is no rigid criterion for model acceptance or rejection in assessing model simulation results for the performance evaluation. As recommended by EPA, the State's model performance evaluations for the selected episode included diagnostic and sensitivity analyses, and graphical and statistical performance measures. TNRCC used these performance measures in conjunction with one another to evaluate the performance of the model. Diagnostic and sensitivity analyses consisted of testing the response of modeled ozone to changes in the various model inputs (*i.e.,* meteorology, emission inventory, and initial & boundary conditions). The model performance evaluation was based upon graphical measures consisting of comparing time series of monitored and modeled ozone and ozone precursor concentrations, and comparing modeled ozone concentration contours with monitored ozone data. The model performance evaluation was also based upon statistical measures consisting of comparing the modeled versus monitored ozone. The ''Unpaired Peak Accuracy,'' ''Normalized Bias,'' and, ''Gross Error'' were all within the suggested limits in the EPA Guideline.

EPA did not dismiss any measures or analyses used by TNRCC for their model performance evaluation, nor should EPA weigh the graphical performance more heavily than the other performance measures. As indicated in the State's modeling results for the selected episode, the model responded generally as expected to the diagnostic/sensitivity analyses for the primary episode day (9/8/93). Overall, these analyses did not reveal any flaws in the CAMx model formulation. In addition, the statistical performance of the model for the primary episode indicated the model performed well. For all days modeled, the graphical performance for the majority of the monitor sites was very good. For instance, the time-series plots developed for each monitoring station in the HG area indicated no significant bias within the diurnal cycle as well as good agreement between the timing of the predicted and observed ozone maxima.

EPA has recognized, however, the graphical model performance for the primary episode day of 9/8/93 indicates the model at some locations underestimated ozone and at other areas the ozone was overestimated. Also, at some locations, there are no ozone monitors to substantiate the model's performance. The ozone plume peaks were simulated in different locations than occurred with the monitored results. EPA believes that most of the error can be best explained by the meteorological model having some difficulty in replicating the wind speed and direction. Discrepancies in wind speed and direction not surprisingly result in the model not predicting the maximum ozone concentration in precisely the right location, a possibility noted by the commenter.

TNRCC has spent considerable effort to better understand the land/sea breeze phenomenon which has added a level of complexity to the HG analysis not seen any where else in the country (with the exception of some lake breeze effects in the Lake Michigan area). Emissions in the HG area are emitted into the local atmosphere where ozone formation begins, later emissions and ozone formed are transported out over the warm air over the Gulf of Mexico where the warmer temperatures further activate the chemistry to form more ozone which is then transported back inland over the area. Current meteorological models have had difficulty in simulating this process. We believe our understanding of the process is sufficient, however, to interpret the photochemical model results.

TNRCC and EPA intend to continue evaluating how to more accurately simulate the HG area's meteorological conditions in the available models. The need for further studies does not mean, however, that the modeling relied upon today was unable to estimate the amount and type of emission reductions needed for attainment. EPA believes because the diagnostic/sensitivity tests reveal no flaws in model formulations and the model generally predicts the right magnitude of the peak which is confirmed by the statistical measures,

that the model does provide an acceptable tool for estimating the amount of emissions reduction. It is EPA's technical opinion that based on the weight-of-evidence and the modeling, the State's control strategy should provide for attainment by November 15, 2007.

Any new information derived from the further studies and evaluation will be incorporated by Texas into the SIP revision modeling to be submitted to EPA by May 1, 2004.

Comment: EPA previously expressed its persistent concern about the model's poor graphical performance. Now, EPA has simply ignored the concern. The commenter quoted a previous EPA comment letter sent to the TNRCC during the State's August 1999 public comment period for its proposed SIP revision. EPA's comment letter stated that ''due to the model's poor graphical performance caution is warranted in assessing the model's projected ozone reduction due to NO_X control strategies.''

Response: EPA disagrees that the discrepancies in graphical performance have been ignored. Texas made numerous enhancements to its August 1999 proposed SIP attainment demonstration modeling, based upon EPA's comments. TNRCC has used a new version of CAMx (i.e., version 2.03), which offers several enhancements over the original version, for the current modeling relied upon in the submitted attainment demonstration SIP revision. Also, major improvements have been made to the base year emission inventory. For instance, biogenic emissions and the emissions for diesel-powered construction equipment, commercial marine vessel emissions, airport ground support equipment emissions, and industrial equipment emissions have been updated with more accurate information. As a result, for all days modeled, the graphical performance, has been improved. For instance, the time-series plots indicate the model performance improved at a number of monitoring stations in the HG area (i.e., Galveston site, HRM sites 3 and 4, Texas City site and Clinton site). In addition, the statistical model performance for the current modeling which was similar to that for the past modeling base case indicated the model performed well. All of the statistical parameters are within the EPA suggested limits for the primary episode day. EPA continues to believe, taken together, the diagnostics, sensitivity, statistical and graphical performances of the model indicate the base case model performance is acceptable for assessing control strategy effectiveness.

Further, in EPA's letter where we said that caution is warranted in assessing the projected ozone reduction to NO_X control strategies, EPA was cautioning TNRCC that sufficient NO_X reductions should be provided to account for this uncertainty in the model. We were not saying that the graphical performance meant the model was unacceptable for assessing control strategy effectiveness. Rather, we were advising the State to take into account the graphical performance, i.e., by ensuring the control strategy took a more conservative approach and erred on the side of caution, in the amount of required NO_X reductions.

Comment: One commenter believes that the modeling fails to account for ozone spikes. The TNRCC's failure to account for these spikes necessarily means that the control strategy will not attain the standard. Further, this results in significant over estimates of NO_X emission reductions needed for attainment. The commenter asserts that the spikes are caused by highly reactive VOCs, a theory it believes to be supported by preliminary data and findings of the Texas 2000 Air Quality Study.

Response: Monitors measure concentration at a point in space, and in reality, these concentrations can vary significantly over a grid cell or an area. This is true especially for ozone if it is contained in a narrow plume. Inevitably, a grid type model will smooth some natural phenomena because natural conditions are averaged over the volume of each grid cell. For instance, model output represents a volume average, typically 4km x 4km by 50 meter column. As a result, reasonable comparisons between model predictions and monitor observations are not expected to match exactly. With reasonable performance, time series typically show similar diurnal cycles but not exact concentration levels. As a result, it is very difficult to obtain a precise equality between modeled concentration and monitored concentration. This is to be expected and does not necessarily call into question the model's utility as a tool to predict the level of emission reductions needed to reach attainment. As stated in previous comments, EPA believes the model provides reasonable predictions of ozone levels as confirmed by comparisons with monitoring data and therefore can provide an acceptable estimate of the amount of emissions needed for attainment. Certainly, any difficulty the model has in replicating rapid increases in ozone, does not indicate that the model is calling for an ''overestimate'' of the amount of NO_X emission reductions needed for attainment. Furthermore, even if the model is shown during the mid-course review to be overestimating the amount of NO_X emission reductions needed for attainment, a State is always free to adopt a control strategy that is more stringent. See *Union Electric* v. *EPA,* 427 U.S. 246 (1976); *Train* v. *NRDC,* 421 U.S 60 (1975).

EPA is following with interest the findings being presented from the Texas 2000 Air Quality Study, particularly the information on concentrations of highly reactive VOCs found in the ambient air in the HG area. We understand Texas intends to incorporate, as much as possible, the findings of this study into its next modeling effort, which is currently underway and they expect to submit by the end of 2002. This study may improve our present understanding of ozone formation in the HG area and result in an improved effectiveness of the control strategy being implemented by the TNRCC. Nevertheless, based upon all available evidence, the State's control strategy shows attainment for the HG area by the statutory deadline and that the NO_X emission reductions are needed for attainment.

Comment: The 2007 post-control strategy peak concentration is 141 ppb at a monitoring site where the model underestimated the monitored peak by 27 ppb during the validation run. Thus, if the control strategy had been in effect during the episode used for validating the model, the actual ozone concentration would likely have been higher than 141 ppb.

Response: EPA disagrees. As is always the case in a photochemical modeling exercise, there are areas within the simulation that do not correspond exactly with observations. As discussed in other comments, in this case, the modeled wind fields tended to move the ozone plumes formed on all four days away from the areas where the highest concentrations were observed. Although the modeled peak on the primary episode day (i.e., September 8, 1993) was pushed west of the observed peak, the results of the State's model performance evaluation analyses for that day indicate overall the model performed well for the majority of the monitoring sites. Misplacing the peak does not necessarily mean the model is providing inaccurate results or predicting less ozone on that day. In addition, this tendency does not, by itself, mean that the model is not useful for developing control strategies. Therefore, again, we feel the model provides a reasonable estimate of the

emission reductions needed for attainment.

Comment: A commenter criticized the State model's inability to replicate ozone levels on September 8, 1993 and recommends that TNRCC estimate the magnitude of emission reductions needed for attainment from the modeling results of September 10 and 11, 1993. One commenter believes the best way to manage the risks of making the wrong decision on the magnitude of the needed controls is to base HG's control strategy on the modeling simulations that have the least uncertainty. Though all four days of the September 8–11, 1993 base case simulation are characterized by poor graphical performance, the greatest uncertainties by far exist for September 8 and 9, 1993. Therefore, the commenter believes that the control strategy should be based on modeling results from September 10 or 11, 1993.

Response: EPA disagrees. As discussed in previous comments, we believe the model performance is acceptable on all four days. Furthermore, EPA guidance recommends that a minimum of three episode days representing different meteorological regimes be modeled(Guideline for the Regulatory Application of the Urban Airshed Model, July 1991). With only four days (i.e., Sept. 8–11), the number of episode days being used by TNRCC for control strategy development is only marginally above the recommendation. Removing days would not provide an appropriate number of modeling days. EPA believes that the September 8, 1993 episode day chosen by TNRCC presents a reliable and accurate modeling scenario for ozone attainment demonstration in the HG area. September 8, 1993 is the controlling day because the meteorological conditions experienced that day require the most control to reach attainment. September 8, 1993 also had the highest observed ozone during the 4 day episode. Though observed and predicted concentrations do not match exactly, plausible inputs resulted in plausible predictions. The overall model performance for the September 8, 1993 episode day meets EPA criteria. Model performance on September 11, 1993 was similar to that observed on September 8, 1993, but is not suitable to design control strategies, since it was a Saturday. Controls based on that day would still need to be shown to be effective in controlling ozone on a weekday, since the Saturday emissions from mobile and area sources differ considerably from their weekday counterparts.

In addition, during episode selection, TNRCC used a modification of the Predominant Wind Direction (PWD) method to analyze each potential episode day. The wind analysis is based on morning winds and afternoon winds. The largest category was calm/calm with 10 of 71 cases where most frequent wind pattern for high ozone days occurred in the HG region. The second was calm/SSE with 9 cases. September 11, 1993 is in this category. The third category was calm/ESE with 8 cases. September 8, 1993 is in this category. The PWD for September 10, 1993 is NNW/ESE, which had one case. Meanwhile, the PWD for September 9, 1993 is NNW/NNW, which had none. Therefore, each of these episode days covers different meteorological conditions that are correlated with high ozone levels in the HG area. To remove one or more of the four episode days would remove conditions that should be evaluated to provide assurance that the controls adopted in the SIP would be expected to show attainment of the NAAQS for potential meteorological conditions conducive to ozone formation in the HG area. In addition, September 10, 1993 had an observed peak value that was significantly lower than the design value. Control strategies based on absolute model predictions on this day may not be sufficient to bring the area into attainment. Therefore, no days should be dropped from the State's attainment demonstration.

Comment: Evaluating the equations used to estimate the shortfall for September 10 and 11, 1993, results in gaps of 21 tpd and 37 tpd, respectively, for which could be filled (with surplus) from the list of gap measures given in Table 6.1–2 of the proposal.

Response: As stated in previous responses, September 8, 1993 must be considered in the control strategy to have confidence that the HG area will attain under a commonly observed meteorological condition. In any case, after revisions to the inventory, modeling now indicates that the additional reductions estimated for attainment on September 8, 1993 and September 10, 1993 is 90.9 tpd and 93.7 tpd NO_X, respectively; thus even on September 10, 1993 the State has a shortfall because Texas has only been able to adopt measures to achieve 38 tons/day of additional measures.

Comment: TNRCC has presented no evidence that the model is accurately simulating NO_X or VOC levels, or other intermediate chemical species in the vicinity of the modeled peaks.

Response: EPA disagrees. There is no monitoring data in the area where the modeled peak occurred to indicate one way or the other how well the model compared to measurements of NO_X, VOC and intermediate species. As a part of the 1993 COAST study, VOC concentrations were measured at two locations in the HG nonattainment area, and comparisons have been made between modeled and monitored concentrations. Similarly, for each of the locations where NO_X was monitored, comparisons have been made between modeled and monitored concentrations. All of these comparisons are included and discussed in the '98 and '99 SIPs submitted to EPA. Therefore, the attainment demonstration we are approving relies upon evidence that the model provided results in a reasonable agreement with the measurements considering that the comparison is between a point measurement and a simulated volumetric average.

Monitors measure the concentration at a point in space, and in practice, these concentrations can vary significantly from a volume average that is 4km square and up to 50 meter high. This is true for VOC and NO_X precursors, and is especially true for precursors emitted by point sources. The comparisons that have been made indicate reasonable agreement between monitored and modeled concentrations given the considerations cited above (see Appendix B entitled ''Time Series Plots of Observed, CAMx and UAM–V Ozone Precursors Over the H/G Modeling Domain for The Base Case Simulation'') of the Appendix B (entitled ''Modeling the Houston/ Galveston Ozone Attainment Demonstration'')) of the December 2000 SIP revision. Besides, the CAMx photochemical model, which is an ozone model, was developed and optimized for that purpose. As expected, some other chemical species will not compare as well with ambient data as does ozone. As mentioned above, there are no monitoring data for intermediate species, which have not been recommended for use in validating model results since they are not reliable. Instead, these are often used to validate model inputs (i.e., emission inventory), if they become available.

Comment: Because of doubts regarding the accuracy of the model predictions, commenters recommend that new emission controls be based on proven cost-effective technology and that stakeholders be given as much time to implement controls as the Act allows. The model simulations and basic science that are the foundations of the commission's control strategy are currently not strong enough to support the unproven, technically infeasible, or

economically challenging measures in the State's adopted control strategy.

Response: As described in previous comments, we believe that the model performance is acceptable and provides an appropriate assessment of the amount of emission reductions needed for the HG area to attain. TNRCC and its contractors have used state-of-the-science approaches to support the adopted control strategy. All appropriate and pertinent data submitted during the State's comment periods to improve the model were incorporated or addressed by the State. As discussed in our RACM and the shortfall enforceable commitment responses, it is EPA's position that the control measures in the HG control strategy are feasible. Therefore, it is our position that the controls that have been adopted by Texas have been shown to be needed for the HG area to attain by the statutory deadline. These controls are being implemented as expeditiously as practicable as required by the Act.

Comment: A commenter believes that the TNRCC must address the risk that the modeling uncertainties may have led the commission to a wrong estimate of the magnitude of emission reductions needed to attain the ozone NAAQS.

Response: In the earlier submitted SIPs, the effect of the uncertainty of the emissions relative to the reductions needed to attain the NAAQS was addressed. This involved developing an alternate emissions inventory that reflected uncertainties, evaluating base case model performance, and the effect on the reductions needed to attain the NAAQS with the future 2007 emissions. This modeling showed that the control path needed to attain the NAAQS did not change (a NO_X rather than VOC-directed control strategy), and that the order of magnitude of the required reductions did not change much. This reinforced the necessity of obtaining the level of NO_X and VOC reductions contained in this SIP revision.

The current approach does not show attainment of the NAAQS at all locations on all days that were modeled, but uses modeling in combination with weight of evidence to show that this level of NO_X and VOC reductions are adequate to attain the standard. Furthermore, the mid-course evaluation can be used by Texas to reassess the level of controls needed to attain the NAAQS and ensure that timely progress is being made toward attainment of the standard.

Comment: One commenter supports the recent contract commissioned by Harris County with Environ. This work will re-run the model with an alternate meteorological simulation model in a further attempt to address the non-performance of the grid cells in question.

Response: EPA understands that TNRCC has worked with Harris County and Environ on the alternate meteorological simulation of the episode modeled by the commission. It takes substantial time and effort to develop meteorological data to be run in the photochemical model. After the data are developed, the model results must be evaluated for adequate meteorological model performance. Then the data must be used in the photochemical model to evaluate base-case model performance with the new data set. If the revised base case modeling meets the performance requirements, then the model will be applied to the future 2007 emissions, and various control scenarios modeled. If these efforts provide a better representation of meteorological conditions in the HG area, then Texas would address them in the mid-course review.

Comment: Because of the model's performance one commenter disagrees with the following proposals:

(1) The model activities were performed as outlined in the Protocols.

(2) The model activities were performed according to the Guideline For Regulatory Application of UAM.

(3) That the model performed within EPA's recommended ranges.

(4) That the base case model is suitable for control strategy testing.

(5) The proposal to accept the base case model as a basis for attainment demonstration modeling.

(6) The implicit finding that the TNRCC validated the performance of the base case modeling.

(7) That the simulated ozone contour plots from the base case model depict the area of ozone to be only ''somewhat at odds geographically'' with the monitors.

(8) The implicit finding that the base case model fails only to ''precisely predict'' the position of the cloud of ozone geographically.

(9) That the base case model's predicted position of the cloud of ozone does not by itself, mean that the base case model is not acceptable for control strategy development.

(10) That the statistical measures from the base case model are within EPA recommended limits for all days of September 8–11, 1993.

(11) That the results of the statistical measures are within EPA recommended ranges.

(12) That the spatial and temporal patterns of ozone generated by the base case model indicate it is acceptable for use in the Attainment Demonstration.

(13) The diagnostic, sensitivity, statistical and graphical performance of the base case model indicate it is acceptable for use in the Attainment Demonstration.

(14) That reductions of NO_X will be most effective in bringing HGA into attainment.

(15) That the quadratic equation used by the TNRCC to determine the additional amount of additional emission reductions is consistent with the 1999 guidance.

(16) That the quadratic equation is an improvement over the 1999 guidance.

(17) That an additional 96 tons/day of NO_X emission reduction are necessary to bring the HG area into attainment.

Response: As discussed in previous comments, we believe the model performed acceptably for use in control strategy development. Therefore, we disagree with the commenter and continue to support the findings in the conclusions from our proposed approval that are cited above.

b. Model Inputs

Comment: Off-road shipping emissions may be underestimated based on preliminary results from the Texas Air Quality 2000 Study.

Response: The State conducted a study of actual shipping activity in the HG area and applied EPA emission factors to the activity to calculate the shipping emissions. This site-specific methodology is approved by EPA and provides the best estimate of emissions at this time. The results from the Texas Air Quality Study 2000 are just now being made available for analysis. The results were not available to the State at the time the SIP was prepared, and the State needs additional time to evaluate the data. It is hoped that the data can be used by Texas for its mid-course review. However, there is no evidence presently before EPA showing that off-road shipping emissions were underestimated by the State.

Comment: Industrial VOC emissions are understated based on the preliminary results of the Texas 2000 Air Quality Study.

Response: As discussed above, TNRCC has followed EPA approved methodologies in preparing its emissions inventory. They have gone to substantial effort to characterize all the categories, including the industrial emissions. This has included detailed inventories from all of the major emitters and inclusion of episodic releases that were reported during the 1993 episode. We believe that the emissions inventory is based on the best

available techniques and data and meets all EPA criteria and requirements.

TNRCC is continuing to work to improve the inventory. This is a major emphasis of the Texas 2000 Air Quality study. We are aware some of the preliminary findings of this study indicate that industrial VOC emissions may be understated. This indication is based upon only preliminary findings at this time, however. Texas has reached no final conclusions. EPA will work with TNRCC and other stakeholders to address improvements to the inventory so that the mid-course review modeling incorporates any new and appropriate data.

Comment: The commission and its contractors have worked commendably to develop what may be, in many respects, the most accurate emissions inventory ever used in photochemical modeling. But major uncertainties still exist in other respects and in the model's representation of the chemical reactions and meteorological processes that determine the location, time, and magnitude of high ozone levels in Houston-Galveston.

Response: EPA disagrees that there are major uncertainties with the modeling. As discussed above in previous responses, it is EPA's technical position that the modeling adequately represents the meteorological processes for the HG area to allow its use for control strategy purposes. Further, the modeling is acceptable in its representation of the chemical reactions in the HG area. TNRCC and its contractors have used state-of-the-science modeling approaches for development of the meteorological parameters used in the modeling.

The chemical algorithms used in the modeling reflect the latest developments in the state-of-the-science today. TNRCC is currently investigating various alternate chemical mechanisms, and they plan to continue this activity with analyses on the Texas 2000 study results. If enhancements are identified for the chemical algorithms, they can be utilized in the mid-course evaluation, and Texas would include them in the mid-course review SIP.

Comment: It was noted that the 91 tpd increase in point source NO_X emissions produced daily maximum ozone increases ranging from 1.5 ppb (on September 10) to 6.1 ppb (on September 11). The commenter also noted that the 91 tpd decrease in on-road mobile and non-road mobile source NO_X emissions produced ozone decreases, relative to HRM Strategy 1, ranging rom 6.9 ppb (on September 11) to 10.8 ppb (on September 8). From this, the commenter sees relatively small benefits from the commission's 90% point source control proposal relative to a 75% point control level, but sees greater benefits if the same amount of incremental emissions was reduced from mobile sources. It was also noted that mobile source emission reductions ranged from 1.1 to 7.0 times more effective than point source NO_X reductions at reducing ozone levels (given the ratio of mobile source to point source NO_X effectiveness). From this, it follows that mobile source NO_X emission reductions are on average 3 times more effective at reducing ozone levels than are point source emission reductions.

Response: It is quite possible that mobile source controls may be more effective in reducing ozone levels for certain nonattainment areas. The State, however, analyzed the ensemble of emission reductions modeled for the SIP development for the HG area based on an analysis of potential reductions available from all of the various source categories. As discussed in other sections, Texas has adopted all RACM for mobile as well as stationary sources. It is not EPA's role to disapprove the State's choice of control strategies if that strategy will result in attainment of the one-hour standard and meets all other applicable statutory requirements. See *Union Electric* v *EPA,* 427 U.S. 246 (1976); *Train* v. *NRDC,* 421 U.S 60 (1975).

Comment: One commenter states that the modeled control strategy contained in the Attainment Demonstration includes measures that were modified or removed from the SIP. The State did not remodel to determine the impact of these changes. Particularly, one measure that was modified was a relaxation in utility controls from 93% to 90%.

Another commenter supported the changes to the required emission rates for utilities because these revisions will be offset by emission reductions from grandfathered facilities in attainment counties surrounding the HG area.

Response: During the State's settlement negotiations and trial court proceedings this summer in *BCCA Appeal Group, et al.* v. *Texas Natural Resource Conservation Commission, et al.* in the District Court of Travis County, Texas 250th Judicial District, Cause No. GN1–00210, TNRCC determined that the amount of control for utilities should be reduced from 93% control to 90% control. Due to time constraints and the necessity for submitting an approvable attainment demonstration in time for EPA action before the NRDC consent decree deadline of October 15, 2001 for proposing a FIP in the absence of a fully approved SIP, the revised utility controls were not modeled by TNRCC. TNRCC believes, and EPA agrees, that any potential loss in ozone benefit from reducing the utility point source requirement will be *de minimis*, based upon a review of certain information gathered from the 2000 Texas Air Quality Study. The information in the Study indicates that Reliant Energy's Parish power plant, located in the HG area has an ozone production efficiency which is 3 to 5 times smaller than the ozone production efficiency expected for the grand-fathered utility and non-utility sources based on Southern Oxidant Study results for the Memphis area. Ozone production efficiency is a measure of the efficiency that a particular NO_X plume generates ozone and is an indication of the reactivity of the VOCs with which the NO_X plume comes in contact. The Parish plant is located outside the central urban area and apparently not in an area of highly reactive biogenic emissions. The remaining units affected by the reduced control requirement are mainly peaking units which deliver their increased emissions during the hot afternoon hours. Modeling for the construction ban and lawn-care activities has consistently shown that emissions in the afternoon contribute less to ozone formation in the HG area than emissions generated in the morning.

To counterbalance the reduced controls on utilities in the HG area, Texas will control grandfathered sources in East and Central Texas by 50% as required by recent State legislation. These controls are in addition to controls on utility sources, Alcoa and Texas Eastman that are already included in the model results. These new controls would apply to all non-utility sources, particularly pipeline compressor station emissions would be reduced by 50%. These emission reductions can be expected to achieve an ozone benefit in the HG area to counterbalance the loss in NO_X reductions from the change in utilities from 93–90% control.

Because the impact of the emission increases for utilities in the HG area will be small and there is a program to offset these *de minimis* increases, EPA believes it is appropriate to accept the modeling and weight of evidence as showing that attainment can be achieved in the HG area by the statutory deadline.

TNRCC currently intends to conduct modeling based on the data results of the Texas 2000 Air Quality Study, in 2002. Pursuant to the State's mid-course review enforceable commitment, Texas will submit a revised attainment demonstration SIP by May 1, 2004 that

will include modeling that incorporates all scientific advancements made since the recent SIP revisions, as appropriate.

Comment: As required by recent legislation, the TNRCC repealed the time-of-day construction ban. To provide for the benefits that would have been achieved by the construction ban, the Texas legislature adopted a diesel emission reduction incentive program. However, TNRCC failed to model the control strategy with the diesel engine incentive program replacing the morning construction ban. EPA may not approve the photochemical modeling and the subsequent gap calculation because these emission reductions were revised and not modeled.

Response: Texas legislation, enacted in May, 2001, established a diesel emission reduction incentive program and required TNRCC to repeal its rules for a morning construction ban and accelerated purchase of diesel equipment. Due to time constraints and the necessity for submitting an approvable attainment demonstration in time for EPA action before the NRDC consent decree deadline of October 15, 2001 for proposing a FIP in the absence of a fully approved SIP, the State could not specifically model the diesel engine incentive program in their attainment demonstration. The TNRCC had, however, conducted numerous control scenario modeling runs, which combined federal, state and local measures, designed to provide significant ozone reductions in the area. The results of one control scenario modeling run indicated that the benefit of the construction ban was approximately 3 ppb of ozone. Based on the quadratic curve, TNRCC estimated that this 3 ppb reduction in the ozone concentration level was equivalent to a 6.7 tpd reduction of NO_X emissions. EPA believes the State used acceptable procedures for determining this estimate. As discussed in other responses to comments regarding the diesel engine incentive Program, EPA believes that this program will achieve greater NO_X emission reductions in the HG area than 6.7 tpd. EPA and State calculations project that this new program will cover the loss in reductions from the construction ban and the accelerated purchase rules, and also fill a portion of the shortfall. EPA believes that the incentive program will likely produce somewhat greater benefits than the morning construction ban because it can achieve emission reductions not only from construction diesel equipment but also from additional categories such as tug/tow boats which are located in the portion of the HG area where the highest ozone levels often occur. In addition, TNRCC currently intends to conduct modeling based on the data results of the 2000 Texas Air Quality Study, in 2002. Pursuant to the State's mid-course review enforceable commitment, Texas will submit a revised attainment demonstration SIP by May 1, 2004 that will include modeling that incorporates all scientific advancements made since the recent SIP revisions, as appropriate.

Comment: TNRCC has not correctly estimated point source growth in attainment counties of East and Central Texas. The commenter provided Public Utility Commission estimates of new capacity.

Response: As noted by the commenter, Appendix H of the SIP contains documentation of the projected newly permitted growth. Texas examined all of the permits issued by TNRCC for the 8 county HG area and the counties within 100 miles of the HG area. Permitted projects in this area were included in the model's future base inventory. EPA believes that Texas used a reasonable method of estimating the growth for the area most likely to impact the HG area's air quality.

Comment: One commenter stated the attainment and rate of progress demonstrations are flawed because they assume a fleet mix that does not accurately reflect the growing proportion of sport utility vehicles and gasoline trucks. EPA and the states have not followed a consistent practice in updating SIP modeling to account for changes in vehicle fleets. EPA cannot rationally approve SIPs that are based on such materially inaccurate assumptions. Continued use of out-dated assumptions is inconsistent with the duty imposed by the Act section 182(a)(3) to triennially update the emission inventory. If the motor vehicle inventory has not been updated in preparing the current SIP submission, the SIP should be disapproved. One commenter compared the numbers from the Dallas/Fort Worth area to the HG area and provided the results of a Contractor Study of vehicle registration data to support its claims that the portion of SUVs in the Houston fleet are understated.

Response: The November 1999 HG area attainment demonstration SIP's associated mobile source budgets were based on fleet mix information updated based on a December 1998 Texas Transportation Institute (TTI) Report, ''Development of Gridded On-road Inventory for the Houston/Galveston Ozone Nonattainment Area,'' found in Appendix G of the November 1999 SIP revision. TTI relied on vehicle classification count data recorded on roadways throughout the 8-county area by Texas Department of Transportation (TxDOT) personnel utilizing automatic vehicle classification (AVC) equipment. This equipment is set up along the roadway and is calibrated to classify all of the passing vehicles into thirteen vehicle types. Due to the fact that AVC equipment cannot distinguish vehicle fuel type on the roadway, the various vehicle categories are then separated out into their gasoline and diesel classifications, based on a combination of MOBILE5 defaults and county vehicle registration data. The fleet mix information was based on vehicle counts that were a mix of 1996 data for week days, and 1993 and 1998 data for weekends. This was the most recent data available when Texas submitted the attainment demonstration SIP for the HG area in November 1999.

The December 2000 SIP included data provided by TTI from the most recently available observed AVC data which was from 1997, 1998, and 1999. In order to avoid year-to-year fluctuations in the data set, TTI averaged the AVC data from these three years in order to obtain a more recent VMT mix, which was used in the revised 2007 inventory. This data was used to update the modeling provided in December 2000. At the time the TNRCC modeling for the December 2000 SIP was being completed, this data set was the most recent data available. The data used for the modeling is more recent than the most recently completed periodic inventory (1996). The 1999 inventory is expected to be completed soon and include the more recent data.

EPA requires the most recent available data to be used, but we do not require it to be updated on a specific schedule. Therefore, different SIPs base their fleet mix on different years of data. Our guidance does not suggest that SIPs should be disapproved on this basis. Nevertheless, we do expect that revisions to these SIPs that are submitted using MOBILE6 (as required in those cases where the SIP is relying on emissions reductions from the Tier 2 standards) will use updated vehicle registration data appropriate for use with MOBILE6, whether it is updated local data or the updated national default data that will be part of MOBILE6.

In the November 3, 1999, ''Guidance on Motor Vehicle Emissions Budgets in One-Hour Ozone Attainment Demonstrations,'' we state that, when developing motor vehicle emissions budgets, the MOBILE inputs (including vehicle fleet characteristics) should be appropriate and up-to-date as outlined in EPA's guidance on SIP inventories and the MOBILE user's guide. The SIP

has been based on the most recent information and meets the intended purpose of the existing guidance.

A particular concern raised by a commenter was that registration data from the TXDOT data base indicate that 13.2% of the vehicles registered in the 8 county area are light duty gas trucks two (LDGT2) as compared to the VMT mix figures provided by TTI which project this category at only 4.5% of the mix. The commenter also pointed out that LDGT2 were estimated as 11.4% of the mix for the Dallas/Fort Worth area SIP and the EPA national default is 8.8%. The LDGT2 category includes large SUV and pickups. The percentage of miles traveled by these vehicles is important because they currently have higher emission standards than passenger cars.

The EPA believes that vehicle registration data alone does not necessarily represent the most accurate estimation of fleet mix characteristics that actually exist on the current transportation network system. The best possible approach would be to use a combination of both AVC and conventional registration data. However, EPA believes that field AVC data of vehicles traveling on the roadways throughout the 8-county area provide a reasonable estimate of the types of vehicles and distance these vehicles are driven. This is because vehicles from some categories are driven more than other categories. Heavy Duty Diesel Trucks, in particular, account for more miles than the values that may be reflected by the vehicular registration process. Registration distribution is different than VMT mix and actual data is the best possible information. In addition, while one might expect the numbers to be similar between DFW and Houston, they are two different cities with many different social and economic variables. One cannot presume Houston to be the same as DFW when the location specific data does not support this conclusion.

It is worth noting that the Tier II standards will eliminate the difference between (i) passenger car and (ii) larger truck and SUV emissions standards. Therefore, as Tier II vehicles become more widespread, possible discrepancies in the percentage of trucks and SUVs will become less important for air quality planning purposes. The Tier II standards begin taking affect in new vehicle manufactured in 2004.

The EPA has encouraged and required use of the latest assumptions and data in forecasting the on-road mobile source emissions whenever possible. Updating the data and using the latest information is a continuous planning process which does not end with this SIP and will continue in the future for emissions inventory updates, SIP development, and for conducting conformity determinations. In addition, the refinements in the emissions inventory procedures and use of the MOBILE6 model will further enhance not only the VMT mix issue but also other parametric inputs in computing the on-road mobile source emissions. However, it must be recognized that because of many constraints associated with availability and timing of new information, the process of updating the vehicular and other data does not necessarily follow the SIP development cycle, and thus there is likely to be a lag time. The EPA is committed to ensure that the best available data are used in any air quality analysis and this SIP is no exception. Therefore, based on the information documented in the SIP and the EPA's current guidance, the EPA believes that Texas has made reasonable assumptions and has utilized the most recent available data in determining the on-road mobile source emissions.

Comment: The model's failure to account for episodic emissions events is a serious flaw. The commenter cited a description in the SIP of a butadiene release as evidence of this problem.

Response: TNRCC made every effort to account for episodic emissions in the model. It surveyed companies to determine if any specific events occurred during the modeling episode, including reported upset events. The reported episodic emissions were included in the modeling. Consequently, we believe Texas used the best information available to address episodic emissions and therefore, the SIP is approvable.

The growing availability of ambient VOC data from the Photochemical Assessment Monitoring Stations (PAMS) network, however, indicates that more may need to be done in this area. The butadiene release cited by the commenter is a case in point. In addition, the Texas 2000 Air Quality Study is providing a wealth of information that is just being analyzed. This data, it is hoped, will shed more light on the impact of episodic emissions on ozone levels. The mid-course review SIP, due to EPA in May 2004, will contain the most recent data available for that SIP's planning.

Comment: EPA should investigate the impact on the plan of any changes being considered in the EPA's 90-day review of the New Source Review (NSR) progam. The commenter is concerned that relaxed NSR requirements may affect the level of emissions from point sources in the Region.

Response: The 90-day review of the NSR program is not complete at this time. It is expected that any modifications to the Federal NSR provisions will include provisions for strict caps for the pollutants and therefore should be as stringent as the present NSR rule. Moreover, any changes made through this review will not affect the NSR rules approved for the HG area in the current SIP. If Texas determines that the HG area rules should be modified in response to the 90-day review, Texas will need to submit those changes as a SIP revision and under Section 110(l) of the Act, EPA will need to consider the effect of those changes on the HG area's attainment demonstration.

c. Weight of Evidence Analysis

Comment: Several commenters stated that the weight of evidence approach does not demonstrate attainment or meet CAA requirements for a modeled attainment demonstration. Commenters added several criticisms of various technical aspects of the weight of evidence approach, including certain specific applications of the approach to particular attainment demonstrations. These comments are discussed in the following response.

Response: Under section 182(c)(2) and (d) of the Act, serious and severe ozone nonattainment areas were required to submit by November 15, 1994, demonstrations of how they would attain the one-hour standard. Section 182(c)(2)(A) provides that ''[t]his attainment demonstration must be based on photochemical grid modeling or any other analytical method determined by the Administrator, in the Administrator's discretion, to be at least as effective.'' As described in more detail below, the EPA allows states to supplement their photochemical modeling results, with additional evidence designed to account for uncertainties in the photochemical modeling, to demonstrate attainment. This approach is consistent with the requirement of section 182(c)(2)(A) that the attainment demonstration ''be based on photochemical grid modeling,'' because the modeling results constitute the principal component of EPA's analysis, with supplemental information designed to account for uncertainties in the model. This interpretation and application of the photochemical modeling requirement of section 182(c)(2)(A) finds further justification in the broad deference Congress granted EPA to develop appropriate methods for

determining attainment, as indicated in the last phrase of section 182(c)(2)(A).

The flexibility granted to EPA under section 182(c)(2)(A) is reflected in the regulations EPA promulgated for modeled attainment demonstrations. These regulations provide, ''The adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases, and other requirements specified in (40 CFR part 51, Appendix W) (Guideline on Air Quality Models).''[1] 40 CFR 51.112(a)(1). However, the regulations further provide, ''Where an air quality model specified in appendix W. * * * is inappropriate, the model may be modified or another model substituted (with approval by EPA, and after) notice and opportunity for public comment. * * *.'' Appendix W, in turn, provides that, ''The Urban Airshed Model (UAM) is recommended for photochemical or reactive pollutant modeling applications involving entire urban areas,'' but further refers to EPA's modeling guidance for data requirements and procedures for operating the model. 40 CFR part 51, Appendix W, section 6.2.1.a. The modeling guidance discusses the data requirements and operating procedures, as well as interpretation of model results as they relate to the attainment demonstration. This provision references guidance published in 1991, but EPA envisioned the guidance would change as we gained experience with model applications, which is why the guidance is referenced, but does not appear, in Appendix W. With updates in 1996 and 1999, the evolution of EPA's guidance has led us to use both the photochemical grid model, and additional analytical methods approved by EPA.

The modeled attainment test compares model predicted one-hour daily maximum ozone concentrations in all grid cells for the attainment year to the level of the NAAQS. The results may be interpreted through either of two modeled attainment or exceedance tests: A deterministic test or a statistical test. Under the deterministic test, a predicted concentration above 0.124 parts per million (ppm) ozone indicates that the area is expected to exceed the standard in the attainment year and a prediction at or below 0.124 ppm indicates that the area is expected to not exceed the standard. Under the statistical test, attainment is demonstrated when all predicted (i.e., modeled) one hour ozone concentrations inside the modeling domain are at, or below, an acceptable upper limit above the NAAQS permitted under certain conditions (depending on the severity of the episode modeled).[2]

In 1996, EPA issued guidance[3] to update the 1991 guidance referenced in 40 CFR part 50, App. W, to make the modeled attainment test more closely reflect the form of the NAAQS (i.e., the statistical test described above), to consider the area's ozone design value and the meteorological conditions accompanying observed exceedances, and to allow consideration of other evidence to address uncertainties in the modeling databases and application. When the modeling does not conclusively demonstrate attainment, EPA has concluded that additional analyses may be presented to help determine whether the area will attain the standard. As with other predictive tools, there are inherent uncertainties associated with air quality modeling and its results. The inherent imprecision of the model means that it may be inappropriate to view the specific numerical result of the model as the only determinant of whether the SIP controls are likely to lead to attainment. The EPA's guidance recognizes these limitations, and provides a means for considering other evidence to help assess whether attainment of the NAAQS is likely to be achieved. The process by which this is done is called a weight of evidence determination. Under a weight of evidence determination, the state can rely on, and EPA will consider in addition to the results of the modeled attainment test, other factors such as other modeled output (e.g., changes in the predicted frequency and pervasiveness of one-hour ozone NAAQS exceedances, and predicted change in the ozone design value); actual observed air quality trends (i.e. analyses of monitored air quality data); estimated emissions trends; and the responsiveness of the model predictions to further controls.

In 1999, EPA issued additional guidance[4] [5] that makes further use of model results for base case and future emission estimates to predict a future design value. This guidance describes the use of an additional component of the weight of evidence determination, which requires, under certain circumstances, additional emission reductions that are or will be approved into the SIP, but that were not included in the modeling analysis, that will further reduce the modeled design value. An area is considered to monitor attainment if each monitor site has air quality observed ozone design values (4th highest daily maximum ozone using the three most recent consecutive years of data) at or below the level of the standard. Therefore, it is appropriate for EPA, when making a determination that a control strategy will provide for attainment, to determine whether or not the model predicted future design value is expected to be at or below the level of the standard. Since the form of the one-hour NAAQS allows exceedances, it did not seem appropriate for EPA to require the test for attainment to be ''no exceedances'' in the future model predictions. The method outlined in EPA's 1999 guidance uses the highest measured design value from all sites in the nonattainment area for each of three years.[6] The three year ''design value'' represents the air quality observed during the time period used to predict ozone for the base emissions. This is appropriate because the model is predicting the change in ozone from the base period to the future attainment date. The three yearly design values (highest across the area) are averaged to account for annual fluctuations in meteorology. The result is an estimate of an area's base year design value. The base year design value is multiplied by a ratio of the peak model predicted ozone concentrations in the attainment year (i.e., average of daily maximum concentrations from all days modeled) to the peak model predicted ozone concentrations in the base year (i.e., average of daily maximum

[1] The August 12, 1996 version of ''Appendix W to Part 51—Guideline on air Quality Models'' was the rule in effect for these attainment demonstrations. EPA is proposing updates to this rule which will not be in effect until the new rule is promulgated.

[2] Guidance on the Use Of Modeled Results to Demonstrate Attainment of the Ozone NAAQS. EPA–454/B–95–007, June 1996.

[3] Ibid.

[4] [5] ''Guidance for Improving weight of Evidence Through Identification of Additional Emission Reductions, Not Modeled.'' U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Emissions, Monitoring, and Analysis Division, Air Quality Modeling Group, Research Triangle Park, NC 27711. November 1999. Web site: *http://www.epa.gov/ttn/scram*. http://www.ncdc.noaa.gov/ol/climate/research/1999/perspectives.html and ''Regional Haze and Visibility in the Northeast U.S.'', NESCAUM at http://www.nescaum.org/pdf/pubslist.pdf

[6] A commenter criticized the 1999 guidance as flawed on grounds that it allows the averaging of the three highest air quality sites across a region, whereas EPA's 1991 and 1996 modeling guidance requires that attainment be demonstrated at each site. This has the effect of allowing lower air quality concentrations to be averaged against higher concentrations thus reducing the total emission reduction needed to attain at the higher site. The commenter's concern is misplaced. EPA relies on this averaging only for purposes of determining one component, *i.e.*,—the amount of additional emission reductions not modeled—of the weight of evidence determination. The weight of evidence determination, in turn, is intended to be a qualitative assessment of whether additional factors (including the additional emissions reductions not modeled), taken as a whole, indicate that the area is more likely than not to attain.

concentrations from all days modeled). The result is an attainment year design value based on the relative change in peak model predicted ozone concentrations from the base year to the attainment year. Modeling results also show that emission control strategies designed to reduce areas of peak ozone concentrations generally result in similar ozone reductions in all core areas of the modeling domain, thereby providing some assurance of attainment at all monitors.

In the event that the attainment year design value is above the standard, the 1999 guidance provides a method for identifying additional emission reductions, not modeled, which at a minimum provide an estimated attainment year design value at the level of the standard. This step uses a locally derived factor which assumes a relationship between ozone and the precursors.

Although a commenter criticized this technique for estimating ambient improvement because it does not incorporate complete modeling of the additional emissions reductions, the regulations do not mandate nor does EPA guidance suggest that States must model all control measures being implemented. Moreover, a component of this technique-the estimation of future design value, should be considered a model predicted estimate. Therefore, results from this technique are an extension of ''photochemical grid'' modeling and are consistent with section 182(c)(2)(A). Also, a commenter believes EPA has not provided sufficient opportunity to evaluate the calculations used to estimate additional emission reductions. EPA provided a 60-day period for comment on the methodology and calculations in December 1999 and a 30-day comment period in July 2001 on the HG area's calculated shortfall. Texas also provided a public comment period and public hearings in September, 2000 on this issue.

A commenter states that application of the method of attainment analysis used for the December 16, 1999 NPRs will yield a lower control estimate than if we relied entirely on reducing maximum predictions in every grid cell to less than or equal to 124 ppb on every modeled day. However, the commenter's approach may overestimate needed controls because the form of the standard allows up to 3 exceedances in 3 years in every grid cell. If the model over predicts observed concentrations, predicted controls may be further overestimated. EPA has considered other evidence, as described above through the weight of evidence determination.

When reviewing a SIP, the EPA must make a reasonable determination that the control measures adopted more likely than not will lead to attainment. Under the Weight of evidence determination, EPA has made this determination for the HG area based on all of the information presented by the State and available to EPA. The information considered includes model results for the majority of the control measures. Though all measures were not modeled, EPA reviewed the model's response to changes in emissions as well as observed air quality changes to evaluate the impact of additional measures, not modeled. EPA's decision was further strengthened by the State's commitment to check progress towards attainment in 2004 and to adopt additional measures, if the anticipated progress is not being made.

A commenter further criticized EPA's technique for estimating the ambient impact of additional emissions reductions not modeled on grounds that EPA employed a rollback modeling technique that, according to the commenter, is precluded under EPA regulations. The commenter explained that 40 CFR part 51, App. W, section 6.2.1.e. provides, ''Proportional (rollback/forward) modeling is not an acceptable procedure for evaluating ozone control strategies.'' Section 14.0 of appendix W defines ''rollback'' as ''a simple model that assumes that if emissions from each source affecting a given receptor are decreased by the same percentage, ambient air quality concentrations decrease proportionately.'' Under this approach if 20% improvement in ozone is needed for the area to reach attainment, it is assumed a 20% reduction in VOC would be required.

The ''proportional rollback'' approach is based on a purely empirically/mathematically derived relationship. EPA did not rely on this approach in its evaluation of the attainment demonstrations. The prohibition in Appendix W applies to the use of a rollback method which is empirically/mathematically derived and independent of model estimates or observed air quality and emissions changes as the sole method for evaluating control strategies. For the demonstrations, EPA used a locally derived (as determined by the model and/or observed changes in air quality) relationship of the change in emissions to change in ozone to estimate additional emission reductions to achieve an additional increment of ambient improvement in ozone. For example, if monitoring or modeling results indicate that ozone was reduced by 25 ppb during a particular period, and that VOC and NO_X emissions fell by 20 tons per day and 10 tons per day respectively during that period, EPA developed a relationship for ozone improvement related to reductions in VOC and NO_X. This formula assumes a quadratic relationship between the precursors and ozone for a small amount of ozone improvement, but it is not a ''proportional rollback'' technique. Further, EPA uses these locally derived adjustment factors as a component to estimate the extent to which additional emissions reductions—not the core control strategies—would reduce ozone levels and thereby strengthen the weight of evidence test. EPA uses the UAM to evaluate the core control strategies. This limited use of adjustment factors is more technically sound than the unacceptable use of proportional rollback to determine the ambient impact of the entire set of emissions reductions required under the attainment SIP. The limited use of adjustment factors is acceptable for practical reasons: It obviates the need to expend more time and resources to perform additional modeling. In addition, the adjustment factor is a locally derived relationship between ozone and its precursors based on air quality observations and/or modeling which is more consistent with recommendations referenced to in Appendix W and does not assume a direct proportional relationship between ozone and its precursors. In addition, the requirement that areas perform a mid-course review (a check of progress toward attainment) provides a margin of safety.

A commenter expressed concerns that EPA used a modeling technique (proportional rollback) that was expressly prohibited by 40 CFR part 51, Appendix W, without expressly proposing to do so in a notice of proposed rulemaking. However, the commenter is mistaken. As explained above, EPA did not use or rely upon a proportional rollback technique in this rulemaking, but used UAM to evaluate the core control strategies and then applied its WOE guidance. Therefore, because EPA did not use an ''alternative model'' to UAM, it did not trigger an obligation to modify Appendix W. Furthermore, EPA did propose to use the November 1999 guidance, ''Guidance for Improving Weight of Evidence Through Identification of Additional Emission Reductions, Not Modeled,'' in the December 16, 1999 NPR and has responded to all comments received on the application of that guidance elsewhere in this document.

A commenter also expressed concern that EPA applied unacceptably broad discretion in fashioning and applying the WOE determinations. For all of the attainment submittals proposed for approval in December 1999 concerning serious and severe ozone nonattainment areas, EPA first reviewed the UAM results. In all cases, the UAM results did not pass the deterministic test. In two cases—Milwaukee and Chicago—the UAM results passed the statistical test; in the rest of the cases, the UAM results failed the statistical test. The UAM has inherent limitations that, in EPA's view, were manifest in all these cases. These limitations include: Only selected time periods were modeled, not the entire three-year period used as the definitive means for determining an area's attainment status. Also, there are inherent uncertainties in the model formulation and model inputs such as hourly emission estimates, emissions growth projections, biogenic emission estimates, and derived wind speeds and directions. As a result, for all areas, even Milwaukee and Chicago, EPA examined additional analyses to indicate whether additional SIP controls would yield meaningful reductions in ozone values. These analyses did not point to the need for additional emission reductions for Springfield, Greater Connecticut, Metropolitan Washington DC, Chicago and Milwaukee, but did point to the need for additional reductions, in varying amounts, in the other areas. As a result, the other areas submitted control requirements to provide the indicated level of emissions reductions. EPA applied consistent methodologies in these areas, but because of differences in the application of the model to the circumstances of each individual area, the results differed on a case-by-case basis.

The commenter also complained that EPA has applied the WOE determinations to adjust modeling results only when those results indicate nonattainment, and not when they indicate attainment. First, we disagree with the premise of this comment: EPA does not apply the WOE factors to adjust model results. EPA applies the WOE factors as additional analysis to compensate for uncertainty in the air quality modeling. Second, EPA has applied WOE determinations to all of the attainment demonstrations proposed for approval in December 1999. Although for most of them, the air quality modeling results by themselves indicated nonattainment, for two metropolitan areas—Chicago and Milwaukee, including parts of the States of Illinois, Indiana, and Wisconsin, the air quality modeling did indicate attainment on the basis of the statistical test.

For the HG area, the primary evidence, in addition to the modeled control strategy that the HG area will attain the standard, is the estimation of the ozone benefits from the emission reductions that were not modeled (*i.e.,* approximately 90.9 tpd). Additional evidence for the HG area is provided by the good model performance which lends credence to the results. Further evidence is the substantial reduction in the area of nonattainment projected for the control strategy case. The State showed the modeled control strategy resulted in a 93.6% reduction in grid cells over the standard. Finally, the state's commitment to perform a mid-course review provides further confidence that the State's overall plan will result in attainment by 2007. Collectively, the above information supported EPA's decision. These determinations were made based on EPA's best understanding of the problem and relied on a qualitative assessment as well as quantitative assessments of the available information.

The commenter further criticized EPA's application of the weight of evidence determination on grounds that EPA ignores evidence indicating that continued nonattainment is likely, such as, according to the commenter, monitoring data indicate that ozone levels in many cities during 1999 continue to exceed the NAAQS by margins as wide or wider than those predicted by the UAM model. EPA did consider the monitoring data along with other information in these determinations. When reviewing the monitoring data, EPA considered other factors. For example, high monitoring values may have occurred for many reasons including, fluctuations due to changes in meteorology and lack of emission reductions. The 1999 monitor values do not reflect several control programs, both local and the regional which are scheduled for implementation in the next several years. And the 1999 meteorology in the Northeast was such that July 1999 was one of the warmest (ranked 9th) ever experienced since 1895.[7] In addition to the heat, the middle and southern portions of the Northeast were also drier than average during this month. This information supports EPA's belief that the high exceedances observed in 1999 are not likely to reoccur frequent enough to cause a violation, once the controls adopted in these SIP's are implemented. There is little evidence to support the statement that ozone levels in many cities during 1999 continue to exceed the NAAQS by margins as wide or wider than those predicted by the UAM. Since areas did not model 1999 ozone levels using 1999 meteorology and 1999 emissions which reflect reductions anticipated by control measures, that are or will be approved into the SIP, there is no way to determine how the UAM predictions for 1999 compare to the 1999 air quality. Therefore, we can not determine whether or not the monitor values exceed the NAAQS by a wider margin than the UAM predictions for 1999. In summary, there is little evidence to support the conclusion that high exceedances in 1999 will continue to occur after adopted control measures are implemented.

In addition, the commenter argued that in applying the weight of evidence determinations, EPA ignored factors showing that the SIPs under-predict future emissions, and the commenter included as examples certain mobile source emissions sub-inventories. EPA did not ignore possible under-prediction in mobile emissions. EPA is presently evaluating mobile source emissions data as part of an effort to update the computer model for estimating mobile source emissions. EPA is considering various changes to the model, and is not prepared to conclude at this time that the net effect of all these various changes would be to increase or decrease emissions estimates. For the HG area's attainment demonstration SIP that relies on the Tier 2/Sulfur program for attainment (and reflects these programs in its motor vehicle emissions budgets), Texas has committed to revise the motor vehicle emissions budgets after the MOBILE6 model is officially released by EPA. EPA will work with Texas if the new emission estimates raise issues about the sufficiency of the present attainment demonstration. If analysis indicates additional measures are needed, EPA will take appropriate action.

Comment: The 1999 Guidance Document was criticized on grounds that EPA could not apply it, by its terms, to the Houston area because the result of such application would have been absurd. The commenter added that the technique used to estimate the additional needed emission reductions for the Houston area does not identify a sufficient level of emission reductions to reach attainment. In addition, according to the commenter, the

[7] http://www.ncdc.noaa.gov/ol/climate/research/1999/perspectives.html and ''Regional Haze and Visibility in the Northeast U.S.'', NESCAUM at http://www.nescaum.org/pdf/pubslist.pdf

technique used for the Houston area is substantially at variance with the UAM modeling analyses performed by Texas and submitted to EPA as SIP revisions. Specifically, Texas showed in its May 1998 SIP submission that emissions in the Houston area would have to be reduced to 230 tons per day to attain. By contrast, according to the commenter, EPA's combination of techniques would allow 305 tons per day of emissions, and yet EPA claims that the area will attain with even this higher level of emissions. The commenters believe that Texas should not be able to use the gap calculation when modeling exists that demonstrates how attainment can be achieved. A commenter also asserted that Texas should not be able to use a gap calculation method that differs from what other areas must use and the gap calculation fails to account for real world chemistry.

Response: Direct application of the two methods discussed in EPA's November 1999 guidance, using available data for the HG area, produced a mathematical impossibility. The results indicated that all ozone precursor emissions would have to be reduced to less than zero. Thus, the two methods described in the 1999 guidance are not directly applicable to Houston. The 1999 guidance describes two techniques for estimating additional levels of emission reductions. Both techniques (methods) described in the 1999 guidance are based on the assumption that EPA can estimate the relationship between ozone and its precursors. EPA Region 6 and TNRCC worked together to develop a revised method that is consistent with the concepts in the 1999 guidance for estimating the relationship, but applicable to the Houston area's modeling results. The methods in the guidance use a linear extrapolation of model results to determine expected ozone benefits from additional precursor reductions. The method for the HG area is also an extrapolation of model results. Because, the method for the HG area extends model results, it does, in fact account for real world chemistry. Instead of a linear extrapolation, however, a quadratic extrapolation was developed based on the results of three of the modeling runs. A quadratic extrapolation is necessary because of the non-linearity of the ozone response to NO_X reductions in the HG area. Therefore, the method is a refinement in the methods described in the 1999 guidance, since it is based on the most recently available modeling for the Houston area. The factors used in the method for the Houston area are based on model results for the majority of the control measures and, consequently, are scientifically sound for the HG area. We believe this approach is consistent with the intent and criteria of the 1999 guidance and, in the case of the Houston area, gives a better approximation (than the other two methods) of the amount of emission reductions that will be necessary to achieve the standard. Therefore, this method fulfills the purposes of the EPA guidance, and it is as rigorous, if not more rigorous, than the two methods discussed in the 1999 guidance. As a result, EPA concludes that the State of Texas used an acceptable method under the November 1999 guidance and applied it correctly.

In the strategy upon which the NO_X mobile vehicle emissions budget is based, Texas modeled NO_X emissions reduced to a level of approximately 396 t/d. Since the model predicted future ozone design values above the standard, using the refinement of the 1999 guidance (discussed above) EPA determined additional emission reductions were needed and the level of NO_X needed for attainment is 305 t/d.

The 230 tons per day emission level in the May 1998 SIP submission was based upon ''across-the-board'' emission sensitivity modeling and not specific control measures, as was submitted in the November 1999 attainment demonstration. Thus, the 230 tons per day emission level is not associated with any control measures, and it is not appropriate as a regulatory emission level for an attainment SIP. In addition, there have been many notable changes to the modeling emissions inventory subsequent to the May 1998 SIP submission. These include revised biogenic emissions, revised non-road emissions, and revised 2007 future year on-road mobile source emissions. Thus, it is not appropriate to compare the 305 t/d and the 230 t/d, since they are really based upon different applications of the model. Further, it is not correct to say modeling exist that demonstrates how attainment can be achieved.

With regards to whether the approach used for the HG area sufficiently identifies the expected additional amount of emission reductions needed for attainment by the deadline, for the reasons noted above, we believe the modeling and weight of evidence techniques used for the HG area do provide a reasonable estimate of the emission reductions necessary for attainment. Furthermore, these emission reductions are quite substantial. The projected attainment level of 305 t/d of NO_X is a 71% reduction from the projected 2007 NO_X emissions of 1052 t/d and a 77% reduction from the 1993 NO_X emissions of 1337 t/d. This is a significant amount of NO_X reductions and based on the analyses presented, EPA believes these level of reductions will bring the area into attainment.

Comment: A commenter stated that TNRCC took into account modeling performance concerns in developing a weight of evidence analysis to support its October 1999 SIP revision and concluded that a modeled control strategy, nearly identical to the one described in its December 2000 SIP revision would produce attainment even though attainment was not conclusively demonstrated by the model. EPA rejected this analysis, however, and prescribed a new method that the commenter goes on to criticize.

Response: EPA did not believe that sufficient emission reductions had been identified in the control strategy modeled in the November 1999 episode. EPA proposed its preliminary analysis of the November 1999 SIP revision that a shortfall of 11% NO_X emission reduction existed. Significantly, we received no comments at the time of that proposal that the 11% shortfall was too high. We received comments to the contrary that the needed additional emission reductions were understated.

EPA does not agree with the characterization that EPA ''prescribed'' a new method. Other weight of evidence techniques, as described in EPA guidance were still available to Texas and could have been considered. We worked with Texas in the development of the quadratic method that was used as weight of evidence for the HG area to provide a method that we and Texas believed gave an accurate estimate of the needed additional emission reductions.

Comment: A commenter criticizes that in contrast to the 1999 Guidance, the weight of evidence method EPA developed for the HGA does not employ a relative reduction factor or a future design value calculation. The quadratic extrapolation is neither consistent with nor an improvement on the 1999 guideline methods and EPA's description of it as such is erroneous. The commenter goes on to compare and contrast specific differences between the method developed for Houston and the 1999 guidance.

Response: EPA continues to believe, in the case of the HG area, the method developed is an improvement over the November 1999 guidance. This guidance was developed for estimating the additional reduction needed to support the one-hour ozone NAAQS for those nonattainment areas using a weight of evidence approach to

demonstrating attainment. This guidance describes two methods for calculating the amount of the additional reductions needed, but does not prohibit the use of an alternative method. Both methods assume that the relationship between ozone and the NO_X and VOC precursors can be estimated. Direct application of the two methods discussed in EPA's November 1999 guidance using available data for the Houston area, produced a mathematical impossibility. The results indicated that all ozone precursor emissions would have to be reduced to less than zero. Thus, the two methods described in the 1999 guidance are not directly applicable to Houston. EPA and TNRCC worked together to develop a revised method that is consistent with the concepts in the 1999 guidance for estimating the relationship, but applicable to the Houston area's modeling results. The methods in the guidance use a linear extrapolation of model results to determine expected ozone benefits from additional precursor reductions. The method for the Houston area is also an extrapolation of model results. Instead of a linear extrapolation, however, a quadratic extrapolation was developed based on the results of three of the modeling runs. A quadratic extrapolation is necessary because of the non-linearity of the ozone response to NO_X reductions in the Houston area. Therefore, the method developed for the HG area is a refinement the two methods in the 1999 guidance, since these two methods are also based on modeling. The factors used in the method for the Houston area are based on model results for the majority of the control measures and, consequently, are scientifically sound for the Houston area. We believe this approach is consistent with the intent and criteria of the 1999 guidance and, in the case of the Houston area, gives a better approximation of the amount of emission reductions that will be necessary to achieve the standard. Therefore, this method fulfills the purposes of the EPA guidance, and it is as rigorous, if not more rigorous, than the two methods discussed in the 1999 guidance. Furthermore, it cannot be accurate to characterize the methods in the 1999 guidance as better when, in fact, they produce a mathematical impossibility for the HG area.

3. Comments on Control Strategies

Comment: One commenter stated that the plan should provide evidence that Texas Senate Bill 5 (SB–5) provisions can be implemented and will lead to at least 6.7 tons/day of NO_X emission reductions. Another commenter stated EPA should not give credit to the Texas Emission Reduction Plan created by SB–5 without assurances of long-term funding levels and details about long-term funding. They also cite information that the funding for the program might be less than EPA assumed because of legal challenges.

Response: Based on experience in California with the Carl Moyer program, the Diesel Emission Reduction Program provided by the Texas Legislature should be able to provide emissions reduction in the range of $3000–5000/ton. This is documented in the report ''The Carl Moyer Memorial Air Quality Standards Attainment Program (The Carl Moyer Program) Guidelines-Approved Revision 2000, November 16, 2000 California Environmental Protection Agency Air Resources Board.'' The clear intent of the legislation, as stated on the TNRCC website, is ''The highest priority for using the funds under the Emissions Reduction Grants Program will be to replace NO_X emissions reductions removed from the State Implementation Plans (SIPs) for the HG area and Dallas/Fort Worth (DFW) nonattainment areas as a result of S.B. 5. Using an average of $5,000 per ton of NO_X reduced, the TNRCC has determined that it will require $6.7 million per year in HGA to replace the construction shift and accelerated Tier II/III rules. Another $7.5 million will be required to partially fill (20 tons) the 56 ton gap, making the HG area total $14.2 million.''

EPA's estimates are not as optimistic but we do believe the $24.7 million/yr projected on the TNRCC website should result in at least 25 tons/year of emission reductions, an amount sufficient to offset the construction shift and accelerated Tier II/III and contribute to reducing the shortfall. We will work with Texas to refine the estimates of emission reductions. It is clear that if more money is needed for the HG area as the program is implemented to make additional reductions in the shortfall, the TNRCC has the discretion to channel more money to the Houston area.

With regard to legal challenges to the program's funding mechanisms, EPA will not anticipate a court's findings. If a court finds the funding mechanism illegal, Texas will have to revise the SIP at that time to address the loss in emission reductions or find alternative funding sources. In the absence of timely State action to address any adverse court ruling, EPA could take action to ensure attainment is not jeopardized.

Comment: Commenters questioned the emissions benefit of the low emission diesel rule.

Response: The EPA has just completed a study of the benefits of low emission diesel fuels, such as the Texas Clean Diesel fuel. EPA determined the Texas fuel will result in NO_X reductions. However, it appears that the NO_X reductions based on the just-completed study will be slightly less than those projected by Texas. EPA believes, because the emissions impact is expected to be small and because Texas has committed to address any change to the amount of needed emission reductions at the mid-course review, the recent study findings do not change the approvability of the attainment demonstration. We will work with Texas to incorporate the findings of the study into future SIP revisions.

Comment: One commenter supported the fact that EPA did not take any action on morning construction ban.

Response: EPA determined not to take action on the construction ban since the legislature had removed the TNRCC's authority to implement this measure.

Comment: EPA must discount the emission reduction credit from the Airport Ground Support Equipment agreed orders because these orders do not assign specific budgets to individual airlines and therefore do not insure the achievement of any particular ton/day emissions.

Response: The agreed orders require percentage reductions from a 1996 baseline which achieve the same purpose as an emissions limitation. The reductions specified in each order are enforceable against the owner/operator of the equipment, thus providing a comfortable degree of certainty that the reductions will take place.

Comment: The EPA should discount the emission reductions from I/M based on the recently released National Research Council (NRC) Report.

Response: The NRC recommendation provides that the models projecting emissions from I/M programs should be improved to reflect actual reductions more accurately. EPA agrees that emission performance of vehicles has improved since the data that form the basis of existing models were generated. Most of the data for MOBILE5 was based on evaluation of early 1980's vehicles.

EPA's soon-to-be-released MOBILE6 model has been substantially updated to better reflect actual emissions and actual I/M benefits. The model has also been made more flexible to better incorporate local data on compliance, technician training, and the inclusion/exclusion of vehicles of certain ages. As technologies and characteristics of the

fleet change, data collection, analysis, and model improvement will likely continue to be warranted. Texas has committed to revise the Mobile Vehicle Emissions Budget using MOBILE6 no later than 2 years after its official release. If a transportation conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 official release, transportation conformity will not be determined until Texas submits an MVEB which is developed using MOBILE6 and which we find adequate. Further, it is our understanding that TNRCC intends to use Mobile 6 in the attainment demonstration modeling planned for submission in December 2002.

Comment: The Act requires the SIP to include a program to provide for enforcement of the adopted measures. Most plans address this requirement, however, none of the plans clearly set out programs to provide for enforcement. Another commenter said the EPA should take steps to insure adequate enforcement of permit standards. Other commenters said the plan includes unenforceable items such as the restriction on commercial lawn mowing.

Response: State enforcement program elements are contained in SIP revisions previously approved by EPA under obligations set out in section 110 of the Act. Once approved by the EPA, there is no need for states to readopt and resubmit their enforcement programs with each and every SIP revision generally required by other sections of the Act.

EPA will monitor the effectiveness of the new programs, such as the commercial lawn mowing restriction, and work with Texas to revise the programs if necessary.

Comment: The State submittal should include creditable, adequate rules to achieve attainment that should also provide for a margin for error.

Response: EPA generally agrees with the comment. EPA believes that the Margin of Error for the HG area plan, while small, is appropriate in light of the significant level of reductions in the plan and the commitment to perform the mid-course review and to adopt additional measures as appropriate.

Comment: One commenter stated that there is over crediting of national rules for architectural coatings, auto-refinishing coatings and consumer products. They state the credit claimed is based on EPA estimates of emission reductions from proposed versions of these rules, but the final versions of the rules are weaker than the proposed rules. Therefore, the credit claimed for these national rules should be recalculated to reflect only the actual emission reductions that can be expected under the final EPA rules.

Response: Architectural Coatings: EPA's March 22, 1995 memorandum [8] indicated EPA's view that it was acceptable for states to claim a 20% reduction in VOC emissions from the AIM coatings category in ROP and attainment demonstration plans based on the anticipated promulgation of a national AIM coatings rule. In developing the attainment SIP for the Houston area, Texas relied on this memorandum to estimate emission reductions from the anticipated national AIM rule. EPA promulgated the final AIM rule in September 1998, codified at 40 CFR part 59, subpart D. In the preamble to EPA's final AIM coatings regulation, EPA estimated that the regulation will result in 20% reduction of nationwide VOC emissions from AIM coatings categories (63 FR 48855). The estimated VOC reductions from the final AIM rule resulted in the same reductions as those estimated in the March 1995 EPA policy memorandum. In accordance with EPA's final regulation, Texas has assumed a 20% reduction from AIM coatings source categories in its attainment modeling. AIM coatings manufacturers were required to be in compliance with the final regulation within one year of promulgation, except for certain pesticide formulations which were given an additional year to comply. Thus all manufacturers were required to comply, at the latest, by September 2000. EPA believes that all emission reductions from the AIM coatings national regulation will occur by 2002 and therefore are creditable in the attainment plan for the Houston area.

Autobody Refinish Coatings Rule: According to EPA's guidance [9] and proposed national rule, many States have claimed a 37% reduction from this source category based on a proposed rule. However, EPA's final rule, ''National Volatile Organic Compound Emission Standards for Automobile Refinish Coatings,'' published on September 11, 1998 (63 FR 48806), did not regulate lacquer topcoats and will result in a smaller emission reduction of around 33% overall nationwide. The 37% emission reduction from EPA's proposed rule was an estimate of the total nationwide emission reduction. Since this number was an overall average, it was not applicable to any specific area. For example, in California the reduction from the national rule is zero because its rules are more stringent than the national rule.

Texas did not rely on the above guidance. Instead, as part of the development of their 15% Rate of Progress plan, Texas used data for auto-refinishing coating use specific for Texas to estimate the emission reductions from existing state rules. To avoid double counting, for the purposes of the attainment demonstration, they did not assume any additional emission reductions due to the national rule. Therefore, the Houston area's attainment demonstration SIP relied on state rules, not the national rule for its emission reductions. On EPA's approval of the 15% ROP plan, EPA approves the credit Texas is now relying on for attainment.

Consumer Products Rule: According to EPA's guidance [10] and proposed national rule, States have generally claimed a 20% reduction from this source category. The final rule, ''National Volatile Organic Compound Emission Standards for Consumer Products,'' (63 FR 48819), published on September 11, 1998, will result in a 20% reduction. Therefore the reductions obtained by States from the final national rule are consistent with credit which was claimed.

Comment: One commenter included by reference their comments on the TNRCC proposed rules. They include several comments opposing the Construction Hour shift, Accelerated Tier II/III, NO_X Reduction Systems (a requirement to retrofit off-road equipment), and low sulfur gasoline.

Response: As all of these measures have been dropped from the State's plan and were not submitted to EPA. Thus, no response is necessary.

4. Comments on Enforceable Commitments

Comment: Several commenters claim that EPA should not approve the attainment demonstration for the HG area because the plan contains, in part, commitments to adopt measures that are necessary to reach attainment. The commenters contend that EPA does not have authority to accept enforceable commitments to adopt measures in the

[8] ''Credit for the 15 Percent Rate-of-Progress Plans for Reductions from the Architectural and Industrial Maintenance (AIM) Coating Rules,'' March 22, 1995, from John S. Seitz, Director, Office of Air Quality Planning and Standards to Air Division Directors, Regions I–X.

[9] ''Credit for the 15 Percent Rate-of-Progress Plans for Reductions from the Architectural and Industrial Maintenance (AIM) Coating Rule and the Autobody Refinishing Rule,'' November 27, 1994, from John S. Seitz, Director, OAQPS, to Air Division Directors, Regions I–X.

[10] ''Regulatory Schedule for Consumer and Commercial Products under Section 183(e) of the Clean Air Act,'' June 22, 1995, from John S. Seitz, Director, OAQPS, to Air Division Directors, Regions I–X.

future in lieu of adopted control measures.

The commenters contend that the 56 tpd gap must be closed now. The commenters are concerned that Texas has proposed a process that will take three more years—until 2004—to develop and adopt the final control measures needed for attainment. Deferred adoption and submittal are not consistent with the statutory mandates and are not consistent with the Act's demand that all SIPs contain enforceable measures. EPA does not have authority to approve a SIP if part of the SIP is not adequate to meet all tests for approval. Because the submittal consists in part of commitments, Texas has not adopted rules implementing final control strategies, and the plan includes insufficient reduction strategies to meet the emission reduction goals established by the TNRCC. Thus, Texas has failed to adopt a SIP with sufficient adopted and enforceable measures to achieve attainment. For these reasons, the submittal also does not meet the NRDC's consent decree definition of a ''full attainment demonstration SIP,'' which obligates EPA to propose a federal implementation plan if it does not approve the HG area SIP. For these reasons, EPA should reject the HG area SIP and impose sanctions on the area and publish a proposed FIP no later than October 15, 2001.

Response: EPA disagrees with the comments, and believes—consistent with past practice—that the Act allows approval of enforceable commitments that are limited in scope where circumstances exist that warrant the use of such commitments in place of adopted measures.[11] Once EPA determines that circumstances warrant consideration of an enforceable commitment, EPA believes that three factors should be considered in determining whether to approve the enforceable commitment: (1) Whether the commitment addresses a limited portion of the statutorily-required program; (2) whether the state is capable of fulfilling its commitment; and (3) whether the commitment is for a reasonable and appropriate period of time.

As an initial matter, EPA believes that present circumstances for the New York City, Philadelphia, Baltimore and Houston nonattainment areas warrant the consideration of enforceable commitments. The Northeast states that make up the New York, Baltimore, and Philadelphia nonattainment areas submitted SIPs that they reasonably believed demonstrated attainment with fully adopted measures. After EPA's initial review of the plans, EPA recommended to these areas that additional controls would be necessary to ensure attainment. Because these areas had already submitted plans with many fully adopted rules and the adoption of additional rules would take some time, EPA believed it was appropriate to allow these areas to supplement their plans with enforceable commitments to adopt and submit control measures to achieve the additional necessary reductions. For the HG area, the State has submitted supporting information that EPA has confirmed indicating that Texas has adopted for the HG area NO_X controls that are as tight or tighter than any other area including the one extreme area—South Coast. Thus, because the State has adopted many strict controls that were included in the submitted plan and needs additional time to consider technologies that are still in the developmental stages, EPA determined that it is appropriate to consider an enforceable commitment for the remaining necessary reductions. For the HG area, EPA has determined that the submission of enforceable commitments in place of adopted control measures for this limited set of reductions will not interfere with the area's ability to meet its rate-of-progress obligations.

EPA's approach here of considering enforceable commitments that are limited in scope is not new. EPA has historically recognized that under certain circumstances, issuing full approval may be appropriate for a submission that consists, in part, of an enforceable commitment. See e.g., 62 FR 1150, 1187 (Jan. 8, 1997) (ozone attainment demonstration for the South Coast Air Basin); 65 FR 18903 (Apr. 10, 2000) (revisions to attainment demonstration for the South Coast Air Basin); 63 FR 41326 (Aug. 3, 1998) (federal implementation plan for PM–10 for Phoenix); 48 FR 51472 (State Implementation Plan for New Jersey). Nothing in the Act speaks directly to the approvability of enforceable commitments.[12] However, EPA believes that its interpretation is consistent with provisions of the Act. For example, section 110(a)(2)(A) provides that each SIP ''shall include enforceable emission limitations and other control measures, means or techniques * * * *as well as schedules and timetables for compliance,* as may be necessary or appropriate to met the applicable requirement of the Act.'' Section 172(c)(6) of the Act requires, as a rule generally applicable to nonattainment SIPs, that the SIP ''include enforceable emission limitations and such other control measures, means or techniques * * * as may be necessary or appropriate to provide for attainment * * * by the applicable attainment date * * *'' (Emphasis added.) The emphasized terms mean that enforceable emission limitations and other control measures do not necessarily need to generate reductions in the full amount needed to attain. Rather, the emissions limitations and other control measures may be supplemented with other SIP rules—for example, the enforceable commitments EPA is approving today—as long as the entire package of measures and rules provides for attainment. EPA's interpretation that the Act allows for a approval of limited enforceable commitments has been upheld by the courts of appeals in some circuits. *See City of Seabrook* v. *EPA,* 659 F.2d 1349 (5th Cir. 1981); *Connecticut Fund for the Environment* v. *EPA,* 672 F.2d 998 (2d Cir.), cert. denied 459 U.S. 1035 (1982); *Friends of the Earth* v. *EPA,* 499 F.2d 1118 (2d Cir. 1974); *Kamp* v. *Hernandez,* 752 F.2d 1444 (9th Cir. 1985).

As provided above, after concluding that the circumstances warrant consideration of an enforceable commitment—as they do for the HG area—EPA would consider three factors in determining whether to approve the submitted commitments. First, EPA believes that the commitments must be limited in scope. In 1994, in considering EPA's authority under section 110(k)(4) to conditionally approve unenforceable commitments, the Court of Appeals for the District of Columbia Circuit struck down an EPA policy that would allow

[11] These commitments are enforcd by the EPA and citizens under, repesctively, sections 113 adn 301 of the Act. In the past, EPA has approved enforceable commitments and courts have enforced these actions against states that failed to comply with those commitments. *See, e.g., American Lung Association of New Jersey v. Kean,* 670 F. Supp. 1285 (D.N.J 1987), affirmed, 871 F.2d 319 (3rd Cir. 1989); *NRDC v. N.Y. State Dept. of Environmental Conservation,* 668 F. Supp. 848 (S.D.N.Y. 1987); *Citizens for a Better Environment v. Deukmejian,* 731 F. Supp. 1448, reconsideration granted in part, 746 F. Supp. 976 (N.D. Cal. 1990); *Coalition for Clean Air, et al. v. South Coast Air Quality Management District, CARB and EPA,* No. CV 97–6916 HLH, (C.D. Cal. August 27, 1999). Further, if a state fails to meet its commitments, EPA could make a finding of failure to implement the SIP under Section 179(a), which would start an 18-month period for the State to begin implementation before mandatory sactions are imposed.

[12] Section 110(k)(4) provides for ''conditional approval'' of commitments that need not be enforceable. Under that section, a State may commit to ''adopt specific enforceable measures'' within one-year of the conditional approval. Rather than enforcing such commitments against the State, the Act provides that the conditional approval will convert to a disapproval if ''the State fails to comply with such commitment.''

States to submit (under limited circumstances) commitments for entire programs. *Natural Resources Defense Council* v. *EPA,* 22 F.3d 1125 (D.C. Cir. 1994). While EPA does not believe that case is directly applicable here, EPA agrees with the Court that other provisions in the Act contemplate that a SIP submission will consist of more than a mere commitment. *See NRDC,* 22. F.3d at 1134.

In the present circumstances, the commitments address only a small portion of the plan. For the HG area, the commitment addresses only 6% of the emission reductions necessary to attain the standard. Already adopted measures include controls to reduce NO_X emissions by approximately 90% from industrial sources, a more stringent and expanded I/M program, a Clean Diesel Program, a well-funded incentive program to encourage the early introduction of cleaner diesel equipment, controls on airport ground support equipment, and several voluntary measures to reduce emissions from mobile sources.

As to the second factor, whether the State is capable of fulfilling the commitment, EPA considered the current or potential availability of measures capable of achieving the additional level of reductions represented by the commitment and whether the State has or is capable of getting the requisite authority to adopt measures to achieve those reductions.

For HG area, the SIP submittal already includes substantial reductions, covering every significant NO_X source category. The SIP for the HG area already includes NO_X control requirements that, overall, are more expensive and technologically advanced, and apply to smaller emitters, than those in any other SIP in the nation other than the South Coast—the one area classified as extreme for the 1-hour ozone standard. Thus, determining measures that will generate the necessary additional reductions is significantly more complex than for the northeastern States. However, the State has provided EPA with sufficient information to assure EPA that it will be capable of adopting controls to achieve the necessary level of emission reductions. First, the State has identified advanced technologies and innovative ideas that, in EPA's opinion, are or will be shortly available and thus could be adopted and implemented in sufficient time for the HG area to attain by 2007. Furthermore, the State has identified a range of emission reductions that potentially could be achieved by each of these advanced technologies and innovative strategies. While at this time the State—in conjunction with EPA—is still working to assess the appropriate level of reductions that may be achieved by these technologies and strategies, EPA believes that the totality of the current information is sufficient to assure EPA that Texas can meet its commitment to adopt measures that will achieve the level of reductions necessary to meet the HG area's shortfall.

The third factor, EPA has considered in determining to approve limited commitments for the HG area attainment demonstration is whether the commitment is for a reasonable and appropriate period. EPA recognizes that both the Act and EPA have historically emphasized the need for submission of adopted control measures in order to ensure expeditious implementation and achievement of required emissions reductions. Thus, to the extent that other factors—such as the need to consider innovative control strategies—support the consideration of an enforceable commitment in place of adopted control measures, the commitment should provide for the adoption of the necessary control measures on an expeditious, yet practicable, schedule.

Texas is faced with exploring cutting-edge technology, as it has already required extremely stringent controls. Thus, in considering the appropriate amount of time for Texas to meet its commitment, EPA considered that Texas needs time to develop and assess the capabilities of these technologies in addition to the time it needs to adopt the measures that will achieve the needed level of emission reductions. Because some of the measures that Texas is considering are further along in the development process, Texas has committed to adopt measures to fill a portion of the shortfall in the near term and to adopt the remaining measures by an intermediate-term date. Thus, Texas has committed to adopt controls to achieve 25% of the needed emission reductions by December 2002 and to adopt controls to achieve the remaining level of reduction by May 1, 2004. EPA believes that this schedule is expeditious in light of the types of cutting-edge controls that Texas needs to evaluate, develop and then adopt in order to achieve the level of reductions needed in the HG area. In addition, EPA believes that these adoption dates will not impede Houston's ability to attain the 1-hour ozone standard by November 15, 2007 nor will it impede Houston's ability to meet the ROP requirement because the HG area can meet the ROP requirement with already adopted measures.

The enforceable commitments submitted for the HG nonattainment area, in conjunction with the other SIP measures and other sources of emissions reductions, constitute the required demonstration of attainment and the commitments will not interfere with the area's ability to make reasonable progress under section 182(c)(2)(B) and (d). EPA believes that the delay in submittal of the final rules is permissible under section 110(k)(3) because the State has obligated itself to submit the rules by specified short-term and intermediate-term dates, and that obligation is enforceable by EPA and the public. Moreover, as discussed in the proposal and TSD, the SIP submittal approved today contains major substantive components submitted as adopted regulations and enforceable orders.

EPA does not agree with the assertion that the HG area SIP does not meet the NRDC consent decree definition of a ''full attainment demonstration.'' The consent decree defines a ''full attainment demonstration'' as a demonstration according to CAA section 182(c)(2). As a whole, the attainment demonstration—consisting of photochemical grid modeling, adopted control measures, an enforceable commitment with respect to a limited portion of the reductions necessary to attain, and other analyses and documentation—is approvable since it ''provides for attainment of the ozone (NAAQS) by the applicable attainment date.'' *See* section 182(c)(2)(A).

Comment: The SIP includes explicit enforceable commitments to consider relaxing regulations on industrial point sources. EPA must reject any efforts to relax effective control measures on the books before the TNRCC eliminates the identified shortfall in emission reductions. Proposed changes to the plan would commit the TNRCC to consider steps that will unlawfully increase the gap between predicted emission reductions resulting from regulatory measures and the emission reduction goals established by the TNRCC. Further, it is unlawful for the SIP to contain a promise to relax NO_X point sources in exchange for implementation of measures to control upset emissions.

Response: The TNRCC has included in Chapter 7 of the SIP its commitment to developing an enforceable plan to reduce releases of reactive hydrocarbon emissions and emissions of chlorine. Recent findings from the Texas 2000 Air Quality Study indicate that highly reactive hydrocarbons and/or chlorine emissions may be primary causes of the rapid build-up of ozone in the HG area.

TNRCC goes on to say that to the extent that the science confirms the benefit from this program then it is the intent of the commission to implement such a program through a SIP revision which would also decrease NO_X reductions required from industrial sources down to 80% control. At this time, EPA is not acting on whether this potential, future SIP revision would be approvable. At this time, we are considering only the effective State rules before us that include 90% control on industrial source NO_X emissions. The State's commitment to consider alternative control strategies in the future has no bearing on this approval. The Supreme Court has consistently held that under the Act, initial and primary responsibility for deciding what emissions reductions will be required from which sources is left to the discretion of the States. *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457 (2001); *Train* v. *NRDC,* 421 U.S. 60 (1975). This discretion includes the continuing authority to revise choices about the mix of emission limitations. *Train* at 79. Therefore, EPA believes that it is appropriate and authorized under the Act for a State to continue to update its growth projections, inventories, modeling analyses, control strategies, etc., and submit these updates as a SIP revision based on newly available science and technology.

However, section 110(l) of the Act governs EPA's review of a SIP revision from a state that wishes to make changes to its approved SIP. This section provides that EPA may not approve a SIP revision if it will interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Act.[13] Therefore, if we receive an attainment demonstration SIP revision from Texas that contains relaxed control measures or the replacement of existing control measures, we would consider the revised plan's prospects for meeting the current attainment requirements and other applicable requirements of the Act. See, the Act section 110(k)(3), *Union Electric* v. *EPA,* 427 U.S. 246 (1976) and *Train,* 421 U.S. at 79.

In summary, the State may choose to submit a SIP revision in 2002 or 2003 as it has suggested it may do. If we receive a SIP revision that meets our completeness criteria, we will review it against the statutory requirements of section 110(l). Further, the Act requires us to publish a notice and to provide for public comment on our proposed decision. EPA believes that it is in the context of that future rulemaking, not EPA's current approval, that the commenter's concern regarding the appropriateness of any replacement measures adopted by the State should be considered.

Comment: The mid-course review process outlined by TNRCC is not a permissible substitute for a currently complete attainment demonstration or adopted enforceable control measures. The mid-course review will delay final approval of the SIP until 2004, 10 years after the SIP was required under the Act.

Response: The mid-course review is not intended as a replacement for a complete attainment demonstration or as a replacement for adopted control measures. As provided elsewhere in the responses to comments, EPA believes the State's commitment to adopt additional measures is appropriate. It is intended to reflect the reality that the modeling techniques and inputs are uncertain. Thus, the progress of implementing the plan should be evaluated so that adjustments can be made to ensure the plan is successful. EPA is fully approving the attainment demonstration based on the information currently available. The mid-course review allows the State and EPA an opportunity to consider additional information closer to the attainment date to assess whether adjustments are necessary.

In the case of Texas, the State has extensive plans to fully evaluate the inputs to the model and the modeling itself using the most up to date information possible. The State will also be evaluating several new control measures for inclusion in the SIP. We are fully supportive of this continued evaluation of the science supporting the plan to reach attainment.

Comment: TNRCC has failed to meet its commitment to provide a plan by July 8, 2001. The TNRCC has reneged on previous commitments to model attainment. These demonstrate reasons for our objection to EPA's reliance on commitments.

Response: We do not agree that TNRCC has reneged on previous commitments to model attainment. As discussed in the response to comments on modeling, using weight of evidence in conjunction with the model is an appropriate method of demonstrating attainment. Further, Texas has made every effort to adopt all of the necessary measures to demonstrate attainment. Therefore, as discussed previously, EPA believes that it is acceptable to allow additional time for the development of new programs or measures for a small percentage of the needed reductions.

Comment: Texas provided a comment letter on EPA's December 1999 proposal. In this letter, Texas explained their plans to provide the following elements and enforceable commitments by April 2000: (1) A list of measures that could be used to achieve attainment (2) a commitment to provide a new mobile source emissions budget using MOBILE6 by May 2004, (3) a reenforcement of their previous commitment to adopt the majority of necessary rules for attainment by December 31, 2000, and to adopt the remainder if necessary by July 31, 2001, and (4) a commitment to perform a mid-course review.

Response: TNRCC adopted these elements in April 2000. We are now approving the commitments that are still relevant. (See the final action section).

Comment: One commenter suggested several specific language changes to the enforceable commitments in the Texas SIP.

Response: EPA and TNRCC met and agreed that some but not all of the language changes should be made. The section on changes from the proposal explain these changes. Other specific language changes proposed by the commenters are not necessary for approvable enforceable commitments.

5. Comments on Motor Vehicle Emissions Budgets

a. Comments on the July 12, 2001 Proposal

Comment: The commenters raised several questions concerning the Motor Vehicle Emissions Budgets (the budgets) established in the Houston attainment demonstration SIP. The commenters stated that the budgets submitted in the SIP should not be called adequate or be approved by the EPA because the attainment demonstration SIP does not provide for attainment. One commenter specifically pointed to the need for adopted and enforceable control measures.

Response: The rate-of-progress (ROP) budgets for the year of 2007 are 79.5 tpd and 156.7 tpd for VOC and NO_X, respectively. The commenters support these budgets. In addition, these budgets are identified as the budgets for the 2007 attainment demonstration SIP which are being approved by the EPA only until revised budgets pursuant to the State's commitments relating to MOBILE6 and shortfall measures are

[13] The Supreme Court under the 1970 CAA, observed that EPA's judgment in determining the approval of a SIP revision is to ''measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison of specified emission modifications.'' *Train* at 93.

submitted and we have found them adequate for transportation conformity purposes. Approval of the attainment budgets is based on the current control measures specified in the SIP and the enforceable commitments made for additional controls which will be implemented in the interim period. Because all measures which have not yet been adopted are included in written commitments in the SIP, EPA believes that it can find the budgets adequate. The EPA believes that consistency of the budgets related to the emissions inventory, and SIP control strategy are demonstrated and meet the requirements of 40 CFR 93.118(e). Therefore, the budgets for the attainment demonstration SIP are adequate for transportation conformity purposes. Also, it should be noted that the conformity rules allow emission reduction credit to be taken for purposes of conformity determinations for any measures that have been either adopted by the enforcing jurisdiction, included in the applicable implementation plan, contained in a written commitment in the submitted implementation plan, or promulgated by EPA as a federal measure. See 40 CFR 93.122(a)(3).

As described in the November 3, 1999 memorandum entitled ''Guidance on Motor Vehicle Emissions Budgets in One-Hour Ozone Attainment Demonstrations,'' from Marylin Zaw-Mon, Office of Mobile Sources, to Air Division Directors, Regions I–VI, there are circumstances in which the EPA could find a SIP's motor vehicle emissions budgets adequate even though additional emission reductions are necessary in order to demonstrate attainment. Specifically, the EPA's position is that the motor vehicle emissions budgets could be adequate for conformity purposes if the State commits to adopt, for the area, measures that will achieve the necessary additional reductions, and the State identifies a menu of possible measures that could achieve the reductions without requiring additional limits on highway construction. The HG area's SIP contains such commitments and such a menu.

We believe that the budgets can be found adequate and approvable because the budgets will not interfere with the area's ability to adopt additional measures to attain the ozone standard and they are consistent with the attainment demonstration SIP. While the area is adopting its additional measures, the SIP's budgets will cap motor vehicle emissions and thereby ensure that the amount of additional reductions necessary to demonstrate attainment will not increase. The budgets are consistent with and clearly related to the emissions inventory and the control measures and consistent with attainment. EPA disagrees that the SIP does not provide for attainment. For further explanation of how this attainment demonstration SIP as an overall plan provides for attainment please see other responses directly relating to the sufficiency of the overall attainment plan, control strategy, enforceable commitments, etc. contained in this final action.

Comment: The commenters asserted that further NO_X reductions needed for attainment will require additional on-road mobile source controls and these controls will result in a lower motor vehicle emissions budget. The commenters felt that the budgets established in the SIP are too high and the NO_X budgets should be reduced by 30 or more tpd.

Response: Agency policy for the areas needing additional emission reductions has provided that, in certain cases, EPA may determine the budget adequate even when the SIP includes commitments to additional measures. In a November 3, 1999, Memorandum entitled ''Guidance on Motor Vehicle Emissions Budgets in One-Hour Ozone Attainment Demonstrations,'' EPA issued guidance regarding such commitments in the ozone attainment demonstrations for the HG area as well as other areas. We indicated that budgets could be based on potential control measures identified in the SIP that, when implemented, would be expected to achieve the emission reductions necessary for attainment of the standard and a commitment to adopt measures to achieve the reductions. These measures may not involve additional limits on highway construction beyond the restrictions already imposed under the submitted motor vehicle emissions budget. As long as the additional measures do not involve additional limits on highway construction, allowing new transportation investments consistent with the submitted budgets will not prevent the area from achieving the additional reductions that it needs for attainment. This allows the EPA to consider the budgets adequate for transportation conformity purposes. The HG area SIP contains such commitments and measures. The SIP demonstrates that the budgets will not interfere with the HG area's ability to adopt additional measures to attain.

The budgets established in the SIP are consistent with the process in 40 CFR 93.118(e), and the EPA does not consider them too high within the context of the ozone attainment demonstration SIP as described above and further documented in the SIP and EPA's TSD. The budgets are consistent with and clearly related to the emissions inventory and the control measures and consistent with attainment. Our approval of the budgets is limited until revised budgets are submitted and we have found them adequate for transportation conformity purposes. Texas has committed to revise the budgets relating to MOBILE6 and the shortfall measures. While the list of potential measures does include measures that pertain to motor vehicles, none of the measures involves additional limits on highway construction; therefore, if lower budgets do result, the transportation investments will still be consistent with the budgets and will not prevent the HG area from achieving attainment.

Comment: The motor vehicle emissions budgets are inadequate because they do not provide for all reasonably available control measures to attain the standard as expeditiously as practicable.

Response: The motor vehicle emissions budgets are adequate. The SIP includes all necessary RACM and provides for expeditious attainment as explained further in the RACM section of this action.

b. Comments on July 28, 2001 Supplemental Notice

Comment: One commenter generally supports a policy of requiring motor vehicle emissions budgets to be recalculated when revised MOBILE models are released.

Response: The Phase II attainment demonstrations that rely on Tier 2 emission reduction credit contain commitments to revise the motor vehicle emissions budgets after MOBILE6 is released.

Comment: The revised budgets calculated using MOBILE6 will likely be submitted after the MOBILE5 budgets have already been approved. EPA's policy is that submitted SIPs may not replace approved SIPs.

Response: This is the reason that EPA proposed in its July 28, 2000 Supplemental Notice of Proposed Rulemaking (65 FR 46383) that the approval of the MOBILE5 budgets for conformity purposes would last only until MOBILE6 budgets had been submitted and found adequate. In this way, the MOBILE6 budgets can apply for conformity purposes as soon as they are found adequate.

Comment: If a State submits additional control measures that affect the motor vehicle emissions budgets but does not submit revised motor vehicle

emissions budgets, EPA should not approve the attainment demonstration.

Response: EPA agrees. The motor vehicle emissions budgets in the HG area attainment demonstration reflect the motor vehicle control measures in the attainment demonstration. In addition, Texas would be required to submit a new budget if any adopted measures would change the budget, and Texas has committed to submit a new budget if they adopt additional control measures that reduce on-road vehicle emissions.

Comment: EPA should make it clear that the motor vehicle emissions budgets to be used for conformity purposes will be determined from the total motor vehicle emissions reductions required in the SIP, even if the SIP does not explicitly quantify a revised motor vehicle emissions budget.

Response: EPA will not approve SIPs without motor vehicle emissions budgets that are explicitly quantified for conformity purposes. The HG attainment demonstration contains explicitly quantified motor vehicle emissions budgets which EPA has found adequate and approvable.

Comment: If a state fails to follow through on its commitment to submit the revised motor vehicle emissions budgets using MOBILE6, EPA could make a finding of failure to submit a portion of a SIP, which would trigger a sanctions clock under section 179.

Response: If a state fails to meet its commitment, EPA could make a finding of failure to implement the SIP, which would start a sanctions clock under section 179 of the Act.

Comment: If the budgets recalculated using MOBILE6 are larger than the MOBILE5 budgets, then attainment should be demonstrated again.

Response: As EPA proposed in its December 16, 1999 notices, we will work with States on a case-by-case basis if the new emissions estimates raise issues about the sufficiency of the attainment demonstration.

Comment: If the MOBILE6 budgets are smaller than the MOBILE5 budgets, the difference between the budgets should not be available for reallocation to other sources unless air quality data show that the area is attaining, and a revised attainment demonstration is submitted that demonstrates that the increased emissions are consistent with attainment and maintenance. Similarly, the MOBILE5 budgets should not be retained (while MOBILE6 is being used for conformity demonstrations) unless the above conditions are met.

Response: EPA agrees that if recalculation using MOBILE6 shows lower motor vehicle emissions than MOBILE5, then these motor vehicle emission reductions cannot be reallocated to other sources or assigned to the motor vehicle emissions budget unless the area reassesses the analysis in its attainment demonstration and shows that it will still attain. In other words, the area must assess how its original attainment demonstration is impacted by using MOBILE6 vs. MOBILE5 before it reallocates any apparent motor vehicle emission reductions resulting from the use of MOBILE6. In addition, Texas will be submitting new budgets based on MOBILE6 so the MOBILE5 budgets will not be retained in the SIP indefinitely.

Comment: We received a comment on whether the grace period before MOBILE6 is required in conformity determinations will be consistent with the schedules for revising SIP motor vehicle emissions budgets (''budgets'') within 1 or 2 years of MOBILE6's release.

Response: This comment is not germane to this rulemaking, since the MOBILE6 grace period for conformity determinations is not explicitly tied to EPA's SIP policy and approvals. However, EPA understands that a longer grace period would allow some areas to better transition to new MOBILE6 budgets. EPA is considering the maximum 2-year grace period allowed by the conformity rule, and EPA will address this in the future when the final MOBILE6 emissions model and policy guidance is released.

Comment: One commenter asked EPA to clarify in the final rule whether MOBILE6 will be required for conformity determinations once new MOBILE6 budgets are submitted and found adequate.

Response: This comment is not germane to this rulemaking. However, it is important to note that EPA intends to clarify its policy for implementing MOBILE6 in conformity determinations when the final MOBILE6 model is released. EPA believes that MOBILE6 should be used in conformity determinations once new MOBILE6 budgets are found adequate.

Comment: One commenter did not prefer the additional option for a second year before the state has to revise the conformity budgets with MOBILE6, since new conformity determinations and new transportation projects could be delayed in the second year.

Response: EPA proposed the additional option to provide further flexibility in managing MOBILE6 budget revisions. The supplemental proposal did not change the original option to revise budgets within one year of MOBILE6's release. State and local governments can continue to use the 1-year option, if desired, or submit a new commitment consistent with the alternative 2-year option. EPA expects that state and local agencies have consulted on which option is appropriate and have considered the impact on future conformity determinations. Texas has committed to revise its budgets within 2 years of MOBILE6's release for the HG area. Texas has committed that if a transportation conformity analysis is to be performed between 12 months and 24 months after the MOBILE6 official release, transportation conformity will not be determined until Texas submits an MVEB which is developed using MOBILE6 and which we find adequate.

6. Comments on RACM

a. Comments on December 16, 1999 Proposal

Comment: Several commenters stated in response to the December 16, 1999 proposed approval/proposed disapprovals for the severe areas and certain serious areas that there is no evidence in several states that they have adopted reasonably available control measures (RACM) or that the SIPs have provided for attainment as expeditiously as practicable. Specifically, the lack of Transportation Control Measures (TCMs) was cited in several comments, but potential stationary source controls were also covered. One commenter stated that mobile source emission budgets in the plans are by definition inadequate because the SIPs do not demonstrate timely attainment or contain the emissions reductions required for all RACM. That commenter claims that EPA may not find adequate a motor vehicle emission budget (MVEB) that is derived from a SIP that is inadequate for the purpose for which it is submitted. The commenter alleges that none of the MVEBs submitted by the states that EPA is considering for adequacy is consistent with either the level of emissions achieved by implementation of all RACM nor are they derived from SIPs that provide for attainment. Some commenters stated that for measures that are not adopted into the SIP, the State must provide a justification why they were determined to not be RACM.

Response: The EPA reviewed the November 1999 submission for the HG area and determined that it did not include sufficient documentation concerning available RACM measures. For all of the severe areas for which EPA proposed approval in December 1999, EPA consequently issued policy guidance memorandum to have these

States address the RACM requirement through an additional SIP submital. (Memorandum of December 14, 2000, from John S. Seitz, Director, Office of Air Quality Planning and Standards, re: ''Additional Submission on RACM from States with Severe 1-hour Ozone Nonattainment Area SIPs.''

On May 30, 2001, TNRCC proposed a RACM analysis which we proposed to approve on July 13, 2001 through parallel processing. The State finalized its RACM analysis on September 26, 2001. The Governor submitted this final RACM analysis in a letter dated October 4, 2001. Based on this SIP supplement, EPA concluded that the SIP for the HG area meets the requirement for adopting RACM.

Section 172(c)(1) of the Act requires SIPs to contain RACM and provides for areas to attain as expeditiously as practicable. EPA has previously provided guidance interpreting the requirements of 172(c)(1). See 57 FR 13498, 13560 (April 16, 1992). In that guidance, EPA indicated its interpretation that potentially available measures that would not advance the attainment date for an area would not be considered RACM. EPA also indicated in that guidance that states should consider all potentially available measures to determine whether they were reasonably available for implementation in the area, and whether they would advance the attainment date. Further, states should indicate in their SIP submittals whether measures considered were reasonably available or not, and if measures are reasonably available they must be adopted as RACM. Finally, EPA indicated that states could reject measures as not being RACM because they would not advance the attainment date, would cause substantial widespread and long-term adverse impacts, would be economically or technologically infeasible, or would be unavailable based on local considerations, including costs. The EPA also issued a recent memorandum re-confirming the principles in the earlier guidance, entitled, ''Guidance on the Reasonably Available Control Measures (RACM) Requirement and Attainment Demonstration Submissions for Ozone Nonattainment Areas.'' John S. Seitz, Director, Office of Air Quality Planning and Standards. November 30, 1999. Web site: *http://www.epa.gov/ttn/oarpg/t1pgm.html*.

EPA evaluated the Texas RACM demonstration and performed an additional analysis of TCMs as described in the TSD for the July 12, 2001 proposed approval. Specific comments on the RACM demonstration are addressed in later responses to comments.

Although EPA does not believe that section 172(c)(1) requires implementation of additional measures for the HG area, this conclusion is not necessarily valid for other areas. Thus, a determination of RACM is necessary on a case-by-case basis and will depend on the circumstances for the individual area.[14] In addition, if in the future EPA moves forward to implement another ozone standard, this RACM analysis would not control what is RACM for these or any other areas for that other ozone standard.

Also, EPA has long advocated that States consider the kinds of control measures that the commenters have suggested, and EPA has indeed provided guidance on those measures. See, *e.g., http://www.epa.gov/otaq/transp.htm.* In order to demonstrate that they will attain the 1-hour ozone NAAQS as expeditiously as practicable, some areas may need to consider and adopt a number of measures-including the kind that Texas itself evaluated in its RACM analysis—that even collectively do not result in many emission reductions. Furthermore, EPA encourages areas to implement technically available and economically feasible measures to achieve emissions reductions in the short term-even if such measures do not advance the attainment date-since such measures will likely improve air quality. Also, over time, emission control measures that may not be RACM now for an area may ultimately become feasible for the same area due to advances in control technology or more cost-effective implementation techniques. Thus, areas should continue to assess the state of control technology as they make progress toward attainment and consider new control technologies that may in fact result in more expeditious improvement in air quality. The mid course review process outlined by Texas in Chapter 7 of the SIP contains the State's commitment to continue to evaluate new technologies as potentially RACM, for inclusion later in the plan. The TNRCC adopted an enforceable commitment to submit a revised SIP no later than May 1, 2004, addressing any new information including an ''ongoing assessment of new technologies and innovative ideas to incorporate into the plan.''

Because EPA is finding that the SIP meets the Clean Air Act's requirement for RACM and that there are no additional reasonably available control measures that can advance the attainment date, EPA concludes that the attainment date being approved is as expeditiously as practicable

EPA previously responded to comments concerning the adequacy of the MVEBs submitted with the November 1999 SIP submission when EPA took final action determining the budgets (associated with that 1999 plan) adequate and does not address those issues again here. The responses are found at *http://www.epa.gov/oms/transp/conform/pastsips.htm.* It should be noted, since that time, EPA has found the MVEBs in the November 1999 HG attainment demonstration SIP inadequate. (66 FR 35420, July 5, 2001) We are now approving and finding adequate through parallel processing the budgets finally submitted by Texas in a letter dated October 4, 2001. The section of this notice on MVEBs explains why the budgets are adequate and indicates that the budgets are consistent with the conclusion that the SIP contains all necessary RACM for expeditious attainment.

b. Comments on July 12, 2001 Proposal

Comment: EPA cannot invent rationales for the states: EPA concedes that Texas failed to adequately justify rejection of RACMs identified as measures to be considered in the future, or provides its own rationales for why Texas might have rejected other RACMs not included on the list to be considered in the future. The Act and EPA guidance require the State to perform the required RACM analysis. EPA's role is limited to reviewing what the states have submitted, and approving or disapproving it. 42 U.S.C. 7410(k)(3); *Riverside Cement Co.* v. *Thomas,* 843 F.2d 1246 (9th Cir. 1988). EPA ''may either accept or reject what the state proposes; but EPA may not take a portion of what the state proposes and amend the proposal ad libitum.'' *Id.* If states are going to reject control measures, their decision to do so and the rationale therefore must be subject to notice and hearing at the state and local level. This comment is essentially the same as a comment provided on EPA's October 12, 2000 Notice of Availability proposing action regarding RACM for the three serious areas of Atlanta, Washington DC and Springfield, MA.

Response: In the case of the HG SIP, Texas has performed an analysis of whether all RACM were included in the SIP. Based upon its analysis, the State concluded that one additional measure not included in the December 2000 SIP

[14] See, *Ober* v. *EPA*, 84 F.3d 304, 311 (9th cir. 1996) (citing the General Preamble, 57 Fed.Reg. at 13560 (April 16, 1992) which held that EPA did not abuse discretion when changing the interpretation of the RACM provisions of the Act.

submission, control of small liquid fired engines, was reasonably available and therefore proposed and adopted a rule to control these sources. Otherwise, the State concluded all RACM were in place. The public did have a chance to comment at the State level on the State's conclusion that no additional RACM were required. The EPA believes that the State analysis was adequate. We reviewed the State's proposed analysis and discussed our evaluation of it in the TSD for our July 2001 proposed action on the State's RACM analysis. The EPA did not amend the SIP; EPA evaluated the State's analysis and for transportation control measures, supplemented the State's rationale with additional thoughts on why we believed the RACM analysis was adequate. We explain in the TSD why we agree with the State that no additional measures are RACM for the HG area and therefore the RACM requirement of the Act is met.

The commenter cites *Riverside Cement* for the proposition that EPA cannot perform an analysis of whether the State's plan complies with the Act's RACM requirement. The EPA believes that the holding of that case is inapplicable to these facts. In *Riverside Cement,* EPA approved a control requirement establishing an emission limit into the SIP and disregarded a contemporaneously-submitted contingency that would allow the State to modify the emission limit. Thus, the court concluded that EPA ''amended'' the State proposal by approving into the SIP something different than what the State had intended. 843 F.2d at 1248. In the present circumstances, EPA did not attempt to modify a substantive control requirement of the submitted plan. Rather, EPA evaluated the State's analysis plus performed additional analysis to determine if the plan, as submitted, fulfilled the substantive RACM requirement of the Act. As a general matter, EPA believes that States should perform their own analyses of RACM (as well as submitting other supporting documents for the choices they make), which is what Texas did in this instance for the Houston area. The statute places primary responsibility on the States to submit plans that meet the Act's requirements. However, nothing in the Act precludes EPA from performing those analyses, and the Act clearly provides that EPA must determine whether the State's submission meets the Act's requirements. Under that authority, EPA believes that it is appropriate, though not mandated, that EPA perform independent analyses to evaluate whether a submission meets the requirements of the Act if EPA believes such analysis is necessary. The EPA has not attempted to modify the State's submission by either adding or deleting a substantive element of the submitted plan. By virtue of the State's analysis and EPA's evaluation of it, and EPA's supplemental RACM analysis for transportation control measures, EPA has concluded that the State's submission contains control measures sufficient to meet the RACM requirement.

Comment: Inappropriate grounds for rejecting RACM. The commenter claims that EPA's bases for rejecting measures as RACM are inappropriate considerations: (a) The measures are ''likely to require an intensive and costly effort for numerous small area sources''; or (b) the measures ''do not advance the attainment dates'' for the areas. 65 FR 61134. Neither of these grounds are legally or rationally sufficient bases for rejecting control measures. This comment is essentially the same as a comment provided on EPA's October 12, 2000 Notice of Availability proposing EPA's RACM action for the three areas of Atlanta, Washington D.C. and Springfield, MA.

Response: The EPA's approach toward the RACM requirement is grounded in the language of the Act. Section 172(c)(1) states that a SIP for a nonattainment area must meet the following requirement, ''In general.—Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.'' [Emphasis added.] The EPA interprets this language as tying the RACM requirement to the requirement for attainment of the national primary ambient air quality standard. The Act provides that the attainment date shall be ''as expeditiously as practicable but no later than * * *'' the deadlines specified in the Act. EPA believes that the use of the same terminology in conjunction with the RACM requirement serves the purpose of specifying RACM as the way of expediting attainment of the NAAQS in advance of the deadline specified in the Act. As stated in the ''General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 (General Preamble)'' (57 FR 13498 at 13560, April 16, 1992), ''The EPA interprets this requirement to impose a duty on all nonattainment areas to consider all available control measures and to adopt and implement such measures as are reasonably available for implementation in the area as components of the area's attainment demonstration.'' [Emphasis added.] In other words, because of the construction of the RACM language in the Act, EPA does not view the RACM requirement as separate from the attainment demonstration requirement. Therefore, EPA believes that the Act supports its interpretation that measures may be determined to not be RACM if they do not advance the attainment date. In addition, EPA believes that it would be unreasonable to require implementation of measures that would not in fact advance attainment. See 57 FR 13560. EPA has consistently interpreted the Act as requiring only such RACM as will provide for expeditious attainment since the agency first addressed the issue in guidance issued in 1979. See 44 FR 20372, 20375 (April 4, 1979).

The term ''reasonably available control measure'' is not actually defined in the definitions in the Act. Therefore, the EPA interpretation that potential measures may be determined not to be RACM if they require an intensive and costly effort for numerous small area sources is based on the common sense meaning of the phrase, ''reasonably available.'' A measure that is reasonably available is one that is technologically and economically feasible and that can be readily implemented. Ready implementation also includes consideration of whether emissions from small sources are relatively small and whether the administrative burden, to the States and regulated entities, of controlling such sources was likely to be considerable. As stated in the General Preamble, EPA believes that States can reject potential measures based on local conditions including cost (57 FR 13561). See *Ober* v. *EPA*, 84 F3d at 312 (9th Circuit 1996).

Also, the development of rules for a large number of very different source categories of small sources for which little control information may exist will likely take much longer than development of rules for source categories for which control information exists or that comprise a smaller number of larger sources. The longer time frame for development of rules by the State would decrease the possibility that the emission reductions from the rules would advance the attainment date. Texas has determined and we agree that such additional measures in the HG area could not be developed soon enough to advance the attainment date.

Comment: Failure to quantify reductions needed to attain sooner: Even if advancement of the attainment date were a relevant test for RACM, EPA has failed to rationally justify its claim that additional control measures would not meet that test. To begin with, neither the Agency nor the states have quantified in a manner consistent with EPA rules and guidance the emission reductions that would be needed to attain the standard prior to achievement of emission reductions required under the NO_X SIP call. Nowhere is there an analysis that shows what it would take to attain in 2004, 2005, 2006 or 2007. This comment generally repeats a comment provided on EPA's October 12, 2000 Notice of Availability proposing EPA's RACM action for the three areas of Atlanta, Washington DC and Springfield, MA.

Response: First, note that while the commenter makes reference to the NO_X SIP call, Texas is not included in the mandatory NO_X SIP call. However, it should also be noted that even though Texas was not included, Texas adopted control measures for regional NO_X emissions reductions (including in attainment areas) as part of the HG attainment demonstration SIP, in a manner similar to those undertaken by the states included in the NO_X SIP call. These regional reductions will occur by May 2003 in Texas. In *Michigan* v. *EPA*, 200 WL 1341477 (D.C. Cir. 2000) (order denying motion to stay mandate pending appeal from 213 F.3d 663(D.C. Cir. 2000)) the court held the NO_X control measures could not be required by EPA until May 31, 2004 in order to allow sources in subject States 1309 days from the date of the court order to implement the measures as provided in the original rule. These regional measures in Texas are thus being implemented on a more expeditious schedule and as expeditiously as is practicable.

Further, it would be futile for TNRCC to attempt to quantify the emission reductions that could be possible for the HG area to attain prior to the 2007 deadline. With all of the adopted control measures, and with the enforceable commitments to achieve the additional 56 tons/day of NO_X emission reductions needed for attainment, plus the necessary reliance upon Federal measures, including the amount of cleaner on and off-road vehicles that will enter the fleet, there are simply no additional measures that EPA is aware of that are reasonably available or economically feasible that could be implemented, much less implemented in time, to achieve attainment in advance of when the measures are being implemented in this plan.

The following respond to the issue of whether additional specific potentially available measures are RACM for the HG area.

Comment: Inadequate RACM analysis: EPA's RACM analysis is grossly inadequate in several key respects.

Comment a: EPA's analysis fails to provide the technical basis and calculations by which it developed its emission reduction estimates for various measures. EPA failed to provide citations to the literature regarding estimates of emission reductions for various TCMs. EPA failed to specify the level of implementation assumed for some of the TCMs in the analysis.

Response a: First, note that EPA's analysis contained in the TSD was intended to evaluate and in one instance supplement the TNRCC analysis and conclusion that all RACM had been adopted. We evaluated the TNRCC's technical basis and calculations for the emission reduction estimates for controls possible for all of the source categories in the emission inventory. Regarding the TCM category, we provided additional technical analysis and calculations. The commenter apparently believes EPA's analysis of potential TCMs as not being RACM for the HG area is insufficient, however. EPA's technical basis for the supplemental TCM RACM analysis and the assumptions used in the calculation of estimated emission reductions from additional potential TCMs were derived from a review of the literature on the implementation and effectiveness of TCM's.[15] The TCMs evaluated depend on the level of implementation. Implementation variables, representing levels of implementation effort, are implicit in the range of effectiveness for each category of TCM. EPA does not believe it is necessary, or even practically possible, to evaluate every explicit variation of TCM's in order to adequately determine if it is reasonably available. In summary, the technical basis is provided in Appendix B to the TSD and Chapter 7 of TNRCC's SIP. In conclusion, we determined that at a reasonable level of implementation, all potential categories of TCMs taken together would not be sufficient to advance the attainment date.

Comment b: EPA's analysis looks at only a small universe of potential measures, and does not evaluate all of the measures identified in public comment and other sources. Several commenters suggested that a variety of measures were Reasonably Available and should be included in the SIP.

Response b: It is EPA's position that the TNRCC's RACM analysis identified and addressed all potential categories of stationary and mobile sources in the HG area, that could provide additional emission reductions, and measures that might be considered RACM. The EPA believes not only that Texas identified and addressed all the potential source categories but that it also addressed identified measures raised by commenters. The TNRCC considered a wide range of potential measures, including all measures adopted in other severe and serious areas and the California South Coast's extreme attainment demonstration SIP.

The following addresses specific measures that were suggested by commenters.

VOC Control Measures

Comment: An adequate plan would emphasize reductions in all precursors not just one.

Response: The two primary precursors to ozone are Volatile Organic Compounds (VOCs) and Oxides of Nitrogen (NO_X). These classes of chemicals react in the atmosphere in the presence of sunlight to form ozone. Under 182(c)(2), States must base their attainment demonstration on photochemical modeling or any other analytical method determined by EPA to be at least as effective. Modeling is generally regarded as the most reliable basis for ascertaining which precursors should be emphasized for control in order to obtain a reduction in ozone concentration levels. In the HG area, the photochemical modeling indicates that NO_X emission reductions are much more effective in reducing ozone and thus, NO_X emission reductions have appropriately been the emphasis in the plan's control strategy. As discussed further in the next comment/response, EPA agrees that no additional VOC measures would advance the attainment date.

Future studies may revise the emphasis of the control strategy. EPA is aware that some of the preliminary results of the Texas Air Quality Study 2000 indicate that reactive VOC's may need to be considered for additional control. Further, there is no clear evidence, at this time, that indicates that the control of other pollutants, such as particulate matter, would help in reducing the ozone concentration levels in the HG area.

[15] Transportation Control Measures: State Implementation Plan Guidance, US EPA 1992; Transportation Control Measure Information Documents, US EPA 1992; Costs and Effectiveness of Transportation Control Measures: A Review and Analysis of the Literature, National Association of Regional Councils 1994.

Comment: A commenter stated that TNRCC has not developed adequate VOC controls. The document presents evidence that categories of emissions representing the ''vast majority'' of point source emissions are regulated but does not determine whether in fact the facilities are regulated. The commenter felt the proper analysis would present an inventory of controlled emissions and compare it with total emissions.

Response: EPA believes the analysis in Chapter 7 of the SIP and in the TSD does demonstrate further VOC controls are not required as RACM based on the information currently available. This conclusion is based on three factors. First, EPA believes Texas has regulated all major sources of VOCs in the HG area to at least a RACT level. We took action on these RACT rules in separate **Federal Register** actions. We found that the State had implemented RACT on all major sources in the HG area except those that were to be covered by post-enactment Control Technique Guidelines (CTGs)(60 FR 12437, March 7, 1995). Since that time many expected CTGs were issued as Alternative Control Technique documents—ACTs. Of the expected CTGs and ACT's, the HG area had major sources in the following categories; batch processing, industrial wastewater, reactors and distillation, and wood furniture. We have approved measures for all of these categories as meeting RACT.

Batch Processing—July 16, 2001 66 FR 36913

Industrial Wastewater—December 10, 2000 65 FR 79745

Reactors and Distillation—January 26, 1999, 64 FR 3841

Wood Furniture—October 30, 1996, 61 FR 55894

Further, EPA agrees with the conclusion drawn by Texas in its RACM analysis that the majority of VOC point source emissions (whether emitted from major sources or minors) are already regulated by the rules contained in Chapter 115 of the State Implementation Plan. The State's VOC rules go beyond RACT level controls for some categories such as fugitive emissions and gasoline loading emissions. EPA has approved Chapter 115 as meeting the RACT requirements.

Second, because of the particular chemistry in the HG area VOC controls are not nearly as effective as NO_X controls in reducing ozone. TNRCC has demonstrated through modeling that 12–15 tons/day of VOC emission reductions are needed to achieve the same ozone benefit as one ton/day of NO_X emission reductions as shown in Chapter 7 of the October 2001 SIP revision. Thus, the particular chemistry in the HG area makes additional ozone benefits very difficult to achieve through VOC reductions. In fact, modeling indicates that if all man made VOC's were reduced to zero, the area would not reach attainment.

Third, Texas analyzed the controlled VOC inventory to determine if any source categories remained where additional VOC controls could be implemented that could advance the attainment date in light of the modeling evidence. As discussed previously, EPA does not believe that section 172(c)(1) requires implementation of potential RACM measures that will not be sufficient to allow the area to achieve attainment in advance of full implementation of all other required measures, in this case, full implementation of the NO_X controls called for in the plan including the 56 tons/day NO_X reductions called for by the enforceable commitments. In the TNRCC analysis, a VOC source category had to have at least 12–15 tons per day of emissions to warrant further analysis. This level was chosen because it might be theoretically possible to reduce these categories enough to achieve as much as the equivalent of one ton/day of NO_X reduction. Given that the final 121 tons/day of point source reductions, out of a total of almost 600 ton/day of emission reductions, will not be implemented until spring 2007 emission reductions from measures that achieve less than the equivalent one ton/day of NO_X reductions even if combined with several measures of similar magnitude cannot advance the attainment date. The TNRCC presents in the SIP Narrative, Chapter 7, a summary of the inventory that reflects the controlled level of emissions. Based on the above screening level one category, storage tanks, was examined for additional control. Based on controls in the Alternative Technique Guideline, only 2.2 tpd of additional reduction in VOC could be achieved which is far less than the equivalent of one ton/day of NO_X reduction and therefore would not advance attainment.

Texas also reviewed all VOC area source (as opposed to points source) categories to see if any categories were emitting greater than 11 tons/day in emissions. While some area source categories emitted more than 11 tons/day, these categories already are subject to rules. TNRCC did not believe additional controls on already regulated categories would be reasonable in light of the amount of VOC reductions needed to achieve ozone benefits.

In summary, the modeling indicates that it takes substantial VOC emission reductions to achieve ozone reductions in the HG area. Already all major sources of VOC's in HG have RACT in place. Emission reductions beyond RACT on major VOC sources may be achievable but could not achieve sufficient ozone benefit for the HG area to achieve attainment in advance of the measures in the SIP we are approving today. Significant area source categories are also regulated. Therefore, no emission reduction measures were identified that would achieve attainment in advance of the measures contained in the plan.

Comment: For States that need additional VOC reductions, this commenter recommends a process to achieve these VOC emission reductions, which involves the use of HFC–152a (1,1 difluoroethane) as the blowing agent in manufacturing of polystyrene foam products such as food trays and egg cartons. HFC–152a could be used instead of hydrocarbons, a known pollutant, as a blowing agent. Use of HFC–152a, which is classified as VOC exempt, would eliminate nationwide the entire 25,000 tons/year of VOC emissions from this industry.

Response: This comment was not provided to TNRCC. EPA has met with the commenter and has discussed the technology described by the company to reduce VOC emissions from polystyrene foam blowing through the use of HFC–152a (1,1 difluoroethane), which is a VOC exempt compound, as a blowing agent. Since the HFC–152a is VOC exempt, its use would give a VOC reduction compared to the use of VOCs such as pentane or butane as a blowing agent. However, EPA has not studied this technology exhaustively. It is each State's prerogative to specify which measures it will adopt in order to achieve the additional VOC reductions it needs. In evaluating the use of HFC–152a, States may want to consider claims that products made with this blowing agent are comparable in quality to products made with other blowing agents. Also the question of the over-all long term environmental effect of encouraging emissions of fluorine compounds would be relevant to consider. This is a technology which States may want to consider, but ultimately, the decision of whether to require this particular technology to achieve the necessary VOC emissions reductions must be made by each affected State. Finally, EPA notes that under the significant new alternatives policy (SNAP) program, created under CAA § 612, EPA has identified acceptable foam blowing agents many of which are not VOCs *(http://www.epa.gov/ozone/title6/snap/).*

In the case of the HG area, the analysis in chapter 7 did not show this category of emissions as one with more than 11 tons/day of emissions so, as discussed in a previous comment, there cannot possibly be enough emission reductions from this category to achieve sufficient ozone benefit for the HG area to reach attainment in advance of the full implementation of the measures in this SIP.

Comment: Two commenters suggested that a portable gasoline container buy back program should be adopted in the HG area to introduce gasoline containers meeting the California Air Resources Board (CARB) standards to the HG area. It was estimated based on CARB experience that controls on containers would be able to achieve 23 tpd of VOC reductions in the HG area.

Response: This measure was suggested to TNRCC as a replacement to their Commercial Lawn Service operating restrictions. TNRCC evaluated the measure and decided the measure would not achieve equivalent reductions to the operating restrictions.

EPA is aware that CARB has projected significant emission reductions from this measure. This is based on their studies of the emissions from evaporation and spillage from gasoline containers in California. TNRCC in their RACM analysis of the HG emission inventory, however, did not identify this source category, i.e., gasoline containers, as having the same level of emissions and therefore the potential to achieve the same level of emission reductions as was found in California. TNRCC used EPA approved methodology to develop its inventory. EPA concludes, based on the record supporting the State's RACM analysis, that Texas used appropriate assumptions for determining emission reductions from this measure. Based on the emission estimates contained in the approved inventory, EPA agrees with Texas that this measure cannot be considered RACM at this time because the measures cannot achieve sufficient ozone benefit for the HG area to achieve attainment in advance of the full implementation of the measures in the SIP we are approving today. Future study of this portion of the inventory utilizing information developed by CARB may indicate that more emissions arise from this category in the HG area and this measure may have to be revisited.

Comment: One commenter pointed to the results of the Channelview Source Reduction Project as evidence that significant levels of VOC emission reductions can be achieved. The Channelview Project resulted in the following improvements: Additional gas flow meters, reduced flaring of off-spec product, elimination of flaring of extra-contract product, improved flare systems, and prevention of unnecessary shutdowns.

Response: The November 14, 2000 ''Source Reduction Project, Report on Phase I'' documents the cooperative effort between the Community Advisory Panel and Lyondell and Equistar (CAPLE) to reduce air emissions at these companies. It documents several improvements and significant emission reductions that have been made at these plants through focusing on source reduction. It is not clear from the report, however, whether or not the measures instituted by these companies have general applicability within the chemical industry. The measures taken by these companies to reduce emissions have promise as measures that can achieve emission reductions throughout the HG area but it will take further study by us and the State to determine if they can be applied to other facilities, are technically and economically feasible and achieve reductions that could advance attainment, and thus can be considered potential RACM for the HG area. Therefore, at this time, EPA cannot find these measures feasible. EPA agrees with Texas that this type of project cannot currently be considered RACM.

Comment: One commenter suggested that the State should reduce fugitive VOC emissions by 90%.

Response: The commenter did not suggest how the 90% emission reduction from fugitive VOC emissions could be achieved. EPA is not aware of any technology or programs that have been demonstrated to achieve this level of reductions. TNRCC already has in place a leak detection and repair requirement that goes beyond the levels in EPA's control technique guidelines to control refinery and chemical plant fugitive emissions. EPA has approved this requirement for fugitive emissions as meeting the RACT requirement for the HG area. Based on the above, EPA concludes that this measure is not technically feasible at this time.

Upset Emissions

Comment: TNRCC has failed to adopt reasonably available control measures for controlling upset emissions because the TNRCC rules fail to meet at a minimum EPA guidance for upset emissions. The rule violates the requirements regarding creating an affirmative defense because (1) it is a blanket exemption, (2) it covers sources whose individual contributions of pollutants have the potential to cause an exceedence, (3) it covers both penalties and injunctive relief, and (4) it could be interpreted as barring citizen and/or EPA enforcement action.

Response: On November 28, 2000, EPA issued a direct final approval of a revision to the Texas SIP addressing excess emissions from start-up, shutdown, malfunction and maintenance. 65 FR 70792. In that notice, EPA explained that it determined that the rule was consistent with the EPA guidance referenced by the commenter, ''State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup and Shutdown,'' September 20, 1999. This determination included EPA's conclusion that the Texas rule does not provide an exemption from compliance for periods of excess emissions. No adverse comments were received and EPA's approval became effective on January 29, 2001. Through the proposed actions on which EPA is taking today, EPA is not re-opening its past approval of SIP requirements. Thus, the commenters attempt to now raise issues about whether EPA's approval of that rule was appropriate are untimely.

Point Source NO_X Controls

Comment: The Phase II NO_X limits agreed to by OTC States are clearly RACM for all areas, as they are widely in effect. States that have not adopted such measures have not adopted enforceable NO_X RACT limits for all relevant facilities. It is not sufficient for States to assert that they will adopt additional NO_X controls if needed.

Response: That the OTC states have implemented the OTC Phase II NO_X limits does not automatically prove that these limits are RACM for all areas. EPA concedes that the wide-spread adoption of such programs and EPA's own analysis of NO_X control on large stationary sources would warrant consideration whether such limits meet the technological and economical feasibility criteria of RACM and would advance attainment. However, such an analysis is not relevant in the case of the HG ozone nonattainment area. Texas has already adopted programs for the HG area to implement limits that are more stringent than the OTC Phase II limits.

Comment: A commenter suggested energy efficiency improvements are not just for residential and commercial buildings and suggested savings could be achieved by more efficient motor and drive systems.

Response: We agree that improved energy efficiency is a desirable method of reducing air emissions. There are difficulties in including such measures in a SIP because it is not always clear

where the benefits of the reduced electrical demand will occur. The reduced demand could result in emission reductions outside the HG area. There are initiatives in Texas to reduce growth in demand in Texas such as the State wide building codes established by Senate Bill 5. The State of Texas has committed to further examine the benefits and methods of improving energy efficiency for possible inclusion in the SIP at the mid-course review. EPA concludes that there is not enough information at this time to determine the appropriate emission benefits and therefore energy efficiency cannot currently be considered RACM.

Comment: Just as Integrated Resource Planning (IRP) for electric utilities resulted in demand side management programs that conserved electricity, IRP for natural gas utilities will have the same impact on conserving natural gas usage and resulting emissions. A number of states have effectively implemented IRP for natural gas.

Response: As noted above, EPA agrees that improved energy conservation-regardless of the form of energy-is a desirable method of reducing air emissions. Since such measures would likely have to rely on voluntary efforts, the State would have to estimate the effect on emission reductions that would result. Putting in place even a voluntary effort to conserve natural gas that could be quantified in terms of its emission reduction benefits would likely require a significant amount of time. EPA is aware that the State had devoted a tremendous amount of resources in developing and adopting the number of control measures that it did for the HG area's one-hour ozone SIP, and even with that had to commit to fill a shortfall of 56 tons/day of NO_X reductions. EPA believes it is unlikely-given the time spent on the bulk of the SIP-that the State had the time to develop such a quantifiable voluntary program that would have yielded enough NO_X reductions to advance the attainment date. Furthermore, it appears unlikely that such a quantifiable program could be put into place in sufficient time to advance the attainment date given the resources that the State will have to spend over the next several years simply developing and adopting the emission controls to achieve the 56 tons/day NO_X emission reductions. Therefore, EPA believes that this measure is not RACM, at this time, for the HG area.

Comment: Stringent Standards for Stationary Diesel Engines: The TNRCC should establish the same requirements for new and existing stationary diesel engines in the HG area that are not used exclusively during infrequent emergency or backup situations.

Response: The State received a similar comment. In their response they explained that based on information in the emissions inventory and contact with diesel engine vendors and others familiar with the stationary diesel engines in the HG area, the State is unaware of any existing stationary diesel engines that are being operated in situations other than generation of electricity in emergency situations or operation for maintenance and testing. The Chapter 117 rule requires that all testing and maintenance be done outside the hours of 6 am to 12 am. As discussed in the comments on the modeling inputs, emissions in the morning are the most conducive to ozone formation. Emissions outside this period are much less conducive to ozone formation. Therefore, the rules for maintenance represent RACM for the HG area.

TNRCC believes and EPA agrees that few existing engines will be moved from emergency service to routine or peak shaving operations for the following reasons. Any existing engines at a site with a collective design capacity to emit (from units with chapter 117 emission limits) greater than ten tpy of NO_X are subject to the Chapter 101 mass emissions cap and trade program if they choose to increase their operation to 100 hours per year or more (based on a rolling 12-month average) and, in addition to having to comply with the Chapter 117 rules, will only be issued NO_X emissions allocations based on their historical activity level which would be much lower than 100 hrs/year. Existing engines theoretically could be switched to peak shaving service up to 100 hours/year but in reality only about 40 hours/year would be available for this type of operation. The remaining time would have to be used for normal routine testing of the engines. It is unlikely that the profit from sale of electricity, would justify the cost of the modifications to the switching system for only about 40 hours of operation. EPA concludes that additional control beyond the existing program is not economically feasible and therefore would not represent RACM.

On-Road Control Measures

Comment: Two commenters suggested that 15 ppm sulfur gasoline should be adopted in the HG area as a reasonably available control measure.

Response: The Act preempts states from establishing state fuels under section 211(c)(4)(A). Waivers from preemption are possible under section 211(c)(4)(C) if the state can show necessity for that fuel to meet the NAAQS, and if no other reasonable or practicable non-fuel measures exist that could be implemented in place of a state fuel. For a state to obtain a waiver of preemption, an acceptable demonstration must be submitted to EPA that can justify the need for a particular state fuel. This provision of the Act was included to discourage the development of a patchwork of fuel requirements from State to State.

Texas considered adopting a 15 ppm sulfur standard in gasoline, but withdrew the proposal once the 30 ppm Federal low sulfur gasoline standard became final. They received comments both for and against the proposal. Comments against cited excessive costs when compared with the emissions benefit, the difficulties in producing a boutique fuel, and anticipated distribution problems and conflicts with on-going efforts to comply with the federal low-sulfur requirements of 30 ppm. Texas only projected a 1.15 ton/day of emission reduction from the institution of a 15 ppm fuel. The BCCA estimates that the cost of these reductions is $400,000/ton to refiners. Based on TNRCC cost estimates, the cost is over $500,000/ton to consumers.

Because of the general preemption in the Act and the low projected cost effectiveness, EPA does not consider this fuel requirement to be RACM for the HG area.

Comment: One commenter suggested that Texas adopt diesel fuel that meets a 15 ppm sulfur standard by 2003.

Response: Texas adopted a low emission diesel fuel in December 2000, that includes a low sulfur component. The state's low sulfur component phases in beginning May 1, 2002, with 500 ppm sulfur statewide for on-highway use and 110 counties in east and central Texas for non-road use. On June 1, 2006, the sulfur level drops to 15 ppm in east and central Texas for off-highway use to be consistent with Federal low sulfur diesel fuel for on-highway use. Thus, TNRCC has already adopted a standard more stringent than the Federal Standards.

In order for Texas to adopt statewide fuel controls that are more stringent than Federal controls, the state must show necessity to achieve the NAAQS in the nonattainment areas and justify implementing a fuel measure over nonfuel measures statewide. Texas has requested and EPA is granting in a separate **Federal Register** a waiver under 211(c)(4)(A) for this fuel. EPA does not believe the accelerated schedule of implementing the low sulfur standard suggested by the commenter is reasonable or will result

in ozone benefits because the low sulfur requirement does not result in NO_X emission reductions by itself but instead enables catalyst technologies. Under Federal regulations, new vehicles will not be required to meet the new emission standard enabled by low sulfur diesel until 2007. Therefore, EPA does not consider calling for these fuel requirements earlier as suggested by the commenter to be RACM.

Comment: Two commenters gave comments that the Inspection and Maintenance Program could be improved. One said that adequate resources to develop and implement an I/M program must be assigned; otherwise, the program cannot be considered credible. A second commenter stated that the program should be established based on where the vehicle owner usually works.

Response: EPA has reviewed the I/M program developed by the State of Texas. In a separate **Federal Register** notice, we are approving the State's I/M program. The new program, using the Accelerated Simulation Mode (ASM) test method will be implemented in all eight counties of the HG nonattainment area and covers more vehicles than are required by the Federal I/M rules. Expanding the program to cover vehicles not registered in the program area is beyond the scope of the Federal rules and would be extremely difficult to implement and enforce. Further, the prior, less stringent program met the minimum I/M requirement for the HG area. The new program goes beyond those requirements. As such, we believe TNRCC has adopted an I/M program that meets the RACM requirement. We agree that adequate resources will have to be devoted to the implementation of this program by the Texas Department of Public Safety and TNRCC for the goals of the program to be achieved. At this time, we have no information to support a determination that the program will not be fully implemented.

Comment: One commenter suggested that public and large commercial fleets be required to have low emitting vehicles.

Response: Texas adopted Fleet provisions and submitted them to EPA on August 27, 1998 as the Texas Clean Fuel Fleet (CFF) substitute plan. EPA approved this provision on February 7, 2001 (66 FR 9203) as meeting the Clean Fuel Fleet Requirements of the Act. These provisions ensure that fleets meet a reasonable level of control in serious and above nonattainment areas. Texas' CFF substitute plan relies on a State fleet program—the Texas Clean Fleet (TCF) program—supplemented with additional volatile organic compound (VOC) and nitrogen oxide (NO_X) emission controls. The emission reductions for Texas' plan greatly exceed the reductions that would have been achieved with the Federal CFF program. Therefore, the State's substitute plan will meet the Federal CFF requirement for VOC and NO_X emissions reductions. EPA believes that TNRCC has instituted RACM for this source category.

Comment: One commenter suggested that the State should encourage the early introduction of Tier 2 vehicles.

Response: In the last session, the Texas legislature passed Senate Bill 5 which includes an incentive program for the purchase of vehicles that meet the more stringent Tier II vehicle standards. This program should result in more cleaner vehicles coming into use in Texas then would be required under the Federal Program. It is uncertain, however, how much additional emission reduction will come from this program as it apparently is the first of its kind in the country. Therefore, EPA concludes that further acceleration of this program would not constitute RACM for the HG area.

Comment: A commenter suggested that non-USA registered trucks should be subject to an I/M inspection.

Response: It is not clear whether the State has the legal authority to require trucks from a foreign country to be inspected. As a practical matter, there are no proven test methods to employ for Diesel I/M programs. Therefore, this cannot be considered a reasonably available measure.

Comment: One commenter felt all highway construction in HG area should be limited. The HG area must absorb on-going expansions at the airports, medical center plus population and job growth. There is no room for the above ongoing new emissions generating projects let alone any new large emissions generating projects. The same commenter later said that the Transportation Improvement Plan and other proposed changes to Regional Highway system must demonstrate full conformity with the Act.

Response: EPA agrees that the Regional Transportation Plans must demonstrate conformance to the State Implementation Plan consistent with section 176(c) of the Act and our transportation conformity rules at 40 CFR 93.100; however, these are separate requirements from demonstrating attainment of the NAAQs. Transportation conformity is the process whereby the transportation plans have to be reconciled with and show they are consistent with the plans for attainment. In this SIP, the State has established an emissions budget for motor vehicle emissions consistent with attainment. The Houston/Galveston Area Council will have to show for all future plans, taking into account existing roads and future growth how they will conform to these budgets. Given the severe impact a ban on road construction would place on the HG area, EPA concludes that this is not a reasonably available measure.

Comment: One commenter suggested the State institute an auto license fee tied to actual vehicle NO_X emission rates.

Response: EPA is not aware of anywhere where this measure has been instituted. It is not clear how much emission reductions could be achieved and at what fee levels. Because of the lack of localized information on the costs and benefits of this program this cannot be considered a RACM.

Texas is already instituting a program to provide rebates for the purchase of vehicles meeting the cleanest Tier II standards. This program should influence positively the introduction of cleaner vehicles into the fleet.

Off Road Measures

Comment: Three commenters recommended measures they felt were appropriate to control emissions from construction equipment. One commenter felt that all diesel equipment should be required to register. He felt this would result in a 70% reduction in emissions. Two other commenters felt that all State and Local Government contracts should have requirements that require lower emission equipment be used.

Response: The Texas legislature has passed an incentive program that will pay for the cost of upgrading diesel equipment to meet cleaner standards. Texas plans to direct 24.7 million dollars/year to the HG area from the Texas Emission Reduction Program passed under Senate Bill 5. Based on experience from similar programs in California, we expect substantial reductions to be achieved. We therefore believe that additional measures to reduce emissions from this category are not RACM.

Comment: One commenter suggested the following measures to achieve additional emission reductions from aircraft operations: (1) Mandatory Powering of Jets at gates with Electric Power (2)Reduced Idling on the runway (3) Congestion Pricing at Rush Hours at Airports.

Response: First, the State has executed agreed Orders with the major airlines and the City of Houston to achieve emission reductions from Ground Support Equipment (GSE) at

airports in the HGA area. These Orders require a phased-in replacement of current combustion engine equipment with electric equipment or to achieve equivalent reductions. Equipment powering jets at gates is included in the definition of GSE; thus, over a period of time jets at gates will be powered with electric equipment or equivalent emission reductions will be achieved. Second, although planning of airline operations during rush hours to reduce idling on runways to reduce emissions may have merit, the State does not have the authority to impose regulations on airlines to require this planning. The Federal Aviation Administration has jurisdiction over airline operations once the aircraft leaves the gate and State regulation is pre-empted. Third, since the State has no authority to control airline operations, and congestion is a function of the higher level of operations during rush hours, congestion pricing is likely to place an unnecessary economic burden on the traveling public with no air quality benefits. State controls on pricing are expressly preempted by the Air Deregulation Act. Therefore, EPA concludes that such measures are not reasonably available.

Transportation Control Measures and Land Use

Comment: Transportation Control Measures as RACM: EPA gives virtually no consideration to the emission reduction benefits of transportation programs, projects and services contained in adopted regional transportation plans (RTPs), or that are clearly available for adoption as part of RTPs adopted for a nonattainment area. In addition, it is arbitrary and capricious for EPA not to require as RACM economic incentive measures that are generally available to reduce motor vehicle emissions in every nonattainment area. One commenter provided a report ''Studies on the Travel and Air Quality Effects of Transit, Land Use Intensification, and Auto Pricing Policies.'' The commenter felt this report contained measures that are RACM.

Response: A similar comment was received in response to the analysis EPA performed as part of EPA's notice of availability where an analysis of Reasonably Available TCMs was performed for four serious ozone nonattainment areas: Greater Connecticut, Springfield, MA, Washington, DC and Atlanta. In the Technical Support Document for the July 12, 2001 proposal on RACM, EPA performed a similar analysis for the HG area. This analysis was performed to evaluate the State's conclusion that further TCMs are either economically infeasible or would not advance attainment.

EPA's TSD for the July 12, 2001 proposal on RACM for the HG area does consider transportation programs, projects and services that are generally adopted, or available for inclusion in a nonattainment area's SIP. The RACM analysis includes seven broad categories and twenty-seven subcategories of Transportation Control Measures (TCMs) that represent a range of programs, projects and services. The inclusion of a TCM in an RTP or TIP does not necessarily mean that it meets EPA's criteria for RACM and must be included in the SIP. The measure must also contribute to expeditious attainment. EPA concluded from its analysis that the State's assertion that further TCMs are not RACM was appropriate.

Some of these TCMs, such as parking cashout, transit subsidies, and parking pricing, are explicitly economic incentive programs. Furthermore, these categories of TCMs, as well as most of the others, could be infinitely differentiated according to criteria, such as the method of implementation, level of promotional effort or market penetration, stringency of enforcement, etc. The application of economic incentives to increase the effectiveness of a TCM is one such criterion. These implementation variables, representing levels of implementation effort, are implicit in the range of effectiveness for each category of TCM. EPA does not believe it is necessary, or even practically possible, to evaluate every explicit variation of TCM's in order to adequately determine if it is reasonably available.

From the analysis for the HG area, EPA identified 1.7 to 22.4 tpd of NO_X emission reductions as theoretically achievable from TCMs. The EPA believes that emission reductions which are in the low- to mid-point range of EPA's analysis are achievable with careful planning, adequate implementation resources, aggressive public information programs and a sustained commitment by the implementing agencies. TNRCC has identified in its SIP the implementation of a wide range of TCMs which are projected to achieve 4.86 tpd of emission reductions. The TCM's identified in the HG analysis are in the low- to mid-point range. Additional emission reductions beyond this level that could be reasonably achieved would not advance attainment given that the final 121 tons/day of NO_X emissions reductions from the point source rules will not be achieved until spring of 2007.

There are many important reasons why a state, regional, or local planning agency might implement TCMs in an integrated traffic management plan beyond whatever air quality benefits the TCMs might generate, including preserving open space, water shed protection, avoiding sprawl, mitigating congestion, and ''smart growth'' planning generally. So the fact that TCMs are being implemented in certain ozone nonattainment areas does not necessarily lead one to the conclusion that those TCMs represent mandatory RACM when they are analyzed primarily for the purpose of determining whether they would advance the ozone attainment date.

The report, ''Studies on the Travel and Air Quality Effects of Transit, Land Use Intensification, and Auto Pricing Policies,'' provides case studies from two areas of the country, Portland OR, and Sacramento, CA and a literature survey. EPA's analysis included consideration of measures in the same categories as provided in this report. Based on this analysis, EPA does not believe implementation of these measures would advance the HG area's attainment. Further, as stated in the General Preamble, 57 FR 13560, EPA believes that local circumstances vary to such a degree from city-to-city that a national presumption of RACM is not appropriate. It is more appropriate for States to consider TCM's on an area-specific basis and to consider groups of interacting measures, rather than individual measures. Therefore, based on EPA's analysis, EPA cannot conclude that these measure suggested in the report are RACM for the HG area.

Comment: A number of specific TCMs and economic incentive programs to reduce vehicle miles traveled were identified by various commenters. These include: Telecommuting, satellite offices, college/university traffic control measures, Bike and Walk pathways, Increased Government Use of the Web, Voluntary No Drive Days, Trip Reduction Ordinances, Employer Based Transportation Management, Road Pricing, Ride Share Incentives, Insurance Pricing, Commuter Choice, Parking Cashout, Taxes on Paid Parking, Congestion Pricing, Location Efficient Mortgages, Fee Bate on Suburban Mortgages, Tax Incentives for Living Near Place of Employment, Incentives for Transit Oriented Development and improved incident response.

Response: As stated in the previous response, EPA does not believe it is necessary, or even practically possible, to evaluate every explicit variation of

TCM's in order to adequately determine if it is reasonably available. EPA notes that many of the measures listed above are being encouraged in the HG area as part of the commuter choice program such as telecommuting, ride share incentives, and employer based transportation management. As discussed in the previous comment Texas has identified 4.83 tpd of NO_X emission reductions from reasonably available Transportation Control Measures which, based on the literature survey, falls into the low to midpoint of emission reductions theoretically achievable from these programs. Also, as noted above, this small amount of emissions reductions would not advance attainment prior to the implementation of all other measures in the plan. Therefore, EPA believes the small amount of additional reductions that could reasonably be achieved would not advance attainment.

Comment: EPA's analysis also completely fails to consider the additional benefits likely from combined implementation of complementary TCMS e.g., parking management along with transit improvements. It is arbitrary and irrational for EPA to assume that these measures can and will be implemented in complete isolation from one another.

Response: EPA recognizes that many control measures, particularly TCMS, are more effective if done in conjunction with others. EPA maintains, however, that it is not practically possible to analyze a seeming infinite set of combinations of measures for possible benefits. The EPA's analysis did look at all measures in various categories at a reasonable level of implementation and concluded that as a whole these categories of measures, taken together, would not advance attainment or would otherwise not be reasonably available.

General RACM Comments

Comment: One commenter suggested that the SIP should include enforcement of New Source Review such that grandfathered plants would get emissions permits with emission limits that are identical to new construction as of June 2001.

Response: Existing industrial sources in the HG area are required to comply with Chapter 115 for VOC and Chapter 117 for NO_X controls regardless of whether the sources are permitted or grandfathered. These rules have been approved as RACT. In addition all sources, both existing and new, are subject to the NO_X mass emissions cap in Chapter 101. Requiring all existing sources to obtain permits is not likely to result in any additional emission reductions beyond those achieved by the Chapter 115 and Chapter 117 rules.

Comment: One commenter incorporated in their comments to EPA their comment to the TNRCC where they encouraged the State to use Market Incentives to the extent possible.

Response: We believe the State has employed market based incentives in a variety of programs. The cap and trade program and the Texas Emission Reduction Program are the two main examples of programs that use markets to provide significant flexibility in how emission reductions are achieved.

Comment: STAPPA's 1993 report recommended adoption of California or South Coast Air Quality Management District (SCAQMD) controls/limits for various source categories. The commenter mentions further possible control measures as well, and notes that none of the states offered consideration of these measures accompanied by reasoned explanations for their rejection.

Response: Texas used the EPA survey ''Serious and Severe Ozone Nonattainment areas: Information on Emissions Control Measures Adopted or Planned and Other Available Control Measures'' as a basis to determine if all reasonably available control measures had been implemented. This report includes measures from the STAPPA 1993 report and other measures that EPA considers potentially reasonably available. TNRCC did not identify any additional measures that were considered reasonable for the HG area.

Comment: By absorbing ozone and reducing air temperatures, trees actually account for a small but measurable reduction in ozone levels. The EPA should work with TNRCC to encourage public funding for tree planting and local ordinance that require canopy cover in new private development.

Response: EPA agrees that tree planting can result in a possible reduction in ozone formation. Unfortunately, at this time, these benefits are difficult to quantify. Efforts are currently underway to complete a modeling study to quantify the impacts of various urban heat island mitigation strategies using the photochemical model. It is hoped that these studies will provide information that will allow tree planting strategies to be included as a creditable portion of the SIP at a later date, perhaps for the mid-course review SIP submission. Texas is involved in this effort and intends to incorporate such programs in the SIP should they prove effective and reasonably available.

C. Response to Comments on Local Measures

1. Comments on Speed Limits

Comment: Three commenters indicated the speed limit measure would not be enforced or was not enforceable and that EPA should not give credit unless TNRCC develops a mechanism to demonstrate that speeds actually decrease.

Response: The mechanism to enforce reduced speed limits is already in place with the Department of Public Safety and local municipalities. EPA acknowledges that it is unlikely that 100% of vehicles will comply with the new speeds. The modeling projections assume that the average speed will be 10% higher than the posted speed limits on roads that currently have average speeds above the reduced speeds. Thus, the State has made reasonable assumptions to anticipate the level of compliance with this rule. We believe we can approve these reasonable planning assumptions about speed reductions. It would not be appropriate to wait until Texas proves that the speeds have been reduced to give credit for this measure just as we would not wait until industrial sources have accomplished their emission reductions before approving point source rules. We do believe that the effectiveness of this measure, as with all measures, should be monitored. Data is collected in the HG area by Transtar and Texas Department of Transportation. This data could be used to evaluate the efficacy of this measure in reducing speeds.

2. Comments on the VMEP

Comment: The plan includes impermissible reductions for ''Voluntary controls.'' EPA has no legal basis for issuing SIP credit for the VMEP program; the VMEP measures do not meet the test of being real, permanent, and enforceable to qualify for emission reductions.

Response: EPA disagrees with the comments, and continues to believe that the voluntary measures proposed by Texas for inclusion in the SIP are approvable under the Act. EPA acknowledges that, by themselves, the measures would not be approvable, because, as noted by the commenter, they are not enforceable against the entities producing the emissions reductions and thus do not meet the enforceability requirement of section 110(a)(2)(A). However, EPA did not propose to approve the measures by themselves. EPA proposed to approve them only in conjunction with an enforceable commitment by the state of Texas to monitor implementation of the

voluntary measures, determine whether the anticipated reductions from the measures were in fact achieved, and if not to either alter the program such that the requisite reductions will be achieved, adopt substitute measures, or demonstrate that the attainment and maintenance goals of the ozone SIP can still be met without the reductions from these measures. Thus, EPA did not propose to approve voluntary measures as satisfying the enforceability requirements of section 110. Rather, EPA proposed to approve the voluntary programs into the SIP as part of the overall attainment scheme, and proposed to approve the state's enforceable commitment to monitor, assess, and rectify any shortfall as meeting the enforceability requirements of the Act.

EPA continues to believe that this approach is a proper means of encouraging implementation of innovative mobile source control measures while providing an enforceable SIP backstop measure. Ideally, the voluntary measures will produce the estimated emissions reductions without need for any state backfill or federal or citizen enforcement. However, should any shortfall result, Texas will be bound by the enforceable SIP commitment to rectify the problem and supply the necessary emissions reductions. Both EPA and private citizens retain all of their rights under sections 113 and 304 to bring appropriate enforcement pressure to bear against the state should Texas fail to monitor, assess or fill any shortfall in emissions reductions resulting from implementation of the voluntary measures in the SIP. Contrary to the commenter's allegations, the emissions reductions associated with the voluntary measures in the HG area SIP are required to be achieved; it is however the state and not the individuals implementing the voluntary measures who must ultimately produce them.

Comment: Two commenters raise numerous arguments concerning the unenforceability of the voluntary measures.

Response: The commenter makes no mention of the enforceable state commitment other than to refer to it as insufficient. This statement without further explanation does not give EPA any guidance on the alleged inadequacy of the commitment nor how the commenter would have EPA improve upon it. Therefore, EPA continues to maintain that the commitment is approvable as meeting the enforceability requirements of the Act. In the past, EPA has often approved enforceable state commitments to take future actions under the SIP, and these actions have been enforced by courts against states that have failed to comply with those commitments.[16] EPA believes that the Texas commitments associated with the voluntary measures portion of the SIP are similarly enforceable and thus approvable. NRDC alleges that the Act requires all control measures to be enforceable against individual polluters and not just against states. However, many mobile source control measures are enforceable only against the state or local transit operator, and not the individual entities actually producing the emissions reductions, for instance in the case of state obligations to establish vehicle inspection and maintenance programs or to purchase buses or expand transit systems. The Act does not require federal enforcement capability against individual vehicle owners or transit users prior to approval of such programs into the SIP.[15]

Comment: A commenter alleges that the public cannot adequately monitor implementation of the voluntary measures nor determine whether the emissions reductions are achieved. The commenter admonishes the State to commit to a solid evaluation or auditing framework to monitor performance of measures in the VMEP.

Response: Texas is required by its enforceable commitment to conduct the evaluation and audit mentioned by ED, and should make such assessments available to the public in the normal course of administrative practice. The commenters also claim that the state itself has raised concerns about the emissions reductions that will be achieved from these measures. Such concerns may be valid, nevertheless Texas has made a commitment to fill any shortfall in emissions, which both EPA and citizens can enforce under the Act.

Comment: A commenter makes various arguments about the unacceptability of the voluntary measures program stemming from the stationary source permitting program under Title V of the Act.

Response: Title V is totally irrelevant to these mobile source programs. The voluntary measures program Texas has included in the HG SIP applies only to mobile sources that are not subject to regulation under the Title V stationary source operating permit program.

Comment: EPA can not alter its past interpretations without completing notice-and-comment rulemaking.

Response: EPA believes that this action is consistent with its past interpretations that enforceable state commitments to take future action are approvable SIP measures. For example, see EPA actions approving California plans at 62 FR 1150 (January 8, 1997) and 65 FR 18903 (April 10, 2000). In addition, this action is consistent with the guidance that EPA issued in 1997 indicating its belief that voluntary programs could be approved in conjunction with enforceable state commitments to fill any resultant shortfall.[18] The individual SIP approval actions implementing the VMEP guidance constitute the notice-and-comment rulemaking required to effectuate action under the guidance. Thus, this SIP rulemaking satisfies both CAA and APA rulemaking requirements with respect to final interpretations of the Act consistent with the guidance. Further, NRDC alleges that EPA may not alter interpretations of the Administrator through SIP rulemaking signed by the Regional Administrator. However, the Administrator has properly delegated the authority for SIP rulemakings to the Regional Administrators under Delegation 7–10 dated May 6, 1997, and section 301(a)(1) of the Act. Thus, the Regional Administrators are authorized to act for the Administrator with respect to all matters pertaining to SIP approvals, including interpretations of the Act relevant to a given SIP approval.

Comment: A commenter questions the 3% limit on voluntary measures, arguing that this limit itself implicitly acknowledges that such measures are not approvable.

Response: EPA did not impose the 3% limit because it believed the measures to be suspect, but rather, as noted in the VMEP guidance, based on the innovative nature of the measures and the agency's lack of experience both

[16] See, *Trustees for Alaska* v. *Fink,* 17 F. 3d 1209 (9th Cir. 1994); *Coalition Against Columbus Center* v. *City of New York,* 967 F. 2d 764 (2d. Cir. 1992); *Citizens for a Better Environment* v. *Deukmejian,* 731 F. Supp. 1448, reconsideration granted in part, 746 F. Supp. 976 (N.D. Cal. 1990); *American Lung Ass'n of New Jersey* v. *Keane,* 871 F.2d 319 (3d Cir. 1989); *NRDC* v. *New York State Department of Environmental Conservation,* 668 F. Supp. 848 (S.D.N.Y. 1987); *Council of Commuter Organizations* v. *Gorsuch,* 683 F.2d 648 (2d Cir. 1982) and *Friends of the Earth* v. *EPA,* 499 F.2d. 1118 (2d. Cir. 1974).

[17] The Act does require that enhanced I/M programs include state enforcement through denial of vehicle registration without proof of compliance with inspection requirements. However, the enforceable SIP requirement is to develop a program that includes registration denial, and any enforcement would be against the state for failing to deny registration. The Act does not contemplate enforcement actions against individual vehicle owners attempting to register their vehicles.

[18] Guidance on Incorporating Voluntary Mobile Source Emission Reduction programs in State Implementation Plans (SIPs), October 24, 1997.

with implementation and calculating appropriate credit for such measures. Therefore, EPA created the 3% limit as a policy matter, indicating in the guidance that it did not think it would be appropriate to approve a greater percentage while the agency begins to implement the program. EPA further indicated that it would reassess the limit after several years of experience with the program. Since all VMEP measures would be approved only with enforceable state commitments to fill any resultant shortfall, EPA felt confident that including voluntary programs up to 3% of required emissions reductions in SIPs would not jeopardize attainment and maintenance goals during initial implementation under the policy. Further, EPA did not indicate that 3% of required emissions reductions could be considered *de minimis,* as the commenter implies. EPA agrees with the commenter that it should not conclude in advance that any given percentage of emissions reduction could be considered *per se de minimis* for all areas and types of SIPs. Any conclusion about the *de minimis* nature of required emission reductions should be made in light of the specific circumstances of the areas and CAA requirements at issue. Therefore, all of the commenter's arguments relating to the availability of a *de minimis* exemption and the need for notice-and-comment rulemaking to effectuate it are not relevant to EPA's approval of the voluntary measures in the HG area SIP.

Comment: The record is insufficient to support TNRCC's credit claims.

Response: EPA reviewed the documentation submitted for each measure of the VMEP. We found that for each measure the documentation was acceptable to demonstrate that the criteria for approval were met for each measure. For each measure the State was able to show that the measure plus the State commitment was quantifiable, surplus, enforceable, permanent, and adequately supported.

Comment: One commenter pointed out that delays may result from identifying and rectifying emissions shortfalls.

Response: EPA acknowledges that reductions will be somewhat delayed where states must first monitor and assess implementation and subsequently implement corrections. For this reason EPA indicated in the VMEP guidance that states should fill any shortfalls in a timely fashion. EPA recently issued a companion voluntary measures policy for stationary sources. See, ''Incorporating Voluntary Stationary Source Emission Reduction Programs Into State Implementation Plans—FINAL POLICY,'' memorandum and attachment dated website January 19, 2001, from John Seitz, Director of the Office of Air Quality Planning and Standards. In that policy EPA indicated that where voluntary measures were included in attainment or rate of progress SIPs, any shortfalls would have to be filled prior to the relevant attainment or progress milestone date. EPA believes this is an appropriate interpretation of the requirement to fill shortfalls in a timely fashion under the VMEP policy.

Comment: EPA put forth different, conflicting explanations for why VMEP measures purportedly will meet the enforceability requirements of section 110(a)(2) of the Act. In the DFW proposed approval we say that the measures will be enforced by the State, whereas in the HGA proposed approval we say that the voluntary measures will be enforceable against the State.

Response: As discussed above, courts have upheld the legal authority to enforce state SIP commitments. The language in the DFW notice was intended to indicate that Texas was to monitor and assess reductions attributable to VMEP and, in case of a shortfall, implement measures to offset that shortfall. What is enforceable is the commitment to see that reductions in an amount equal to what is proposed in the VMEP are achieved. Such enforcement is also available against the State, but not against the individual entities that are implementing the voluntary measures. Texas has made similar commitments with respect to both Dallas/Fort Worth and the HG area.

Comment: EPA improperly redefined the subject of the enforceability requirements of section 110(a)(2); that what is enforceable against the State is the commitment to monitor, assess, and timely remedy a shortfall from implementation of the measures.

Response: We agree that what is enforceable against the State is the commitment to monitor, assess and timely remedy any shortfall to ensure the claimed VMEP reductions are met. We do not agree that this is improper under the Act and have already cited case law in support of this position.

Comment: One commenter appreciated EPA's approval of the VMEP and asked for the State's and EPA's continued support.

Response: We appreciate the commenters support. EPA will continue to support the State's VMEP activities as long as they are developed and implemented in accordance with EPA's October 24, 1997, Guidance on Incorporating Voluntary Mobile Source Emission Reduction Programs in State Implementation Plans (SIPs) and the responses to comments in this rulemaking.

3. Comments on TCMs

Comment: The commenters stated that the TCMs are inadequate and do not satisfy the requirements of section 182(d)(1)(A) of the Act.

Response: Section 182(d)(1)(A) directs the State to submit a SIP revision that identifies and adopts specific enforceable transportation control strategies and TCMs to offset any growth in emissions from growth in vehicle miles traveled or number of vehicle trips in severe nonattainment areas, and to attain reduction in motor vehicle emissions as necessary to meet reasonable further progress and attainment requirements of the Act. The State submitted SIP revisions to the EPA on August 25, 1997 and May 17, 2000 to address the VMT Offset provision, the first required element under section 182(d)(1)(A). The EPA proposed approval of these SIP revisions on July 10, 2001 (66 FR 35920, *see also* 66 FR 35903), and subsequently received public comments. The EPA's final approval action on this SIP, the VMT Offset Plan, has been taken in a separate concurrent Federal Register action that discusses the emissions growth offset element in detail.

That action also explains that EPA believes it is appropriate to allow States to separate the VMT Offset SIP into three elements, each to be submitted at different times: (1) The initial requirement to submit TCMs that offset growth in emissions; (2) the requirement to comply within the 15 percent periodic reduction requirement of the Act; and (3) the requirement to comply with the post-1996 periodic reduction and attainment requirements of the Act. Please see the concurrent VMT Offset action referenced above for the first element.

Today's action here satisfies the second and third elements of section 182(d)(1)(A). EPA believes this SIP action, including its TCMs, demonstrates that the HG area will achieve the required ROP and attainment of the ozone NAAQS for the reasons discussed in more detail throughout this final action, and that the SIP therefore satisfies the last two elements.

D. Response to Comments on Post 1999 Rate of Progress Plans

Comment: Texas provided a comment on EPA's December 1999 proposal indicating the April 2000 SIP revision will contain a commitment by the state

to submit a full Post-99 ROP analysis by 12/31/00.

Response: Texas has fulfilled this commitment. EPA is approving this Post-99 ROP plan in this action.

Comment: The TNRCC ROP plan should be revised to be consistent with the budget. The required NO_X reduction for 2005–2007 should be more than the 6% (3%/year for the 2 year period) figure included in Chapter 5.

Response: The EPA acknowledges that the TNRCC has included a 2007 MVEB, which in conjunction with the other measures in the plan will result in more than 6% emission reduction. The Rate of Progress requirement is to achieve at a minimum 6% emission reduction for the time period 2006–2007 as called for by section 182(b)(2) of the Act. The requirement should remain 6%, setting the MVEB lower will only result in more reductions than needed to achieve the required ROP levels.

Comment: One commenter on the December 1999 proposed approval/proposed disapproval claims that the plans fail to demonstrate emission reductions of 3% per year over each 3-year period between November 1999 and November 2002; and November 2002 and November 2005; and the 2-year period between November 2005 and November 2007, as required by 42 U.S.C. section 7511a(c)(2)(B). The states have not even attempted to demonstrate compliance with these requirements, and EPA has not proposed to find that they have been met. The EPA has absolutely no authority to waive the statutory mandate for 3% annual reductions. The statute does not allow EPA to use the NO_X SIP call or 126 orders as an excuse for waiving rate-of-progress (ROP) deadlines. The statutory ROP requirement is for emission reductions—not ambient reductions. Emission reductions in upwind states do not waive the statutory requirement for 3% annual emission reductions within the downwind nonattainment area.

Response: Under no condition is EPA waiving the statutory requirement for 3% annual emission reductions. In today's action we are approving Texas Post-99 ROP plan as submitted December 2000 and revised and submitted in October 2001. As provided in this EPA's final action on the ROP plan Texas is relying on reductions of NO_X and VOC within the nonattainment area for meeting the ROP requirement.

E. Response to Comments on Administrative Record

Comment: A commenter could not find support in the administrative record for the following propositions:

The Shortfall

Proposition: Identified potential measures can achieve an additional 56 tons/day NO_X emissions reduction without requiring additional limits on highway construction.

Support: In Chapter 7, Texas projected that the measures being considered for adoption would address the 56 tpd short fall. Examination of these measures reveals that their implementation would not result in additional limitations on highway construction. Further, the State has provided a commitment that future measures will not rely on limits on highway construction.

Proposition: The State's cited ranges of potential reductions from measures being considered to address the shortfall provide a ''reasonable assurance'' that the State can meet its commitment to submit adopted measures to fill the shortfall; the State has identified sufficient innovative programs and new technologies such that it is reasonable to believe that, in the aggregate, the projected emission reductions from these new programs and technologies can be achieved and will fill the shortfall and the measures to be considered for adoption at the mid-course review can achieve the NO_X emissions reductions indicated on pp. 23–24 of the Technical Support Document.

Support: Chapter 7 of the Texas SIP discusses each of the measures and the State's projected range of emission reductions. The TSD in Section IV.F. has further discussion of each of the potential measures and information that exists to support the projected emission reductions.

SB5 and Incentive Programs

Proposition: Texas Emission Reduction Plan (TERP) will provide 130 million dollars per year for incentive programs to reduce emissions.

Support: This estimate was based on fiscal estimates provided by the State regarding the revenue that will be available from the fees associated with this bill. Chapter 7 of the adopted SIP cites an estimate of 133 million dollars.

Proposition: Incentive programs in SB5 can achieve more reductions than the reductions that were projected to be achieved by the accelerated purchase of Tier II/III non-road diesel equipment and the Heavy-duty Diesel Equipment Operating Restrictions measure and can contribute to reducing the shortfall.

Support: This is discussed at Section IV.F. of the TSD.

Proposition: It can safely be assumed that at least 45% of the SB5 funding for clean up of diesel engines will go to the HG area and TERP can reasonably be expected to provide 40 million dollars/year to the HG area for reducing emissions from existing diesel equipment.

Support: These assumptions were first developed based on early discussions with TNRCC. We understand as pointed out by the commenter that only $24.7 million/year are currently being planned for the HG area. As discussed in our response to comment on this issue, we believe this will still provide sufficient funds to replace the emission reductions from the morning construction ban and Accelerated Tier II/III. clearly, the priority of TNRCC and the legislation is to preserve the HG and Dallas/Fort Worth SIPs. to that end as discussed in the comments on this control strategy in section III.B.3, Texas has the discretion to provide more money, even more than 40 million, to the HG area if necessary.

Proposition: Incentive programs in SB5 can obtain emissions reductions from existing diesel equipment at an average cost on the order of $3,000–5,000/ton.

Support: As stated in the TSD, this is based on experience with California programs. The actual experience of the Carl Moyer Program is a cost effectiveness of better than $3000/ton as stated in ''The Carl Moyer Memorial Air Quality Standards Attainment Program (The Carl Moyer Program) Guidelines-Approved Revision 2000, November 16, 2000 California Environmental Protection Agency Air Resources Board.''

Proposition: The TERP program for reducing emissions from diesel equipment can achieve between 32 and 40 tons/day of emissions reductions in the HG area.

Support: This is discussed in IV.F of the TSD. It is also discussed in Chapter 7 of the adopted version of the Texas SIP and in the responses to comments in this action.

Proposition: The TERP's projected emissions reductions that will be substituted for the Tier II/III non-road diesel equipment measure will achieve 12.2 tons/day. It is also discussed in Chapter 7 of the adopted version of the Texas SIP submitted in a letter dated October 4, 2001.

Support: This is discussed in Section IV.F of the TSD.

Growth Rates

Proposition: Projected growth rates and emissions reductions from the sources subject to the Tier 2 Vehicle Emission Standards and Federal Low Sulfur Gasoline, National Low Emitting

Vehicle Standards, and Heavy-duty Diesel Standards were calculated correctly by the State.

Support: The procedures for calculating the emissions from on-road vehicles are documented in Chapter 3 of the SIP. As discussed in Chapter 3, these emissions are based on a report that was included in Appendix G of the November 1999 SIP revision. Chapter 3 discusses several refinements and revisions to what was provided in the November 1999 SIP. These were discussed in Appendix A of the TSD Section I.F.

Proposition: Growth rates and emission reductions were correctly projected by the State for sources subject to the Federal Measures, including on-road and off-road mobile source measures and the Act Statutory Requirements.

Support: On-road measures were discussed in the previous proposition. Off-road measures are also discussed in I.F. of Appendix A of the TSD.

Proposition: The State has correctly factored growth in emissions due to population and economic growth.

Support: These are discussed in Section I.G.4 of Appendix A of the TSD.

Settlement

Proposition: Additional controls at uncontrolled grandfathered facilities in East Texas, which are called for by recent legislation, will offset the increased emissions from utilities pursuant to the settlement agreement.

Support: This issue is discussed in Chapter 6 of the Texas SIP. EPA's review is discussed in the TSD in Section III.K of the TSD. The issue is also discussed in the response to comments regarding model inputs.

Proposition: Substitution of a portion of the emissions reductions from the new TERP measures for the modeled Heavy-duty Diesel Equipment Operating Restrictions along with the change in the NO_X point source measures are not expected to increase the modeled ozone reductions. Changes in the Heavy-duty Diesel Equipment Operating Restrictions and rules for utilities will not ''adversely affect the modeling results'' or ''affect modeling results in a way to increase ozone.''

Support: These issues were discussed in III. I. of the TSD and in Chapter 7 of the adopted SIP revision.

Speed Limit Reductions

Proposition: Reductions in the speed limit to 55 mph in the HG area will result in the reductions calculated by TTI. The percentage of motorists that TTI projected to exceed the newly proposed speed limits is reasonable.

Support: The reduction in speed limit is discussed in detail in TNRCC's SIP and in particular in the State's response to comments in the December 2000 SIP. EPA reviewed and evaluated these documents to draw these conclusions. Also, se the Chapter 3 of the December 2000 SIP and Appendix A of the TSD.

RACM

Proposition: Texas has established that all reasonable measures that could accelerate the attainment date have been adopted, or will be adopted.

Support: Chapter 7 of the SIP and Appendix B of the TSD extensively discuss this issue.

VOCs

Proposition: The modeling and list of control measures demonstrate that additional VOC controls are not cost-effective in reducing ozone in the HG area and would not advance the attainment deadline.

Support: This issue is extensively discussed in Appendix B. of the TSD and Chapter 7 of the SIP. This issue is discussed further in our response to comments on this action.

Proposition: RACT is in place for all major sources of VOC in the HG area.

Support: As part of our action approving VOC requirements, we found that the State had adopted RACT for all major sources, in the HG area except those that were to be covered by post-enactment Control Technique Guidelines (CTG's)(60 FR 12437, March 7, 1995). Since that time many expected CTGs were issued as Alternative Control Technique documents—ACTs. Of the expected CTGs and ACTs, the HG area had major sources in the following categories; batch processing, industrial wastewater, reactors and distillation, and wood furniture. We have approved measures for all of these categories as meeting RACT.

Batch Processing—July 16, 2001 66 FR 36913

Industrial Wastewater—December 10, 2000 65 FR 79745

Reactors and Distillation—January 26, 1999, 64 FR 3841

Wood Furniture—October 30, 1996, 61 FR 55894

State's Estimated NO_X Reductions

Proposition: The State control measures and local initiatives will provide the NO_X reductions indicated in Table 4 of the TSD. The State's projection of expected emissions reductions from Regional and Local Measures is correct (this includes the adequacy of the equivalent NO_X reductions credited to the commercial lawn care shift). The NO_X reductions for the 2007 attainment year resulting from the State control measures and local initiatives predicted in Table 4 on pg. 18 of the TSD are accurate.

Support: First, each of the control measures have been approved in separate actions or in this action as listed in Section II of this action. These **Federal Register** actions announce our belief that these are permanent, enforceable measures that will achieve emission reductions toward attainment. Regarding the projected emission reductions from each measure:

Point Source Control reductions are well documented in a table in the State's preamble to NO_X rules submitted in December 2000. We reviewed this table in concluding the SIP will achieve the projected reductions from point sources. Also see the EPA's TSDs for its actions on the point source rule and this action.

The record for reductions for on-road emissions reductions from I/M, low emissions diesel fuel, speed limit reductions, and vehicle idling are discussed in previous propositions. They are principally discussed in the record in Chapter 3 of the SIP and in Appendix A of the TSD.

Off-road measures; Heavy duty diesel operating restriction and Accelerated Tier II/III have been replaced by the TERP and the potential emission reductions from the TERP are discussed in section IV.F. of the TSD. The emissions shifted by small spark operating restrictions are discussed in the State's preamble to the rule and in Chapter 6. Airport GSE emissions are discussed in Appendix A of the TNRCC December 2000 SIP submission, Heavy equipment gas engines emission reductions are discussed in the State's preamble to the rules submitted in December 2000.

Gas-fired water heaters—EPA reviewed the discussion provided in the State's preamble to the water heater and small boiler rule.

VMEP measures and the projected emission reductions are extensively discussed in Appendix K of the December 2000 State submission and in section IV of the TSD.

Energy Efficiency projections are discussed in Chapter 6 of the SIP.

Transportation Control Measure are documented in Appendix I of the SIP and discussed in section IV of the TSD.

IV. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not

subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 14, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Attainment, Hydrocarbons, Nitrogen oxides, Ozone, Incorporation by reference, Reporting and recordkeeping requirements.

Dated: October 15, 2001

Gregg A. Cooke,

Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

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

Subpart SS—Texas

2. In § 52.2270, entries in the ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP'' table in paragraph (e) are added to the end of the table to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(e) * * *

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/effective date	EPA approval date	Comments
* *	* *	*	*	*
Attainment Demonstration for the 1-hour Ozone NAAQS.	Houston/Galveston, TX	[1] 12/09/00	[Insert 11/14/01 Federal Register cite].	
Speed Limit Reduction	Houston/Galveston, TX	12/09/00	[Insert 11/14/01 Federal Register cite].	Section 6.3.12
Voluntary Mobile Emission Program	Houston/Galveston, TX	12/09/00	[Insert 11/14/01 Federal Register cite].	
Texas Senate Bill 5	Houston/Galveston, TX	9/26/00	[Insert 11/14/01 Federal Register cite].	
Transportation Control Measures Appendix I	Houston/Galveston, TX	12/09/00	[Insert 11/14/01 Federal Register cite].	
Commitment to Mid-course review	Houston/Galveston, TX	4/19/01	[Insert 11/14/01 Federal Register cite].	

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP—Continued

Name of SIP provision	Applicable geographic or nonattainment area	State submittal/effective date	EPA approval date	Comments
Table 7.1–1 Enforceable Commitments	Houston/Galveston, TX	9/26/01	[Insert 11/14/01 Federal Register cite].	
Post 1999 Rate of Progress Plans and associated contingency measures.	Houston/Galveston, TX	9/26/01	[Insert 11/14/01 Federal Register cite].	
15% Rate of Progress Plan	Houston/Galveston, TX	12/09/00	[Insert 11/14/01 Federal Register cite].	
Revisions to the 1990 Base Year Inventory ..	Houston/Galveston, TX	12/09/00	[Insert 11/14/01 Federal Register cite].	
Reasonably Available Control Measure Analysis.	Houston/Galveston, TX	9/26/01	[Insert 11/14/01 Federal Register cite].	

[1] As revised 9/26/01.

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[FR Doc. 01–27580 Filed 11–13–01; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–134–5–7509; FRL–7091–5]

Approval and Promulgation of Air Quality State Implementation Plans (SIP); Texas: Low Emission Diesel Fuel

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Texas establishing a Low Emission Diesel (LED) fuel program for distribution in 110 counties in the eastern and central parts of Texas. Texas developed this fuel requirement to reduce ozone as part of the State's strategy to achieve the National Ambient Air Quality Standard (NAAQS) in the Houston-Galveston Area (HGA) nonattainment area. We are approving Texas' fuel requirement into the SIP because we found that the fuel requirement is in accordance with the requirements of the Clean Air Act (the Act) as amended in 1990 and is necessary for the nonattainment area to achieve the ozone NAAQS.

DATES: This final rule is effective on December 14, 2001.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. Persons interested in examining these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra G. Rennie, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–7367.

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

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II. What Action Is EPA Taking Today?

We are granting final approval into the Texas SIP of Texas' LED fuel requirement for distribution in 110 counties in the eastern and central parts of Texas. The State's LED program will apply in the designated nonattainment counties in the Houston-Galveston (HGA), Dallas-Fort Worth (DFW), and Beaumont-Port Arthur (BPA) ozone nonattainment areas, and the attainment counties listed in this action.

III. What Are the Clean Air Act Requirements?

Section 172 of the Act provides the general requirements for nonattainment plans. Section 172(c)(6) and section 110 require SIPs to include enforceable emission limitations, and such other control measures, means or techniques as well as schedules and timetables for compliance, as may be necessary to provide for attainment by the applicable attainment date. Today's SIP revision involves approval of one of a collection of controls adopted by the State to achieve the ozone standard in the HGA nonattainment area as required under section 172. EPA approval of this SIP revision is governed by section 110 of the Act.

In addition to these general requirements, section 211(c)(4)(C) provides that a state fuel control, otherwise preempted under section 211(c)(4)(A), may be approved into a SIP if EPA finds the fuel control is ''necessary'' to achieve a NAAQS. Today's approval of the State's fuel control also meets the requirements of section 211(c)(4)(C) because we have found that the control is ''necessary'' to achieve the NAAQS in the HGA ozone nonattainment area.

IV. Why Is EPA Taking This Action?

We are taking this action because the State submitted an adequate demonstration to show the necessity for this fuel requirement to achieve the NAAQS in the HGA ozone nonattainment areas.

V. What Does the State's LED Regulation Include?

The State's LED regulation requires that diesel fuel sold within the 110 counties listed in the regulations have a maximum sulfur content of 500 ppm, have no more than 10 percent aromatic hydrocarbons by volume, and have a cetane number of 48 or greater. The regulations apply to diesel fuel sold for highway and nonroad use beginning April 1, 2005.

The nonattainment counties affected are Collin, Denton, Dallas, Tarrant, Harris, Galveston, Brazoria, Montgomery, Chambers, Liberty, Waller, Fort Bend, Jefferson, Hardin, and Orange.

The 95 central and eastern Texas counties affected by these rules are Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

Beginning June 1, 2006, the sulfur content requirement will change to 15 ppm in all the above-named counties.

VI. What Did the State Submit?

The State submitted SIP revisions on December 20, 2000 for 30 Texas Administrative Code (TAC) 114 on December 6, 2000. The submittal contained data and analyses to support a finding under section 211(c)(4)(C) that the State's LED fuel requirement is necessary for the HGA nonattainment area to achieve the ozone NAAQS. For further discussion of the submittals, see the proposed approval, 66 FR 36542 (July 12, 2001) and accompanying Technical Support Document.

The State also requested parallel processing of 30 TAC 114 rules that were proposed on June 15, 2001. The proposed rules were adopted without changes on September 26, 2001, and submitted under a letter from the Governor dated October 4, 2001.

VII. What Comments Did EPA Receive in Response to the July 12, 2001, Proposed Rules?

Relevant comments on the proposed rulemaking to approve the Texas Low Emission Diesel (LED) rule into the Houston-Galveston (HGA) Ozone Non-Attainment area were received from the Association of American Railroads (AAR), the American Trucking Association (ATA), Baker and Botts on behalf of the Business Coalition for Clean Air (BCCA), Environmental Defense (ED), National Petrochemical & Refiners Association (NPRA), and Texas Motor Transport Association (TMTA). Reliant Energy (REI) also referenced this rulemaking in a comment letter on other related rulemaking actions, but made no substantive comments about the LED fuel program except to endorse comments made by BCCA; therefore, all comments mentioned below as having been made by BCCA are also made by REI. Responses to the comments follow.

Issue 1: Cost and Feasibility of the LED Fuel Rule and Program

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Federal inquiry into the economic reasonableness of state action is not allowed under the Clean Air Act (see, Union Electric Co., v. EPA, 427 U.S. 246 (1976); 42 U.S.C. 7410(a)(2)) other than for purposes of evaluating the reasonableness and availability of alternatives for purposes of a waiver of Federal preemption. Even though EPA's role is not to second guess the state's choices in this regard, EPA has done its own review of specific comments noted below on the potential cost and feasibility of the LED fuel rule and program.

1.1 State LED requirements will lead to significantly higher production costs

BCCA asserts that the production cost of LED will be greater than Texas has estimated. In particular, the first phase will cost 9 cents per gallon to produce, or about twice what Texas estimated. The second phase will be comparable to the cost of producing ultra-low sulfur diesel (ULSD) fuel for the federal rule, or about 10 cents per gallon. Overall the combined cost for producing LED fuel is estimated to be over two times higher than the Texas estimate of 8 cents per gallon.

Response: EPA believes that the State's estimates of increased production costs are generally consistent with that which has been observed for wholesale prices for diesel fuel in California. (Using California as

an indicator is appropriate because the California diesel requirements are very similar to those in the LED rule). According to a California Air Resources Board (CARB) publication entitled California Diesel Fuel Factsheet (1997), a gallon of California diesel costs one to four cents per gallon more to produce than diesel fuel in other states. More recently, CARB analyzed wholesale diesel prices in California and neighboring States (Arizona, Oregon and Nevada) during the period 1997 to 2001 and found that California wholesale diesel prices ranged from 1.3 cents per gallon lower to 6.0 cents per gallon higher (averaged 0.8 to 4.5 cents/gallon more) than diesel in Arizona, Oregon and Nevada (September 13, 2001 letter from CARB to ''World Fuels Today'', a copy of which is in the docket for this rulemaking). With respect to the second phase of LED fuel, *i.e.,* the 15 ppm sulfur requirement, we note that refiners who make highway diesel fuel will be subject to ULSD requirements at the same level under the federal rule in the same timeframe, so the production cost for phase 2 LED would be comparable to ULSD. According to data from Energy Information Administration (EIA),[1] ULSD production cost for PADDIII (which includes Texas, and is defined below in response to Issue 1.3) range from 4.5 to 7.0 cents per gallon higher than current diesel costs, so the Texas estimate of four cents per gallon for phase 2 LED is consistent with this range.

1.2 State LED requirements could cause supply disruptions

BCCA and NPRA argue that there is a higher market risk of the LED rules; specifically, it will reduce regional diesel fuel supplies, reduce incentives for refineries to invest in low sulfur diesel facilities, and limit refiner's ability to build new facilities. NPRA argues that any requirement for a unique diesel fuel will affect supply balance.

Response: As discussed in detail in the response to issue 1.6, we estimate that approximately 60 percent of diesel supplied to Texas is in the 110 county area affected by the LED rule. At a minimum, therefore, we expect that LED would make up 60 percent of the diesel used in Texas. The Texas comptroller's office reports that 3.1 billion gallons of diesel were sold in Texas during the fiscal year ending August 30, 2001.[2] Thus 1.8 billion gallons of LED would be required to replace the existing grades being sold. Diesel consumption in Texas is approximately 8 percent of the U.S. total consumption (see issue 1.6).

Approximately 18 to 20 percent of U.S. refineries producing diesel are located in Texas. This is comparable to California in which approximately 15 percent of U.S. refineries producing diesel are located in California. Because California refineries for the most part supply the special diesel required in that state, the situation in Texas is similar. In addition, considering refineries located in the neighboring States of Louisiana, Oklahoma, Arkansas, and New Mexico, the number of refineries in or in proximity to Texas rises to 34 to 38 percent of the U.S. total.

Based on this information, EPA concludes that refineries in Texas and neighboring states currently supplying the covered area with diesel now are highly likely to supply the LED fuel. EPA believes because of the size of the covered area and its proximity to widespread fuel production and distribution systems, the area will be less prone to many of the problems associated with small isolated areas that have unique fuel requirements.

1.3 State LED requirements could cause price spikes

ATA asserts that boutique fuels are contrary to sound public policy objectives because departures from the national diesel fuel standard will disrupt interstate and local trucking industries. The parties assert this is mainly because Texas LED requirements would create a boutique fuel and lead to unpredictable price spikes.

Response: The 110 county area in Texas in which the LED fuel will be consumed is very large and in close proximity to widespread fuel production and distribution systems. Thus, the fuel will be less prone to many of the problems associated with unique fuel requirements in small isolated areas. (See 1.2 above). We conclude that the frequency of price spikes in Texas would not be expected to be greater than the frequency of spikes in other areas. Therefore we examined diesel prices in Petroleum Administration for Defense Districts (PADD) PADD III and PADD IV[3] and analyzed those prices relative to prices of diesel in California—a state which currently has a large diesel program. Retail diesel prices were obtained for the period July 1995 through September 2001 from the Energy Information Administration (*http://www.eia.doe.gov/oil_gas/petroleum/info_glance/distillate.html*). The price of diesel in California was positively correlated to the prices of diesel in PADD III and PADD IV (correlation coefficients of 0.93 and 0.94, respectively), indicating the frequency of spikes was not unique to—nor were spikes more frequent in—California.

1.4 Retail price increases may not be reasonable

NPRA argues that the potential cost volatility of Texas low emission diesel does not meet the CAA requirement that the state fuel regulation be both reasonable and practicable. The TNRCC has estimated the production cost of LED to be four cents per gallon more than current specifications. Parties suggest that Energy Information Administration (EIA) data indicate the retail price of diesel in California is much more than four cents per gallon higher than the price of diesel in PADD III (11 to 41 cents per gallon).

Response: Comparing State of Texas estimates for production cost to California retail prices and PADD III retail prices is misleading because retail prices do not reflect the production cost alone. Other factors in retail pricing include differences in supply and demand, dealer mark up, and proximity of supply. The State of Texas has determined that 4 cents per gallon (production costs) for Phase I is an acceptable difference since LED provides an environmental benefit. As discussed in issue 1.1, California recently validated similar production cost estimates for their analogous diesel fuel via a comparison of wholesale prices in California to prices in neighboring states. Based on this, we believe that State of Texas' estimate is reasonably accurate. See also our response to issue 3.8 for discussion of NPRA's comment about the CAA requirement.

1.5 State LED requirements will injure small businesses

BCCA asserts that the LED rule will have an adverse effect on small businesses and disagrees with Texas' characterization that the impact will be small. Commenters argue that retailers located in the covered area near the boundary areas will suffer because facilities outside the area can sell non-LED fuel which would be lower in price.

Response: The commenter does not quantify the extent of the impact, nor do

[1] ''The Transition to Ultra-Low Sulfur Diesel Fuel: Effects on Prices and Supply,'' May, 2001, EIA, Chapter 7, page 68. It is posted at *http://www.eia.doe.gov/oiaf/servicerpt/ulsd/pdf/ulsd.pdf.*

[2] Personal communication between EPA and Texas comptroller's office; October 1, 2001.

[3] A PADD is a designation used to delineate regions of petroleum production. Texas is in PADD III (Gulf Coast) which also comprises New Mexico, Louisiana, Arkansas, Mississippi and Alabama. PADD IV comprises the States of Montana, Idaho, Wyoming, Utah, and Colorado.

they provide any evidence that this will happen. Specifically, we do not know with certainty what the price differential between LED and non-LED fuel will be. The commenter also does not provide the relationship between price differential and outside-the-boundary purchases. Presumably at lower differences in price, impacts will be small to negligible. Finally, the commenter does not provide the percentage of retail facilities located near the boundary of the covered area that are owned by small businesses as opposed to larger companies.

1.6 State LED requirements will injure the trucking industry

ATA and TMTA argue that the rule represents a departure from the national diesel fuel standard and that there will accordingly be a sudden price increase or spike in diesel fuel in Texas. They base the argument on price behavior of ''boutique fuels'' thus asserting that the LED will be a boutique fuel and have similar impacts. They state that the price increases will be disruptive and will force many small truckers into bankruptcy. They argue that an RIA to assess the economic impacts of the rule has not been prepared as required under Texas law.

Response: While there will be some increase in price due to increased production costs, we do not believe that they will be excessive as discussed previously in our responses to issues 1.1 through 1.4. We also believe that characterizing the LED as a fuel that will cause problems in distribution and supply because of the nature of its specifications is misleading. Unique fuel requirements, particularly in isolated or small markets, are those that have caused the greatest concern. This would not be the case with LED.

The LED will be required to be sold in a 110 county area. The total lane-miles in the covered area represents approximately 60 percent of the lane-miles for the entire state of Texas.[4] Diesel use is generally directly proportional to lane miles; thus, the 60 percent figure suggests that there will be a large market for the LED; i.e., approximately 60 percent of the diesel sold in Texas will be LED. The amount of diesel fuel currently used in Texas makes up approximately 8 percent of the total national demand.[5] Given the large market for diesel that Texas currently represents—and that the LED fuel will also represent—it is highly likely that the refiners that currently make and supply diesel for Texas will make the LED. The large market for LED provides some degree of assurance that LED will not function as a specialty fuel that only a few refiners will make. When that happens, there are difficulties if the refinery that supplies the fuel is unable to operate which cause prices to increase or spike. Because of the large source of supply of LED, the LED rule will not reduce the fungibility of diesel supply; thus, we do not envision the same issues of supply disruptions that sometimes occur with other types of unique fuels.

The issue of the RIA is addressed under Issue 7.

1.7 State LED requirements will injure the railroad industry

AAR states that the costs of LED will be significant to the railroad industry even if only 4 cents/gallon as TNRCC estimates. This is significant to the railroad industry which purchases more than 4.1 billion gallons of diesel fuel annually.

Response: The commenter's argument about cost being a significant factor because of the large volume of diesel fuel purchased by the railroads is based on national diesel consumption. The LED will be sold only in a 110 county area in Texas. Based on year 2000 data from the Energy Information Agency's (EIA) ''Fuel Oil and Kerosene Sales 2000'' report, the amount of diesel used by railroads on a national basis is 3,290,507,000 gallons of which Texas railroads consume 504,360,000 gallons or approximately 15 percent. While there will be an increase in cost to the railroads, we estimate such increase to be 15 percent or less of their projected cost.

1.8 State LED requirements will impair future controls on railroads

AAR commented that implementing the LED rule for locomotives would significantly increase costs without offsetting environmental benefits. They cite a document entitled ''Statement of Principles: Houston/Galveston Ozone Nonattainment Area Railroad Program'' signed by USEPA, TNRCC, Burlington Northern & Santa Fe Railway Company, and Union Pacific Railroad Company. They claim they are committed to implementing measures to achieve greater emission reductions than those required under EPA's locomotive emissions regulations.

Response: We have addressed cost in our responses to Issues 1.1 through 1.6. We do not believe that the increase in cost of fuel will be prohibitive, nor do we believe that they will adversely affect business.

We agree with the commenter that locomotives are more fuel efficient than trucks, and so would have lower emissions on a ton/mile basis. Fuel efficiency is only one means to reduce emissions; however, having greater fuel efficiency does not mean that there is no room for improvement. If emissions are lower using LED, then locomotives would stand to have even greater emission reductions.

We also agree that approving the LED program in Texas does limit the measures available for the companies to meet the reduction targets agreed upon for the Statement of Principles in that this type of fuel will now be required. Sufficient alternatives still exist, however, that allow the companies to meet their emission reduction goals

1.9 State LED requirements will impair implementation of Federal low-sulfur diesel

ATA and BCCA commented that boutique fuels are contrary to sound public policy objectives because boutique fuels will jeopardize EPA's efforts to introduce ULSD in 2006. The ULSD requirement, in conjunction with tighter emission standards, will result in much greater emission reductions than the LED rule, especially when considering the negative impact of the LED rule on the refining industry's effort to comply with the ULSD rule. The refining industry's need to make substantial capital investments to produce ULSD fuel will be diverted to comply with the LED rule. BCCA supports efforts to align the Texas rule with EPA's national rulemaking.

BCCA commented that the existing distribution infrastructure for diesel fuel is not adequate to supply both LED fuel within Texas and EPA-specified fuels throughout the rest of the country. (Focused especially on low sulfur phase of LED rule.)

NPRA commented that the sulfur standard of LED program which takes effect in 2006 (15 ppm) is inconsistent with EPA's ultra low sulfur diesel (ULSD) program, also taking effect in 2006 but at a different date (9/1/06 for

[4] ''Lane miles'' are the product of miles and the number of lanes in a given area. Thus, a one-mile segment of six lane highway is equivalent to 6 lane miles. Lacking diesel fuel sales or use on a county-wide level, we felt that lane miles would serve as a relatively accurate surrogate for diesel use. We had considered using vehicle miles traveled (VMT) as a surrogate. VMT in the 110 county area makes up 95percent of total VMT in Texas, according to Texas Department of Transportation (TXDOT) statistics. The TXDOT statistics, however, include both diesel and gasoline vehicles on given lengths of road. Because ''lane miles'' do not include vehicle use, they serve as a better indicator.

[5] The figure of 8 percent was derived from EIA: ''Fuel Oil and Kerosene Sales 2000'' information compiled by the Federal Highway Administration, using the annual VMT for trucks in Texas and nationwide.

EPA, compared to 6/1/06 for LED) and with transitional flexibilities that permit the sale of some 500 ppm sulfur cap highway diesel fuel until the end of May, 2010 (which LED does not have.) Additionally, the EPA program includes a credit trading feature which would exclude LED fuel, thus resulting in the unintended consequence of creating an obstacle to the accomplishment of the transitional objectives of EPA's program. This could jeopardize the supplies of ULSD, which could in turn cause increased product price volatility, price spikes, and product outages. (Cites EIA report, The Transition to Ultra-Low Sulfur Diesel Fuel: Effects on Prices and Supply, May, 2001, especially chapter 5.)

Response: The commenter points out that the low sulfur standard of the LED program takes effect at a different date than the ULSD rule. There is only a three month difference, however. We do not believe this poses logistical difficulties. Also, the low sulfur requirement of the LED rule was established to harmonize with EPA's ULSD rule so that there would not be a significant difference in sulfur requirements.

The commenter also argues that producing LED will be difficult because of the efforts needed to meet EPA's ULSD rule in that this rule excludes LED fuel from the credit trading provision. The ULSD rule contains a provision that if a state requires more than 80 percent of its fuel to meet a sulfur limit of 15 ppm or lower, then it would be excluded from the credit transfer area, a region that generally follows the boundaries of the Petroleum Administration for Defense Districts (PADDs). Since the major concern in the ULSD rule was ensuring availability of 15 ppm fuel nationwide, credit transfers were limited to these areas.

Under this provision Texas would in effect become its own PADD, separate from PADD III. Because much of the refining capacity in PADD III is in Texas, the commenter is correct that the LED rule will limit the flexibility offered under the ULSD rule for refiners in Texas. The LED rule, however, will also result in more production of 15 ppm fuel in PADD III, and thus more availability of 15 ppm fuel. The market for LED fuel is certain, allowing refiners a reasonably accurate estimate for payback of the investments required to make this fuel. Finally, a state that obtains a waiver of preemption for fuels under section 211(c)(4)(C) of the Clean Air Act, (which we are granting to the State of Texas for the LED rule, as it applies to highway diesel fuel,) can adopt fuel controls that are non-identical to and that may be more stringent than federal requirements.

As indicated in the response to issue 1.6, because of the large area in which LED area would be required, we do not believe that supply and fungibility problems that are typical to fuels with unique specifications in small isolated areas will affect LED. The LED fuel will replace the diesel fuel currently used in the 110 county area. Since this area represents an estimated 60 percent of the diesel use in Texas, the area represents a dedicated market that refiners are currently servicing, and in close proximity to numerous refineries as noted in our response to issue 1.2. Those refiners who choose to make the LED fuel will have complied with the ULSD sulfur limits which would therefore not jeopardize EPA's efforts to introduce ULSD in 2006.

Issue 2: Benefits of the LED Rule and Program

2.1 The environmental benefit of the LED rule is uncertain or overstated because the analysis of the NO_X reduction benefit is flawed

ATA commented that Texas failed to establish baseline fuel parameters representative of local parameters, instead relying on national averages. Furthermore, Texas failed to establish whether the single prototype engine used by Heavy-Duty Engine Working Group (HDEWG) is representative of the 1990 and later model year engines that will be operating in the nonattainment area in 2005.

BCCA commented that Texas has overestimated the NO_X reduction benefit of LED fuel because EPA stated in the preamble to ULSD NPRM that the emission effects of regulating aspects of diesel fuel other than sulfur are ''rather small, and points out the limited test data on which ERG relied in making its 7/26/00 estimate . ATA agrees stating that Texas' estimate for older engines is suspect because it relied on CARB data, which is ''thin,'' and Texas mistakenly applied the wrong estimate from CARB. ATA further states that CARB claims only a 5.6 percent reduction for its diesel fuel rather than 7 percent as Texas uses for pre-1990 highway engines. (Cites CARB's EMFAC 2000 TSD, Section 10.9, 5/15/00, and say CARB mistakenly bases its estimate on 10 percent aromatic fuel. This is not used in California but ''equivalent'' formulas are used if they demonstrate equivalency using a 1991 Detroit Diesel engine. ATA says the appropriateness of using this engine to demonstrate fuel equivalency is the ''subject of great debate.'' They note that in 2005 the pre-1990 trucks will be 15 years old and will comprise only a very small percentage of the trucking fleet.)

ATA states that the emissions impact of altering gasoline fuel components is well understood, with several peer-reviewed studies, but the same scientific rigor has not been applied to estimating the emissions impact of altering diesel fuel components. (Cites Sierra Research, Inc. report, 3/20/98, and MathPro, Inc. and Energy & Environmental Analysis, Inc. report, 2/16/98.)

Furthermore, ATA states EPA has itself questioned the benefits of altering diesel fuel components, and has not yet completed its analysis. ATA said EPA will host a public workshop (which was held on 8/28/01) to ''receive comment on its preliminary evaluation of the emission reductions from LED fuel.'' ATA's preliminary analysis of EPA's model reveals significant statistical errors, rendering its predictive capabilities inadequate. It is impossible to make the Section 211 necessity determination without first accurately quantifying the emissions impact of using this fuel.

ATA states that there is bipartisan commitment to study the impacts of boutique fuels, in the form of a bill recently passed by the U.S. House of Representatives to require a joint DOE/EPA report by 12/31/01. Making a decision on the LED fuel before this report is produced is unwise and unnecessary.

BCCA encourages Texas to adopt the EPA diesel formulation without cetane and aromatics controls. AAR states that although TNRCC says there are additional emission reductions when low sulfur fuel is coupled with low aromatic content fuel, regardless of engine technology, the cost to achieve any such additional reductions, when compared to the emissions benefit, would be enormous. The direct effect on emissions of LED would be small. (Cites EPA's discussion of effects of fuel parameters on emissions, 64 FR 26142, 26147, 5/13/99.)

Response: In the preamble to our recent proposed rulemaking on the emission standards for heavy duty engines and the sulfur level of highway diesel fuel, EPA considered whether parameters of highway diesel fuel other than sulfur should be regulated. EPA's focus in that proposal was to enable diesel engines to meet much more stringent emission standards which EPA was also proposing. We believed that diesel engines could meet those standards with the use of advanced exhaust emission control systems, but the performance of these systems is dramatically reduced by sulfur. Other

fuel properties such as cetane levels and aromatics content did not appear to have the same impact as sulfur on the advanced emission control systems, although they could achieve immediate emission reductions by affecting the combustion process directly rather than by enabling the advanced emission control system. We noted, however, that those emission reductions effects are ''rather small,'' especially in comparison to the emission benefits projected to occur as a result of the more stringent emission standards and sulfur levels in highway diesel fuel that EPA was then proposing, and subsequently adopted. (See preamble to proposed rule, 65 FR 35430, 6/2/00, at 35519–35520. For final rule, described in the Issue 1 discussion as the ''ULSD rule'', see 66 FR 5002, 1/18/01.)

Although Texas, just as other states, will see the NO_X reduction benefits of this federal rule when the engine emission standards and the fuel sulfur controls are implemented, beginning in 2006–2007, it will not see significant NO_X reductions by 2007, the attainment date for the Houston area to achieve the 1-hour ozone standard. The full benefit of the federal rule will not be seen until significant fleet turnover occurs, when the newer engines meeting the more stringent emission standards are a bigger portion of the highway diesel fleet. Texas chose to impose restrictions on the cetane and aromatics levels of diesel fuel for both highway vehicles and nonroad equipment, realizing that the NO_X emission reductions would be immediate, even if the emission reductions would not be as large as those which will result from the Federal rule.

When we learned that Texas was claiming NO_X reductions from the cetane and aromatics controls in its low emission diesel rule, we were concerned about the size of the estimated benefits and the analysis upon which the estimate was based. In November, 2000, we initiated a project to analyze existing test data, rather than conduct new emissions testing, and developed a regression model approach to analyze the results and to develop a quantitative relationship between fuel parameters and emissions changes. In July, 2001, we made public a Staff Discussion Document [6] with the preliminary results of this analysis.

As part of our process in conducting this analysis, we had notified stakeholders of our project and asked for relevant data. As we prepared our preliminary conclusions, we met with numerous stakeholders to review these conclusions, beginning in May, 2001, and in response to requests from stakeholders, held a public workshop on August 28, 2001, to hear comments on the Staff Discussion Document. Although the comment period on the Staff Discussion Document remains open to October 30, 2001, we have analyzed the comments made at the workshop which have the most direct bearing on our NO_X benefit estimates for the LED rule, and believe it is appropriate to use the estimates from EPA's draft NO_X model in lieu of the estimates Texas originally claimed. More detail on EPA's review of these comments and our use of the draft NO_X model in estimating the NO_X benefits of the LED rule are in the memorandum dated September 27, 2001, from Robert Larson, Acting Director, Transportation and Regional Programs Division, EPA Office of Transportation and Air Quality, to Carl Edlund, Director, Multimedia Planning and Permitting Division, EPA Region VI. (See memo in docket for this rulemaking.)

As noted in Section I of the Staff Discussion Document, Texas claimed that use of LED fuel in the attainment year (2007) reduced NO_X emissions by 7 percent for older highway diesel engines (pre-1990 model year) and for nonroad engines, and by 5.7 percent for newer highway diesel engines (1990 and later model years). EPA's estimate is similar, but is given with respect to different engine categories, *i.e.*, we estimate that the use of LED fuel in 2007 will reduce NO_X emissions by 6.2 percent for highway or large nonroad diesel engines without EGR technology, and by 4.8 percent for highway or large nonroad diesel engines with EGR technology.

For this estimate, we are defining ''large'' nonroad engines as those engines with greater than 50 horsepower. ''EGR'' technology is ''exhaust gas recirculation'' technology, which we expect will play a significant role in new engines designed to meet EPA's 2004 heavy duty highway engine emission standards. We expect many of the new engines with EGR technology will be produced as early as 2002. Many nonroad diesel engines may also be produced with EGR technology in order to meet EPA's Tier 3 standards beginning with model year 2005. For small nonroad engines (less than 50 horsepower) which constitute a very small fraction of the nonroad engine emissions inventory, we have determined that we cannot assign a NO_X benefit on the basis of data considered by EPA.

This estimate is based on comparing the LED-like fuel to a baseline fuel with the same diesel fuel properties as those reported by the Alliance of Automobile Manufacturers (AAM) for nationwide average diesel fuel properties (excluding California). AAM data is based on surveys of fuel properties in various cities around the country, including San Antonio, but no other cities in Texas; we could not find any other source of data for Houston. The average fuel properties for San Antonio are very similar to the nationwide average fuel properties, but since we could not be certain that the San Antonio average fuel was a better representation of Houston fuel than the nationwide average, given the small differences between the two, we used the nationwide average fuel properties to represent the baseline fuel. (*See* issue 6 in the September 27, 2001 memo from Larson to Edlund.)

As to the use of estimates for newer engines based on results of the Heavy Duty Engine Workgroup (HDEWG), the use of California data for older engines, and the concern over a limited database, we refer to the discussion in both the Staff Discussion Document and the September 27, 2001, memo from Larson to Edlund (particularly issues 3, 4, and 5) regarding the size of the database, the names and dates of the 35 studies which EPA used in building its draft NO_X model, and the appropriateness of making estimates for newer model engines with more limited data points. One of EPA's concerns about Texas's original estimate was the reliance on California data, most of which was collected under the VE–1 program administered by the Coordinating Research Council and used by California in preparation for its October, 1988, report on the projected benefit of its proposed diesel fuel regulation, which was eventually adopted and implemented in 1993. We knew that many more studies relevant to this subject had been completed since 1988, and we have been able to use those studies in our project. With respect to the estimate in section 10.9 of California's EMFAC 2000 Technical Support Document of 5.6 percent for NO_X reductions for pre-1991 engines (as well as its estimate of 12.4 percent for NO_X reductions for 1991 and later engines) these are not the estimates EPA is using and approving today.

The discussion of issue 4 in the September 27, 2001, memo addresses the appropriateness of using data from the HDEWG program for newer engines. Although ATA expressed concern that

[6] ''Strategies and Issues in Correlating Diesel Fuel Properties with Emissions,'' Staff Discussion Document, EPA report number EPA420-P–01–001, July 2001. This document is in the docket for this rulemaking and is posted on EPA website at: *http://www.epa.gov/otaq/models/analysis.htm*

the estimate for 1990 and later model engines was based on the single prototype engine used by HDEWG, we note that EPA's estimate is based on data from more this single post-1990 engine, although we acknowledge that 1997 and newer model engines are not well represented in the database. In discussing Issue 4, we explain the reasons we think this does not affect the validity of the estimate, and we incorporate that discussion by reference here.

ATA commented that, although the emissions impact of altering gasoline fuel components is well understood, with several peer-reviewed studies, the same scientific rigor has not been applied to estimating the emissions impact of altering diesel fuel components. As we note in discussing issue 2 in the September 27, 2001, memo, most of the studies in our database have gone through some level of peer review, including 28 studies (out of 35) for which this was a requirement since they were published under the auspices of the Society of Automotive Engineers. We note other levels of review applicable to three more of the studies conducted through the Coordinating Research Council as well as EPA's own review of the quality of the studies before deciding to use the emissions data for our database. This level of review ensures there is scientific rigor to our process.

ATA also comments that a bill recently passed by the U.S. House of Representatives would require EPA and the U.S. Department of Energy to conduct a joint study of the impact of boutique fuels, and that EPA's approval of the LED rule in advance of this study is unwise and unnecessary. We note that, although ATA did not identify the bill, we believe they are referring to Section 603 of HR 4 which is pending action in the U.S. Senate but has not yet become law as of today. EPA is required to take final action on the SIP submittal for Houston by October 15, 2001, under a consent decree, and cannot base any aspect of its decision on this or any other Congressional bill which has not yet become law. Additionally, we have addressed concerns raised by this commenter and others regarding cost and feasibility of the LED rule in the responses to several comments related to issue 1 of the LED rule.

In summary, we believe the NO_X reduction benefits of the LED rule are estimated with reasonable certainty, and are not overstated. EPA carefully reviewed the available test data relevant to analyzing emissions impacts of LED fuel, subjected its analysis to public scrutiny, evaluated comments at a public workshop, and has concluded that its draft model is an appropriate predictor of NO_X emission impacts of the LED rule, as described above and in the September 27, 2001, memo from Larson to Edlund.

2.2 The environmental benefit of the LED rule is not properly accounted for or is insignificant because its reliance on low sulfur levels will not have impact until newer engines enter the fleet after 2007, or because low sulfur levels will not have impact on locomotives since they do not use engines which benefit from low sulfur fuel.

BCCA asserts that the emissions benefit for the LED rule is not properly accounted for since the program will not be mature in the attainment year (2007) and will not get the estimated benefit until the fleet turns over and there are more vehicles with exhaust treatment systems that can efficiently make use of the low sulfur LED fuel. TX should ''work with EPA and all the other areas in this predicament to develop a method for crediting these prospective reductions.''

AAR commented that there has been no showing that LED would have a significant impact on emissions, especially lower sulfur. AAR also noted in comments to TNRCC in its rulemaking process that EPA has refrained from requiring railroads to use low sulfur fuel because there would not be any meaningful environmental benefit. Sulfur levels in diesel fuel are controlled to enable the use of aftertreatment devices, but neither the railroad industry nor EPA expects such devices suitable for locomotives to be available in the foreseeable future. (In 1997, EPA noted that exhaust gas recirculation (EGR) systems would probably not be used by locomotive manufacturers due to technical problems, and that catalysts on locomotives are problematic. Cites OMS document, ''Locomotive Emission Standards: Regulatory Support Document'' p 87, 12/97.) TNRCC said, in response to AAR's objections, that control of non-road diesel fuel is necessary in terms of retrofit technology, but neither EPA nor the railroads expect that retrofit technology dependent on LED will be used on locomotives in the foreseeable future. (Cites TNRCC Rule Log 2000–011D–114–AI, p 44.)

Response: Texas is not relying on low sulfur levels in calculating estimated benefits of the LED rule, but relies only on the changes in cetane and aromatics levels, which will have an immediate impact on the current fleet. (*See* page 6–17 of the HGA Attainment Demonstration SIP.) As noted in the TSD, sulfur has no direct effect on NO_X reductions by itself. If low sulfur fuel is used with engines that have either been retrofitted or originally designed with aftertreatment devices or other methods of taking advantage of the low sulfur fuel, the combined effect is reductions in NO_X emissions.

2.3 The Environmental Benefit of Using LED Fuel Is Overstated Because Texas Has Failed To Account for Consumers Who Will Re-fuel Outside the Covered Area

ATA and TMTA assert that Texas has overestimated the benefit of using LED fuel because it did not account for refueling by consumers outside the covered area. ATA cites the Arizona report for the statistic that six times as many trucks refuel outside California as within California. As a result, the LED rule would likely result in more vehicle miles traveled with a corresponding increase in vehicle emissions. Additionally, long-haul trucks will fuel up before entering the covered area and eliminate any benefit assumed to derive from their use of LED fuel. Approving the waiver request in the absence of an accurate estimate of emissions reductions is arbitrary and capricious.

TMTA notes two reasons for refueling outside the covered area, as follows:

(1) The use of ''federal fuel'' has not been accounted for. Except for diesel vehicles which operate solely within the covered area, all other diesel vehicles traveling within the covered area have an incentive to purchase cheaper federal fuel outside the covered area. TMTA refers to California and Arizona statements (regarding the percentage of diesel vehicle miles or activity attributable to out-of-state vehicles or vehicles purchasing diesel fuel outside a covered area) as examples supporting a statement that the LED rule will not be able to affect the significant level of federal fuel use, and questions Texas' failure to anticipate an environmental difference between application of the LED rule statewide (as currently adopted) and application in only 110 counties (as currently proposed.) TMTA says the failure to account for the use of federal fuel in its estimates of potential emission reductions is contrary to law and must be remedied.

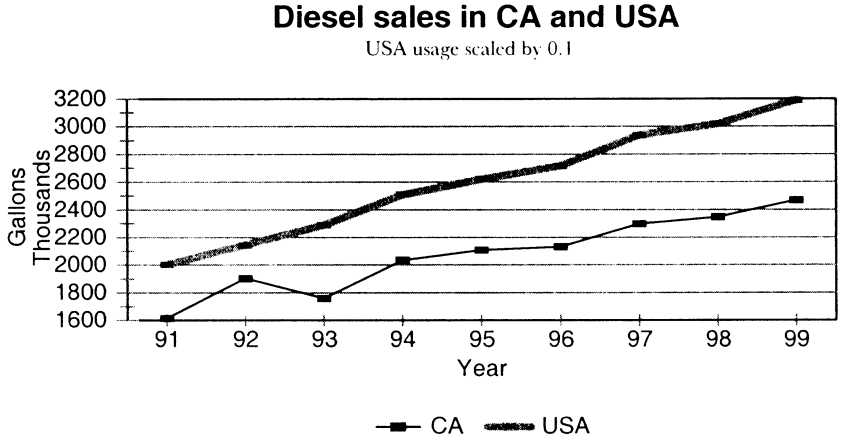
TMTA cites CARB EMFAC 2001 Workshop, 5/29/01, for the statement that according to California's emissions inventory model, 33 percent of the state's HD diesel vehicle activity is attributed to out-of-state vehicles. They also cite Arizona Department of Environmental Quality Deputy Director

Ira Domsky's report to the On-Road Mobile Sources Subcommittee, 11/00, CARB diesel evaluation-amount of locally purchased diesel fuel, for the statement that in the Phoenix metropolitan area, more than 70 percent of diesel vehicle miles are attributed to vehicles operating on diesel fuel purchased outside the area. (2) The cheaper ''federal fuel'' will be available across county and state lines, within 50 miles of the HGA and DFW nonattainment areas and adjacent to the BPA nonattainment area, so trucking companies will begin serving the covered area from primary or satellite operations based in Arkansas, Oklahoma, Louisiana, western Texas, and beyond. The real impact will be an increase in vehicle miles traveled, as trucks drive beyond the covered area to purchase cheaper fuel but presumably return to serve the covered area.

AAR argues that because locomotive fuel tanks have a capacity of several thousand gallons, locomotives travel for as much as 1,000 miles without refueling. Locomotives entering a state are fueled out-of-state, and much of the fuel they burn is out-of-state fuel. They argue that the converse is also true; *i.e.*, that locomotives fueled in-state burn a significant amount of that fuel out-of-state, so that the LED requirement would mostly benefit states other than Texas since most of the LED purchased in Texas would be burned in other states.

Response: Regarding the commenters' arguments that trucks will seek to refuel outside the covered area, we do not believe that this will be the case based on the usage pattern of diesel in California. Based on annual diesel fuel usage numbers compiled by the Federal Highway Administration (FHWA) from 1991 through 1999, we compared the slope of increase in diesel fuel use between California and nationwide. The diesel usage pattern for California and USA (derived from statistics compiled by FHWA[7]) shown in Figure 1 below however, does not indicate an abrupt change in refueling patterns in California.[8] Figure 1 indicates that in 1993 (the year in which California's diesel rule took effect) there is a slight decrease in use from the previous year. In all subsequent years, however, the increase follows a similar rate of increase as the nationwide rate.

Figure 1:



We also investigated the statement that the commenter attributes to the Arizona Department of Environmental Quality (ADEQ) that six times as many trucks refuel outside California as within California. On page 7 of ADEQ's April, 1999 report titled ''Explanation for Choosing not to Require CARB Diesel or Other 'Cleaner' Diesel Fuels in Maricopa County'' ADEQ states: ''ADEQ has been advised that, in California, six times as many long-distance trucks refuel outside California before entering the state than refuel in California before leaving.'' The referenced report, a copy of which is in the docket for this rulemaking, does not cite any source or other supporting data for this statement. As such, we believe that it may be anecdotal and is not supported by the California diesel usage shown in Figure 1. Alternatively, if it is true, it may be the case that this pattern existed even before California's diesel rule went into effect. The commenter has provided no data to support the conjecture that refueling patterns will change other than the apparently anecdotal evidence from Arizona, and statements that higher costs will cause trucks to refuel outside the covered area.

Taking California as an indicator, therefore, we do not believe that the trucking industry will reroute trucks in order to refuel outside the covered area. With respect to the statement that long haul trucks will seek to refuel out of state or outside the covered area, we note that according to the 1997 Vehicle Inventory and Use Survey, compiled by the U.S. Census, the majority of truck traffic in Texas remains in-state. Specifically, less than 25 percent of the miles traveled by the majority of truck traffic in Texas (70 percent) is outside of Texas. Also, the average range of operation or length of trip for approximately 76 percent of the truck traffic in Texas is less than 200 miles. Border-to-border travel distances for the 110 county covered area range from 153 to 454 miles. Based on these figures, we believe that the majority of environmental effects from use of LED by trucks comes from the in-state traffic, not from through traffic. We do not believe that the small amount of long-

[7] Available at: *http://www.fhwa.dot.gov/ohim/ohimstat.htm*

[8] National usage has been scaled by multiplying values by 0.1 for purposes of comparing rate of increase with California usage. FHWA usage figures are based on state motor fuel tax records. Motor fuel usage was split between gasoline and ''special fuel'' which includes diesel, liquid petroleum gas (LPG), and propane. Given that LPG and propane usage are relatively small compared to diesel, we believe that the special fuel usage numbers are adequate indicators of diesel usage.

haul traffic will change their refueling patterns significantly.

Regarding the argument that the benefit of the LED rule will be realized mostly out of state because of the size of the locomotive fuel tanks, the commenter fails to quantify how much of the fuel purchased out of state is burned in the Houston non-attainment area, or how much of the fuel purchased in the covered area is burned in this area. Even though some fuel purchased in Texas will be burned out of State, there will still be some amount of LED fuel purchased and burned within the Houston nonattainment area which would result in some emission reduction there. As we noted in the response to Issue 1.7, 15 percent of national railroad purchases of diesel fuel are in Texas. So we expect the emission reduction would still be significant.

2.4 The Environmental Benefit of the LED Rule Is Uncertain or Overstated Because Texas Has Failed To Determine How Alternative Formulations Will Be Tested To Determine if They Achieve Equivalent Emission Reductions

ATA asserts that Texas has failed to determine how alternative formulations will be tested to determine they achieve equivalent emissions reductions. The proposed rule has no explanation of the baseline fuel to be used for comparison with the alternative formulation; there is no mention of which engines are tested for equivalency; and there is no mention of what operating conditions are simulated.

Response: Both the proposed and final versions of the LED rule for the Houston SIP, as submitted to EPA in December, 2000, include provisions for determining how alternative formulations will be tested to see if they achieve equivalent emission reductions. No changes have been made to these sections in the revisions requested for parallel processing by the Governor on June 15, 2001, or in the final version of the LED rule adopted September 26, 2001, submitted to EPA on October 4, 2001, and approved by EPA in today's rulemaking. (*See* rule revisions on TNRCC website at *http://www.tnrcc.state.tx.us/oprd/sips/houston.html#revisions,* and in Rule Log 2001–007d–114–AI.) These provisions, as specified in section 114.312(g), are in section 114.315(c) of the LED rule, and are modeled on the procedures used by California in determining equivalent emission reductions of alternative formulations of California diesel fuel. (*See* Title 13, California Code of Regulations, 2282(a)(1)(C) and (g).)

Although the LED rule provisions for this purpose are not identical to those of California, they are very similar. The LED rule provides for testing the ''candidate'' fuel, *i.e.,* the alternative formulation, against a ''reference'' fuel, *i.e.,* the baseline fuel, which must have cetane, aromatics and sulfur levels meeting the standards for ''conventional'' LED fuel. The two fuels must be tested for exhaust emissions using a Detroit Diesel Corporation Series-60 engine or an engine specified by the applicant and approved by the executive director of TNRCC to be equally representative of the post-1990 model year heavy duty diesel engine fleet. A minimum of five exhaust emission tests must be conducted in accordance with Federal Test Procedures for Control of Emissions from New and in-Use Highway Vehicles and Engines: Emissions Regulations for New Otto-Cycle and Diesel Heavy Duty Engines—Gaseous and Particulate Exhaust Test Procedures, dated 1998. (40 CFR part 86, subpart N.) These procedures are for transient cycle testing, which is intended to represent actual in-use driving conditions.

Alternative formulations can only be approved by the executive director of TNRCC if the director finds that the candidate fuel has been properly tested in accordance with these provisions and makes the determinations specified in section 114.315(c)(5) regarding the average individual emissions of the candidate fuel compared to those of the reference fuel.

2.5 A Process Is Needed To Protect Consumer Interests During the Development of Alternative Emission Reduction Plans

TMTA stated that a process is needed to protect consumer interests during the development and approval of alternative emission reduction (AER) plans under proposed section 114.318, which allows producers to submit plans for substitute fuel strategies that are determined to achieve an equivalent level of reductions as the LED fuel which is regulated specifically. TMTA acknowledges that TNRCC's executive director and EPA must approve such AER plans, but notes the lack of details and the potential for market manipulation that may result if each proposal is not given proper scrutiny by affected entities. TMTA requests that a process be instituted to enable diesel fuel users to evaluate and comment on any proposed AER plan submitted to TNRCC.

Response: EPA made comments to TNRCC on July 2, 2001, regarding section 114.318 and the ability of producers to submit AER plans. (See letter dated July 2, 2001, from Thomas Diggs to Herbert Williams in the docket for this rulemaking.) We expressed similar concerns about the implementation of this section and the ''market share'' approach it seems to allow for estimating equivalency of emission reductions. Since EPA's approval of such plans is required, in addition to approval of TNRCC's executive director, we will be working with TNRCC on the implementation of this section, and will consider the request made by this commenter as the procedures are developed, by providing for public notice and comment.

Issue 3: Federal Preemption and the Necessity Showing Under CAA Section 211(c)(4)(C)

3.1 General Preemption Comments

ATA and BCCA argue that the federal Clean Air Act preempts the LED rule under 211(c)(1), and Texas has failed to meet the statutory test for a waiver of preemption under CAA 211(c)(4)(C) and object to EPA's finding.

ATA and BCCA support adopting federal diesel rules for Texas. EPA should use this opportunity to move the overall national regulatory strategy for diesel fuel away from the patchwork quilt of boutique fuels towards a single national fuel standard, as Congress originally intended. In regulating mobile sources under the Clean Air Act, Congress intended to avoid subjecting mobile sources to a patchwork quilt of separate state controls, recognizing that allowing each state to go its own way could be difficult for manufacturers and users. ATA cites Senate report No. 192, 89th Congress, 1st Session. 5–6 (1965).

Response: The statutory preemption in CAA section 211(c)(4)(A) and the corresponding standard in section 211(c)(4)(C) for a ''waiver'' of this statutory preemption are central to many of the issues raised by commenters. To the extent that a waiver of preemption is required, EPA believes that Texas has met the statutory criteria for justifying EPA's approval of the LED measure into the HGA SIP, thus waiving federal preemption of the state's fuel measure for highway diesel fuel.

As we explained in the preamble to the Notice of Proposed Rulemaking and in the Technical Support Document, section 211(c)(4)(A) generally prohibits the state from prescribing or attempting to enforce controls respecting motor vehicle fuel characteristics or components that EPA has controlled under section 211(c)(1), unless the state control is identical to the federal control. This statutory preemption does

not apply to the state's control of fuel content for nonroad engines, since this fuel is not used in ''motor vehicles'' as that term is used in the CAA. Thus, the Texas LED rule, which applies to diesel fuel for both highway and nonroad use, is not preempted under this statutory provision to the extent it applies to diesel fuel for nonroad use.

For a state fuel control which is subject to the section 211(c)(4)(A) preemption, the CAA does provide an exception in section 211(c)(4)(C). Under this section, EPA may approve a non-identical state fuel control as a SIP provision, if the state demonstrates that the measure is necessary to achieve a NAAQS. EPA may approve an otherwise preempted state fuel measure as necessary if no other measures would bring about timely attainment, or if other measures exist and are technically possible to implement but are unreasonable or impracticable. EPA may make a finding of necessity even if the plan for the area does not contain an approved demonstration of timely attainment.

EPA has reviewed numerous state fuel controls for approval into SIPs under section 211(c)(4)(C). In 1997, EPA issued guidance for EPA regions and States on the use of fuel options in ozone SIPs. (See ''Guidance on Use of Opt-in to RFG and Low RVP Requirements in Ozone SIPs,'' August, 1997, U.S. Environmental Protection Agency, Office of Mobile Sources, at: *http://www.epa.gov/otaq/fuels.htm#rvp.*) This guidance was directed primarily at state requirements for low Reid Vapor Pressure (RVP) of gasoline, since that was the principal type of fuel control which states had adopted to date. It sets forth guidelines for application of the statutory test in section 211(c)(4)(C), explaining the following demonstrations which a state should make in showing that its fuel measure is ''necessary,'' and justifying its request for a waiver of preemption:

(1) Identification of the quantity of reductions needed to reach attainment;

(2) Identification of other possible control measures and the quantity of reductions each would achieve;

(3) Explanation for rejecting alternative control measures as unreasonable or impracticable; and

(4) Demonstration that reductions are needed even after implementation of reasonable and practicable alternatives, and that the fuel measure will provide some or all of the needed reductions.

Texas followed these guidelines in making its request to EPA for approval of the LED measure into the Houston SIP. EPA agrees that Texas has demonstrated the need for the LED measure pursuant to the statutory test in section 211(c)(4)(C), as explained in detail in the TSD. We address specific comments on the details of this necessity showing in responses to Issues 3.2 through 3.9 below.

We acknowledge, as ATA notes, that Congressional intent in regulating mobile sources of air pollution was to avoid a ''patchwork quilt'' of separate state controls in an effort to prevent difficulties for manufacturers of vehicles and fuels, and that this is consistent with the statutory preemption of state fuel controls in section 211(c)(4)(A). Congress specifically provided an exception to preemption, however, in section 211(c)(4)(C) for state fuel controls that are necessary for achievement of a NAAQS. This exception is consistent with Congressional intent for state flexibility in choosing control measures in meeting federal CAA requirements. This statutory scheme balances the need for national uniformity against the state's flexibility to choose the most appropriate control measures for each state.

EPA recognizes the concerns associated with the potential disruption caused by numerous state (or ''boutique'') fuels. In most situations, EPA believes that a uniform national program is the best way to protect public health and minimize disruption to the country's efficient fuel distribution network. As the number of state fuels increases, so do the potential problems associated with a disruption of the fuel distribution network. Therefore, EPA's general expectation is that states will limit state fuel programs that differ from Federal standards to situations where local or unique circumstances warrant control. Texas has demonstrated that the Houston area's attainment of the 1 hour ozone NAAQS in 2007 can only be achieved with a combination of all reasonable control measures, including the LED measure, that are being adopted now, together with an enforceable commitment to adopt control measures in the future to fill the emissions shortfall which remains after adopting the current control measures.

3.2: Explanation of Why Other Control Measures Are Unreasonable or Impracticable

ATA states that under the statutory test for waiver of preemption, Texas has failed to analyze whether other control measures could be implemented to achieve the ozone NAAQS.

ATA further argues that in analyzing whether other control measures are ''unreasonable'' or ''impracticable,'' EPA must independently determine whether the state has met a very heavy burden in showing that all other ozone control measures are either incapable of being performed or not reasonable because their implementation might result in exorbitant costs or be viewed as an irrational choice for pollution abatement. To merely find that a boutique fuel will reduce air emissions or is less costly or easier to implement than an alternative control measure is an insufficient basis for approving a fuel preemption waiver, and would render Section 211 meaningless.

Response: Section 211(c)(4)(C) currently provides, ''The Administrator may find that a State control or prohibition is necessary to achieve that standard if no other measures that would bring about timely attainment exist, or if other measures exist and are technically possible to implement, but are unreasonable or impracticable.'' ATA argues that whether an alternative control measure is reasonable or practicable must be determined in absolute terms, without comparison to the fuel measure being considered. EPA does not agree that this type of determination is compelled by the Act. To the contrary, the current language of section 211(c)(4)(C) represents Congress' ratification of EPA's long held interpretation that States may justify a fuel control as necessary when the alternatives by comparison would be more drastic, unpopular, costly or slower to implement.

The ''reasonable and practicable'' language in section 211(c)(4)(C) that ATA points to derives from EPA's interpretation of the pre-1990 language of 211(c)(4)(C). *See* 53 FR 30224, 30228–29 (Aug. 10, 1988) (Maricopa County SIP Approval). Before the 1990 Clean Air Amendments, the Act allowed SIP approval of otherwise preempted state fuel controls if such controls were ''necessary'' for timely attainment, but the Act was silent on the criteria for determining what was ''necessary.'' In amending the Clean Air Act in 1990, Congress adopted EPA's interpretation of ''necessary'' directly into the statutory language.

Because Congress effectively ratified EPA's pre-1990 interpretation of ''necessary,'' it is valuable to review EPA's approach in making the necessity determination in SIP approvals prior to the 1990 Amendments. In those rulemakings, EPA repeatedly made clear that the determination of whether there were other reasonable or practicable alternatives involved some comparison with the proposed State fuel control. *See* 54 FR 19173, 19174 (May 4, 1989) (''EPA need look at other measures

before RVP control, only if it has clear evidence that RVP control would have greater adverse impacts than those alternatives. EPA has no such evidence here. Therefore, EPA can defer to Massachusetts' apparent view that RVP control is the next less costly (or is itself reasonable) measure. Thus, EPA concludes that Massachusetts' RVP regulations are 'necessary' to achieve the NAAQS.''); 54 FR 23650, 23651 (June 2, 1989) (finding same in approving Connecticut and Rhode Island RVP programs); 54 FR 37479, 37481 (Sept. 11, 1989) (stating in approval of Maine RVP, ''In addition, none of the available control strategies which could achieve the same magnitude of reductions as limiting the RVP of gasoline can be as quickly implemented'').

ATA's argument is not new. In comments on both the New York and New Jersey RVP SIP approvals, commenters claimed that, ''EPA's method for determining what is necessary is too vague because it would allow EPA to approve state fuel controls 'simply because alternative measures are more inconvenient, unpopular, or costly.' '' 54 FR 25572, 25574 (June 16, 1989); *see* also 54 FR 26030 (June 21, 1989). In responding to these comments, EPA explained:

> This judgment concerning what is too drastic is a complicated policy determination requiring the Administrator to weigh precisely those factors which the commenter would exclude from [the Administrator's] consideration—whether the remaining alternatives are costly or unpopular. * * * EPA's and New Jersey's analysis of reasonably available controls is based on a factual record supported by the best analytical tools the agencies had available to them at the time. EPA's judgment that State fuel regulation is a less drastic course than gas rationing and other unpopular controls so far not implemented in any SIP is clearly a matter on the frontier of air pollution control planning, and therefore cannot (and need not) be supported by the same technical record as, for example, EPA's determination of [the emissions reductions needed] to attain the standard.

54 FR at 25574; *see also* 54 FR at 26033. In both the New Jersey and New York approvals, EPA reiterated the comparative nature of the analysis of alternatives:

> To be sure, if there were sufficient evidence for EPA to conclude that the state's RVP controls would result in significantly more severe impacts than other measures that neither EPA nor the state has yet identified as ''reasonable'' for the state to implement, then it might well be appropriate for the Agency to account for the emission reductions that those other measures would achieve before determining the shortfall against which to judge the RVP controls. The Agency does not believe, however, that the State's RVP control would produce significantly more severe effects than such alternatives (e.g., than a trip reduction ordinance of the type that Arizona found reasonable for application in Phoenix and Tucson).

54 FR at 26034–35; *see also* 54 FR at 25576.

EPA's current interpretation is consistent with the pre-1990 interpretation implicitly adopted by Congress. EPA's August 1997 *Guidance on Use of Opt-in to RFG and Low RVP Requirements* (''1997 Guidance'') explains:

> In determining whether other ozone control measures are unreasonable or impracticable, reasonableness and practicability should be determined in comparison to the [fuel] measure that the state is petitioning to adopt. This is not an abstract consideration of whether the other measures are reasonable or practicable, but rather a consideration of whether it would be reasonable or practicable to require such other measures in light of the potential availability of the preempted state fuel control. Some measures may be reasonable and practicable for certain areas of the country, but given the advantages of a [fuel] requirement under the specific circumstances of the particular area, the other measures may be comparatively unreasonable or impracticable. Finding another measure unreasonable or impracticable under this criteria would not necessarily imply that the measure would be unreasonable or impracticable for other areas, or even the same area, under different circumstances.

1997 Guidance at 6.

The Guidance also reviews factors which may be used in comparing control measures, as follows:

> While the basis for finding unreasonableness or impracticability is in part comparative, the state still must provide solid reasons why the other measures are unreasonable or impracticable and must demonstrate these reasons with adequate factual support. Reasons why a measure might be unreasonable or impracticable for a particular area include, but are not limited to, the following: length of time to implement the measure; length of time to achieve ozone reduction benefits; degree of disruption entailed by implementation; other implementation concerns, such as supply issues; costs to industry, consumers and/or the state; cost-effectiveness; or reliance on commercially unavailable technology. A strong justification for finding a measure unreasonable or impracticable may depend upon the combination of several of these reasons. Regions should consider as many of these factors as may apply in evaluating each measure that a state rejects as unreasonable or impracticable. Also, small differences in overall costs or cost-effectiveness are generally not sufficient to make a measure unreasonable, and states should not attempt to justify fuel requirements on that basis alone. Cost is one component of an overall assessment of comparative reasonableness and practicability.
>
> For example, two programs may achieve comparable emission reductions, but implementation of the measure other than the state fuel measure may involve substantially more disruption by requiring development and imposition of a new state regulatory program, together with significant capital investment in necessary technology. In addition, these hurdles to implementation may mean that there would be a substantial comparative delay in emissions reductions. Under such circumstances, the other measure may well be unreasonable in comparison to a fuel requirement.

1997 Guidance at 6.

EPA believes this interpretation reasonably preserves a State's ability to address its air quality problems in an efficient and timely manner. It also reflects the reality that the reasonableness and practicability of control measures is dependent on the circumstances faced in a particular area and the suite of options available to address the particular problems. EPA also believes, contrary to ATA's claim, that Texas has analyzed whether other control measures could be implemented. EPA reviewed that analysis in the TSD, and responds to specific comments on that analysis in responses to Issues 3.4, 3.5, and 3.6 below.

3.3: Explanation of Why Other Control Measures Are Unreasonable or Impracticable-Premature To Assess This Now When Texas Must Still Identify Future Control Measures To Fill the Emissions Shortfall, and the LED Rule Will Not Be Implemented Until 2005

ATA and TMTA commented that because the Texas SIP contains only enough control measures to achieve the NAAQS in part, and leaves a NO_X emissions shortfall for which Texas makes an ''enforceable commitment'' to fill in the future, it is premature to determine whether the State has met the statutory test of necessity when it is impossible to analyze other possible control measures. EPA must review the additional control measures Texas will adopt in the future before making a Section 211(c)(4)(C) determination on the LED measure, which will not take effect until 2005.

ATA further states that by delaying implementation of the LED rule until 2005, Texas has made it premature for EPA to grant a fuel waiver since Texas must determine by 2004 what other measures will be used to meet attainment. One stated purpose of the delay to 2005 is to allow for alternative emission reduction plans, but despite this purpose, Texas is asking EPA to grant a preemption waiver for a fuel that

will not be used for four years. It is impossible to predict what mix of control measures will be needed in 2005 to reach attainment in 2005 and beyond. EPA should conduct a public workshop and publish a formal request for information to identify all potential NO_X control measures, obviating the need for boutique fuel formulations.

Response: EPA disagrees with commenters' claims that necessity cannot be determined until all of the control measures necessary for demonstrating attainment have been identified. The interpretation offered by ATA and TMTA would be in direct conflict with the language of 211(c)(4)(C) and has been repeatedly rejected by EPA.

ATA and TMTA argue that because the SIP identifies a shortfall in the needed emissions reductions and commits the State to implement control measures in the future, it is premature to find the fuel measure necessary because other measures will need to be adopted and may be more reasonable. Under this interpretation, no state fuel controls could be approved into a SIP unless the SIP provided a final demonstration of attainment. For all other SIP revisions, where a shortfall of emissions reductions is identified, a fuel control could not be found to be necessary because other alternative controls would eventually need to be adopted and those other measures may be more reasonable than the fuel measure or provide sufficient benefits to offset the need for the fuel control.

This result is expressly rejected by section 211(c)(4)(C), which provides ''The Administrator may make a finding of necessity under this subparagraph even if the plan for the area does not contain an approved demonstration of timely attainment.'' In other words, Congress expressly allows approvals of fuel controls into a SIP before a final demonstration of attainment is made.

The language in 211(c)(4)(C), added as part of the 1990 Amendments, again represents a ratification of EPA's pre-1990 interpretation that necessity under 211(c)(4)(C) can be demonstrated even though the SIP approval acknowledges an emissions reduction shortfall and implicitly anticipates the need for additional future controls. *See, e.g.,* 54 FR at 37481 (proposing approval of a Maine State fuel control); 54 FR at 19174 (approving a Massachusetts State fuel control); and 54 FR at 23652 (approving State fuel controls for Connecticut and Rhode Island). In the 1989 approvals of the New York and New Jersey low RVP control programs, EPA explained that it does not interpret section 211(c)(4)(C) to require a complete demonstration of attainment in order to approve a fuel control measure:

> Forcing a state to demonstrate attainment before allowing it to adopt stricter fuel controls would yield perverse results. Areas with the worst ozone nonattainment problems, which have the most difficulty assembling a demonstration of attainment, would be disabled for perhaps several years from adopting clearly necessary controls. * * * Several commenters noted that New Jersey so far has not been able to identify any combination of control measures which would bring the State into attainment. It is precisely in areas like New Jersey, with an especially difficult nonattainment problem, where the expeditious implementation of new controls, and hence the finding of necessity under section 211(c)(4)(C), is most appropriate.

54 FR at 25573–74; *see also* 54 FR at 26032 (finding same for New York).

ATA also suggests that because additional controls must be identified in 2004, before the LED implementation date in 2005, EPA cannot determine that reasonable and practicable alternatives will not be available. TMTA argues further, that the finding of necessity is inconsistent with EPA's presumption that such reasonable or practicable controls will be available by 2004.

At the outset, TMTA's assertion that EPA has presumed reasonable and practicable measures will be available in the future is unfounded. Texas developed a list of measures that it is able to implement but could still not provide enough NO_X reductions to meet the attainment goal. As a result, the State must look to the future for emerging technologies and other newly available measures to fill its enforceable commitments. EPA's approval of the SIP with enforceable commitments, however, is not dependent on any assumption as to the reasonableness or practicability of these future controls. In all likelihood, the State will need to explore more and more drastic control measures to fulfill the enforceable commitments made in this SIP.

EPA and the State have canvassed an extensive array of control measures and adopted or counted the emissions reductions of a number of measures that have not been implemented as part of any other SIP. These options reflect the combined efforts of multiple agencies and stakeholders and represent the set of controls that these groups believed were worthy for State consideration. This list will certainly change over time, as will the assessment of the reasonableness and practicability of these controls. It is not reasonable, however, to prevent the State from moving forward with fuel controls based on the inherently changing nature of the list of alternatives. Based on the information before the State and EPA at this time, it is reasonable to conclude that the LED program is necessary under 211(c)(4)(C) because the alternatives known to the agencies are not considered reasonable and practicable at this time. Whether new controls are identified in the future or currently identified controls become more reasonable at a later date, does not affect the rational basis supporting EPA's action today.

ATA's claim that necessity cannot be demonstrated until later because the State has provided lead time for implementing the LED control that extends beyond the 2004 date for identifying additional controls, further ignores the reality of the situation being faced by the State. The State concluded that significant lead time will be required for refineries to implement the LED program. Notwithstanding the extended time needed for implementation, the State and EPA have still concluded that the control is necessary because no other reasonable or practicable alternatives are available that would achieve timely attainment. If the State were forced to wait until 2004 to finally adopt the LED program into the SIP, it could be 2009 before the program could be reasonably implemented. Alternatively, if the State maintained the LED program as an adopted program but waited for SIP approval around 2004, refiners would be put in the difficult position of trying to decide whether to make the necessary investments to comply with the State rule should it be approved. Neither outcome is a reasonable approach to implementing the Clean Air Act and neither is consistent with section 110(a)(2) of the Act which requires attainment ''as expeditiously as practicable.''

3.4 Explanation of Why Other Control Measures Are Unreasonable or Impracticable—Measures for Which There Is No Explanation of Justification

ATA shows there are 21 control measures listed in Appendix L of the HGA SIP for which Texas claims it had insufficient information to evaluate for possible adoption. This list of measures contains no explanation why they meet the statutory standard of being ''unreasonable or impracticable'' to adopt.

TMTA also argues that Texas failed to explain why other more cost-effective measures are unreasonable or impracticable. Some of the measures in Appendix L, the ''initial list of brainstorming ideas,'' were transformed

into proposed rules while others were not. For those measures not incorporated into the SIP, Texas has not justified why these measures were deemed ''unreasonable or impracticable.'' A more thorough review is necessary.

Response: Appendix L consists of the list of more than 200 brainstorming ideas that was generated by TNRCC (State of Texas), EPA Region 6, California contacts, and stakeholders. The process of brainstorming involves listing all ideas suggested without making any judgment on them, and without necessarily knowing what each idea entails. The list was later categorized by the State to reflect its evaluation of the merits of each option as known at that time. When the list was developed during the SIP development process, not much was known about some of the options. Many that fell into that category turned up on ATA's list of measures for which it claims a more thorough review is necessary. At the time the SIP was adopted, the State continued to lack sufficient information for most of these measures to make an informed decision about credit values that could be assigned to them as well as effective implementation strategies. Other criteria that were used to determine if options were reasonable or practicable are whether legislative authority would be necessary and the difficulty (hence the effectiveness) of enforcement to bring about real reductions. Most of these measures have not been adopted into ozone SIPs anywhere in the country. A few of these measures may be re-considered for future attainment plans to fill the emissions shortfall, or have been incorporated into HGA's programs for Voluntary Mobile Emissions Programs (VMEP) and/or Transportation Control Measures (TCM) for very limited, if any, credit in current or future attainment plans, but are so small that they could not begin to fill the 56 tpd NO_X emissions shortfall.

Control option	What we know/what we don't know
Require purchase of emission reduction credits to offset upset emissions of NO_X.	The State is uncertain about what this idea entails. There is already a provision in the current Mass Cap and Trade rules covering exceptional circumstances.
Expanded I/M Light-duty diesel & Expanded I/M Heavy-duty Diesel.	EPA has not certified a technology for diesel inspection and maintenance that addresses NO_X reductions; this is still an emerging technology. The State has listed Diesel I/M as a possible future control strategy on p. 7–40 and 43 of the HGA SIP attainment demonstration.
Remove speed bumps & Traffic calming (reduce fast starts/stops).	These Transportation Control Measures appear to do the same thing by eliminating starts and stops. Preliminary studies have shown the benefit to this TCM to be in pounds per day rather than tons per day.
Restrict private traffic control officials on Regional Computerized Traffic Signal System streets (RCTSS).	This measure would prohibit businesses from placing cops-for-hire at exits to employee parking lots at close of business. This type of traffic control activity conflicts with automated signalization on the RCTSS streets. The benefit is dubious based on the amount of idling that would result in the employee parking lot while motorists waited to dart into moving traffic. No known studies on this.
Consider merging all regional mass transit into 8-county mass transit authority to better coordinate programs.	Implementing this measure would require a legislative change as well as local voter approval. The benefit, if any, for this measure is unknown, and would depend on the success of such a merger in increasing use of mass transit and decreasing VMT. This could take many years to establish.
New technology (Guided bus)	No one knows enough about this new technology to know if implementing this technology would produce a benefit or be cost-effective.
TRANSTAR expansion & TRANSTAR: Incident detection system (covers 20 miles of freeway corridor).	TRANSTAR expansion appears in the VMEP but is assigned zero credit for implementation.
Air conditioner use assumptions in emissions model plus reduction options.	These are not control measures, therefore cannot be considered as a reasonable or practicable measure. When MOBILE6 is released for use, these factors will be included in future modeling. They are not included in MOBILE5 modeling which is required for use in this attainment demonstration.
Adjustments to Modeling assumptions: Emissions model deterioration rate.	
Adjustments to Modeling assumptions: Speed controls by type of vehicle.	The State is uncertain which type of vehicles would be speed controlled and in what manner.
2005 Registration fee for diesel engines. To be waived for CNG engines.	Texas Senate Bill 5, signed by the Governor on June 14, 2001, imposes a surcharge on the registration of a truck-tractor or commercial motor vehicle in an amount equal to 10 percent of the total fees due for the registration of the truck-tractor or commercial motor vehicle. This was effective September 1, 2001. There would be little if any NO_X benefit to convert to CNG because CNG is directed more toward non-methane hydrocarbon, CO2, mass of particulate matter, and air toxic emissions.
Combustion control (Off-road mobile sources)	Senate Bill 5 (TERP) also addresses this control option. See response to issue 3.5 for description of TERP, and issue 3.6 for explanation of how TERP emission reduction credits in excess of credits from repealed rules can help fill the emissions shortfall.
Fertilizer substitutions	Fertilizer is a part of the NO_X emissions inventory under biogenics (18 tpd). Reducing the biogenic portion of the inventory has not been studied enough to provide any certainty on effective control measures.
Airplane ground operations—taxiing; scheduling	Although planning of airline operations during rush hours to reduce idling on runways to reduce emissions may have merit, the State does not have the authority to impose regulations on airlines to require this planning. The Federal Aviation Administration has jurisdiction over airline operations once the aircraft leaves the gate. The State executed agreed Orders with the major airlines and the City of Houston to achieve emission reductions from Ground Support Equipment (GSE) at airports in the HGA area, which does not apply to planes.
Contract incentives (construction industry)	This measure is being implemented in the HGA VMEP as one part of the Local Government Emission Reduction Program. Credits generated from the Texas Emission Reduction Plan (TERP) can be used in this measure once they become available.

Control option	What we know/what we don't know
Regulate speed and course in Texas water of Gulf of Mexico	The Houston-Galveston Area Council investigated this control measure as part of the VMEP. It was not considered feasible for the HGA area. Two reasons were cited. Ships already operate at reduced speed during their time in the Houston Ship Channel so only small speed reductions are possible. Second, even small reductions in speed raise safety concerns by the Harbor Pilots because of potential loss of steerage.
Emission controls (offshore sources) & Restriction on use of off-shore equipment at certain times of day/week/season.	EPA, along with the U.S. Department of Interior—Minerals Management Service conducted a modeling evaluation of the impacts from emissions of offshore sources on ozone nonattainment areas in Texas and Louisiana. A field study was conducted in 1993, and the final report was completed in 1995. Based on the modeling completed, the overall impact from these offshore sources was deemed to be small. Texas has limited ability to regulate offshore sources, being confined to those sources within State waters (within 10 miles of the coast). Section 209(e) prohibits State controls of non-road engines unless the measure is identical to one approved by EPA for California. See Engine Manufacturers Ass'n v. EPA, 88 F. 3d 1075 (D.C. Cir. 1996).

3.5: Explanation of Why Other Control Measures Are Unreasonable or Impracticable-Measures for Which There is Inadequate Explanation of Justification

ATA comments that there are eight categories of control measures rejected by Texas which cannot be summarily dismissed as unreasonable or impracticable. EPA failed to conduct an independent analysis of these rejected measures, and failed to analyze whether each rejected measure is, by itself, unreasonable or impracticable but only compared each measure to the LED rule. Finally, the list of 200 measures which Texas relied on in its planning process is dated 2/99, more than two years ago, and is outdated, especially considering the 2005 implementation date of the LED rule. The eight categories are:

(A) Expanding control measures beyond the HGA non-attainment area (focus is on Major Point Source NO_X reduction controls, *i.e.*, power plants)

(B) Expanding vehicle I/M requirements.

(C) Expanding speed limit reductions.

(D) Expanding vehicle idling restrictions.

(E) Three variations of driving restrictions.

(F) Four control measures identified in App L as ''economically infeasible,'' including LED fuel. The others are an emission-based registration fee; a clean-fueled shuttle; and a gas tax increase.

(G) Accelerated purchase of low NO_X engines (Tier 2 and Tier 3 diesel equipment) and early (pre-2004) introduction of lower emission HD trucks and buses through market-based incentives.

(H) Construction shift.

Response: ATA claims the list of 200 measures used in the Texas planning process is outdated, especially considering the 2005 implementation date of the LED rule. Although the list is outdated in some respects with more than two years of hindsight, we disagree with the implication that it was not reasonable for Texas to proceed from that list to choose measures such as the LED rule which will be implemented several years in the future. As noted above in our response to issue 3.4, the Texas planning process for this 2001 attainment demonstration deadline involved numerous stakeholders and a time-consuming review of measures which originated with brainstorming and progressed to an evaluation of the then-known advantages and disadvantages of the 202 measures listed in Appendix L. The planning process led to choices for the State's rulemaking effort, another time-consuming process which is required in order to provide public notice and comment on the State's proposed controls and to meet the CAA standards for SIP measures. Following adoption is the time required to implement the measures, which in some cases may take several years.

The process beginning in 1999 or earlier is necessary to meet the 2001 deadline and the eventual 2007 attainment date. The CAA specifically requires interim deadlines or milestones for states with attainment dates many years in the future in order to prevent a state from waiting until the last minute to find ways to achieve attainment, in recognition of the time required to identify, evaluate, propose, adopt, and implement controls. Some of the rejected measures in Appendix L will be re-considered by the State to fill the emissions shortfall from this attainment demonstration, but Texas made reasonable decisions in choosing from measures identified in 1999 from which it has proceeded to adopt the measures we are approving today.

The first four measures listed above are measures which ATA claims could be adopted in the areas beyond the HGA non-attainment area and have not been analyzed sufficiently to reject them as reasonable alternatives to the LED rule. We disagree. In addition to considering and adopting control measures within the three ozone non-attainment areas in Texas (HGA, DFW, and BPA) to meet their respective attainment obligations, Texas considered adopting many of the same measures for the 95 attainment counties of eastern and central Texas. As discussed in the response to issue 3.7, both ozone and its precursor NO_X and VOC emissions can be transported from the attainment areas into the non-attainment areas. The transport influence of ozone and NO_X emissions into the HGA non-attainment area is strongest within the attainment areas that are up to 50 and 200 kilometers of the HGA area, respectively.

Texas adopted a regional SIP strategy for the 95 counties after considering the expected benefit for the non-attainment areas as well as the costs to be imposed on the residents of the 95 attainment counties. Some of the 95 counties are more populated than others but the population density of the 95 counties is much less than in the HGA non-attainment area, as noted below. The strategy included two measures for VOC reductions (Stage I vapor recovery control and low RVP gasoline control), approved into the Texas SIPs on December 20, 2000, (at 65 FR 79745), and April 26, 2001 (66 FR 20927), respectively, and one measure for stationary source NO_X controls, approved into the Texas SIPs on March 16, 2001 (at 66 FR 15195). Additionally, Texas adopted speed limit reductions and vehicle I/M requirements as part of the DFW SIP in five of the 95 attainment counties, those nearest DFW, where population size and VMT is large enough to show a significant benefit. More detail on the NO_X control measures is provided below for the first three measures listed, but we believe Texas has made reasonable choices in assessing the possible control measures

to be adopted in the 95 counties after considering their likely benefit for the non-attainment areas and the size of the population that would bear the cost of the control.

We also note that for the following alternative measures, even if the measures were considered reasonable and practicable, they would have to provide enough emission reductions to fill the 56 tpd NO_X emissions shortfall completely in order to displace the need for the LED rule. Many of these measures would yield small reductions, as noted in discussion of such measures.

Expanding Control Measures Beyond the HGA Non-Attainment Area—(Focus Is on Stationary Source NO_X Controls)

Texas rules for stationary sources in attainment areas are already more stringent than Federal rules for attainment areas. For stationary source NO_X controls in the attainment area, the State rules require all grandfathered sources to reduce their emissions by 30 percent, all grandfathered utilities to reduce emissions by 50 percent, and cement kilns to reduce by 30 percent. New sources in the attainment areas must meet Federal Prevention of Significant Deterioration requirements which may require controls be put in place depending on emission levels.

The 30 percent control for cement kilns is consistent with EPA's Alternative Control Techniques (ACT) for Cement Plants. See EPA–453/R–94–004. There are no requirements for cement kilns in HGA, DFW, and BPA because there are no cement kilns there. Technology to reduce NO_X emissions beyond 30 percent for cement kilns is not cost-effective, although some cement kilns in the attainment area near DFW were able to reduce emissions by as much as 50 percent. All kilns cannot be controlled in the same way or to the same degree due to technology differences in the kiln type, design, and operation. The 50 percent reduction requirement for utilities was determined by examining the most cost-effective controls. Because most of these facilities are grandfathered they had few controls, if any, to start with. Combustion control was determined to be the most cost-effective control for these facilities. The annualized cost to install and operate combustion controls on utilities is estimated at $4,000 per ton of emissions reduced. Thirteen of the utilities affected by this rule are municipal or electric cooperatives. The coal-fired utility in San Miguel will spend more ($5,288/ton) for 4,768 tons of reductions, while the municipality-owned stationary gas turbines will be less than $4,000/ton. Small business emission reduction controls are also expected to average about $4,000/ton. Small increments of additional NO_X reductions for utilities were expected to run $10,000/ton. For this reason, the cost/benefit ratio goes up dramatically past 50 percent for utilities.

In the nonattainment areas of HGA, DFW, and BPA, Selective Catalytic Reduction was determined to be the most cost-effective means of control because combustion controls had already been applied to sources in those areas and further NO_X reductions were still needed in these more populated areas. In response to a comment from TXU (Texas Utilities) on the State's NO_X point source rulemaking, the State responded that regarding cost for increasing reductions from 70 percent to 88 percent, it was determined that an average cost to do so could be as high as $7,500/ton depending on the type of unit being retrofitted. For grandfathered utilities this cost would be on top of the initial costs for combustion controls plus other measures, which we have not discussed, to increase reductions from 50 to 70 percent. Therefore, not even accounting for all costs, the estimated cost per ton for these small sources is well over $10,000/ton. For this reason, the cost/benefit ratio goes up dramatically past 50 percent for utilities. We agree this is unreasonable in attainment areas where a smaller population would bear the larger cost.

Expanding Speed Limit Reductions Beyond the HGA Non-Attainment Area

Speed limit reductions have been implemented in five attainment counties that adjoin the DFW nonattainment area. These counties have a significant amount of vehicle miles traveled (VMT) and ample fleet size to justify expanding this measure beyond the 4-county area, and the resulting emission reduction is reflected in the DFW SIP for its attainment of the 1 hour ozone NAAQS.

Population density in the remaining attainment counties is about 83 persons per square mile.[9] In the HGA nonattainment area (including 3 mostly rural counties whose total population is 116,000,) the population density is 502 persons per square mile. This measure would have a very small benefit due to the low VMT in the counties nearest to HGA. Considering the high degree of cost and disruption involved in implementing and enforcing speed limit reductions in areas with such low population density and VMT, the measure would be unreasonable and impracticable.

For example, Montgomery County is part of the HGA nonattainment area, not considered rural, but much less urbanized than Harris County, which is the core county in the HGA. Montgomery County has a daily VMT of slightly over 5.8 million miles. Lowering speed limits in Montgomery County contributes only 1.44 tpd or 0.14 percent of needed NO_X emissions reductions. Of eight attainment counties adjoining the nonattainment counties, the average population is under 38,000 per county, and the average daily VMT is about 1.1 million miles (or less than 1/5 that of Montgomery County). This data regarding relatively low population, as well as Texas Department of Transportation (TXDOT) data,[10] support our statement that there is not a significant amount of vehicles miles traveled or ample fleet size to justify expanding this measure. The TXDOT Districts are made up of a number of counties each.

TxDOT district	Vehicles registered	VMT/day	Sq. miles
Houston District—Brazoria, Fort Bend, Galveston, Harris, Montgomery, Waller	3,675,485	67,549,266	6,732
Lufkin District—north of Houston—Angelina, Houston, Nacogdoches, Polk, Sabine, San Augustine, San Jacinto, Shelby, Trinity	264,061	8,087,867	7,538

[9] Data from the Texas Almanac, 2000–2001 edition, 1999. Dallas Morning News, Dallas, TX. pp. 131–284.

[10] Data from the Texas Department of Transportation website, at: http://www.dot.state.tx.us.txdot.htm.

TxDOT district	Vehicles registered	VMT/day	Sq. miles
Beaumont District—northeast of Houston—Chambers+, Hardin*, Jasper, Jefferson*, Liberty+, Newton, Orange*, Tyler	484,998	14,286,703	2,846 2,045+ 2,388*
			7,279 total
+Part of HGA nonattainment			+HGA
*Nonattainment counties in the Beaumont-Port Arthur nonattainment area.			*BPA
Bryan District—west of Houston—Brazos, Burleson, Freestone, Grimes, Leon, Madison, Milam, Robertson, Walker, Washington	294,645	11,114,870	8,845
Yoakum District—south of Houston—Austin, Calhoun, Colorado, DeWitt, Fayette, Gonzales, Jackson, Lavaca, Matagorda, Victoria, Wharton	310,694	10,719,104	11,025
East of Houston—There are no counties, just the Gulf of Mexico			

Expanding I/M Beyond the HGA Non-Attainment Area

Vehicle I/M is being expanded into five attainment counties in the DFW area which have opted to establish this program. These counties have sufficient population, percent of commuters, and potential growth rates to warrant implementing I/M to obtain meaningful reductions in NO_X emissions which would benefit the DFW non-attainment area, and the resulting emission reduction is reflected in the DFW SIP for attainment of the 1 hour ozone NAAQS.

With respect to the remaining attainment counties, none has opted to establish such a program, and cannot be required to do so under current state law or Federal I/M rules. Although we agree with the commenter that the fact that a legislative change is required to implement a program is not a sufficient reason to reject a control measure, we reiterate that it is the length of time that would be required to seek such changes and implement them that make the success of such a measure unpredictable and impracticable. Opposition to vehicle I/M programs in Texas historically has been strong, resulting in the legislative decision in 1997 to allow such programs in attainment counties only if those counties voluntarily decide to adopt them. It is very unpredictable whether such opposition could be overcome, even with the delay in implementation of the LED rule from 2002 to 2005.

We also consider the amount of emission reductions expected versus the cost to implement an I/M program. In the three mostly rural counties of the HGA nonattainment area, the average NO_X emission reductions from I/M is about one ton per day. The cost for one I/M testing station equipped with ASM–2 (the type of testing equipment required in the non-attainment area) is about $40,000, which means the cost per ton of NO_X reduction is at least $40,000 per ton. More than one station in a county might be required, increasing the cost per ton of NO_X reductions even more. Although this cost can be recovered when the number of vehicles is large, it is not reasonable or practicable in less populated areas with fewer vehicles, such as the 36 counties nearest HGA (as indicated in the chart above) where emissions would have the strongest influence on HGA.

Expanding Vehicle Idling Restrictions Beyond the HGA Non-Attainment Area

Idling restrictions in the nonattainment area which is congested and includes eight counties yields less than 0.5 tpd of NO_X emission reductions. Emission reductions from idling restrictions in less populated areas, especially the 36 counties closest to HGA where emissions would have the strongest influence on HGA (as noted in the chart above) would be considerably less. The cost to implement and enforce such restrictions in less populated areas where the benefit would be very small makes this an impracticable measure.

Measures Rejected Due to Technical Infeasibility

The three types of driving restrictions mentioned by the commenter are (1) restrictions on use of ''drive-through'' services, such as fast food restaurants and banks; (2) restrictions on driving by time of day or by alternate days; and (3) restrictions on driving by geographic area. No jurisdiction in the country has adopted such restrictions for ozone SIPs, with the exception of use of ''drive-through'' restrictions on a voluntary basis on ozone action days. Such voluntary measures would be subject to EPA's limit on their use in SIPs, which Texas has already met.

The impact of such driving restrictions on consumers as well as businesses, big and small, would be substantial, forcing a major examination of alternate transportation methods and drivers' access to such methods. Such restrictions would have to be examined in light of the equity of forcing drivers who have limited economic means or limited access to alternate transportation methods to find other ways to get to their places of work. Enforcement of driving restrictions is difficult, and such restrictions would likely be very unpopular. EPA agrees with the State that these measures are unreasonable and impracticable.

Measures Rejected Due to Economic Infeasibility

The State originally adopted a statewide LED program for on-highway diesel fuel, considering wider coverage to be more economically feasible than the half-state program for 110 counties, and submitted this rule for the HGA SIP. More recently, the State reconsidered the half-state program, consistent with the Texas Clean Air Strategy,[11] and asked EPA to parallel process a change to the rules for geographic coverage as well as implementation date. The State concluded that the reduction in coverage area would reduce the cost burden upon areas of the State that would not benefit as much from the use of LED as the currently covered counties, but would also continue to ensure that there was sufficient supply to the areas that need it the most. See also our response to issues 1.2 and 1.6 regarding supply and coverage in the 110 county covered area, and our response to issue 3.7 regarding the necessity showing for LED fuel in the attainment areas.

Emission-based registration fees and a gas tax increase would require legislative action. Legislative action not

[11] The Texas Clean Air Strategy is a group of measures adopted by the State on April 19, 2000, to reduce background ozone concentrations in 95 attainment counties in east and central Texas. These include Stage I vapor recovery, Low RVP gasoline, and permitting of grandfathered stationary sources. EPA approved these measures into the SIP as cited above in this response.

only takes time (because the Texas Legislature is in session only in odd-numbered years for a few months each time), but the success of such action is unpredictable and opposition to such measures is strong. The impact of such economic requirements has the most severe impact on the poorest people who tend to own older, dirtier cars and would therefore pay the highest emission based fees, and for gas taxes would be paying a higher percentage of their income, since gas taxes are not progressive, for what is a virtual necessity in terms of access to places of work. It is not clear what the identifiable benefit of these programs would be, and we agree with Texas that they would be unreasonable or impracticable at this time.

Mandates to purchase new clean fuel airport shuttles or convert existing airport shuttles to clean-fuels were rejected as unreasonable because this would be a clear economic hardship on a very small group of vehicles typically owned by small businesses. Should this measure be considered in the future, some financial incentives may be available under the TERP (as described below) or through the Department of Energy's Clean Cities program.

Accelerated Purchase of Low-NO_X Engines and Early (pre-2004) Introduction of Lower Emission HD Trucks and Buses Through Market-Based Incentives

Senate Bill 5, adopted by the 77th Legislature in June of this year, required repeal of State rules requiring the accelerated purchase of low-NO_X engines but, in their place, adopted a plan to achieve equivalent reductions through the use of economic incentives. Senate Bill 5, which includes the Texas Emission Reduction Program (TERP), is an economic incentive program to accomplish exactly what the rule mandated—to accelerate the purchase of new engines or rebuilt or retrofitted existing engines to achieve the same low-NO_X emission levels. Although most of the funds will be directed toward the nonattainment areas, funds are not restricted to the nonattainment areas. Therefore, this measure is being implemented, and has been submitted as part of the SIP which is being approved today.

The TERP is similar to California's Carl Moyer Program that provides grants to cover the incremental cost of cleaner on-road, off-road, marine, locomotive and stationary agricultural pump engines, as well as forklifts and airport ground support equipment. The TERP is also a state-funded program to provide grants, rebates, and other incentives for improving air quality throughout the State. The grant program will pay the incremental costs of repowering, rebuilding, or retrofitting on-highway vehicles and non-road equipment. A rebate program offers incentives for the purchase or lease of cleaner new on-road, heavy-duty diesel vehicles.

The Construction Shift

Pursuant to Senate Bill 5, referenced above, the Legislature revoked TNRCC's authority to implement the construction shift rule with the understanding that the incentives provided by the TERP will achieve equivalent reductions. The construction shift rule allowed operation during the morning hours only if a company presented a plan that showed how they would achieve reduced NO_X emissions. A plan using low-NO_X engines, whether new, rebuilt, or retrofitted, would have been acceptable to meet that requirement. Therefore, the TERP achieves the same goal, and the measure is being implemented. The equivalent emission reductions from the TERP were substituted for the reductions that would have resulted from the construction shift rule in the SIP we are approving today.

3.6 Explanation of why other control measures are unreasonable or impracticable-measures which Texas and EPA failed to consider at all, or which Texas has recently adopted and has failed to account for in the SIP

ATA commented that there are at least six measures which Texas did not adopt which Texas should have considered and EPA should have independently analyzed as to whether they are unreasonable or impracticable.

(A) Emissions banking and trading program (mentions new SCAQMD program)

(B) Accelerated retirement of HD vehicles

(C) Natural gas buses

(D) Phoenix voluntary early ozone plan

(E) Energy efficiencies (Building codes)

(F) Federal clean fuel fleet program

Texas failed to consider existing programs with demonstrated cost-effective emission reductions. TMTA argues that Texas is obligated to look beyond its borders to investigate control measures used in other jurisdictions before obtaining a fuel preemption waiver. A non-exhaustive list includes the following seven measures. The last two of these measures which were recently adopted in Texas need to be accounted for in the SIP analysis; since attainment was demonstrated without them, it is likely attainment can now be demonstrated by substituting these programs for the LED rule.

(A) Emissions banking and trading program

(B) Phoenix voluntary early ozone plan

(C) Accelerated retirement of HD vehicles

(D) Early introduction of low-NO_X engines

(E) Carl Moyer Memorial air quality standards attainment program

(F) Texas emissions reduction program (Senate Bill 5)

(G) Texas House Bill 2912

TMTA also commented that two non-fuel measures have been adopted by Texas since TNRCC submitted its attainment demonstration SIP to EPA, and these non-fuel measures will provide emission reductions that will make the LED rule emissions benefits unnecessary: (1) is the Texas Emissions Reductions Plan Fund, modeled on California's Carl Moyer program. If it is as successful as its prototype, the 52 [sic] tpd additional NO_X reductions required in the Houston SIP can be achieved in less than three years; (2) is a requirement that unregulated facilities in eastern Texas be permitted by 2007 and that oil and gas pipeline facilities in eastern Texas reduce emissions from internal combustion engines by as much as 50 percent.

Response: Most of the measures discussed below have already been adopted by Texas for inclusion in the SIP, whether previously approved (such as the Clean Fuel Fleet program) and therefore reflected in the baseline emissions inventory or as part of today's attainment demonstration or as plans for future attainment demonstrations to fill the 56 tpd NO_X emissions shortfall. Unless they would provide enough emission reductions to fill the 56 tpd NO_X emissions shortfall completely, they do not displace the need for the LED rule. Many of these measures would yield small reductions, as noted in discussion of such measures.

Emissions Banking and Trading Program

The comment pertained to South Coast Air Quality Management District expanding the emissions trading program by permitting stationary sources of air pollution to purchase NO_X credits from mobile sources. ATA commented that programs like these rely on the free market to produce NO_X reductions in the most cost effective manner. The TNRCC Mass Emissions Cap and Trade (MECT) EIP program for the HGA nonattainment area provides for this free market trading approach.

EPA proposed approval into the Houston SIP of the TNRCC MECT program on July 23, 2001 (66 FR 38231), to provide flexibility in achieving the 595 tpd NO_X reductions from stationary sources. EPA is finalizing that approval today in a separate action. For more information on the emissions banking and trading program, see our action published elsewhere in the **Federal Register**.

Accelerated Retirement of Heavy Duty Vehicles

The Texas Emission Reduction Program (TERP), described above in the response to issue 3.5, offers incentives to replace engines in older vehicles with the cleanest engines available. This program did not exist when the SIP was developed and adopted but was recently adopted by the Legislature. Emission reductions from the TERP replace the reductions that would have resulted from two rules for which the Legislature required repeal, i.e., the accelerated purchase of low NO_X engines and the construction shift. Any emission reductions from this voluntary program which exceed the reductions that would have resulted from the repealed rules will go toward filling the emissions shortfall in the attainment demonstration we are approving today.

(*See* a description of the TERP and how it compares to the Carl Moyer program under the discussion in our response to issue 3.5 for accelerated purchase of Tier II/Tier III (low-NO_X) engines.)

Natural Gas Buses

Natural gas buses, as one type of Low Emission Vehicle, are already mandated by the State for purchase by mass transit authorities in 30 TAC 114.150. The low emission vehicle fleet rules meet Federal Clean Fuel Fleet requirements for this program. EPA approved this program into the HGA SIP on February 7, 2001, (66 FR 9203) so the NO_X emission reductions achieved through this measure are already accounted for in the baseline emissions inventory for this attainment demonstration and SIP revision.

Phoenix Voluntary Ozone Plan

Houston has adopted most of the measures included in the Phoenix Voluntary Ozone Plan, as described below, but such measures are limited in terms of NO_X benefits and would not fill the 56 tpd NO_X emissions shortfall in the attainment demonstration. Some of these measures are already in the attainment demonstration being approved today, and some will be adopted for inclusion in future attainment plans to help fill the emissions shortfall.

Tax incentives similar to those in the Phoenix Voluntary Ozone Plan are included in future attainment plans as part of the State's enforceable commitments to adopt measures to fill the emissions shortfall in the attainment demonstration being approved today. Fireplaces are not used regularly in HGA, and definitely not during the ozone season. So, this measure is more likely to address carbon monoxide or particulate matter pollution that may be issues in Phoenix but not in HGA.

Traffic light synchronization is also being implemented in HGA, partially under Transportation Control Measures(TCMs) and partially under the VMEP. The Computerized Traffic Management System, the Arterial Traffic Management System and Intersection Improvements are TCMs that include some signalization projects.

Trip reduction programs are part of the HGA Voluntary Mobile Emission Reduction Program (VMEP) in the Commute Solutions program. Texas has addressed the use of alternate energy sources at construction sites by providing incentives through the TERP (described above). The Regional Computerized Traffic Signal System is part of the VMEP that includes signalization timing projects for roadways designated as local streets, either intrazonal or central connectors. The VMEP credits are limited to 3 percent of the total emission reductions needed for the SIP. Therefore additional credits for traffic signalization cannot be taken under the VMEP.

Signalization under the VMEP is estimated to generate an estimated 0.0–0.5 tpd NO_X reductions in the 8-county area. The three TCM projects are projected to generate 0.36 tpd. This includes other activities within these categories besides the signalization projects. Details of the VMEP are found in Appendix K, while details of the TCMs are found in Appendix I of the HGA SIP.

Energy Efficiency (Building Codes)

This is included as a measure to fulfill an enforceable commitment in future attainment plans which will address the emissions shortfall in the attainment demonstration being approved today. (See pages 7–44 through 7–52 of the HGA attainment demonstration SIP.) Senate Bill 5, enacted in June 2001, includes incentives for purchase of energy efficient appliances and sets building energy performance standards. Rules on the energy efficiency program will be submitted as part of the future attainment plans.

Federal Clean Fuel Fleet Program

ATA points to the following EPA statement in its approval of the Texas Clean Fuel Fleet substitute plan as support for its claim that the Texas substitute program would not produce the same NO_X reductions when compared to the Federal Clean Fuel Fleet program:

> It is similar to the Federal CFF program, but with a number of significant differences that, but for the supplemental controls, result in an emissions reduction shortfall as compared to the Federal CFF program. (Emphasis added.)

66 FR 9203 (2/7/01), at 9203. The italicized phrase is the important qualification to the sentence which ATA ignored in making its claim. EPA's statement refers to only one component of the Texas substitute plan, a State fleet program—the Texas Clean Fleet (TCF) program. Texas has supplemented this state fleet program with additional controls, as allowed under the CAA.

The Federal CFF program requirements are contained in part C, entitled, ''Clean Fuel Vehicles,'' of Title II of the CAA, as amended in 1990. Part C was added to the CAA to establish two programs: a clean-fuel vehicle pilot program in the State of California (the California Pilot Test Program) and the Federal CFF program in certain ozone and carbon monoxide (CO) non-attainment areas. Section 182(c)(4) of the CAA, 42 U.S.C. 7511a, allows States to opt-out of the Federal CFF program by submitting, for EPA approval, a SIP revision consisting of a substitute program resulting in as much or greater long term emissions reductions in ozone producing and toxic air emissions as the Federal CFF program.

Texas submitted a SIP revision to Chapter 114 and the State's plan for implementing a substitute program to opt out of the Federal CFF program on August 27, 1998. The revision was adopted after public notice and hearing as required by sections 110(a)(2) and 110(l) of the CAA and 40 CFR 51.102(f). Texas' CFF substitute plan relies on a State fleet program—the Texas Clean Fleet (TCF) program—supplemented with additional VOC and NO_X emission controls.

The State has met the requirements of the CAA and has successfully demonstrated that its CFF substitute plan will achieve long term reductions in emissions of ozone producing and toxic air pollutants in excess of those that would have been achieved by the Federal CFF program. EPA published its direct final rule on the State's substitute program on February 7, 2001, (66 FR 9203) and no adverse comments were

received. Credit for the NO_X reductions attributable to Texas' CFF substitute plan are reflected in the Texas SIP baselines for ozone.

Early Introduction of Low-NO_X Engines

See our response to issue 3.5 regarding Accelerated Purchase of low NO_X engines.

Carl Moyer Memorial Air Quality Standards Attainment Program

See our previous responses that discuss the Texas Emission Reduction Program (TERP) in issue 3.5 regarding Accelerated Purchase of low NO_X engines and in this issue 3.6 regarding Accelerated Retirement of HD vehicles.

Texas Emissions Reduction Program (Senate Bill 5)

When the HGA SIP was developed and adopted, the 77th Texas Legislature had not yet come into session. Senate Bill (SB) 5, which created the Texas Emission Reduction Program (TERP), was introduced during that session that ran from January to June 2001. Therefore, emission reductions from the TERP could not be included in the adopted SIP submitted in December 2000. At the same time, SB5 also directed the State to repeal the rules for the construction shift and the accelerated purchase of Tier II/Tier III (low NO_X) engines. The Governor requested parallel processing of SB5 on June 15, 2001. We are parallel processing SB5 with the HGA attainment demonstration. Credits generated by the TERP are intended to replace the credits lost by repeal of the rules. It is expected that excess credits from the TERP will contribute to closing the 56 tpd NO_X emissions shortfall, but it is not expected to fill the shortfall. In addition, EPA believes the three year timeframe referenced in the comment is extremely optimistic.

See also our previous responses that discuss the Texas Emission Reduction Program (TERP) in issue 3.5 regarding Accelerated Purchase of low NO_X engines and in this issue 3.6 regarding Accelerated Retirement of HD vehicles.

Texas House Bill 2912

EPA acknowledges the comment that this Bill requires grandfathered facilities to obtain permits by 2007. It is anticipated that Texas will submit the reductions from these measures in future SIP revisions to help fill the remaining NO_X shortfall of 56 tpd. The 50 percent NO_X reduction expected from the newly permitted oil and gas pipeline facilities in eastern Texas partially offsets the increase in NO_X emission reduction levels mandated for utilities resulting from the State lowering utility emission reduction requirements from 93 percent to 90 percent. The State believed the higher levels to be unreasonable due to extraordinary costs to obtain the additional 3 percent reductions. Therefore, this legislative action does not provide additional credits to be used in place of the LED fuel program.

3.7 Failure To Show Necessity for the LED Fuel Measure in Attainment Areas

BCCA asserts that LED fuel is not needed in attainment areas of Texas outside the HGA area. These areas are already meeting national air quality standards and do not need the LED fuel for air quality reasons.

TMTA commented that Texas does not have the authority to require LED fuel in the attainment areas, because it has not shown the LED fuel is necessary in those areas, and is acting arbitrarily to require LED fuel in those areas. Attainment areas do not need to submit control measures to meet CAA standards because they already attain the standards. Further, scientific studies have not shown a nexus between NO_X emissions in the state's eastern and central attainment areas and ozone violations in the state's nonattainment areas.

Response: In both the TSD (at pp 11–12) and the proposed rule (66 FR 36542, at 36545), EPA explained the reasons Texas has shown as to why requiring LED fuel in the covered area benefits the Houston non-attainment area. There are three reasons. First, requiring LED fuel in the covered area will reduce emissions of NO_X in the non-attainment area by helping to ensure that the fuel used by intrastate and long-haul trucks that transit the non-attainment area but purchase fuel in Texas outside the nonattainment area but within the covered area meets the required fuel characteristics for lowering NO_X emissions. (See also our discussion in response to Issue 2.3 as to why this requirement for a covered area as large as 110 counties is important in maintaining the benefit of the LED program.)

Second, the LED fuel program will reduce possible transport of ozone from the surrounding covered areas to the non-attainment area. EPA described the meteorological on-shore/ off-shore phenomenon called ''flow reversal'' which, according to the Coastal Oxidant Assessment for Southeast Texas (COAST) study, exacerbates the Houston ozone problem. Ozone formed over land moves out over the Gulf in the early morning, and then blows back over the land in the early afternoon of the same day. This flow reversal influences ozone concentrations inland at least 50 kilometers, easily reaching into the attainment area immediately surrounding the HGA non-attainment area. Another study (Nielsen-Gammon) claims this phenomenon may reach as far inland as 400 kilometers.

Third, the LED fuel program will reduce the transport of NO_X from the surrounding covered areas to the nonattainment area. EPA policy recognizes that ozone precursors such as NO_X emitted in attainment areas may be transported to non-attainment areas and contribute to ozone problems therein. Specifically, EPA's 1997 guidance for implementing the 1 hour ozone NAAQS, cited in the TSD and the proposed rule, recognizes that NO_X emissions outside non-attainment areas at 200 kilometers could influence the non-attainment areas.

We disagree with TMTA's statement that scientific studies have not shown a nexus between NO_X emissions in the eastern and central attainment areas of Texas and ozone violations in the non-attainment areas. TMTA has not disputed any of EPA's statements regarding the COAST study or the Nielsen-Gammon study, nor has it provided any other data to contradict the conclusions from these studies. We reiterate the three reasons mentioned above which show that requiring LED fuel in the covered area benefits the Houston non-attainment area, thus contributing to the necessity demonstration Texas has made.

3.8 Failure To Meet CAA Requirement That the State Fuel Measure Is Reasonable and Practicable, Due to the LED Fuel Measure's Consumer Cost Volatility

NPRA stated it is not clear that the potential consumer cost volatility of Texas LED meets the CAA requirement that the state fuel regulation be both reasonable and practicable. TNRCC has estimated the production cost of LED to be four cents per gallon more than current specifications. Parties suggest that EIA data indicate the retail price of diesel in California is much more than four cents per gallon higher than the price of diesel in PADD III (eleven cents to forty-one cents per gallon).

Response: NPRA's comment misstates the applicable CAA requirement. The CAA does not require that the state fuel regulation must be reasonable and practicable, but it does require that the state fuel program be shown to be more reasonable and practicable than the existing alternatives. Texas has made a comparative analysis of many possible alternatives to the LED fuel requirement,

and as demonstrated in the TSD and in the responses to comments in this final rule, considered the costs, benefits, implementation time, public acceptance and other factors for evaluating reasonableness and practicability. EPA has reviewed these findings and made its own assessment of these controls as well as the additional alternatives identified by commenters. In particular, as discussed in issue 1.4, comparing Texas estimates for production cost to California retail prices and PADD III retail prices is misleading because retail prices do not reflect the production cost alone. Other factors in retail pricing include differences in supply and demand, dealer mark up, and proximity of supply. The State of Texas has determined that four cents per gallon (production costs) for Phase I is an acceptable difference since LED provides an environmental benefit. California recently validated similar production cost estimates for their analogous diesel fuel via a comparison of wholesale prices in California to prices in neighboring states. Based on this, we believe that State of Texas' estimate is reasonably accurate.

3.9 Failure To Show Necessity Because the Environmental Benefits of the LED Rule Are Overstated or Inaccurately Quantified

ATA and TMTA commented that it is impossible to make the section 211 necessity determination without first accurately quantifying the emissions impact of using the LED fuel. The necessity of LED, as required under section 211(c)(4)(C) of the CAA, has not been demonstrated, because (among other reasons) the environmental benefits are overstated, due to the assumed 100 percent effectiveness in the nonattainment area and the failure to account for significant use of the cheaper ''federal fuel'' as described above.

Response: EPA has made its own analysis of the NO_X reduction benefit expected from use of LED fuel, confirming the emission reduction at levels slightly different from those estimated by Texas but still significant in helping achieve ozone attainment. (*See* discussion in our response to issue 2.1.) We have also analyzed the potential overstatement of the benefit due to re-fueling outside the non-attainment area, and have concluded there is a reasonable basis to agree with the State of Texas that re-fueling outside the non-attainment area will not significantly affect the benefit of the LED rule. (*See* discussion in our response to issue 2.3.) Thus, we have demonstrated that the LED rule will provide some or all of the emission reductions needed to achieve the ozone NAAQS.

3.10 Preemption Under the Supremacy Clause of the U.S. Constitution

ATA commented that in addition to the explicit statutory preemption under CAA 211(c)(4), the Supremacy Clause of the U.S. Constitution implicitly preempts the LED rule since it stands as an obstacle to accomplishing the Congressional objective of a single national fuel standard.

Response: Aside from the explicit preemption in Section 211(c)(4)(A), a court could also consider whether a state sulfur control is implicitly preempted under the Supremacy Clause of the U.S. Constitution. Courts have determined that a state law is preempted by federal law where the state requirement actually conflicts with federal law by preventing compliance with both federal and state requirements, or by standing as an obstacle to accomplishment of Congressional objectives. A court could thus consider whether a given state fuel control is preempted, notwithstanding waiver of preemption under 211(c)(4)(C), if it places such significant cost and investment burdens on refiners that refiners cannot meet both state and federal requirements in time, or if the state control would be preempted on some other legal basis.

Commenters have not raised specific problems that could reasonably give rise to a claim of conflict preemption. The State of Texas' program appears consistent with Congress' overall goal of achieving air quality standards as expeditiously as possible as expressed in section 110(a)(2), and is consistent with Congress' allowance of State fuel controls when necessary to achieve such standards. Nor does there appear to be any conflict between the State and federal standards that would prevent compliance with both provisions. It is practically and legally possible to produce diesel fuel that meets both the federal and State sulfur standards, as noted in our response to issue 1.9. The State of Texas has provided significant lead time for refiners to come into compliance and the State and federal standards are similar for on-highway diesel fuel. While refiners have raised concerns about the impact of the LED rule on the Federal ULSD rule, as we discussed in response to Issue 1.9, they did not say it would be impossible to comply with both rules, or that compliance with the LED rule prevents compliance with the Federal ULSD rule. Furthermore, ATA does not provide any support for the claim that compliance with the two standards is not possible. For these reasons, EPA does not believe there is a clear Constitutional problem that should lead EPA to deny approval of the State LED program.

Issue 4 Potential ''Backsliding'' With Proposed SIP Changes

ED commented that EPA must reject any effort to relax effective control measures on the books before the identified shortfall in emissions reductions is eliminated. In particular, the proposed change Texas will make to the LED rule is backsliding from the 12/00 SIP since it limits applicability for on-road use of LED fuel to East and Central Texas instead of statewide, and delays implementation of the LED rule until 2005. ED notes that no net loss is calculated.

Response: The proposed changes to the Texas regulations do not constitute ''backsliding'' as that term has come to be used in the context of the CAA. The Clean Water Act term ''backsliding'' (33 U.S.C. 1342(o)) is used in regard to the CAA to refer to weakening federally approved regulations in a manner which would interfere with the attainment or maintenance of one of the National Ambient Air Quality Standards (NAAQS). See, sections 101(b), 110(a)(2)(D), and 161 of the CAA. Section 110(1) prohibits EPA from approving a SIP revision if it would interfere with attainment, reasonable further progress, or any other applicable requirement of the Clean Air Act. The statute leaves with the State, however, the ability to formulate and revise the SIP in whole or in part so long as the plan provides for timely attainment of the NAAQS and meets other applicable CAA requirements. *See*, CAA section 110(k)(3) and *Train* v. *NRDC*, 421 U.S. 60, 79 (1975).

The revisions were proposed and submitted to EPA (along with a request for parallel processing) prior to approval so they do not represent changes to an approved SIP from which a state could be seen as ''backsliding''. These are changes to the State's choice as to how the ozone NAAQS will be achieved in the HG area. It is not EPA's role to disapprove the State's choice of control strategies if that strategy will result in attainment of the one-hour standard and meets all other applicable statutory requirements. *See Union Electric* v. *EPA*, 427 U.S. 246 (1976); *Train* v. *NRDC*, 421 U.S. 60 (1975).

Even if these changes represented changes in an approved SIP, we do not agree that it would be appropriate to reject this rule because it is unlikely the changes made to the LED rule since its original adoption by the State of Texas

in December, 2000, would significantly impair the emission reductions attributable to this measure. The change in implementation date from 2002 to 2005 does not affect the benefit of the LED rule, since the yearly emission reductions are not cumulative. It is the emission reductions in 2007, the attainment date, which is critical. The change in geographic scope of the LED rule (from statewide to 110 counties for highway diesel fuel) should not significantly affect the benefit of the LED rule since the 110 county covered area includes 95 percent of all vehicle miles traveled (VMT) in Texas and the most populated cities in the state.

A principal purpose of extending the coverage of the LED rule to the 102 counties outside the 8 county Houston non-attainment area is to ensure that intrastate and long-haul trucks traveling through the Houston area but re-fueling outside the Houston area are re-fueling with LED fuel. Because most of the VMT and most of the diesel fuel purchased for on-road travel in Texas is within the 110 county area (as noted in our response to issue 1.6), this change should not significantly affect the resulting benefits of the LED rule. Because this rule would not interfere with attainment of the NAAQS, we believe approval is proper. *See*, *United States Steel* v. *EPA*, 633 F.2d 671, 674 (3d cir. 1980). *See* response to issue 2.3 for discussion of the impact of re-fueling outside the covered area on the benefit of the LED rule.

Issue 5 Potential Changes at Mid-Course Correction Jeopardize Need for Certainty

BCCA needs to know that the LED rule, as finalized in 12/00, will not change at the mid-course correction in 2004, because its members need certainty in order to make plans for investment and construction to meet the fuel requirements. These plans carry long lead times.

Response: We agree this would be a problem but we assume Texas has made its final changes to the LED rule after significant negotiations between Texas and relevant stakeholders earlier this year led to the passage of legislation (HB 2912) delaying the implementation date and limiting the geographic scope of the LED rule. This legislation was signed by the Governor on May 29, 2001, and led to the most recent revisions to the LED rule, implementing the change in date and geographic scope, which EPA is approving today.

If Texas wants to make changes to the LED rule at the mid-course correction in 2004, Texas would have to go through its state rulemaking process, with public notice and comment, so that stakeholders such as the commenter would have an opportunity to explain the implications of such changes. Additionally, EPA would have to go through a rulemaking process with public notice and comment if Texas wanted to request that such changes be approved into the SIP.

In addition, EPA is approving the enforceable commitment to conduct this mid-course correction in the attainment demonstration approval being published elsewhere in today's **Federal Register**. Further discussion regarding the appropriateness of the mid-course correction can be found in the Response to Comments for that action.

Issue 6 Need for Energy Analysis Under E.O. Issued 5/22/01

ATA commented that EPA should perform an energy analysis in accordance with EO issued 5/22/01 concerning regulations that significantly affect energy supply, distribution, or use.

Response: On May 18, 2001, President George W. Bush signed Executive Order 13211, entitled ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (*See*, 66 FR 28355, May 22, 2001). This Executive Order (EO) requires Federal agencies to prepare, and submit to the Office of Management and Budget (OMB), a Statement of Energy Effects for matters identified as significant energy actions. ''Significant energy action'' is defined by the EO as:

> any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation * * * (1)(i) that is a significant regulatory action under Executive Order 12866 or any successor order, and (ii) is likely to have a significant adverse impact on the supply, distribution or use of energy; or (2) that is designated by the Administrator of the Office of Information and Regulatory Affairs as a significant regulatory action.

SIP approvals are not ''significant regulatory actions'' subject to OMB review and are consequently excluded from the requirements of EO 13211.

Issue 7 Need for Regulatory Impact Analysis Under Texas Law

BCCA argues that the LED rule is not legally defensible because it is a ''major environmental rule'' requiring a RIA under Texas law because it (1) Exceeds standards set by Federal law, and (2) exceeds an express requirement of state law.

TMTA commented that the cost of purchasing LED and its impact on the Texas trucking industry has been understated. A Regulatory Impact Analysis to adequately assess the economic impacts of the rule has not been prepared, as required under Texas law. TMTA makes three main arguments: (1) The cost of purchasing cleaner diesel fuel has not been considered; (2) higher fuel costs cannot be passed on due to outside competition; and (3) a Regulatory Impact Analysis must be performed under Texas law when proposing certain ''major environmental rules'', and Texas has mistakenly failed to do so.

Response: As stated previously, EPA's role in reviewing SIP submittals is to approve state choices, provided that they meet the criteria of the Clean Air Act. Federal inquiry into the economic reasonableness of state action is not allowed under the Clean Air Act (*see*, *Union Electric Co.*, v. *EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2)) other than for purposes of evaluating the reasonableness and availability of alternatives for purposes of a waiver of Federal preemption.

The State has submitted information indicating that the administrative requirements of Texas law have been met. We defer to the State analysis until such time as a State Court has determined otherwise.

Issue 8 Need for Regulatory Flexibility Act Analysis

ATA commented that EPA has mistakenly concluded that the Regulatory Flexibility Act does not apply to this rulemaking.

Response: This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law and hence does not have a significant economic impact on a substantial number of small entities, an analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) is not required.

Issue 9 EPA's Action Is Arbitrary and Capricious

ATA states that approval of the LED fuel rule is arbitrary and capricious.

Response: ATA provides no independent support for its claim that EPA acted arbitrarily or capriciously. Thus, to the extent ATA relies on its previous comments to support this final conclusion, EPA has responded to this claim in responding to the specific issues raised by ATA and others.

EPA actions may be overturned if such action is found to be arbitrary,

capricious, an abuse of discretion or otherwise not in accordance with law; contrary to Constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority, or limitations or without observance of procudure required by law. CAA Section 307(d)(9). *See also, Virginia* v. *Browner*, 80 F.3d 869, 876 (4th Cir. 1996) (applying the APA standard to the EPA's disapproval of a state implementation plan); *see also Sierra Club* v. *EPA*, 252 F.3d 943, 946–47 (8th Cir. 2001) (applying the APA standard to approval of a state implementation plan); *Ober* v. *Whitman*, 243 F.3d 1190, 1193 (9th Cir. 2001) (applying the APA standard to the EPA's exemption in a Federal implementation plan of certain *de minimis* sources of pollution).

The commenter has suggested that this action is arbitrary and capricious. That is not the case. When a Court reviews an agency action to see if it was arbitrary and capricious, the Court looks to see if the agency ''relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'' *Hughes River Watershed Conservancy* v. *Johnson,* 165 F.3d 283, 288 (4th Cir. 1999)(citing *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut.,* 463 U.S. 29, 43 (1983)). The discussion in this Response to Comments Preamble and the Technical Support Document supporting the proposal for this action provide a reasonable basis for the decision reached, demonstrating that this approval is not arbitrary and capricious. *See, Natural Res. Def. Council, Inc.* v. *EPA,* 16 F.3d 1395, 1401 (4th Cir. 1993).

Section 211(c)(4)(C) provides for SIP approval of otherwise preempted state fuel controls if EPA finds the control is ''necessary'' to achieve a NAAQS because no other reasonable or practicable alternatives exist that would bring about timely attainment. We have demonstrated that the LED fuel measure is necessary to achieve attainment of the 1-hour ozone standard. First we quantified the emissions reductions needed to achieve the NAAQS and showed that even with implementation of the extraordinary controls being adopted by the State, additional reductions are needed. In order to address the difficult nonattainment problem in the Houston area, the State has adopted a long list of control measures, many of which have never been implemented by other states. Notwithstanding these aggressive controls, the State has identified a shortfall in the required emission reductions and has committed to pursue other necessary controls.

After demonstrating the air quality need, we showed that, at this time, there are no reasonable and practicable alternatives sufficient to achieve the NAAQS. In coming to adopt the LED control, the State reviewed an unprecedented list of alternatives, reviewing the costs, benefits, implementation time, public acceptance and other factors for evaluating reasonableness and practicability. EPA has reviewed these findings and has made its own assessment of these controls as well as the additional alternatives identified by commenters.

Finally, we demonstrated that the LED program will provide some of the needed NO_X reductions. While commenters dispute the quantity of reductions the LED program will provide, no commenter disputes that LED will provide some NO_X benefits. EPA has nonetheless addressed the specific arguments on the costs and benefits of the program and believes that given the costs and benefits of the program, the LED program remains a more desirable control option than the alternatives rejected by the State.

EPA, therefore, concludes the record provides a reasonable basis for approving the LED SIP revision in accordance with sections 110, 211(c)(4), and 307(d)(9) of the Clean Air Act.

VIII. EPA's Rulemaking Action

We are granting final approval pursuant to sections 110 and 211(c)(4)(C) because we find that the State has (1) identified the reduction in NO_X needed to achieve attainment of the ozone NAAQS; (2) identified all other reasonable and practicable control measures; (3) shown that even with the implementation of all reasonable and practicable control measures, the State would need additional emissions reductions for the HGA nonattainment area to meet the ozone NAAQS (124 ppb) on a timely basis; and (4) demonstrated that the LED fuel requirement would provide some of those additional reductions.

IX. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does

not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 14, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: October 15, 2001.

Gregg A. Cooke,

Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

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

Subpart SS—Texas

2. In § 52.2270 the table in paragraph (c) is amended under Chapter 114 (Reg 4):

a. Under Subchapter A, by adding a new entry for Section 114.6 in numerical order;

b. Revising the heading ''Subchapter H—Low Emission Fuels; Division I: Gasoline Volatility'' to read ''Subchapter H—Low Emission Fuels';

c. Under the heading ''Subchapter H—Low Emission Fuels'' and before Section 114.301 by adding the heading ''Division 1: Gasoline Volatility';

d. Under Subchapter H immediately after Section 114.309 by adding a new heading ''Division 2: Low Emission Diesel'' followed by new individual entries for Sections 114.312, 114.313, 114.314, 114.315, 114.316, 114.317, 114.318, and 114.319.

The revisions and additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/Subject	State approval Submittal date	EPA approval date	Explanation
*	* * * * *	*		*
Chapter 114 (Reg 4)—Control of Air Pollution from Motor Vehicles				
Subchapter A—Definitions				
*	* * * * *	*		*
Section 114.6	Low Emission Fuel Definitions	12/06/2000	[Insert 11/14/01 Federal Register Cite.]	
*	* * * * *	*		*
Subchapter H—Low Emission Fuels				
Division 1: Gasoline Volatility				
*	* * * * *	*		*
Division 2: Low Emission Diesel				
Section 114.312	Low Emission Diesel Standards	12/06/2000	[Insert 11/14/01 Federal Register Cite.]	
Section 114.313	Designated Alternate Limits	12/06/2001	Insert 11/14/01 Federal Register Cite.]	

EPA APPROVED REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/Subject	State approval Submittal date	EPA approval date	Explanation
Section 114.314	Registration of Diesel Producers and Importers	09/26/2001	[Insert 11/14/01 Federal Register Cite.]	
Section 114.315	Approved Test Methods	12/06/2000	[Insert 11/14/01 Federal Register Cite.]	
Section 114.316	Monitoring, Recordkeeping, Reporting and Requirements	12/06/2000	[Insert 11/14/01 Federal Register Cite.]	
Section 114.317	Exemptions to Low Emission Diesel Requirements	12/06/2000	[Insert 11/14/01 Federal Register Cite.]	
Section 114.318	Alternative Emission Reduction Plan	09/26/2001	[Insert 11/14/01 Federal Register Cite.]	
Section 114.319	Affected Counties and Compliance Dates	09/26/2001	[Insert 11/14/01 Federal Register Cite.]	
*	* * * * *	*		*

[FR Doc. 01–27581 Filed 11–13–01; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–134–4–7508; FRL–7093–1]

Approval and Promulgation of Air Quality State Implementation Plans (SIP); Texas: Administrative Orders Issued to Airport Operators and Airlines Regarding Control of Pollution From Ground Support Equipment (GSE) for the Houston/Galveston (HGA) Ozone Nonattainment Area and a Non-Road Large Spark-Ignition Engine Rule for the HGA and Dallas/Fort Worth (DFW) Ozone Nonattainment Areas

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Texas. This rule making covers two separate actions. The EPA is approving: Administrative Orders and Memoranda of Agreement (MOA) requiring owners and operators at major airports in the HGA area to implement reductions in oxides of nitrogen (NO_X) emissions for sources under their control, primarily GSE; and a rule requiring that non-road large spark-ignition engines of 25 horsepower (hp) or larger in all counties of the State of Texas conform to requirements identical to Title 13 of the California Code of Regulations, Chapter 9. This rule includes the HGA and DFW ozone nonattainment areas.

This new rule and the orders will contribute to attainment of the ozone standard in the HGA and DFW ozone nonattainment areas. The EPA is approving these revisions to the Texas SIP to regulate emissions of NO_X in accordance with the requirements of the Federal Clean Air Act (the Act).

DATES: This final rule is effective on December 14, 2001.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. Persons interested in examining these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Herbert R. Sherrow, Jr., Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–7237.

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

What Action Is EPA Taking Today?

We are granting final approval of Texas' administrative orders requiring owners and operators at major airports in the HGA area to implement reductions in NO_X emissions for sources under their control and a rule requiring that non-road large spark-ignition engines of 25 hp or larger in all counties of the State of Texas conform to requirements identical to Title 13 of the California Code of Regulations, Chapter 9. This rule includes the HGA and DFW ozone nonattainment areas. A proposed

approval of the large spark-ignition rules for the HGA ozone nonattainment area was published at 66 FR 36226 on July 11, 2001, and a proposed approval of the non-road large spark-ignition rules for the DFW nonattainment area was published at 66 FR 16432 on March 26, 2001. A proposed approval of the Administrative Orders and Memoranda of Agreement issued to airport owners and airlines regarding pollution controls on GSE for the HGA area was published at 66 FR 36226 on July 11, 2001.

What Are the Clean Air Act Requirements?

Section 172 of the Act provides the general requirements for nonattainment plans. Section 172(c)(6) and section 110 require SIPs to include enforceable emission limitations, and such other control measures, means or techniques as well as schedules and timetables for compliance, as may be necessary to provide for attainment by the applicable attainment date. Today's SIP revision involves approval of two of a collection of controls adopted by the State to achieve the ozone standard in the DFW and HGA ozone nonattainment areas as required under section 172. EPA approval of this SIP revision is governed by section 110 of the Act.

Why Is EPA Taking This Action?

We are taking this action because the State submitted these SIP revisions and they are necessary to achieve the National Ambient Air Quality Standards in the DFW and HGA ozone nonattainment areas.

What Is Included in the State's Non-Road Large Spark-Ignition Rule?

Texas developed a non-road large spark-ignition (LSI) engine strategy which establishes emission requirements for non-road, LSI engines 25 hp and larger for model year 2004 and subsequent model-year engines, and all equipment and vehicles that use such engines, by requiring non-road LSI engines in all counties in the State to meet emission limits equivalent to, and certified in, a manner identical to 13 California Code of Regulations, Chapter 9. Texas has met the statutory and regulatory requirements for adoption of the California LSI program. All counties in the State are affected by this rule, including counties in the HGA and DFW ozone nonattainment areas.

What Is Included in the State's Airport Ground Support Equipment Orders?

The State signed an Agreed Order with Continental Airlines for its operations at Houston's George Bush Intercontinental Airport on October 18, 2000, and signed a similar Agreed Order with Southwest Airlines for its operations at William Hobby Airport on December 6, 2000. The Orders make enforceable specific local emission reductions of NO_X from sources under the airlines' control. On October 18, 2000, Texas approved a Memorandum of Agreement with the City of Houston to bring about additional reductions from operations in the Houston Airport System. The sum of these reductions is equal to those reductions required in the HGA Attainment Demonstration SIP.

What Did the State Submit?

On April 30, 2000, the Governor of Texas submitted to us revisions to the 30 TAC, Chapter 114, ''Control of Air Pollution From Motor Vehicles,'' as a revision to the SIP for the DFW area. That submission included requirements that non-road large spark-ignition engines of 25 hp or larger conform to Title 13 of the California Code of Regulations, Chapter 9. For further discussion of the submittal, see the proposed approval, 66 FR 16432, March 26, 2001, and accompanying Technical Support Document.

On December 22, 2000, the Governor of Texas submitted to us revisions to the 30 TAC, Chapter 114, ''Control of Air Pollution From Motor Vehicles,'' as a revision to the SIP for the HGA area. That submission included requirements that non-road large spark-ignition engines of 25 horsepower (hp) or larger conform to Title 13 of the California Code of Regulations, Chapter 9; and NO_X reductions from airport Ground Support Equipment (GSE). For further discussion of the submittal, see the proposed approval, 66 FR 36226 (July 11, 2001) and accompanying Technical Support Document.

Also on December 22, 2000, the Texas Natural Resource Conservation Commission (TNRCC) submitted orders with airlines and airport operators in the HGA area for NO_X reductions. For further discussion of the submittal, see the proposed approval, 66 FR 36226 (July 11, 2001) and accompanying Technical Support Document.

What Comments Did EPA Receive in Response to the Proposed Approval of Agreed Orders for HGA Airport Ground Support Equipment?

EPA received comments from Environmental Defense. A summary of the comments received and EPA's response is presented below.

A. The Orders Do Not Require the Specific Levels of Emissions Reductions Claimed in the SIP

Comment: The agreements do not limit total emissions from airport GSE equipment. The Attainment Demonstration SIP assumes that total controlled emissions in 2007 will be 0.5 tpd, 90% below the 5.65 tpd that TNRCC projected from uncontrolled GSE NO_X emissions in the HGA nonattainment area in 2007. These agreements afford no certainty that the 0.5 tpd level of emissions will be achieved (even if one considers the flexibility provided to parties to seek reductions outside of the GSE fleet).

Response: The agreed orders require percentage reductions from a 1996 baseline which achieve the same purpose as an emissions limitation. The reductions specified in each order are enforceable against the owner/operator of the equipment, thus providing a degree of certainty that the reductions will take place.

B. The Orders Are Not Enforceable

Comment: The orders are not enforceable within EPA's national guidance for determining enforceability.

Response: The orders are enforceable through December 31, 2007. These are administrative orders that were adopted by the TNRCC under applicable State law and enforceable by TNRCC or citizens. These orders have been submitted by the Governor to EPA as a SIP revision and, upon the effective date of this action will be federally enforceable.

C. The Agreed Orders and MOAs Are Unlikely To Produce the Emissions Reductions for Which TNRCC Takes Credit in the Attainment Demonstration SIP

Comment: It is quite unlikely that the 0.5 tpd target assumed in the SIP will be achieved. The target will not be achieved if either of the following is true: (1) Growth exceeds the projected amount, such that the total uncontrolled GSE emissions in 2007 (from all airlines) are greater than 5.65 tpd; or (2) the actual reductions that will result from Southwest's and Continental's use of Reasonably Available Control Considering Cost and Best Available Technology on post-1996 equipment are less than anticipated. EPA must discount the emission reduction credit assigned to these agreements in the Attainment Demonstration SIP.

Response: The growth projections were developed using EPA approved methodology and are appropriate for planning purposes. The orders require a

phase-in of new GSE which should permit future emission inventories to monitor the progress of the reductions. The State has committed to a 2004 mid-course review of all measures and to make any necessary adjustments to ensure the reductions claimed are being achieved. Growth exceeding the projections would be identified during that review and would necessitate implementation of additional measures to offset such growth. Further, SIPs are planning tools and cannot guarantee future absolute certainty. However, the reductions approved are enforceable, ensuring a high degree of certainty. For the reasons stated, we believe there is no basis for discounting the emission reduction credit taken by the State at this time; but, as previously stated, additional reductions will be required at the mid-course correction if the reductions claimed are not achieved.

D. The Orders Expire in 2007

Comment: There needs to be ample time for EPA and the public to verify performance under the agreement before the agreements expire.

Response: The Orders are in effect through the attainment year. The State should be preparing a maintenance plan to take effect after the attainment year, which will provide opportunity for us and the public to verify performance under the Orders before they expire. In addition, the State has committed to a 2004 mid-course review of all measures and to make any necessary adjustments to ensure the reductions claimed are being achieved. This commitment includes the requirement to institute additional measures if necessary to account for any newly discovered shortfall in reductions.

What Comments Did EPA Receive in Response to the Proposed Rule for Non-Road Large Spark-Ignition Engines?

We did not receive any comments on the Non-Road Large Spark-Ignition Engine rule for either HGA or DFW.

EPA's Rulemaking Action

We are granting final approval of Texas' Agreed Orders with the major airlines operating at the major airports in the HGA area and the Memorandum of Agreement with the City of Houston. We are also granting final approval of Texas' Non-Road Large-Spark Engine rule for the HGA and DFW areas. We are approving these revisions to the Texas SIP to regulate emissions of NO_X pursuant to sections 110 and 172 of the Act.

Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

The Congressional Review Act, 5 U.S.C. section 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing the rule in this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a ''major rule'' as defined by 5 U.S.C. section 804(2). In addition, Section 804 exempts from section 801 the following types of rules: (1) Rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. section 804(3). EPA is not required to submit a rule report regarding the Orders contained in this action under section 801 because this is a rule of particular applicability.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 14, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons,

Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: October 15, 2001.

Gregg A. Cooke,

Regional Administrator, Region 6.

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

Part 52—[AMENDED]

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

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

Subpart SS—Texas

2. Section 52.2270 is amended:

a. In the table in paragraph (c) under Chapter 114 (Reg 4) following Section 114.309 by adding under the heading ''Subchapter I—Non-Road Engines'' the new heading ''Division 3—Non-Road Large Spark-Ignition Engines'' and individual entries for Sections 114.420, 114.421, 114.422, 114.427, and 114.429;

b. In the table in paragraph (d) entitled ''EPA Approved Texas Source-Specific Requirements'' by adding to the end of the table Agreed Order No. 2000–0826–SIP for Continental Airlines and Agreed Order No. 2000–0827–SIP for Southwest Airlines;

c. In the table in paragraph (e) entitled ''EPA Approved Texas Non-Regulatory Provisions and Quasi-Regulatory Measures in the Texas SIP by adding to the end of the table Houston Air Port System Memorandum of Agreement. The additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State submittal/approval date	EPA approval date	Explanation
*	*	*	*	*
Chapter 114 (Reg 4)—Control of Air Pollution From Motor Vehicles				
*	*	*	*	*
Subchapter I—Non-Road Engines Division 3—Non-Road Large Spark-Ignition Engines				
Section 114.420	Definitions	04/19/2000	[Insert 11/14/01 Federal Register Cite.]	
Section 114.421	Emission Specifications	12/06/2000	[Insert 11/14/01 Federal Register Cite.]	
Section 114.422	Control Requirements	04/19/2000	[Insert 11/14/01 Federal Register Cite.]	
Section 114.427	Exemptions	04/19/2000	[Insert 11/14/01 Federal Register Cite.]	
Section 114.429	Affected Counties and Compliance Schedules.	12/06/2000	[Insert 11/14/01 Federal Register Cite.]	
*	*	*	*	*

(d) * * *

EPA APPROVED TEXAS SOURCE-SPECIFIC REQUIREMENTS

Name of source	Permit or order number	State effective date	EPA approval date	Comment
*	*	*	*	*
Continental Airlines at George Bush Intercontinental Airport, Houston, Texas.	Agreed Order No. 2000–0826–SIP.	10/18/2000	[Insert 11/14/2001 Federal Register Cite.]	HGA, Texas 1-hour ozone standard attainment demonstrations.
Southwest Airlines at William Hobby Airport, Houston, Texas.	Agreed Order No. 2000–0827–SIP.	12/06/2000	[Insert 11/14/2001 Federal Register Cite.]	HGA, Texas 1-hour ozone standard attainment demonstrations.

(e) * * *

EPA APPROVED TEXAS NON-REGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State approval/submittal date	EPA approval date	Comment
* *	*	*	*	* *
Memorandum of Agreement between TNRCC and Houston Airport System.	Houston/Galveston Area Ozone Nonattainment Area.	10/18/2000	[Insert 11/14/2001 Federal Register Cite.]	HGA, Texas 1-hour ozone standard attainment demonstrations.

[FR Doc. 01–27582 Filed 11–13–01; 8:45 am]
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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–133–1–7493; FRL–7092–8]

Approval and Promulgation of Implementation Plans; Texas; Lawn Service Equipment Operating Restrictions; and Requirements for Motor Vehicle Idling for the Houston/Galveston (HG) Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving revisions to the Texas State Implementation Plan. This approval covers two separate actions. We are approving: a rule that implements an operating-use restriction program requiring that the handheld and non-handheld spark-ignition engines, rated at 25 hp and below, be restricted from use by commercial operators between the hours of 6 a.m. and noon, April 1 through October 31, in the counties Brazoria, Fort Bend, Galveston, Harris, and Montgomery; and, a rule to implement idling limits for gasoline and diesel-powered engines in heavy-duty motor vehicles in the HG area counties of Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. The EPA is approving these revisions to the Texas SIP to regulate emissions of nitrogen oxides (NO_X) and volatile organic compounds (VOC) in accordance with the requirements of the Federal Clean Air Act (the Act). These new rules will contribute to attainment of the National Ambient Air Quality Standard (NAAQS) for ozone standard in the HG ozone nonattainment area. For details on the SIP submittals and the EPA analysis of the submittals, refer to the June 11, 2001 proposed rule, and the associated Technical Support Document (TSD).

DATES: This final rule is effective on December 14, 2001.

ADDRESSES: Copies of documents relevant to this action are available for public inspection during normal business hours at the Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Dallas, Texas 75202–2733; and, the Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Steven Pratt, Air Planning Section (6PD–L), 1445 Ross Avenue, Dallas, Texas 75202–2733. Telephone Number (214) 665–2140, e-Mail Address: *pratt.steven@epa.gov*.

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

What Action Are We Taking Today?

On December 20, 2000, the Governor of Texas submitted to EPA these two rule revisions (an operating-use restriction program for handheld and non-handheld spark-ignition engines, rated at 25 hp and below, used by commercial operators; and, idling limits for gasoline and diesel-powered engines in heavy-duty motor vehicles) to the 30 TAC, Chapter 114, ''Control of Air Pollution From Motor Vehicles,'' as a revision to the SIP.

These new rules will contribute to attainment of the ozone standard in the HG area. The EPA is approving these revisions to the Texas SIP to regulate emissions of NO_X and VOCs in accordance with the requirements of the Federal Clean Air Act (the Act). For more information on the SIP revision, please refer to our TSD and the State's December 20, 2000 SIP revision.

What Are the Clean Air Act Requirements?

Section 172 of the Act provides the general requirements for nonattainment plans. Section 172(c)(6) and section 110 require SIPs to include enforceable emission limitations, and such other control measures, means or techniques as well as schedules and timetables for compliance, as may be necessary to provide for attainment by the applicable attainment date. Today's SIP revision involves approval of one of a collection of controls adopted by the State to achieve the ozone standard in the HG nonattainment area as required under section 172. EPA approval of this SIP revision is governed by section 110 of the Act.

Why Is EPA Taking This Action?

We are taking this action because the State submitted an adequate demonstration to show the necessity for these requirements to achieve the NAAQS in the HG ozone nonattainment area.

What Are the Requirements of the December 20, 2000, Texas SIP Revision for the Operation of Lawn Service Equipment That We Are Approving Today?

The purpose of this rule is to implement an operating-use restriction program requiring that the handheld and non-handheld spark-ignition engines, rated at 25 hp and below, be restricted from use by commercial operators between the hours of 6:00 a.m. and noon, April 1 through October 31. Spark-ignition lawn and garden service handheld equipment includes, but is not limited to, trimmers, edgers, chain saws, leaf blowers/vacuums, and shredders. Spark-ignition lawn and garden service non-handheld lawn and garden equipment covered by the rules includes such devices as walk-behind lawnmowers, lawn tractors, tillers, and small generators. The engines are both two cycle and four cycle engines, generally unable to use automotive technology, such as closed-loop engine control and three-way catalysts, to reduce emissions.

As a result of this restriction, production of ozone precursors will be stalled until later in the day when optimum ozone formation conditions no longer exist, ultimately reducing the peak level of ozone produced. It is estimated that this measure will achieve a minimum of 0.23 tons per day (tpd)

delay of NO_X until after noon. There will also be a 12.4 tpd delay in VOC emissions until after noon. Because the emission of NO_X and VOC, both precursors to the formation of ozone, will be delayed until after noon, this delay will lead to a reduction in ozone that is equivalent to that which would result from approximately 4.6 tpd of NO_X reduction.

The Texas regulation allows operators to submit an alternate emissions reduction plan by May 31, 2003. The alternate plan would allow operation during the restricted hours, provided the plan achieves reductions of NO_X and VOCs that would result in ozone benefits equivalent to the underlying regulation.

The regulation exempts from the restriction use at a domestic residence by the owner of, or a resident at, that domestic residence, use by a non-commercial operator, or any equipment used exclusively for emergency operations to protect human health and safety or the environment, including equipment being used in the repair of facilities, devices, systems, or infrastructure that have failed, or are in danger of failing, in order to prevent immediate harm to public health, safety, or the environment.

The affected area includes the following counties within the HG nonattainment area: Brazoria, Fort Bend, Galveston, Harris, and Montgomery. The restrictions applicable to this Texas regulation will take effect April 1, 2005.

What Are the Requirements of the December 20, 2000, Texas SIP Revision for Restricting Motor Vehicle Idling?

The purpose of this rule is to establish idling limits for gasoline and diesel-powered engines in heavy-duty motor vehicles in the HG area. The rule defines heavy-duty motor vehicles as those motor vehicles that have a gross vehicle weight rating (GVWR) of greater than 14,000 pounds. To comply with the motor vehicle idling regulations, no person in the affected counties may cause, suffer, allow, or permit the primary propulsion engine of a heavy-duty motor vehicle to idle for more than five consecutive minutes when the vehicle is not in motion during the time period April 1 through October 31.

These idling limits will lower NO_X emissions and other pollutants from fuel combustion. Because NO_X is a precursor to ground-level ozone formation, reduced emissions of NO_X will result in ground-level ozone reductions. It is estimated that this measure will achieve a minimum of 0.48 tpd of NO_X equivalent reductions.

The Texas regulation allows the following exemptions: covered vehicles that are forced to remain motionless because of traffic conditions over which the operator has no control; vehicles being used as an emergency or law enforcement motor vehicle; when the engine of a covered motor vehicle is being operated for maintenance or diagnostic purposes; when the engine of a covered motor vehicle is being operated solely to defrost a windshield; when the covered vehicle is being operated to provide a power source necessary for mechanical operation other than propulsion, passenger compartment heating, or air conditioning; where the primary propulsion engine of a covered vehicle is being operated to supply heat or air conditioning necessary for passenger comfort/safety in those vehicles intended for commercial passenger transportation or school buses, in which case idling up to a maximum of 30 minutes is allowed; where the primary propulsion engine of a covered vehicle is being used for transit operations, in which case idling up to a maximum of 30 minutes is allowed; and where the primary propulsion engine of a vehicle is being used in airport ground support equipment. The exemption for ground service equipment is intended to cover all equipment that is used to service aircraft during passenger and/or cargo loading and unloading, maintenance, and other ground-based operations.

The affected area includes the following counties within the HG nonattainment area: Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller. The restrictions applicable to this Texas regulation took effect April 1, 2001. This control strategy is a necessary measure to consider for contributing to a successful attainment demonstration with the NAAQS for ozone.

The TNRCC has proposed revisions to the idling restriction rule. The changes clarify that the operator of a rented or leased vehicle is responsible for compliance with the requirements in situations where the operator of a leased or rented vehicle is not employed by the owner of the vehicle. Our preliminary review indicates that the changes do not weaken the rule, but merely clarify enforcement provisions. Should a SIP revision be submitted incorporating these changes, the EPA may publish a revision to this rule.

What Comments Did EPA Receive in Response to the June 11, 2001, Proposed Approval of These Rules?

A. Comments Received in Response to the Lawn Service Operating Restrictions Rule

Five sets of comments were received on this portion of the June 11, 2001 (66 FR 31197), proposed approval. Comments were received from the Engine Manufacturer's Association (EMA), the Toro Company (Toro), the Business Coalition for Clean Air (BCCA), the Outdoor Power Equipment Institute (OPEI), and Jeri Yenne on behalf of Brazoria, Fort Bend and Montgomery counties in Texas (Counties). Each of these comments were in opposition to the operating-use restriction.

Comment 1: EMA, BCCA, OPEI and Toro each comment that the operating-use restriction is a requirement relating to the control of emissions from non-road engines and thus preempted under section 209(e) of the Clean Air Act. These commenters point to a recent holding from the U.S. District Court for the Western District which overturned a State use-restriction on heavy-duty engines *(Engine Manufacturers Association* v. *Huston,* No. 316–SS (June 13, 2001)).

Response 1: We disagree that the regulation is preempted under Section 209(e) of the Act. Section 209(e) addresses state regulation of nonroad equipment. Section 209(e)(1) prohibits states from promulgating standards relating to the control of emissions from new construction and farm equipment which are smaller than 175 horsepower and new locomotives. Section 209(e)(2) does not expressly prohibit state regulation, but instead provides in section 209(e)(2)(A) that EPA shall authorize California to adopt and enforce standards and other requirements relating to the control of emissions for any nonroad engines other than those preempted under section 209(e)(1). The criteria for providing such an authorization are similar to those in section 209(b). Section 209(e)(2)(B) allows any state other than California to adopt and enforce emissions standards for nonroad equipment, and to take such others actions as are referred to in section 209(e)(2)(A), if such standards, implementation, and enforcement are identical to California's standards and two years of lead time is provided. Neither California nor other states are authorized to adopt or enforce emissions standards or other requirements for the farm, construction, and locomotive categories of non-road

equipment specified in 209(e)(1). See, *Engine Manufacturers Ass'n* v. *EPA,* 88 F. 3d 1075 (D.C. Cir. 1996) (*EMA*).

EPA is expressly required to issue regulations to implement section 209(e).

An emission standard under section 209(a) and (e) is a quantitative limit on emissions of a pollutant from an engine, vehicle or piece of equipment. The means for achieving such control are typically through modifying or changing the engine or equipment itself, as compared to controlling or regulating how the equipment is operated in-use. This is the central distinction between emissions standards, which are prohibited under section 209(e), and state limitations on in-use operation, which are allowed under section 209(d).

Pursuant to its express authority, EPA promulgated regulations implementing section 209(e) on December 30, 1997 (62 FR 67733). See 40 CFR part 85 subpart Q and 40 CFR part 89, appendix A to subpart A. This rule revised earlier regulations promulgated on July 20, 1994 (59 FR 36969) and on June 17, 1994 (59 FR 31306). EPA's regulations include an interpretive rule stating, in part, that ''EPA believes that states are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of use, daily mass emission limits or sulfur limits on fuel.'' The regulations promulgated on December 30, 1997 were not challenged and are binding Federal law. The initial regulations were challenged in the Court of Appeals for the District of Columbia Circuit. *Engine Manufacturers Ass'n* v. *EPA,* 88 F. 3d 1075 (D.C. Cir. 1996) (*EMA*). The basic issue before the court was the scope of preemption under section 209(e). While all parties agreed that Congress implicitly intended to preempt state action under section 209(e)(2), the scope of this preemption was in dispute. The court held that preemption under section 209(e)(2) extended to both new and non-new nonroad equipment. The court then went on to address ''what sorts of regulations the states are preempted from adopting.'' *See, EMA,* 88 F. 3d at 1093. The court agreed with EPA that ''standards'' prohibited under 209(e) were quantitative limits on emissions as discussed in *Motor & Equipment Manufacturers Ass'n, Inc.* v. *EPA,* 627 F.2d 1095 (D.C. Cir. 1979) (MEMA), cert. denied, 446 U.S. 952 (1980). It also agreed that EPA's interpretation of ''other requirements'' under section 209(e) was reasonable, limiting them to ''ancillary enforcement mechanisms such as certificates and inspections.'' Again, see *EMA,* 88 F. 3d at 1093. Finally, the Court agreed with EPA that states had the rights to impose the kind of use, operation or movement restrictions on nonroad equipment authorized under section 209(d).

We believe Congress explicitly excluded such use restrictions from the preemption of section 209 because, among other things, Congress believed states were best situated to regulate such use. ''It may be that, in some areas, certain conditions at certain times will require control of movement of vehicles. Other areas may require alternative methods of transportation * * * These are areas in which the States and local government can be most effective.'' S. Rep. No. 403, 90th Cong., 1st Sess. 34 (1967). Similar congressional intent was expressed when the nonroad provisions were adopted in 1990. *See EMA,* 88 F. 3d at 1094 n.58.

The EPA regulations on this issue are binding rules and have been upheld by the Court of Appeals for District of Columbia. We believe that the decision of the District Court in *EMA* v. *Huston,* in which EPA was not a party, was incorrect both in its failure to defer to the reasoned opinion of both EPA and the D.C. Court of Appeals and in its failure to dismiss the challenge to the Dallas use restriction as an inappropriate collateral attack on regulations that had already been upheld in an earlier appellate court case.

The hours-of-use restriction enacted by the state are exactly the type of restrictions on use permitted under section 209(d) and EPA regulations.

Comment 2: Toro and the Counties commented that the use restriction does not meet the enforceability requirements of section 110(a)(2)(C). They point out that no additional manpower is provided for in the submittal to EPA and assert that there are no provisions regarding the consequences for failure to comply with the restrictions.

Response 2: The submittal containing these measures included evidence of legal authority to enforce them. Section 382.039 of the Texas Health and Safety Code provides authority for the State to promulgate and implement regulations to demonstrate attainment. This authority to implement necessarily includes the authority to enforce.

The State has addressed in the SIP documents that they will enforce the requirements after the rule compliance date and take appropriate action for noncompliance situations. They have indicated that the rules will be enforced by both their staff in the commission's regional offices, as well as local air pollution control programs. In Texas, local governments have the same power and are subject to the same restrictions as the commission under TCAA, § 382.015, Power to Enter Property, to inspect the air and to enter public or private property in its territorial jurisdiction to determine if the level of air contaminants in an area in its territorial jurisdiction meet levels set by the commission. Thus, the local governments which also may sign cooperative agreements with the commission to enforce the rules under TCAA, § 382.115, Cooperative Agreements, have the authority to enforce these rules as well. The authority of local governments to enforce air pollution requirements is specified in detail in TCAA, §§ 382.111–382.115, and local governments can institute civil actions in the same manner as the TNRCC pursuant to Texas Water Code (TWC), § 7.351. The TNRCC states they will work with local officials to ensure enforcement of the SIP and SIP rules. The TNRCC has existing relationships with pollution control authorities in the City of Houston, Harris County, and Galveston County for enforcement of other commission rules. The agency details that they will continue enforcement relationships with these entities and develop relationships with other local officials as needed to create any additional enforcement mechanisms required for carrying out the SIP and related SIP rules. The TNRCC states they will enforce this rule with existing personnel and does not anticipate any increase in enforcement costs. The State indicates there would be no civil penalties issued to a commercial operator, however, fines may be assessed via an administrative penalty, with the monies being collected and retained by the state.

40 CFR part 51, Appendix V, details the criteria for determining completeness of plan submissions. With respect to enforceability requirements, the State has met the applicable criteria listed in Section 2.0 of Appendix V, including: adoption in State code; evidence of legal authority; submitting copies of the regulation; evidence that the proper state procedural requirements were followed; giving public notice consistent with EPA procedures; certification of the public hearings; and, compilation of public comments and the State's responses thereto.

If the State is unable to enforce the program adequately, we would be in a position to issue a ''SIP call'' and require additional efforts or additional emission control measures to make up for the reductions lost by a failure to enforce the approved program.

Comment 3: The Counties, Toro and BCCA all express concern that the use

restriction increases the danger of heat related injuries. They assert that because operators currently work from 7:00 a.m until noon and then stop until later in the afternoon, the restriction will cause workers to be out during the mid-day hours, typically the hottest part of the day. Further, Toro asserts that citizens would be inconvenienced by changes in maintenance schedules at parks and golf courses.

Response 3: We do not necessarily agree that all workers will have to be exposed to the early afternoon heat because of the morning restrictions. True, the restrictions apply during the hottest time of the year. However, this is also the time of the year when there is more daylight. If the owner/operator does not opt for alternatives to the morning operating restrictions (discussed later in this response), instead of working during the mid-afternoon, the work can be later in the evening, when temperatures have begun to moderate and there is more shade and less direct sunlight. Another alternative is to take measures to mitigate the affects of the heat. According to OSHA there are various methods of preventing heat stroke and other adverse health effects without eliminating work during hot hours of the day. Supervisors can schedule frequent breaks and provide adequate amounts of water. Operators of lawn equipment would be expected to take all necessary measures to protect their health and safety and educate themselves about potential risks as it is presumed they do currently.

While there are ways to work around the restrictions or mitigate the potential adverse impacts, the same may not be said of the known adverse health impacts of elevated ozone levels. These impacts are not limited to those in the field of commercial landscaping, but apply across the board to everyone. These health affects are even more pronounced in those particularly unable to avail themselves of potential mitigating measures, the elderly and very young. Likewise, the inconvenience for those wishing to play golf on a freshly manicured course or not be subject to the noise of the equipment while a park is being mowed is extremely trivial when compared to the benefits of reduced ground level ozone. As a result, we do not feel that these concerns justify disapproval of the submittal. The rule does not ban lawn maintenance activities altogether, but simply shifts the time period during which activities with certain types of equipment may be conducted.

Finally, the regulations offer alternatives to the restriction of operation during the morning hours. The owner/operator of commercial landscape equipment may opt to submit a plan which provides for reductions of VOC and NO_X equivalent to those that would result from compliance with the restrictions. Such plans are to be submitted by May 31, 2003, and the State commits to take action on the plans by May 31, 2004. To support the alternative compliance methods, the TNRCC has developed guidance to assist commercial operators in developing a plan to achieve equivalent emission reductions of NO_X and VOC. Commercial operators would be able to submit a plan that uses these pre-approved actions or changes instead of developing a plan that would require case-specific approval by the executive director and the EPA. Reliance on the pre-approved measures will simplify the plan submittal process for commercial operators and will assist the executive director in the review and approval of each submittal. Commercial operators retain the option of developing their own plan which will be subject to executive director and EPA approval.

The State considered the difficulties this rule may impose on businesses and individuals, and thus is adopting it with an extended compliance schedule so that lawn and maintenance businesses may supplement their equipment with electric or manual powered units, re-arrange their working schedules, or develop an emissions control plan. It should be noted that the compliance schedule fits well with the indicated equipment replacement cycle of 2 to 4 years common in the industry. This schedule facilitates the transition to cleaner, electric, or manual equipment.

Comment 4: Toro, OPEI, the Counties and BCCA commented that this regulation will have a significant economic impact on the landscape service industry and that this economic impact exceeds the actual benefits derived from the restrictions.

Response 4: Actions such as the approval of a SIP revision which merely approve state law as meeting federal requirements and impose no additional requirements beyond those imposed by state law are not subject to economic impact analysis under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Such consideration is up to the state under applicable state administrative procedure laws. Details on the State's assessments of financial impact can be found in the submitted SIP documents.

Comment 5: The Counties questioned how the individual enforcing the restriction will distinguish commercial from non commercial operators of the equipment. The Counties also stated that a ''kind gesture before noon would result in violation of the restriction'', and cited the following circumstances as causing a violation: The teenager who mows his neighbor's lawn; the church member who mows the church lawn or church property; the kind neighbor who trims his neighbor's trees, and the neighbor who tills the flower bed or garden spot for the someone next door.

Response 5: For this rule, a Commercial operator is defined as any person who receives payment or compensation in exchange for operating lawn and garden service equipment powered by spark-ignition engines of 25 hp or below where the payment or compensation is required to be reported as income by the United States Internal Revenue Code. Generally speaking, this is any person who earns more than $400 a year using the aforementioned equipment. The persons cited by the commenters as examples of those who would be violating the regulation do not fall under the category of a commercial operator, and as such would not be in violation of this rule.

The field methods to distinguish commercial from non commercial operators is the responsibility of the State and can be accomplished in a number of ways. The time period between now and the date of April 1, 2005, when the restrictions become effective, provides sufficient time for formulation of State procedures/requirements for such determination.

Comment 6: BCCA indicated that the commitment to implement innovative measures should be used in lieu of the restriction on hours of operation. BCCA contends that the ban could be eliminated and alternative measures could be pursued before or during the mid-course review to account for the NO_X reductions that the TNRCC currently allocates to the ban.

Response 6: We agree that the possibility exists that innovative measures may come about that would exceed the amounts needed to fill the gap. However, we do not agree that the State should withdraw reasonably available measures with the hope that sufficient reductions to offset these regulations will come to fruition. Lawn and garden equipment makes a significant contribution to the HG area ozone levels. This rule is significant in the HG area's plan to close the gap and demonstrate attainment. In addition, section 172(c)(1) of the Clean Air Act requires the SIP to provide for implementation of all reasonably available control measures (RACM) as expeditiously as practicable and for attainment of the NAAQS. This measure is reasonable, available, and will accelerate the attainment of the ozone

standard. Therefore, the restriction on hours of operation of commercial lawn equipment is required to remain a part of the attainment demonstration SIP.

Comment 7: Toro and the Counties questioned the validity of the modeling used to determine the benefits associated with the restriction on hours of operation. Toro believes that the emissions predicted by the State are purely speculative. OPEI commented that the emissions benefits in the submittal were greatly exaggerated and submitted a technical analysis from a technical consultant in support of their position. Further, OPEI commented that the baseline emissions inventory upon which the calculations were based was incorrect.

Response 7: In developing the SIP and related regulations the TNRCC worked extensively with the lawn and garden industry, consultants, and other affected industries in the HG area, in the development of emissions and equipment inventories reflecting accurate and HG area specific data. The latest version of the photochemical model recognized by the EPA for SIP modeling (the Comprehensive Air Model with Extensions (CAM_X)) was used for the modeling. The latest emissions inventories available, those provided with EPA's ''Non-Road Equipment and Vehicle Emission Study'' (NEVES, EPA–21A–2001, November 1991), were used by the State in developing the Lawn and Garden Equipment Operating Restriction rule. The TNRCC adjusted this inventory data for temporal factors on the basis of a local study performed in 1990 for the Houston Galveston area. For lawn and garden equipment this represents the best information available at the time. This inventory was then built up to the attainment year of 2007 by using urban planning data from the Houston/Galveston Area Council (HGAC—the area's urban planing organization), and the latest population database (1999) obtained from the State of Texas Comptroller of Public Accounts and the Texas State Data Center.

The draft EPA model known as the NONROAD model was not used for calculations of emissions, however limited use was made of the NONROAD model to develop the attainment-year inventory. Because NONROAD accounts for the several phases of federal requirements for small engines, TNRCC ran NONROAD for the base and attainment years, assuming zero growth in equipment population. The resulting emissions were then ratioed to provide reduction factors for each source category resulting from federal controls. Thus, the modeling performed by the State does include the Federal Phase II emission standards for small handheld and non-handheld engines recently adopted.

The use of urban planning projections from HGAC, the latest human population numbers as the basis for growth to the attainment year of 2007, and the inclusion of up to date engine emissions data, provides competent accuracy of emissions growth and the industries' contribution to ozone production.

The State simulated the shifting of commercial operators emissions to the afternoon while keeping the residential operators emissions in the morning hours to ensure proper accounting of the shift effect in the photochemical modeling. Commercial use profiles show full use occurring in the morning and afternoon hours, tapering off in the evening. However, residential use indicates a two peak profile with cutting peaks in the morning and the evening, with slow times occurring during mid-day. Because of these profiles, the modeled shift was more sensitive to commercial operators shifting of hours of operation, and an approximate 50% shift in emissions resulted.

Numerous emission control strategies were considered by the State in developing the modeling. Varying degrees of reductions from point sources, on-road and non-road mobile sources, and area sources were analyzed in multiple iterations of modeling, to test the effectiveness of different NO_X reductions. The attainment demonstration modeling and other analysis show that a significant amount of NO_X reductions is necessary from ozone control strategies in order for the HG nonattainment area to achieve the ozone NAAQS by 2007, including reductions from surrounding counties included in the HG consolidated metropolitan statistical area (CMSA). The State used state-of-the-art photochemical methodologies to develop this rule. However, the TNRCC and EPA continually seek to improve inventories and modeling, and while it may be true that there may be several methods of analysis and that better emissions inventories may yet be developed, it is also known that substantial reductions are necessary in the HG area. The reductions provided by this rule are significant and important in helping the HG area to attain by 2007. The State will be performing a mid-course review in May, 2004. At that time modifications to the SIP can be made, if applicable.

Comment 8: Toro commented that Texas should implement a voluntary emission reduction credit program in lieu of the operating restrictions. They point to the Texas Emission Reduction Program established by Texas Senate Bill 5.

Response 8: The ''Carl Moyer'' style program referred to by Toro was specifically authorized by Texas' 77th legislature. Senate Bill 5 not only provides statutory authority for emission reduction projects, but also provides a funding mechanism for such a program. However, that authority is limited and not available for the small combustion-ignition engines that are the subject of the operating restrictions, and, it is known that substantial reductions are necessary in the HG area to enable the HG area to attain by 2007. The reductions provided by this rule are significant and important in this respect. The State will be performing a mid-course review in May, 2004. At that time modifications to the SIP can be made, if applicable.

Comment 9: OPEI and BCCA contend that the restriction has a disproportionate impact on small and minority owned businesses.

Response 9: EPA disagrees with this contention. The rule will not have a disparate impact on persons based on income level, business size, race, color, or national origin. Any negative impacts of the rule are clearly borne equally by all commercial operators and their employees governed by the rule. Equally significant is the fact that the health benefits (including health related economic benefits) of this rule will be enjoyed by all, including those claimed to be adversely affected. Every citizen in the area, especially asthmatics, the very young, and the very old, are vulnerable to the effects of ground level ozone. The ultimate responsibility of this rule is to maintain and improve the air quality and public health in the HG area. This rule would do that by creating reductions in NO_X and VOC. These reductions are a necessary measure for successfully demonstrating attainment. The State was aware of the economic and other difficulties this rule will impose on businesses and individuals in the drafting of this rule. Consequently, the rule includes an extended compliance schedule so that lawn and maintenance businesses may supplement their equipment with electric or manual powered units or develop an emissions control plan.

B. Comments Received in Response to the Requirements for Motor Vehicle Idling Rule

Only one set of comments were received on this portion of the proposal. Those comments were submitted by Jeri Yenne on behalf of Brazoria, Fort Bend

and Montgomery counties in Texas (Counties).

Comment 1: The Counties assert that the exceptions provided effectively nullify the prohibition on idling and that because the exceptions are so broad there will be no emission reductions as a result of these requirements.

Response 1: We disagree with this comment. Under 30 TAC section 114.507 the restrictions clearly apply to all vehicles over 14,000 pounds, including long-haul trucks and buses, that operate in the counties specified. The exceptions are intended to account for reasonable circumstances, such as when the vehicle is not in motion due to traffic congestion. Those vehicles used for commercial passenger transportation and school buses may idle for the purpose of passenger comfort, but only up to thirty minutes. We do not believe extending the idling limitation from five minutes to 30 minutes or applying any of the other exemptions render the program a nullity.

Comment 2: The Counties commented that enforcement of these provisions was unlikely given the difficulty enforcing weight restrictions.

Response 2: We are unaware of any credible evidence indicating that the State would not be able to enforce the idling restrictions. The State has submitted information to demonstrate the legal authority to enforce this measure. If there is a failure to implement the program, EPA may issue a ''SIP call'' and require the State to either correct the program deficiencies or submit measures sufficient to offset all lost emission reductions.

The State is working on reaching agreements with the local governments for assistance in enforcing these regulations. The Texas Health and Safety Code provides for enforcement of State environmental regulations in sections 382.111 through 382.115. In addition, local governments may institute civil actions in the same manner as the TNRCC according to section 7.351 of the Texas Water Code.

Comment 3: The Counties assert that there is no scientific evidence to support the reductions claimed from idling restrictions.

Response 3: EPA disagrees with the comment. Statistics clearly indicate that vehicles over 14,000 GVMR are typically diesel. These vehicles have documented less stringent emission standard requirements than light duty vehicles. Studies indicate that these types of vehicles typically are allowed to idle for long periods of time. Targeting of these vehicles to restrict their idle time will reduce their emissions, including NO_X. Because NO_X is a precursor to ground-level ozone formation, reduced emissions of NO_X will result in ground-level ozone reductions. Texas used state-of-the-art photochemical methodologies to develop this rule. Emissions data for covered vehicles were adjusted for lower idle times in accordance with the restriction (estimated hours of operation that would be reduced due to the restrictions), and this data was used as modeling input. Modeling assessing the benefits of this NO_X emission reduction strategy demonstrated that emission reductions could be achieved by limiting the idling time of heavy-duty motor vehicles. The modeling showed that by the year 2007, the idling limits will reduce NO_X emissions in the affected area by 0.48 tons per day (tpd). The TNRCC further estimates a daily cost savings benefit of this rule at approximately $51,900 per ton of NO_X reduced. This figure was calculated from the estimated NO_X reductions from this strategy of 0.48 tpd, the estimated reduction in fuel consumption per hour, and the current price per gallon of fuel sold in the affected area.

Substantial reductions are necessary in the HG area. The reductions provided by this rule are significant and important in helping the HG area to attain by 2007. This rule is one element of an air pollution control strategy in the eight-counties HG ozone nonattainment area to reduce NO_X necessary for the counties to be able to demonstrate attainment with the ozone NAAQS. The State will be performing a mid-course review in May, 2004. At that time modifications to the SIP can be made, if applicable. Should the restrictions not provide the reductions anticipated, Texas will be required to submit additional measures to ensure attainment of the ozone NAAQS by 2007.

EPA Action

We are approving two rules: Lawn Service Equipment Operating Restrictions; and, Requirements for Motor Vehicle Idling for the HG Ozone Nonattainment Area.

Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 14, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Intergovernmental relations, Motor vehicle pollution, Volatile organic compounds, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements.

Dated: October 15, 2001.

Gregg A. Cooke,

Acting Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

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

Subpart SS—Texas

2. In § 52.2270, the table in paragraph (c) is amended by adding to the ending of the section ''Chapter 114 (Reg 4)—Control of Air Pollution From Motor Vehicles'' new headings with entries for ''Subchapter I—Non-Road Engines'' and ''Subchapter J—Operational Controls for Motor Vehicles'', to read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State approval/submittal date	EPA approval date	Explanation
* *	*	*	* *	*
Chapter 114 (Reg 4)—Control of Air Pollution from Motor Vehicles				
* *	*	*	* *	*
Subchapter I—Non-Road Engines Division 6: Lawn Service Equipment Operating Restrictions				
Section 114.452	Control Requirements	12/20/00	[Insert 11–14–01 Federal Register cite]	
Section 114.459	Affected Counties and Compliance Dates.	12/20/00	[Insert 11–14–01 Federal Register cite]	
Subchapter J—Operational Controls for Motor Vehicles Division 1: Motor Vehicle Idling Limitations				
Section 114.500	Definitions	12/20/00	[Insert 11–14–01 Federal Register cite]	
Section 114.502	Control Requirements for Motor Vehicles.	12/20/00	[Insert 11–14–01 Federal Register cite]	
Section 114.507	Exemptions	12/20/00	[Insert 11–14–01 Federal Register cite]	
Section 114.509	Affected Counties and Compliance Dates.	12/20/00	[Insert 11–14–01 Federal Register cite]	

* * * * *

[FR Doc. 01–27583 Filed 11–13–01; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–134–8–7532; FRL–7092–7]

Approval and Promulgation of Implementation Plans; Texas; Control of Emissions of Nitrogen Oxides From Stationary Sources in the Houston/ Galveston Ozone Nonattainment Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is approving revisions to the Texas State Implementation Plan (SIP). This rulemaking covers five separate actions. First, we are approving revisions to the Texas Nitrogen Oxides (NO_X) rules for point sources of NO_X in the Houston/ Galveston (H/GA) ozone nonattainment area of Texas as submitted to us by the State on December 22, 2000. These new limits for point sources of NO_X in the H/GA will contribute to attainment of the 1-hour ozone National Ambient Air Quality Standard (NAAQS) in the H/GA 1-hour ozone nonattainment area. Second, we are approving an exclusion, from the federally-approved SIP, of carbon monoxide (CO) and ammonia emission limits ancillary to the NO_X standards for post combustion controls found in Title 30 of the Texas Administrative Code (TAC), Chapter 117. Third, we are approving, by parallel processing, revisions to the Texas NO_X rules for stationary diesel engines or stationary dual-fuel engines in the H/GA 1-hour ozone nonattainment area. Fourth, we are approving, through parallel processing, revisions made to the Texas SIP concerning compliance schedules for utility electric generation and Industrial, Commercial, and Institutional (ICI) sources in the H/GA area. Fifth, we are approving, through parallel processing, revisions made to the Texas SIP concerning lean-burn and rich-burn engines. The EPA is approving the SIP revisions described as actions number one, two, three, four, and five to regulate emissions of NO_X as meeting the requirements of the Federal Clean Air Act (the Act).

DATES: This rule will be effective on December 14, 2001.

ADDRESSES: Copies of the documents about this action including the Technical Support Document, are available for public inspection during normal business hours at the following locations. Persons interested in examining these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Environmental Protection Agency, Region 6, 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733.

Texas Natural Resource Conservation Commission, Office of Air Quality, 12124 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Mr. Alan Shar, Air Planning Section (6PD–L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–6691, and Shar.Alan@epa.gov.

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

1. What Actions Are We Taking in This Document?

On December 22, 2000, George W. Bush, then Governor of Texas, submitted rule revisions to 30 TAC, Chapter 117, ''Control of Air Pollution From Nitrogen Compounds,'' as a revision to the SIP for point sources in the H/GA. The December 22, 2000, submittal required an 89 percent reduction in emissions of NO_X from point sources in the H/GA area.

As part of a negotiated settlement in the case of *BCCA Appeal Group* v. *Texas Natural Resource Conservation Commission,* No. GN1–00210 (250th Dist. Ct. Travis County)(complaint filed on January 19, 2001) reached on May 18, 2001, TNRCC issued a proposal to revise 30 TAC, Chapter 117 on May 30, 2001. On June 15, 2001, Texas Governor Rick Perry submitted a request letter to us asking to process the May 30, 2001, proposed rule revisions to 30 TAC, Chapter 117, as a revision to the SIP from point sources in the H/GA, through parallel processing.

On July 12, 2001 (66 FR 36532), we published a notice of proposed approval of the December 22, 2000 rules for point sources of NO_X in the H/GA. We also proposed to approve, through parallel processing, revisions to the NO_X rules for H/GA concerning (a) stationary diesel engines or stationary dual-fuel engines, (b) compliance schedules for utility electric generation and ICI sources and (c) lean-burn and rich burn engines. We noted, but did not propose

for approval, alternate NO_X emissions reductions and specifications contained in the May 30, 2001 proposed changes to the Texas rules.

On September 26, 2001, the TNRCC adopted as final rules amendments to 30 TAC, Chapter 117 proposed on May 30, 2001, with certain revisions.

On October 4, 2001, Texas Governor Rick Perry submitted a request letter to us asking us to process the September 26, 2001, final rule amendments to 30 TAC, Chapter 117, as a revision to the SIP for point sources in the H/GA area.

The State of Texas submitted this revision to us as a part of the NO_X reductions needed for the H/GA area to attain the 1-hour ozone standard. In this document we are taking five separate actions: (1) We are approving the December 22, 2000, rule revision to the Texas SIP as proposed at 66 FR 36532 (July 12, 2001). The State of Texas submitted this revision to us as a part of the NO_X reductions needed for the H/GA area to attain the 1-hour ozone standard. These NO_X reductions will assist H/GA to attain the 1-hour ozone standard. (2) We are approving exclusion of the CO and ammonia emission limits found in 30 TAC Chapter 117 in conjunction with NO_X emission limits, from the federally approved Texas SIP. In our 65 **Federal Register** 64148 document published on October 26, 2000, and 65 **Federal Register** 64914 document published on October 31, 2000, we included CO and ammonia emission limits, in addition to the NO_X emission limits, as a part of the federally approved Texas SIP. Texas did not originally request their inclusion and subsequently asked us not to have these limits included as a part of the federally approved SIP. In today's final rulemaking, we are excluding the limits on CO and ammonia emissions, resulting from use of post combustion controls, from the federally approved SIP for Texas as proposed at 66 FR 36532, 36533. (3) We are approving, through parallel processing, revisions made to sections of 30 TAC, Chapter 117 that Texas proposed on May 30, 2001, and submitted to us as final rules on October 4, 2001, concerning stationary diesel engines or stationary dual-fuel engines because Texas is relying on these NO_X reductions to demonstrate attainment of the 1-hour ozone standard in the H/GA 1-hr ozone nonattainment area. (4) We are approving, through parallel processing, revisions made to sections of 30 TAC, Chapter 117 that Texas proposed on May 30, 2001, and submitted to us as final rules on October 4, 2001, concerning NO_X emissions specifications and compliance schedules for utility electric generation and ICI sources in the H/GA area. (5) We are approving, through parallel processing, revisions made to sections of 30 TAC, Chapter 117 that Texas proposed on May 30, 2001, and submitted to us as final rules on October 4, 2001, concerning both the lean-burn and rich-burn reciprocating internal combustion engines.

In this document we are not approving the alternate or less stringent NO_X emissions specifications and less stringent emissions reductions that are part of the proposed May 30, 2001, Texas SIP revision, and submitted to us as final rules on October 4, 2001. See proposed action number six at 66 FR 66352, published on July 12, 2001.

Table I contains a summary list of the sections of 30 TAC, Chapter 117 that Texas proposed, on May 30, 2001, adopted on September 26, 2001, and submitted to us as final rules on October 4, 2001, that we are approving (with certain exceptions discussed below) for sources of NO_X in the H/GA area.

TABLE I.—SECTION NUMBERS AND SECTION DESCRIPTIONS OF 30 TAC, CHAPTER 117 AFFECTED BY THE MAY 30, 2001, PROPOSED RULE REVISION

Section	Description
117.10	Definitions.
117.101	Applicability.
117.103	Exemptions.
117.105	Emission Specifications for Reasonably Available Control Technology.
117.106	Emission Specifications for Attainment Demonstrations.
117.107	Alternative System-wide Emission Specifications.
117.108	System Cap.
117.110	System Cap.
117.111	Initial Demonstration of Compliance.
117.113	Continuous Demonstration of Compliance
117.114	Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration.
117.116	Final Control Plan Procedures for Attainment Demonstration Emission Specifications.
117.119	Notification, Recordkeeping, and Reporting Requirements.
117.121	Alternative Case Specific Specifications.
117.138	System Cap.
117.201	Applicability.
117.203	Exemptions.
117.205	Emission Specifications for Reasonably Available Control Technology (RACT).
117.206	Emission Specifications for Attainment Demonstrations.
117.207	Alternative Plant-wide Emission Specifications.
117.208	Operating Requirements.
117.210	System Cap.
117.211	Initial Demonstration of Compliance.
117.213	Continuous Demonstration of Compliance.
117.214	Emission Testing and Monitoring for the Houston/Galveston Attainment Demonstration.
117.216	Final Control Plan Procedures for Attainment Demonstration Emission Specifications.
117.219	Notification, Recordkeeping, and Reporting Requirements.
117.221	Alternative Case Specific Specifications.
117.471	Applicability.
117.473	Exemptions.
117.475	Emission Specifications.
117.478	Operating Requirements.
117.479	Monitoring, Recordkeeping, and Reporting Requirements.
117.510	Compliance Schedule for Utility Electric Generation in Ozone Nonattainment Areas.

TABLE I.—SECTION NUMBERS AND SECTION DESCRIPTIONS OF 30 TAC, CHAPTER 117 AFFECTED BY THE MAY 30, 2001, PROPOSED RULE REVISION—Continued

Section	Description
117.520	Compliance Schedule for Industrial, Commercial, and Institutional Combustion Sources in Ozone Nonattainment Areas.
117.534	Compliance Schedule for Boilers, Process Heaters, Stationary Engines, and Gas Turbines at Minor Sources.
117.570	Use of Emissions Credits for Compliance.

2. Did We Receive Written Comments on These Proposed Actions?

Yes, we received written comments on these proposed actions. See sections 4 and 5 of this document for additional information.

3. When Did the Public Comment Period for Our Proposal on These Actions Expire?

The public comment period for our proposal on these actions expired on August 13, 2001.

4. Who Submitted Comments to Us?

We received written comments from Reliant Energy, Inc. (RE); Environmental Defense (ED) of Austin, Texas; Louisiana-Pacific Corporation (LPC); Business Coalition for Clean Air Appeal Group (BCCAAG) represented by Baker Botts, L.L.P. of Dallas, Texas; and Texas Industries Operations, L.P. (TXI) represented by Jenkens and Gilchrist of Austin, Texas.

5. How Do We Respond to the Submitted Written Comments?

The summary of the written comments that we received and our response to those comments are as follows:

Comment #1: RE commented that it supports EPA's approval of the emissions specifications for the utility boilers (proposed action number four, section 9, Table VI of 66 FR 36532, published on July 12, 2001).

Response to comment #1: We appreciate the commenter's support in this regard.

Comment #2: RE commented that it supports the BCCAAG's position on alternate emission specifications and further adjustments to the proposed NO_X emissions reductions.

Response to comments #2: A Consent Order filed in *BCCA Appeal Group* v. *Texas Natural Resource Conservation Commission,* No. GN1–00210 (250th Dist. Ct. Travis County) (complaint filed on January 19, 2001), among other things, provides for completion of a Science Evaluation to study the causes of rapid ozone formation events and to identify potential control measures not found in the H/GA Attainment Demonstration. We can not act upon the suggested alternate emission specifications and any further adjustments to the State's NO_X rules without the completed studies and necessary modeling relevant to the H/GA area. Neither the State nor EPA has any final scientific data and modeling results to support a final action that relaxes the NO_X reductions required presently by the State for the H/GA area. Such an action is not ripe for EPA's review. Therefore, we acknowledged but did not propose to approve the BCCAAG's alternate emission reductions and schedules identified in 66 FR 36532, published on July 12, 2001. At present there is inadequate information in the record to demonstrate that the alternate emission specifications and further adjustments to the federally-approved NO_X emissions reductions would enable H/GA to attain the NAAQS for ozone.

Comment #3: RE states that it is incorporating its September 25, 2000 comments to TNRCC on the SIP into its present comments on EPA's proposed approval of the SIP. RE commented that it incorporates the BCCAAG's comments submitted to the TNRCC by reference in its letter. In the comments filed by letter of September 25, 2000, with TNRCC, RE proposed the REI NO_X Emission Reduction Plan, formulated by the company, as an alternative to the plan proposed by TNRCC. RE further commented that (a) the TNRCC proposed NO_X emission rates for gas-fired boilers were technically infeasible and economically unreasonable; (b) TNRCC underestimated the cost of controlling NO_X emission from utility boilers and gas turbines; (c) CO limits for Gas, Oil, and Coal-fired units need delineation; (d) the baseline heat input for 30-day average limit calculations should be changed; (e) heavy-duty engine NO_X reduction technology is not effective on power take off devices on utility vehicles; (f) REI supports the rule revisions regarding the cap and trade program filed by the Texas Industry Project (TIP); and (g) the photochemical modeling forming the basis of the rule is not simulating meteorological and chemical processes with sufficient accuracy to quantitatively predict the emission reductions needed to attain the ozone NAAQS.

Response to comment #3: We will respond to the BCCAAG's comments that have been incorporated by reference by RE later in this document. *See* our responses to comments #21 through #30. We are responding here only to those comments by RE in September 2000, which are germane to the present rulemaking adopting the TNRCC revisions to 30 TAC Chapter 117 into the SIP. The TNRCC responded to RE comments in Rule Log No. 2000–011H–117–AI (December, 2000). The Clean Air Act assigns to the states initial and primary responsibility for formulating a plan to achieve NAAQS. It is up to the state to prepare state implementation plans which contain specific pollution control measures. It is clear from review of the TNRCC's analysis, contained in Rule Log No. 2000–011H–117–AI, that the issues raised by RE comments were evaluated and considered by TNRCC during the state rulemaking process.

The EPA's responsibilities under the Act are qualitatively different from those of the state agency. The EPA is charged with reviewing and approving or disapproving of enforceable implementation plans prepared by states and other political subdivisions identified in the statute. It is not EPA's role to disapprove the State's choice of control strategies if that strategy will result in attainment of the one-hour standard and meets all other applicable statutory requirements. *See Union Electric* v *EPA,* 427 U.S. 246 (1976); *Train* v. *NRDC* 421 U.S 60 (1975). The EPA's role in reviewing SIP submittals is to approve state choices, provided that they meet the criteria of the Clean Air Act. Federal inquiry into the economic reasonableness of state action is not allowed under the Clean Air Act (*see, Union Electric Co.,* v. *EPA,* 427 U.S. 246, 255–266 (1976); 42 U.S.C. 7410(a)(2)) other than for purposes of evaluating the reasonableness and availability of alternatives for purposes of a waiver of Federal preemption. The State has submitted information indicating that the administrative requirements of Texas law have been met. We defer to the State analysis until such time as a State Court has determined otherwise. Our review of the

TNRCC's responses to RE comments, taken together with all the rest of the information in the administrative record for the SIP, does not lead to the conclusion that the SIP is inadequate to attain the ozone NAAQS in the H/GA area.

Comment #4: LPC commented that the NO_X emission reductions and corresponding emission limits are too low for RACT for industrial wood-fired boilers.

Response to comment #4: The Emission Specifications for Attainment Demonstration (ESAD) for wood-fired boilers, taken together with ESADs for other point sources of NO_X, were developed in order for the H/GA area to achieve attainment with the ozone NAAQS. The ESADs are technically feasible standards which represent the level of point source NO_X controls necessary for the H/GA area to attain the NAAQS. The EPA recently published an updated version of AP–42 concerning wood-fired boilers, discussed in the next response.

Comment #5: LPC commented that EPA should evaluate the NO_X RACT on wood-fired boilers, and particularly how it applies to boilers of differing design, heat input, and wood-fuel. LPC noted that the California Air Resource Board's 1991 RACT for wood-fired boilers in certain nonattainment areas was 0.052 lb NO_X/MMBtu or 40 parts per million (ppm).

Response to comment #5: The AP–42 section 1.6.1 referenced by the LPC in the commentor's August 10, 2001, comment letter is from the 2/98 or 2/99 version of the AP–42 (older AP–42). The LPC's comment letter is dated August 10, 2001. On August 21, 2001, EPA released its final revised version of the AP–42, section 1.6 concerning ''Wood Residue Combustion in Boilers.'' You can find the latest version of the AP–42, section 1.6 (8/01 version) concerning ''Wood Residue Combustion in Boilers'' at *http://www.epa.gov/ttn/chief/ap42/ch01/final/c01s06.pdf.* The NO_X emission factor rating in the Table 1.6–2 of the older AP–42s were of ''C'' and ''D'' rating category. The NO_X emission factors in the new Table 1.6–2 are not categorized as being boiler type and heat input (size) specific or dependent. The NO_X emission factor rating of the new NO_X emission factor from wood-fired boilers listed in the new Table 1.6–2 is reported as high as ''A'' rating. The ''A'' rating of the NO_X emission factor, from wood-fired boilers in the new AP–42, indicates that differentiation of the boiler type and heat input may not be as significant as once thought to be. In Texas the original NO_X RACT rules, 30 TAC Chapter 117, were adopted in 1993 and earlier. As H/GA area continued to be nonattainment for ozone and photochemical grid modeling indicated that those early NO_X control measures were not adequate to bring the area into attainment with the one-hour ozone standard, more source categories became subject to Chapter 117 rules, and the Chapter 117 requirements and emission limitations became more stringent. The California Air Resource Board recommended the 0.052 lb NO_X/MMBtu limitation in a document entitled ''Determination of RACT/BARCT for Industrial, Institutional, and Commercial Boilers, Steam Generators, and Process Heaters'' in 1991. The air pollution control technology is a dynamic and evolving process. Ten years ago, in 1991, a concentration based NO_X limit in single digit ppm was impracticable. With today's technology and advancements in process control techniques, such NO_X limits for combustion sources are not uncommon. Therefore, we are of the opinion that the State in its proposed NO_X emission limitation of 0.046 lb NO_X/MMBtu has taken the boilers of differing type and heat input into consideration, and this limit is approvable.

Comment #6: LPC recommended that EPA should consider and clarify potential complications with meeting PM–10 and NO_X emission limits with multiple and simultaneous controls. In particular, LPC commented that NO_X control technologies for wood-fired boilers are unproven, and that it was unable to locate industry-specific data supporting the proposed limit of 0.046 lb NO_X/MMBtu.

Response to comment #6: According to section 4.5 of the ''Background Document Report on Revisions to 5th Edition AP–42, Section 1.6, Wood Residue Combustion In Boilers'', dated July 2001, emission factors for NO_X have been replaced with new factors. The old (2/99) AP–42 NO_X emission factors separated the data by boiler configuration. The average NO_X emission factors for each individual combustor were grouped by fuel type. All of the data were from boilers that had no NO_X emission controls and were from boilers burning either dry wood or bark and bark/wet wood. After analysis of the data, the AP–42 factors were determined by grouping the data by dry or wet wood regardless of firing configuration. The following table shows the summary statistics of the data. The old (2/99) AP–42 factors have been converted to lb/MMBtu for this table. The units for the minimum and maximum are also lb/MMBtu. The following table contains NO_X emission factors for wood-fired boilers.

TABLE II.—NO_X EMISSION FACTORS FOR WOOD-FIRED BOILERS

Fuel	Firing configuration	2/99 AP–42 NO_X Factor (lb/MMBtu)	New AP–42 NO_X Factor (lb/MMBtu)	Count	Minimum	Maximum
Bark/Wet Wood	All	0.042/0.16/0.22	0.22	82	0.023	1.281
Dry Wood	All	0.042/0.16/0.22	0.22	8	0.187	0.863

The use of one emission factor for all firing configurations, 82 different counts of data, NO_X emission factors as low as 0.023 lb/MMBtu, all together indicate that the proposed limitation of 0.046 lb NO_X/MMBtu by adoption of combustion control and/or post combustion controls is practicable. Section 5 of the ''Background Document Report on Revisions to 5th Edition AP–42, Section 1.6, Wood Residue Combustion In Boilers' dated July 2001, contains a listing of 72 references used to develop this report. You can find a copy of this report at: *http://www.epa.gov/ttn/chief/ap42/ch01/bgdocs/b01s06.pdf*

On the issue of multiple controls, it is not uncommon to see a series of different control devices serving one combustion source. For example, a quick search of the California Air Resource Board's Clearinghouse reveals that for wood fired boilers, thirteen years ago, a 216 MMBtu/hr fluidized bed combustion boiler fired with pelletized wood waste (even smaller than LPC's 249 MMBtu/hr boiler) was permitted to use ammonia injection (thermal de-NO_X) to control NO_X emissions, limestone injection to control sulfur oxides (SOx) emissions, and multiclone and baghouse, to reduce particulate matter (PM) emissions. The permit A310–300–88, for this source was issued on 09/30/1988. This existing source is only one example of many

other wood-fired boilers that employ multiple control devices to reduce emissions of different pollutants without jeopardizing compliance with regulations whether proposed/promulgated by the State or EPA. The record supports that use of multiple controls in association with operation of a wood fired boiler has been successfully practiced elsewhere and is technically feasible in the H/GA area.

Comment #7: LPC commented that EPA should evaluate the negative impacts associated with a forced change from a sustainable and waste minimizing energy source to other energy alternatives.

Response to comment #7: Based on the background information discussed above concerning wood-fired boilers, EPA disagrees that the ESAD for this equipment in the Texas SIP approved today will necessitate a forced change of fuel source. There may be instances in which it may be practical or economically advantageous for an individual facility to effect such changes. On this issue as with others, the state has the initial and primary responsibility of formulating plans to attain the NAAQS.

Comment #8: LPC expressed its concern over introducing ammonia in its plywood mill that employs 400 people.

Response to comment #8: We can understand and do appreciate LPC's concern about safety of its employees due to potential introduction of ammonia into its plywood plant. Historically many facilities in Europe, Japan, and the United States have used injection of this reagent as a method of control to reduce NO_X or SOx emissions from their combustion sources. As material contained in the docket indicates if control equipment is properly operated, there would be no excess ammonia emissions. Once again, we are of the opinion that LPC's expressed concern, over introduction of a harsh compound at its mill, can be alleviated by proper training of its operators, implementing safe and good housekeeping/maintenance practices, and actively preparing employees for possible emergency episodes. As a regulatory safeguard, the 30 TAC, Chapter 117 does set short term emission limits for ammonia associated with operation of combustion sources and their associated control devices. See 117.105(j), 117.106(d)(1)(B)(2), 117.205(g), and 117.206(e)(2). Additionally, Chapter 117 allows for operational flexibility and emission cap and trading as viable options to a source or operator. We believe that LPC can safely introduce ammonia or other reagent to reduce NO_X emissions from its wood-fired boiler, but that LPC can also come into compliance by other means if it chooses to do so.

Comment #9: TXI commented that its lightweight aggregate kilns in Fort Bend County, Texas are the only such kilns in the H/GA area and thus are unfairly targeted. TXI states that NO_X emissions from its kilns account for only 0.02% of the NO_X reductions from point sources and the NO_X reduction technique has not been demonstrated.

Response to comment #9: The EPA has reviewed the TNRCC's response to this and other comments, and generally agrees with the TNRCC's analysis. The logic for including lightweight aggregate kilns as a part of the control strategy to reduce its NO_X emissions is due to several factors. NO_X emissions from these kilns have been uncontrolled previously. The TXI plant in Fort Bend is a major source of NO_X. The photochemical grid modeling indicates that additional NO_X reductions are needed to bring the H/GA area into attainment with the one-hour ozone standard. The fact that large amounts of NO_X reductions are needed to bring the H/GA area into attainment constitutes grounds to require NO_X emissions reductions from a major and uncontrolled source of NO_X, as is the case with the TXI's Fort Bend operation, in a severe ozone nonattainment area, even though the source's NO_X emissions are a small percentage of the area's total NO_X emissions. Advances in air pollution control technology combined with the Chapter 117 rules' operational flexibility, and emission cap/trading as available options to the source or operator should enable the commenter to comply with the proposed emission limitation of 117.206(c)(13). The H/GA area's control strategy requires other sources with even lower NO_X emissions to reduce their emissions at much higher rates. An 11 hp stationary diesel engine emits less NO_X per day and year than TXI's plant in Fort Bend County. Under the proposed requirements, this 11 hp stationary diesel engines will have to reduce its emissions from 11.0 grams NO_X/hp-hr to 5.0 grams NO_X/hp-hr. This degree of reduction for stationary diesel engines in excess of 50% is far more than the degree of reduction required of TXI's lightweight aggregate kilns in Fort Bend County. Therefore, we disagree with the TXI's position that NO_X emissions from its lightweight aggregate kilns in Fort Bend County are small, that it has been unfairly targeted by the State, and that a reasonable NO_X control technique for the Fort Bend plant is not feasible.

Comment #10: TXI comments that the proposed Chapter 117 rule is a ''major environmental rule'' and potentially subject to the requirements of Texas Government Code section 2001.0225 (25 Texas Register of August 25, 2000). As a result, a cost, benefit and economic analysis to comply with the control strategy for TXI's lightweight aggregate plant should have been performed by the TNRCC.

Response to comment #10: As stated previously, EPA's role in reviewing SIP submittals is to approve state choices, provided that they meet the criteria of the Clean Air Act. Federal inquiry into the economic reasonableness of state action is not allowed under the Clean Air Act (*see, Union Electric Co.,* v. *EPA,* 427 U.S. 246, 255–266 (1976); 42 U.S.C. 7410(a)(2)) other than for purposes of evaluating the reasonableness and availability of alternatives for purposes of a waiver of Federal preemption. The State has submitted information indicating that the administrative requirements of Texas law have been met. We defer to the State analysis until such time as a State Court has determined otherwise. Federal inquiry into the economic reasonableness of state action is not allowed under the Clean Air Act (*see, Union Electric Co.,* versus *EPA*, 427 U.S. 246, 255–266 (1976) and 42 U.S.C. 7410(a)(2)) other than for purposes of evaluating the reasonableness and availability of alternatives for purposes of a waiver of Federal preemption. The State has submitted information indicating that the administrative requirements of Texas law have been met. We defer to the State analysis until such time as a court of competent jurisdiction determines otherwise.

Comment #11: TXI commented that mobile sources are the cause of nonattainment, that major cities of the State have expanded, and that point sources need not to be further controlled.

Response to comment #11: We do agree that mobile sources are a major source of air pollution in major cities in the States and mobile source emissions need to be controlled to help bring the nonattainment areas into attainment with the ozone standards. The State has proposed and adopted many measures to reduce emissions associated with on-road and off-road mobile source. However, as TNRCC noted in its response to this comment, while mobile sources contribute a significant share of the ozone-forming pollutants in H/GA, modeling analyses show that reducing mobile source emissions alone will not be sufficient to bring the area into attainment. The Texas SIP must

therefore also regulate point sources of NO_X. The 1996 emission inventory of NO_X sources in the H/GA area indicates that 54% (672.05 of total 1250.16 tpd) of emissions are from stationary sources, while on-road mobile sources account for 24% (302.04 of the total 1250.16 tpd) of the emissions. *See http://www.tnrcc.state.tx.us/air/aqp/ei/rsumhg.htm#nox.*

Further, the State has shown that even if it controlled all of the mobile source emissions to zero, the H/GA area would still be in nonattainment. Therefore, the record shows that both mobile and stationary sources need to be controlled simultaneously to achieve the ozone attainment goal.

Comment #12: TXI commented that the State did not have any technical justification for a 30% reduction in NO_X emissions from lightweight aggregate kilns. TXI contended the reduction requirement is arbitrary and has no scientific basis.

Response to comment #12: The TNRCC based the 30% reduction in NO_X emissions on availability of combustion modification, combustion control, mid-kiln firing, 30-day rolling average, and the emission cap and trading options to the source or operator. The available technologies, operational flexibilities, and the emission cap and trading allowed for in Chapter 117 rules, should accommodate a source to obtain 30% reduction in its NO_X emission as compared to the source's 1997 baseline emissions. The 30% reduction in NO_X emissions from a kiln is consistent with EPA's publication number ''EPA–453/R–94–004,'' entitled ''Alternate Control Techniques for Cement Plants.'' Therefore, we believe that the State's record supports the 30% reduction requirement, is technically feasible, and based on a sound scientific basis.

Comment #13: ED commented that the proposed rule for stationary diesel engines fails to provide sufficient emissions limitations.

Response to comment #13: As stated in section six of 66 FR 36532, published on July 12, 2001, Texas had not proposed any regulations in the SIP limiting NO_X emissions from stationary diesel engines or stationary dual-fuel engines prior to May 30, 2001. After the State adopted and submitted its December 2000 attainment demonstration SIP for the H/GA area, and based upon Texas' proposed Reasonably Available Control Measures (RACM) review, the State determined that this particular source category should be controlled in the H/GA area to meet the Act's RACM requirements. Adopting these emission limitations will only strengthen the existing federally-approved Texas SIP and further supports the H/GA area's attainment of the ozone NAAQS. This was our basis for proposing to approve the rule revision. The proposed emission specifications for stationary diesel engines or stationary dual-fuel engines are based on 40 CFR 89.112(a), Table I. For the H/GA area, the State has shown that the chosen emission limitations are technically and economically feasible and further reductions would not benefit the H/GA area's environment.

Comment #14: ED commented that the TNRCC should establish the same requirements for new and existing stationary diesel engines in the H/GA area that are not used exclusively during infrequent emergency or backup situations.

Response to comment #14: The TNRCC has adopted Chapter 117 regulations for control of NO_X emissions from stationary diesel engines or stationary dual-fuel engines. The emission specifications for stationary diesel engines or stationary dual-fuel engines are based on 40 CFR 89.112(a), Table I. We understand Texas has adopted even more stringent standards for new engines getting standard permits. We believe it is reasonable for existing engines to have less stringent standards than new engines because it is generally more feasible to achieve cleaner operation when starting from an initial design rather than retrofitting an older engine. Furthermore, the emissions of NO_X and CO from combustion sources are interrelated. Requiring further reductions in NO_X emissions from existing engines could potentially result in increases of CO emissions, and must be approached carefully. The State received a similar comment. In their response they explained that based on information in the emissions inventory and contact with diesel engine vendors and others familiar with the stationary diesel engines in the H/GA area, the State is unaware of any existing stationary diesel engines that are being operated in situations other than generation of electricity in emergency situations or operation for maintenance and testing. The TNRCC believes and EPA agrees that few existing engines will be moved from emergency service to routine or peak shaving operations for the following reasons. Any existing engines at a site with a collective design capacity to emit (from units with chapter 117 emission limits) greater than ten tpy of NO_X are subject to the Chapter 101 mass emissions cap and trade program if they choose to increase their operation to 100 hours per year or more (based on a rolling 12-month average) and, in addition to having to comply with the Chapter 117 rules, will only be issued NO_X emissions allocations based on their historical activity level which would be much lower than 100 hrs/year. Existing engines theoretically could be switched to peak shaving service up to 100 hours/year but in reality only about 40 hours/year would be available for this type of operation. The remaining time would have to be used for normal routine testing of the engines. It is unlikely that the profit from sale of electricity would justify the cost of the modifications to the switching system for only about 40 hours of operation. EPA concludes that additional control beyond the existing program is not reasonable.

Comment #15: ED comments that potential emissions from stationary diesel engines are significant and refers to an electricity management and consulting firm that is marketing the concept of linking these emergency diesel back up generators together as a mid-size peaking unit through a virtual power plant.

Response to comment #15: It is unclear how many or which of these emergency back up generators in the H/GA area could conceivably participate in such a virtual power plant marketing plan. Should the NO_X emissions and number of emergency back up generators participating in this virtual power plant market or otherwise operating in H/GA area grow to such a degree that they prove to be significant for purposes of attaining the ozone NAAQS, we will work with the State to evaluate this concern in the mid-course review process. Presently, neither the State nor we have the information whether this type of control is feasible for the H/GA area. Additional control measures will be required as necessary to achieve the NAAQS as expeditiously as practicable but no later than November 2007. This will allow adjustments to be made should a source category grow at an unexpectedly large rate.

Comment #16: ED commented that EPA should require the TNRCC to make ''one-date'' as the effective date for compliance with the NO_X emission limitations for the stationary diesel engines or dual-fuel stationary engines instead of the Tier 1, 2, or 3 approach.

Response to comment #16: The phased-in approach or the Tier 1, 2, or 3 compliance date method has been proven to work in practice at the Federal level (40 CFR 89.112(a)), and we have decided to adopt this approach for practical reasons. We are of the opinion

that the phased-in approach is a proper and practical method of phasing-in new emission limitations where a large range of engine sizes and various engine ages are involved. We disagree with the ED's position to have the TNRCC replace the effective compliance date of NO_X emission limitations for the stationary diesel engines or dual-fuel stationary engines from the proposed Tier 1, 2, or 3 method to a ''one-date'' for all.

Comment #17: ED commented that EPA should significantly strengthen the NO_X emission requirements for the existing small backup electric generating units.

Response to comment #17: As stated earlier, the emission specifications for stationary diesel engines or stationary dual-fuel engines are based on 40 CFR 89.112(a), Table I. Currently, we are not aware of any other State program that has adopted more stringent emission specifications for stationary diesel engines or stationary dual-fuel engines. Although it is possible that existing emergency diesel generators could be converted to a peak shaving use, and consequently contribute to ozone exceedances due to operation on high electricity demand during summer days and conditions that are conducive to formation of more ozone, these diesel units are normally equipped with a timer that operates the engines for one-half to one hour weekly for testing and maintenance purposes. To demonstrate continuous compliance, subsection 117.213(i) requires engines to operate with an elapsed run time meter and further states that the installed run time meters shall be ''non-resettable.''

52 weeks per year × ½ hour to 1 hour per week for maintenance and testing =26 to 52 hours per year for maintenance and testing. Due to the fact that the 100 hours per year limit includes the testing and maintenance times also, the remaining (100 hours per year − 26 to 52 hours per year for maintenance and testing = 74 to 48 hours per year for peak shaving) 48 to 74 hours per year would be too short a time to economically justify the expense of telemetry interconnect equipment in order to generate and supply power to a grid system. These inherent difficulties will serve as hurdles/reasons in discouraging an operator from converting its emergency backup generators to peak shaving units. Furthermore, by converting these backup generators the source or operator would always run the risk of not having power available to itself when a true emergency situation arises at its own site. As stated earlier, should the NO_X emissions and number of emergency back up generators participating in this virtual power plant market actually prove to be significant, we will work with the State to evaluate this concern in the mid-course review process.

Comment #18: ED commented that EPA must reject efforts to relax the control measures on the books before the identified shortfall in emission reductions is eliminated.

Response to comment #18: The Supreme Court has consistently held that under the Act, initial and primary responsibility for deciding what emissions reductions will be required from which sources is left to the discretion of the States. *Whitman* v. *Am. Trucking Ass'ns,* 531 U.S. 457 (2001); *Train* v. *NRDC,* 421 U.S. 60 (1975). This discretion includes the continuing authority to revise choices about the mix of emission limitations. *Train* at 79. Therefore, EPA believes that it is appropriate and authorized under the Act for a State to continue to update its growth projections, inventories, modeling analyses, control strategies, etc., and submit these updates as a SIP revision based on newly available science and technology.

However, Section 110(l) of the Act (added by the 1990 Amendments to the Act) governs EPA's review of a SIP revision from a state that wishes to make changes to its approved SIP. This section provides that EPA may not approve a SIP revision if it will interfere with any applicable requirement concerning attainment and reasonable further progress or any other applicable requirement of the Act. The Supreme Court under the 1970 CAA, observed that EPA's judgment in determining the approval of a SIP revision is to ''measure the existing level of pollution, compare it with the national standards, and determine the effect on this comparison of specified emission modifications.'' *Train* at 93. Therefore, if we receive an attainment demonstration SIP revision from Texas that contains relaxed control measures or the replacement of existing control measures, we would consider the revised plan's prospects for meeting the current attainment requirements and other applicable requirements of the Act. See, the Act section 110(k)(3), *Union Electric* v. *EPA,* 427 U.S. 246 (1976) and *Train* v. *NRDC,* 421 U.S. at 79.

In summary, the State may choose to submit a SIP revision in 2002 or 2003 as it has suggested it may do. If we receive a SIP revision that meets our completeness criteria, we will review it against the statutory requirements of section 110(l). Further, the Act requires us to publish a notice and to provide for public comment on our proposed decision. The EPA believes that it is in the context of that future rulemaking, not EPA's current approval, that the commenter's concern regarding the appropriateness of any replacement measures adopted by the State should be considered.

Comment #19: ED commented that EPA should not approve the NO_X reduction proposal of 90% for electric power plants, but should instead require the electric power plants to meet the 93% NO_X reduction.

Response to comment #19: The NO_X control strategy of December 22, 2000, SIP revision called for 595 tons per day reduction. *See* Table V, section 8 of this document. The revised NO_X control strategy of the May 30, 2001, calls for 588 tons per day reduction. *See* Table XI, section 16 of this document. Although ED is correct in stating that the amount of NO_X reduction from electric power plants has been reduced, the NO_X emissions reductions from recent State Legislative actions requiring some grandfathered sources to reduce their emissions by about 50% offsets and counter balances the power plant's NO_X emission reduction adjustment. Therefore, the NO_X emissions in east and central Texas (regional strategy) will be less than what the State SIP had called for in the December 22, 2000 SIP revision. In terms of cost per ton of overall NO_X removed, the modified NO_X emission limitations of the May 30, 2001 state proposal would be more cost effective than the December 22, 2000, control strategy scenario for the H/GA area. We disagree with the ED's position to reject the revised May 30, 2001 reduction proposal for the electric power plants.

Comment #20: ED commented that the compliance schedule under action number four of the proposal 66 FR 36532, (July 12, 2001) is not as expeditious as practicable.

Response to comment #20: The compliance schedule under action number four of the proposal 66 FR 36532, (July 12, 2001) was needed to allow affected sources more planning time and choices to put in place the NO_X emissions reductions. Action number four requires utility electric generation and ICI sources to adopt a phased-in approach (year by year) and incremental method (percent NO_X reduction required each year) for compliance purposes. According to this approach the ultimate compliance date of 2007 will remain unchanged. In our proposal published on July 12, 2001, we made it very clear that the final compliance date to attain compliance with the one-hour ozone standard in the H/GA area will remain the same and

unchanged and that any control strategy will have to achieve attainment with the federal one-hour ozone standard by 2007. The essential and resulting final compliance date will remain the same; the distinction is the route and method of approach used to reach the same end point. Therefore, we are of the opinion that compliance requirements under action number four of the July proposal are as expeditious as practicable.

Comment #21: BCCAAG commented that most of the NO_X emission limitations have been developed with a less than complete analysis of economic and technical feasibility or possible economic or environmental dis-benefits. It further stated that the TNRCC's 90% NO_X control approach is arbitrary and circumvents the intent established in the Texas Clean Air Act.

Response to comment #21: We do not believe that reducing NO_X and thus controlling ozone in the H/GA area will constitute an environmental dis-benefit.

This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Because this rule approves preexisting requirements under state law and does not impose any enforceable duty beyond that required by state law and hence does not have a significant economic impact on a substantial number of small entities, an analysis under the Regulatory Flexibility Act (5 U.S.C. § 601 *et seq.*) is not required.

Details on the State's assessments of financial impact and technical feasibility can be found throughout the record generated by the TNRCC for the SIP (''SIP documents''). The EPA's role in reviewing SIP submittals is to approve state choices, provided that they meet the criteria of the Clean Air Act. Federal inquiry into the economic reasonableness of state action is not allowed under the Clean Air Act (*see, Union Electric Co.*, v. *EPA*, 427 U.S. 246, 255–266 (1976); 42 U.S.C. 7410(a)(2)) other than for purposes of evaluating the reasonableness and availability of alternatives for purposes of a waiver of Federal preemption. The State has submitted information indicating that the administrative requirements of Texas law have been met. We defer to the State analysis until such time as a State Court has determined otherwise.

Comment #22: BCCAAG commented that point sources control technology has advanced in recent years but there is no one demonstrated retrofit technology application to achieve 90% NO_X reduction from point sources.

Response to comment #22: We agree with the statement that NO_X point source control technology has advanced in recent years. In fact, levels of NO_X emissions control that can be achieved have advanced to degrees that may not have been practicable a decade or so ago. Pollution control technology is a dynamic and evolving field. The domain of reference for NO_X retrofit technology is not limited to this country. It is technologically feasible to accomplish the degree of control that the rule calls for; the issue becomes cost and economic feasibility rather than technical infeasibility. We also refer the commenter to 26 Texas Register 524, published on January 12, 2001, for a detailed explanation by the TNRCC of the level of NO_X control. We responded to comments on the cost and economic feasibility of the control requirements in our response to comment #22 of this document.

Comment #23: BCCAAG commented that not enough time (year-end 2004) has been allowed in the rule to implement the required NO_X reductions from point sources.

Response to comment #23: In Texas the original NO_X RACT rules, 30 TAC Chapter 117, were adopted in 1993 and earlier. As the H/GA area continued to remain nonattainment for ozone and it became evident that earlier NO_X control measures were not adequate to bring the area into attainment with the one-hour ozone standard, more source categories became subject to the Chapter 117 rules, and the Chapter 117 requirements and emission limitations became more stringent. Historical revisions to the Chapter 117 rules, including the additional NO_X control from point sources in the H/GA area, have not been introduced by the State without active participation of the stakeholders. We believe that the majority of the affected sources have been aware, involved, and actively participating in the regulatory development arena of Chapter 117 rules over the last decade. The H/GA area is classified as a severe-17 ozone nonattainment area according to the federal Clean Air Act, 42 U.S.C., § 7401 *et seq.*, and will need to attain the one-hour ozone standard by November 15, 2007. Under 42 U.S.C., § 7511a(d) the State of Texas is required to develop and submit to EPA a SIP revision that will bring the H/GA area into attainment with the one-hour ozone standard. To be classified as attainment with the one-hour ozone standard by EPA, three complete calendar years of ozone monitoring data are needed (Appendix H to 40 CFR Part 50—Interpretation of The 1-Hour Primary and Secondary National Ambient Air Quality Standards for Ozone). Reading 42 U.S.C. § 7511a(d) and 40 CFR 50 Appendix H together, as a practical matter, the year-end 2004 deadline will effectively become an initial compliance deadline; otherwise the H/GA area will not be able to comply with the compliance deadline of November 15, 2007. Thirty plus years of ozone nonattainment in the H/GA area warrants no more delays. We fully support the State's proposed implementation deadline and therefore disagree with the commenter's position on insufficiency of time allowed to implement the required NO_X control measures.

Comment #24: BCCAAG commented that 90% reduction effectively eliminates the ability to create surplus credits under the cap and trade program and will cause regional economic impacts that would lead to a ''no future growth'' situation.

Response to comment #24: We want to emphasize that it is not within the scope of this rulemaking to forecast on the region's future business growth and expansions. The Mass Emissions Cap and Trade Program (30 TAC Chapter 101, Subchapter H, Division 3) is being approved in an action published separately in this issue of the **Federal Register**. The emission credits under the mass emissions cap and trade program will have to be actual, surplus, real, enforceable, and certifiable. These rules will bring more flexibility and financial incentives to reduce air pollution, promote technological innovations, and encourage creative methods of pollution control over the old command and control approach for each individual source. The Chapter 117 rules do not limit or stop future economic expansion and growth. Generally, environmental regulations do not limit growth; they enhance sustainable growth. We do not believe that Southern California experienced no growth under its Regional Clean Air Incentives Market (RECLAIM) program. In fact, one cannot dispute the business expansions and economic prosperity of Southern California in the years following the adoption of its RECLAIM program. We disagree with the BCCAAG's position in this regard.

Comment #25: BCCAAG commented that according to their forecast for the 2000–2004 time frame, resource supply and demand for construction labor, design engineering staff, specialized labor, and Selective Catalytic Reduction (SCR) catalyst supply for the H/GA area exceed available capacities.

Response to comment #25: It is not within the scope of this rulemaking to forecast resource and market demand availability of a certain industrial sector. However, historically the market develops additional supply when there

is increased demand. Regulated units in the H/GA area can come into compliance in several ways, not all of which rely on physical installation of additional controls. Moreover, the TNRCC has extended the compliance deadlines for certain units, which is expected to mitigate any potential inadequate capacity problems. For objectivity and public record purposes, it appears that surveys cited as reference by the commenter are conducted or sponsored, in part, by the industry groups.

We refer the commenter to 26 Texas Register 524, published on January 12, 2001, for a detailed explanation of the level of NO_X control. The EPA's role in reviewing SIP submittals is to approve state choices, provided that they meet the criteria of the Clean Air Act. Federal inquiry into the economic reasonableness of state action is not allowed under the Clean Air Act (see, *Union Electric Co.*, v. *EPA*, 427 U.S. 246, 255–266 (1976); 42 U.S.C. 7410(a)(2)) other than for purposes of evaluating the reasonableness and availability of alternatives for purposes of a waiver of Federal preemption. The State has submitted information indicating that the administrative requirements of Texas law have been met. We defer to the State analysis until such time as a State Court has determined otherwise.

Comment #26: BCCAAG commented that the proposed rules will decrease the production of ethylene and polyethylene plants during the 2003–2004 implementation period and will cause loss of sales/income.

Response to comment #26: We are not aware of any NO_X rules in the country that have tailored their compliance deadlines or emissions reduction plans to fit operation of one certain industrial sector (ethylene and polyethylene plants) or specific plants' long run maintenance or shutdown schedules. Any such accommodation in the rule could be interpreted as lowering the bar of emission control or extending special treatment to those specific plants. What seems to be missing from the commenter's statement of concern over production/sales losses from ethylene and polyethylene plants is the health care and welfare costs associated with failure to install the proposed controls. The fact that the construction/reconstruction and installation of a control device may cause temporary delay in production rate does not constitute grounds for exempting that source or subjecting the source to a less stringent control requirement than the regulations would otherwise require. We support the State's proposed implementation deadline and emission limitations and disagree with the commenter's position in this regard.

Comment #27: BCCAAG commented that the State has not weighed and analyzed costs and technical feasibility of the control options for utility boilers, gas turbines, heaters and furnaces, duct burners, internal combustion (IC) engines, and ICI boilers. The commenter proposes a NO_X standard comparable to those deployed in South Coast Air Quality Management District (SCAQMD).

Response to comment #27: On the subject of technical feasibility analysis we offer the following: The H/GA area is classified as a severe-17 ozone nonattainment area and is the largest emitter of NO_X emissions in the southern part of the country, a larger emitter in amount than the Los Angeles area. *See http://www.epa.gov/air/data/netemis.html.* The ozone control strategy in the H/GA area is driven more by NO_X control measures than VOC. Although the SCAQMD is normally the trend-setter in the field of air pollution control in the States, some of the point source NO_X standards the commenter refers to were set in the 1988 to 1991 time era. Air pollution control technology is a dynamic and evolving process. A decade ago, a concentration based NO_X limit in single digit ppm was impracticable; while with today's technology and advancements in process control techniques a concentration based NO_X limit in single digit ppm has become practicable and common. What used to be the state-of-art control technique a decade or so ago, as set by the SCAQMD, may not be so in the air pollution control industry now. Additionally, operational flexibility and emission cap and trading provisions built in the NO_X rules serve as viable options that a source or operator can take advantage of. We believe that advances in air pollution control technology combined with the Chapter 117 rule operational flexibility, and with emission cap/trading, should enable a source or operator to meet the proposed point source NO_X emission limitations. With regard to the cost and economic feasibility of the control requirements, actions such as the approval of a SIP revision which merely approve state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law are not subject to economic impact analysis under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The EPA's role in reviewing SIP submittals is to approve state choices, provided that they meet the criteria of the Clean Air Act. Federal inquiry into the economic reasonableness of state action is not allowed under the Clean Air Act (*see, Union Electric Co.*, v. *EPA*, 427 U.S. 246, 255–266 (1976); 42 U.S.C. 7410(a)(2)) other than for purposes of evaluating the reasonableness and availability of alternatives for purposes of a waiver of Federal preemption. The State has submitted information indicating that the administrative requirements of Texas law have been met. We defer to the State analysis until such time as a State Court has determined otherwise. Furthermore, we refer the commenter to 26 Texas Register 524, published on January 12, 2001, for a detailed explanation of the level of NO_X control. We support the State's proposed NO_X emission limitations and therefore, disagree with the commenter's position on costs and technical feasibility of the emission controls from point sources of NO_X.

Comment #28: BCCAAG commented that introduction of post combustion technology with ammonia usage could increase ammonia emissions and concentrations in the H/GA area.

Response to comment #28: We can understand and do appreciate BCCAAG's concern about the potential for increase in ammonia emissions in the H/GA area. Historically many facilities in Europe, Japan, and the United States have used injection of this reagent as a method of control to reduce NO_X or SO_X emissions from their combustion sources. As material contained in the docket indicates if control equipment is properly operated, there would be no excess ammonia emissions. As a regulatory safeguard, 30 TAC Chapter 117 does set short term emission limits for ammonia associated with operation of combustion sources and their associated control devices. *See* 117.105(j), 117.106(d)(1)(B)(2), 117.205(g), and 117.206(e)(2). We support the State's proposed emission limitations and; therefore, disagree with the commenter's position in this regard.

Comment #29: BCCAAG commented that storage, handling, and transportation of ammonia is risky.

Response to comment #29: We can understand and do appreciate BCCAAG's concern about potential risk associated with the storage and handling of ammonia in the H/GA area. As a regulatory safeguard, 30 TAC Chapter 117 does set short term emission limits for ammonia associated with operation of combustion sources and their associated control devices. *See* 117.105(j), 117.106(d)(1)(B)(2), 117.205(g), and 117.206(e)(2). The commenter mentions that annually millions of pounds of ammonia would have to be transported, handled, stored,

and used throughout the H/GA area. We want to bring to the commenter's attention that many more millions of pounds of petroleum related chemicals are transported, handled, stored, and used throughout the H/GA area in association with activities related to some of the commenter's constituents, every year. Using a similar analogy, gasoline is a volatile, flammable solvent and is composed of potentially carcinogenic chemicals. Some of the BCCAAG constituents in the H/GA area are involved in the business of refining and producing gasoline and petrochemical solvents. Millions of Americans drive gasoline-fueled engines to and from work/home every day. We do not believe that it follows that these people will need to cease their daily driving activities due to the risk associated with the storage and handling of gasoline. We support the State's proposed emission limitations and therefore disagree with the commenter's position in this regard.

Comment #30: BCCAAG commented that there will be instances that shutdown of equipment may have to be considered to meet the desired NO_X emission reductions.

Response to comment #30: We agree that there may be instances that the shutdown of marginal (economically speaking) existing equipment will have to be considered. The surplus credit associated with these shutdowns could be used in emission trading for financial gains by the source or operator. The source also has the option to consolidate the emissions from marginal equipment with other point sources and utilize a combined control technique, or to obtain emission allowances. Both of these options have been built into the Chapter 117 rules.

6. What Are the NO_X Emission Specifications for Point Sources of NO_X, in the H/GA Area Based Upon the December 22, 2000, SIP Revision, That We Are Approving?

This rule revision requires reductions of NO_X emissions from point sources in the H/GA ozone nonattainment area. The following table contains a summary of the NO_X emission specifications for attainment demonstration purposes that we are approving for point sources in the H/GA.

TABLE III.—AFFECTED SOURCES AND NO_X EMISSION SPECIFICATIONS FOR ATTAINMENT DEMONSTRATION IN THE H/GA

Source	NO_X emission specification for attainment demonstration
Utility Boilers	0.010–0.060 lb/MMBtu.
Turbines and Duct Burners	0.015–0.150 lb/MMBtu.
Heaters and Furnaces	0.010–0.036 lb/MMBtu.
Internal Combustion Engines	0.045–0.133 lb/MMBtu or 0.17–0.50 gram/hp-hr.
Industrial Boilers	0.010–0.030 lb/MMBtu.
Coke-fired Boilers	0.057 lb/MMBtu.
Wood Fuel-fired Boilers	0.046 lb/MMBtu.
Rice hull-fired Boilers	0.089 lb/MMBtu.
Oil-fired Boilers	2.0 lb/1,000 gallons of oil burned.

We are approving the above-listed NO_X emissions specifications for point sources of NO_X in the H/GA as a part of the Texas 1-hour ozone SIP under Part D of the Act because Texas is relying on the NO_X control measures to demonstrate attainment of the 1-hour ozone standard in the H/GA nonattainment area.

7. What Is the Compliance Schedule for Point Sources of NO_X, in the H/GA Area Based Upon the December 22, 2000, SIP Revision, That We Are Approving?

The following table contains a summary of the affected sources and their compliance schedules for attainment demonstration purposes that we are approving for point sources in the H/GA.

TABLE IV.—AFFECTED SOURCES OF NO_X AND COMPLIANCE SCHEDULES

Sources	Compliance schedule	Additional information
Utility Electric Generation	March 31, 2003	Investor-owned; first 46% of total required NO_X reductions.
Utility Electric Generation	March 31, 2004	Investor-owned; the next 46% required NO_X reductions.
Utility Electric Generation	March 31, 2007	Investor-owned; final required NO_X reductions.
Industrial, Commercial, and Institutional Combustion Sources.	March 31, 2004	First 44% of required NO_X reductions.
Industrial, Commercial, and Institutional Combustion Sources.	March 31, 2005	Next 45% of required NO_X reductions.
Industrial, Commercial, and Institutional Combustion Sources.	March 31, 2007	Final NO_X reductions.
Boilers, Process Heaters, and Stationary Engines at Minor Sources.	March 31, 2005	In cap and trade program.
Boilers, Process Heaters, and Stationary Engines at Minor Sources.	March 31, 2005	Not in cap and trade program.

We are of the opinion that the above listed compliance dates and time-table combined with the cap and trade provisions of the rule offer operational flexibility to the affected point sources in the H/GA. We are approving the above-listed compliance dates for point sources of NO_X in the H/GA as a part of the Texas 1-hour ozone SIP under Part D of the Act because Texas is relying on the NO_X control measures to demonstrate attainment of the 1-hour

ozone standard in the H/GA nonattainment area.

8. What Are the NO_X Emissions Reductions for Point Sources of NO_X, in the H/GA Area Based Upon the December 22, 2000, SIP Revision, That We Are Approving?

This rulemaking will control/reduce NO_X emissions in the H/GA area in two phases or Tiers. We will refer to these two emission reduction phases as Tier I and Tier II Reductions. You can find a summary of the affected sources and their NO_X emission reductions for attainment demonstration purposes, that we are approving for point sources in the H/GA area, in the following table.

TABLE V.—AFFECTED POINT SOURCES, 1997 EMISSIONS, AND THEIR EMISSION REDUCTIONS FOR THE H/GA

Sources	1997 NO_X emissions, tons per day (tpd)	Tier I + Tier II reductions, (tpd)
Utility Boilers	196.44	184
Turbines and Duct Burners	155.65	141
Process Heaters and Furnaces	110.12	97
Internal Combustion Engines	86.37	75
Industrial Boilers	85.98	79
Other	32.99	19
Overall Point Sources	667.55	595

The combined NO_X emission reductions of Tier I and Tier II in the rulemaking will be 595 tpd or 89 percent, when compared to the 1997 emission levels. We are approving the overall NO_X point source reductions in the H/GA as a part of the Texas 1-hour ozone SIP under Part D of the Act because Texas is relying on the NO_X control measures to demonstrate attainment of the 1-hour ozone standard in the H/GA nonattainment area.

9. What Are the NO_X Emission Specifications, for Stationary Diesel Engines or Stationary Dual-Fuel Engines, That We Are Approving?

This rule revision requires reductions of NO_X emissions from stationary diesel engines or stationary dual-fuel engines in the H/GA area. The following table contains a summary of the NO_X emission specifications for stationary diesel engines in the H/GA area.

TABLE VI.—AFFECTED SOURCES AND NO_X EMISSION SPECIFICATIONS FOR STATIONARY DIESEL ENGINES OR STATIONARY DUAL-FUEL ENGINES IN THE H/GA AREA

Source	NO_X emission specification
Diesel engines in service after October 1, 2001: not modified, reconstructed, or relocated on or after October 1, 2001	11.0 gram/hp-hr.
Rated less than 11 hp: modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2004	7.0 gram/hp-hr.
Rated less than 11 hp: modified, reconstructed, or relocated on or after October 1, 2004	5.0 gram/hp-hr.
11 hp ≤ rated < 25 hp: installed, modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2004.	6.3 gram/hp-hr.
11 hp ≤ rated < 25 hp: installed, modified, reconstructed, or relocated on or after October 1, 2004	5.0 gram/hp-hr.
25 hp ≤ rated < 50 hp: installed, modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2003.	6.3 gram/hp-hr.
25 hp ≤ rated < 50 hp: installed, modified, reconstructed, or relocated on or after October 1, 2003	5.0 gram/hp-hr.
50 hp ≤ rated < 100 hp: installed, modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2003.	6.9 gram/hp-hr.
50 hp ≤ rated < 100 hp: installed, modified, reconstructed, or relocated on or after October 1, 2003	5.0 gram/hp-hr.
50 hp ≤ rated < 100 hp: installed, modified, reconstructed, or relocated on or after October 1, 2007	3.3 gram/hp-hr
100 hp ≤ rated < 175 hp: installed, modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2002.	6.9 gram/hp-hr.
100 hp ≤ rated < 175 hp: installed, modified, reconstructed, or relocated on or after October 1, 2002, but before October 1, 2006.	4.5 gram/hp-hr.
100 hp ≤ rated < 175 hp: installed, modified, reconstructed, or relocated on or after October 1, 2006	2.8 gram/hp-hr.
175 hp ≤ rated < 300 hp: installed, modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2002.	6.9 gram/hp-hr.
175 hp ≤ rated < 300 hp: installed, modified, reconstructed, or relocated on or after October 1, 2002, but before October 1, 2005.	4.5 gram/hp-hr.
175 hp ≤ rated < 300 hp: installed, modified, reconstructed, or relocated on or after October 1, 2005	2.8 gram/hp-hr.
300 hp ≤ rated < 600 hp: installed, modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2005.	4.5 gram/hp-hr.
300 hp ≤ rated < 600 hp: installed, modified, reconstructed, or relocated on or after October 1, 2005	2.8 gram/hp-hr.
600 hp ≤ rated < 750 hp: installed, modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2005.	4.5 gram/hp-hr.
600 hp ≤ rated < 750 hp: installed, modified, reconstructed, or relocated on or after October 1, 2005	2.8 gram/hp-hr.
Rated ≥ 750 hp: installed, modified, reconstructed, or relocated on or after October 1, 2001, but before October 1, 2005.	6.9 gram/hp-hr.

TABLE VI.—AFFECTED SOURCES AND NO_X EMISSION SPECIFICATIONS FOR STATIONARY DIESEL ENGINES OR STATIONARY DUAL-FUEL ENGINES IN THE H/GA AREA—Continued

Source	NO_X emission specification
Rated ≥ 750 hp: installed, modified, reconstructed, or relocated on or after October 1, 2005	4.5 gram/hp-hr.

We are of the opinion that these emission specifications are in agreement with those found in Code of Federal Regulations (CFR), Title 40, section 89.112, and EPA's Document Number 420–R–98–016 dated August 1998, entitled ''Final Regulatory Impact Analysis: Control of Emissions from Nonroad Diesel Engines.'' We are also of the opinion that these NO_X emission specifications will contribute to the attainment of the 1-hr ozone standard in the H/GA area. We are approving these stationary diesel engines or stationary dual-fuel engines rule revisions under Part D of the Act because Texas is relying on these NO_X reductions to demonstrate attainment of the 1-hour ozone standard in the H/GA 1–hr ozone nonattainment area.

10. What Is the Proposed Compliance Schedule Date for Stationary Diesel Engines in the H/GA Area Based on the May 30, 2001, SIP Revision?

The compliance date for stationary diesel engines and stationary dual-fuel engines in the H/GA area is April 1, 2002. See sections 117.520 and 117.534 of the proposed rule. We consider the April 1, 2002, compliance date for stationary diesel engines and dual-fuel engines, in the H/GA area, to be as expeditious as practicable. We are approving these stationary diesel engines or stationary dual-fuel engines compliance schedules under Part D of the Act because Texas is relying on these NO_X reductions to demonstrate attainment of the 1-hour ozone standard in the H/GA 1-hr ozone nonattainment area.

11. What Are the NO_X Emissions Reductions for Stationary Diesel Engines in the H/GA Area Based on the May 30, 2001, SIP Revision, That We Are Approving?

The estimated NO_X emission reductions attributed to the stationary diesel engines or stationary dual-fuel engines that we are approving is 1.00 tpd.

12. What Are the NO_X Emissions Specifications for Point Sources of NO_X in the H/GA Area Based on the May 30, 2001, SIP Revision, That We Are Approving?

The following table contains a summary of the NO_X emission specifications for attainment demonstration purposes that we are approving for point sources in the H/GA.

TABLE VII.—AFFECTED SOURCES AND NO_X EMISSION SPECIFICATIONS FOR ATTAINMENT DEMONSTRATION IN THE H/GA

Source	NO_X Emission Specification for Attainment Demonstration
Utility Boilers, Gas-fired	0.020 lb/MMBtu.
Utility Boilers, Coal-fired or Oil-fired	0.040 lb/MMBtu.
Auxiliary Steam Boilers	0.010–0.036 lb/MMBtu.
Stationary Gas Turbines + Duct Burners in Turbine Exhaust	0.015–0.150 lb/MMBtu.

We are of the opinion that NO_X emission specifications listed in Table VII will contribute to attainment of the 1-hr ozone standard in the H/GA area. We are approving the above-listed NO_X emissions specifications for affected point sources of NO_X in the H/GA as a part of the Texas 1-hour ozone SIP under Part D of the Act because Texas is relying on the NO_X control measures to demonstrate attainment of the 1-hour ozone standard in the H/GA nonattainment area.

13. What Is the Compliance Schedule For Utility Electric Generation Point Sources of NO_X in the H/GA Area Based on the May 30, 2001, SIP Revision, That We Are Approving?

The following table contains a summary of the time-table/ compliance schedule for the affected utility electric generation point sources of NO_X in the H/GA that we are approving.

TABLE VIII.—AFFECTED SOURCES OF NO_X IN THE H/GA AND COMPLIANCE SCHEDULES

Sources	Compliance schedule	Additional information
Utility Electric Generation	March 31, 2003	At least 47% of total required NO_X reductions.
Utility Electric Generation	March 31, 2004	At least 95% of total required NO_X reductions.
Utility Electric Generation	March 31, 2007	Demonstrate compliance with system cap limits of 117.108.

We are of the opinion that the above-listed compliance dates and time-table for affected sources offer operational flexibility to the rule. We are approving the above-listed compliance dates for affected point sources of NO_X in the H/GA as a part of the Texas 1-hour ozone SIP under Part D of the Act because Texas is relying on the NO_X control measures to demonstrate attainment of the 1-hour ozone standard in the H/GA nonattainment area.

14. What Are the NO_X Emissions Specifications in the ICI Source Category for Attainment Demonstration Within the H/GA Area, Based on the May 30, 2001, SIP Revision, That We Are Approving?

You can find proposed NO_X emissions specifications for the ICI source category within the H/GA for attainment demonstration purposes in the H/GA in the following table.

TABLE IX.—AFFECTED INDUSTRIAL, COMMERCIAL, AND INSTITUTIONAL COMBUSTION SOURCES AND THEIR NO_X EMISSION SPECIFICATIONS FOR ATTAINMENT DEMONSTRATION IN THE H/GA

Source	NO_X Emission specification for attainment demonstration
Stationary, reciprocating internal combustion engines: gas-fired rich-burn firing on landfill gas	0.60 gram/hp-hr.
Stationary, reciprocating internal combustion engines: gas-fired rich-burn not firing on landfill gas.	0.17 gram/hp-hr.
Stationary, reciprocating internal combustion engines: gas-fired lean-burn firing on landfill gas	0.60 gram/hp-hr.
Stationary, reciprocating internal combustion engines: gas-fired lean-burn not firing on landfill gas.	0.50 gram/hp-hr.
Dual fuel engines with initial start of operation on or before December 31, 2000	5.83 gram/hp-hr.
Dual fuel engines with initial start of operation after December 31, 2000	0.50 gram/hp-hr.
Gas-fired boilers	0.010—0.036 lb/MMBtu.
Fluid catalytic cracking units. Includes CO boilers, CO furnaces, and catalyst regenerator vents	13 ppm @ zero percent O_2, dry basis.
Boilers and industrial furnaces	0.015—0.030 lb/MMBtu.
Coke-fired boilers	0.057 lb/MMBtu.
Wood fuel-fired boilers	0.046 lb/MMBtu.
Rice hull-fired boilers	0.089 lb/MMBtu.
Oil-fired boilers	2.0 lb/1,000 gallons of oil burned.
Process heaters	0.010—0.036 lb/MMBtu.
Stationary gas turbines	0.015—0.15 lb/MMBtu.
Duct burners in turbine exhaust ducts	0.015 lb/MMBtu.
Pulping liquor recovery furnaces	0.050 lb/MMBtu or 1.08 lb/ADTP.
Lime kilns	0.66 lb/ton of CaO.
Lightweight aggregate kilns	0.76 lb/ton of product.
Metallurgical heat treat furnaces	0.087 lb/MMBtu.
Metallurgical reheat furnaces	0.062 lb/MMBtu.
Incinerators	0.030 lb/MMBtu.

We are approving the above-listed NO_X emissions specifications for point sources of NO_X in the H/GA as a part of the Texas 1-hour ozone SIP under Part D of the Act because Texas is relying on the NO_X control measures to demonstrate attainment of the 1-hour ozone standard in the H/GA nonattainment area.

15. What Is the Compliance Schedule for Affected ICI Sources of NO_X in the H/GA Area Based on the May 30, 2001, SIP Revision That We Are Approving?

This rule revision offers a phased-in approach concerning the emission reductions and compliance schedule for point sources of NO_X in the H/GA area. The following table contains a summary of the time-table/compliance schedule for the affected ICI sources of NO_X in the H/GA area.

TABLE X.—AFFECTED ICI SOURCES OF NO_X IN THE H/GA AREA AND COMPLIANCE SCHEDULES

Sources	Compliance schedule	Additional information
ICI sources	March 31, 2004	At least 39% of total required NO_X reductions.
ICI sources	March 31, 2005	At least 67% of total required NO_X reductions.
ICI sources	March 31, 2006	At least 78% of total required NO_X reductions.
ICI sources	March 31, 2007	Demonstrate compliance with system cap limits of 117.210.

We are approving the above-listed compliance dates for affected ICI sources of NO_X in the H/GA as a part of the Texas 1-hour ozone SIP under Part D of the Act because Texas is relying on the NO_X control measures to demonstrate attainment of the 1-hour ozone standard in the H/GA nonattainment area.

16. What Are the NO_X Emissions Reductions Based on the May 30, 2001, SIP Revision, That We Are Approving?

This rulemaking will control/reduce NO_X emissions in the H/GA area in two phases or Tiers. We will refer to these two emission reduction phases as Tier I and Tier II Reductions. The following Table contains a summary of the 1997 NO_X emissions and the May 30, 2001, emission reductions for each point source category in the H/GA area that we are approving.

TABLE XI.—AFFECTED POINT SOURCES, 1997 EMISSIONS, AND PROPOSED EMISSION REDUCTIONS FOR THE H/GA

Sources	1997 NO_X emissions, tons per day (tpd)	Tier I + Tier II reductions, (tpd)
Utility Boilers	196.44	176
Turbines and Duct Burners	155.65	141
Process Heaters and Furnaces	110.12	97
Internal Combustion Engines	86.37	77
Industrial Boilers	85.98	79
Other	32.99	19
Overall Point Sources	667.55	588

The combined NO_X emission reductions of Tier I and Tier II in this SIP revision will be 588 tpd or 88 percent, when compared to the 1997 emission levels. The change in overall point sources NO_X reductions in Table XI, as compared with that of Table V in this document, is due to revisions to the requirements of subsections 117.106(c)(1) and 117.206(c)(9)(D).

17. When Did the State Adopt the Final Version of the Rule for Point Sources of NO_X in the H/GA Area?

The State adopted the final version of the rule for point sources of NO_X in the H/GA area on September 26, 2001.

18. Is There a Substantial Difference Between the State's Proposed and Final Versions of the Rule for Point Sources of NO_X in the H/GA Area?

For parallel processing purposes, there is no substantial difference between the State's proposed and final versions of the rule for point sources of NO_X in the H/GA area with regard to actions number three, four, and five of this document. We did not review actions number one and two through the parallel processing mechanism. There is no substantial difference between the State's proposed and final versions of the rule for point sources of NO_X in the H/GA area with regard to actions number one and two of this document.

19. What Are NO_X?

Nitrogen oxides belong to the group of criteria air pollutants. The NO_X result from burning fuels, including gasoline and coal. Nitrogen oxides react with volatile organic compounds (VOC) to form ozone or smog, and are also major components of acid rain.

20. What Is a Nonattainment Area?

A nonattainment area is a geographic area in which the level of a criteria air pollutant is higher than the level allowed by Federal standards. A single geographic area may have acceptable levels of one criteria air pollutant but unacceptable levels of one or more other criteria air pollutants; thus, a geographic area can be attainment for one criteria pollutant and nonattainment for another criteria pollutant at the same time.

21. What Are Definitions of Major Sources for NO_X?

Section 302 of the Act generally defines ''major stationary source'' as a facility or source of air pollution which emits, when uncontrolled, 100 tons per year (tpy) or more of air pollution. This general definition applies unless another specific provision of the Act explicitly defines major source differently.

According to section 182(d) of the Act, a major source in a severe nonattainment area is a source that emits, when uncontrolled, 25 tpy or more of NO_X. The H/GA area is a severe ozone nonattainment area, so the major source size for the H/GA area is 25 tpy or more, when uncontrolled. This rulemaking will regulate NO_X emissions from major stationary sources in the H/GA area.

22. What Is a State Implementation Plan?

Section 110 of the Act requires States to develop air pollution regulations and control strategies to ensure that State air quality meets the NAAQS that EPA has established. Under section 109 of the Act, EPA established the NAAQS to protect public health. The NAAQS address six criteria pollutants. These criteria pollutants are: carbon monoxide, nitrogen dioxide, ozone, lead, particulate matter, and sulfur dioxide.

Each State must submit these regulations and control strategies to us for approval and incorporation into the federally enforceable SIP. Each State has a SIP designed to protect air quality. These SIPs can be extensive, containing State regulations or other enforceable documents and supporting information such as emission inventories, monitoring networks, and modeling demonstrations.

23. What Does Federal Approval of a SIP Mean to Me?

A State may enforce State regulations before and after we incorporate those regulations into a federally approved SIP. After we incorporate those regulations into a federally approved SIP, both EPA and the public may also take enforcement action against violators of these regulations.

24. What Areas in Texas Will the Stationary Diesel Engines or Stationary Dual-Fuel Engines Rule Affect That We Are Approving Based on the May 30, 2001, SIP Revision Affect?

The following table contains a list of counties affected by this SIP revision concerning the stationary diesel engines or dual-fuel engines that we are parallel processing for approval.

TABLE XII.—RULE LOG NUMBER AND AFFECTED AREAS FOR TEXAS NO_X SIP

Rule log	Affected areas
2001–007B–117–AI Stationary diesel engines and dual-fuel engines provisions.	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties.

If you are in one of these Texas counties, you should refer to the Texas NO_X rules to determine if and how today's action will affect you.

25. What Areas in Texas Will Be Affected by the Rule for Point Sources of NO_X, That We Are Approving Based on the May 30, 2001, SIP Revision?

The following table contains a list of counties affected by this SIP revision concerning point sources of NO_X that we are parallel processing for approval.

TABLE XIII.—RULE LOG NUMBER AND AFFECTED AREAS FOR TEXAS NO_X SIP

Rule log No.	Affected areas
2001–007B–117–AI ICI and electric utility sources.	Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller counties

Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This proposed action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et. seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). For the same reason, this rule also does not significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings.'' This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Nitrogen dioxide, Nitrogen oxides, Nonattainment, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 15, 2001.

Gregg A. Cooke,

Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

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

Subpart SS—Texas

2. In § 52.2270 the entry for Chapter 117 in the table in paragraph (c) is amended as follows:

a. Under Subchapter A, revising the entry for section 117.10;

b. Under Subchapter B, revising the entries for sections 117.101, 117.103, 117.105, 117.106, 117.107, 117.108, 117.111, 117.113, 117.116, 117.119, 117.121, 117.138, 117.201, 117.203, 117.205, 117.206, 117.207, 117.208, 117.211, 117.213, 117.216, 117.219, and 117.221, and adding new entries for sections 117.110, 117.114, 117.210, and 117.214;

c. Under Subchapter D, adding new entries for sections 117.471, 117.473, 117.475, 117.478, and 117.479;

d. Under Subchapter E, revising entries for sections 117.510, 117.520, and 117.570, and adding a new entry for section 117.534. The revisions and additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVAL REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State submittal/approval date	EPA approval date	Explanation
*	*	*	*	*
Chapter 117 (Reg 7)—Control of Air Pollution From Nitrogen Compounds Subchapter A				
Section 117.10	Definitions	09/26/2001	[Insert 11–14–01 Federal Register cite.]	

EPA APPROVAL REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/subject	State submittal/approval date	EPA approval date	Explanation
Subchapter B—Division 1—Utility Electric Generation				
Section 117.101	Applicability	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.103	Exemptions	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* * * *	*	*	*	*
Section 117.105	Emission Specifications	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.106	Emission Specifications for Attainment Demonstrations.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.107	Alternative System-Wide Emission Specifications.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.108	System Cap	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* * * *	*	*	*	*
Section 117.110	Change Ownership—System Cap	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.
Section 117.111	Initial Demonstration of Compliance.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.113	Continuous Demonstration of Compliance.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.114	Emission Testing and Monitoring for the Houston Galveston Attainment Demonstration.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.
* * * *	*	*	*	*
Section 117.116	Final Control Plan Procedures for Attainment Demonstration Emission Specifications.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* * * *	*	*	*	*
Section 117.119	Notification, Record keeping, and Reporting Requirements.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.121	Alternative Case Specific Specifications.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* * * *	*	*	*	*
Section 117.138	System Cap	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* * * *	*	*	*	*
Section 117.201	Applicability	09/26/2001	[Insert 11–14–01 Federal Register cite.]	

EPA APPROVAL REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/subject	State submittal/approval date	EPA approval date	Explanation
Section 117.203	Exemptions	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.205	Emission Specifications for Reasonably Available Control Technology (RACT).	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.206	Emission Specifications for Attainment Demonstrations.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.207	Alternative Plant-Wide Emission Specifications.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.208	Operating Requirements	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* *	* *	*	*	*
Section 117.210	System Cap	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.
Section 117.211	Initial Demonstration of Compliance.	09/26/2001	11–14–01	
Section 117.213	Continuous Demonstration of Compliance.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.214	Emission Testing and Monitoring for the Houston Galveston Attainment Demonstration.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.
* *	* *	*	*	*
Section 117.216	Final Control Plan Procedures for Attainment Demonstration Emission Specifications.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* *	* *	*	*	*
Section 117.219	Notification, Recordkeeping, and Reporting Requirements.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
Section 117.221	Alternative Case Specific Specifications.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* *	* *	*	*	*
Section 117.471	Applicability	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.
Section 117.473	Exemptions	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.
Section 117.475	Emission Specifications	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.
Section 117.478	Operating Requirements	09/26/2001	11–14–01	New.
Section 117.479	Monitoring, Recordkeeping, and Reporting Requirements.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.

EPA APPROVAL REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/subject	State submittal/approval date	EPA approval date	Explanation
* *	* *	*	*	*
Section 117.510	Compliance Schedule for Utility Electric Generation in Ozone Nonattainment Areas.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* *	* *	*	*	*
Section 117.520	Compliance Schedule for Industrial, Commercial, and Institutional, Combustion Sources in ozone Nonattainment Areas.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* *	* *	*	*	*
Section 117.534	Compliance Schedule for Boilers, Process Heaters, Stationary Engines, and Gas Turbines at Minor Sources.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	New.
* *	* *	*	*	*
Section 117.570	Use of Emissions Credits for Compliance.	09/26/2001	[Insert 11–14–01 Federal Register cite.]	
* *	* *	*	*	*

[FR Doc. 01–27584 Filed 11–13–01; 8:45 am]
BILLING CODE 6560–5–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX 28–1–7538; FRL–7092–4]

Approval and Promulgation of Implementation Plans; Texas; Houston/Galveston Ozone Nonattainment Area Vehicle Miles Traveled Offset Plan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: In this final action, the EPA is approving, as part of the Texas State Implementation Plan(SIP) for the Houston/ Galveston Ozone Nonattainment Area (HGA), the Vehicle Miles Traveled (VMT) Offset Plan to offset any growth in emissions from growth in VMT, or number of vehicle trips in the Houston/ Galveston severe ozone nonattainment area. This is part of the State's effort to attain the National Ambient Air Quality Standard (NAAQS) for ozone. The State demonstrated that emissions from increases in VMT or numbers of vehicle trips within HGA will not rise above an established ceiling by 2007; thereby not requiring additional transportation control measure (TCM) offsets to prevent an increase in VMT above the ceiling. The requirements for the VMT Offset plan to be consistent with the State's demonstration of Reasonable Further Progress (RFP) and attainment are addressed in a corresponding action for the HGA area taken and published separately in this **Federal Register**. This action approves the proposed approval published on July 10, 2001 (66 FR 35920). Comments made on the direct final rule, published on July 10, 2001 (66 FR 35903) and withdrawn on September 4, 2001 (66 FR 46220), are addressed later in this action. This action is being taken under sections 110 and 182 of the Federal Clean Air Act, as amended (the Act, or CAA).

DATES: This final rule is effective on December 14, 2001.

ADDRESSES: Copies of the relevant material for this action are available for inspection during normal business hours at the following locations. Persons interested in examining these documents should make an appointment at least 24 hours before the visiting day.

Environmental Protection Agency, Region 6, Air Planning Section (6PD–L), 1445 Ross Avenue, Suite 700, Dallas, TX 75202–2377.

Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Ms. Brooke M. Ivener at (214) 665–7362 or Mr. Bill Deese at (214) 665–7253, Air Planning Section (6PD–L), EPA Region 6, Suite 700, 1445 Ross Avenue, Dallas, Texas 75202–2733.

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

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1. What Are We Approving?
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1. What Are We Approving?

The EPA is approving a new SIP revision for VMT Offset submitted by the State on May 17, 2000. Specifically, we are approving the VMT Offset SIP, submitted by the State on August 25, 1997 and with minor, non-substantive revisions submitted on May 17, 2000. For information regarding our analysis

of the State submittal, please refer to the Technical Support Document for this action.

Section 182(d)(1)(A) of the Act directs states containing ozone nonattainment areas classified as severe, pursuant to section 181(a) of the Act, to adopt transportation control strategies and TCMs to offset increases in emissions resulting from growth in VMT or numbers of vehicle trips, and to obtain reductions in motor vehicle emissions as necessary (in combination with other emission reduction requirements) to comply with the Act's Reasonable Further Progress (RFP) milestones (CAA sections 182(b)(1) and 182(c)(2)(B)) and attainment demonstration requirements (CAA section 182(c)(2)(A)). The EPA General Preamble to Title I of the CAA (57 FR 13498, 13521–13523, April 16, 1992) explains our interpretation regarding how states may demonstrate that the VMT requirement is satisfied. (We incorporate that discussion by reference.)

In summary, the purpose of the VMT offset requirement is to prevent growth in motor vehicle emissions from cancelling out the emission reduction benefits of federally mandated programs in the Act. Sufficient measures must be adopted so projected motor vehicle volatile organic compound (VOC) emissions will stay beneath a ceiling level established through modeling of mandated transportation-related controls. When growth in VMT and vehicle trips would otherwise cause a motor vehicle emissions upturn, this upturn must be prevented by TCMs. If projected total motor vehicle emissions during the ozone season in one year are not higher than during the previous ozone season due to the control measures in the SIP, the VMT Offset requirement is satisfied.

For several years, we have consistently implemented this interpretation in response to several states' submissions of VMT SIPs under section 182(d)(1)(A) of the Act.[1] We first announced our intent to apply this longstanding interpretation to the HGA's SIP in 1997. See 62 FR 54598 (October 21, 1997) (proposed disapproval of HGA SIP). We similarly followed the General Preamble's approach in the July 10, 2001 direct final rule that would have approved the HGA SIP (see 66 FR at 35903, 35904).

The August 25, 1997 VMT SIP submittal from the State includes a projection of the mobile source emissions profile for HGA through 2007, the date by which the HGA area is to attain the NAAQS for ozone. The August 25,1997 submittal fulfills the first required element under CAA section 182(d)(1)(A)for a VMT Offset Plan in the HGA severe ozone nonattainment area. The second and third required elements under section 182(d)(1)(A) are fulfilled in the corresponding action addressing RFP and attainment for the HGA area taken and published separately in this **Federal Register.**

2. Response to Comments on the Direct Final Action

On July 10, 2001, the EPA published a direct final rule approving the Texas VMT Offset SIP, with the condition that if any adverse comments were received by the end of the public comment period on August 9, 2001 the direct final rule would be withdrawn, and that we would respond to the comments in taking final action on the proposal to approve the Texas VMT Offset SIP, published concurrently on July 10, 2001,(66 FR 35920). One set of comments was received from Environmental Defense (ED). The following summarizes the comments and EPA's response to these comments:

Comment 1: The comment argues that section 182(d)(1)(A) of the Act requires offsets for increased emissions attributable to all growth in VMT above 1990 levels, and that EPA is required by the House Report language (H. R. No. 101–490, Part I, 101st Cong., 2nd session at 242) to ensure emission reductions despite an increase in VMT. The comment states that EPA is acting inconsistently with the law by not applying ''the guidance provided by the House committee report in the review of VMT Offset SIPs[.]'' In other words, the comment challenges the longstanding interpretation of section 182(d)(1)(A) that we discussed in the General Preamble and in our other rulemaking actions approving states' VMT SIPs.

Response: As discussed in the General Preamble, EPA believes that section 182(d)(1)(A) of the Act requires the State to ''offset any growth in emissions'' from growth in VMT, but not, as the comment suggests, all emissions resulting from VMT growth. See 57 FR at 13522–23. As we explained in response to similar comments objecting to our application of the General Preamble's approach when approving Illinois' and Indiana's SIPs, the purpose is to prevent a growth in motor vehicle emissions from canceling out the emission reduction benefits of the federally mandated programs in the Act. See 60 FR at 48898; 60 FR at 38720–21. The baseline for emissions is the 1990 level of vehicle emissions and the subsequent reductions in emission levels required to reach attainment with the NAAQS for ozone. Thus, the anticipated benefits from the mandated measures such as the Federal motor vehicle pollution control program, lower Reid vapor pressure, enhanced inspection and maintenance and all other motor vehicle emission control programs are included in the ceiling line calculations used by Texas in the VMT Offset SIP. Appendix B, Table 2, in the Texas submittal shows how emissions will decline substantially and will not begin to turn up, nor does it reach the ceiling established by the mandated controls. Emission reductions are expected every year through the year 2007.

Our approach is consistent with the purposes Congress had in enacting section 182(d)(1)(A). The ceiling line level decreases from year to year as the state implements various control measures, and the decreasing ceiling line prevents an upturn in mobile source emissions. Dramatic increases in VMT that could wipe out the benefits of motor vehicle emission reduction measures will not be allowed and will trigger the required implementation of TCMs. This prevents mere preservation of the status quo, and ensures emissions reductions despite an increase in VMT or number of vehicle trips. To prevent future growth changes from adversely impacting emissions from motor vehicles, States are required under section 182(c)(5) of the Act to track actual VMT and to periodically demonstrate that the actual VMT is equal to or less than the projected VMT, with TCMs required to offset VMT that is above the projected levels.

Under the commenter's approach to section 182(d)(1)(A), Texas would have to offset VMT growth even while vehicle emissions are declining. Although the statutory language could be read to require offsetting any VMT growth, EPA believes that the language can also be read so that only actual emissions increases resulting from VMT growth need to be offset. The statute by its own terms requires offsetting of ''any growth in emissions from growth in VMT.'' It is reasonable to interpret this language as requiring that VMT growth must be offset only where such growth results in emissions increases from the motor vehicle fleet in the area. Our interpretation of the language of section

[1] See, e.g., 62 FR 23410, 23417 (Apr. 30, 1997) (proposed approval of New Jersey's SIP); 61 FR 53624, 53624–25 (Oct. 15, 1996) (direct final approval of New York's SIP); 61 FR 51214, 51216 (Oct. 1, 1996) (direct final approval of New York's SIP); 60 FR 48896, 48897 (Sept. 21, 1995) (final approval of Illinois' SIP); 60 FR 38718, 38719–20 (July 28, 1995) (final approval of Indiana's SIP); 60 FR 2565, 2566–67 (January 10, 1995) (proposed approval of Wisconsin's SIP).

182(d)(1)(A) is entitled to deference. *Chevron U.S.A., Inc.* v. *NRDC,* 467 U.S. 837, 842–44 (1984).

While it is true that the language in the House Committee Report could appear to support the ED's interpretation of the statutory language, such an interpretation would have drastic implications for Texas if the State were forced to impose such draconian control measures as mandatory no-drive restrictions to fully offset the effects of increasing VMT if the area were forced to ignore the beneficial impacts of all vehicle tailpipe and alternative fuel controls. Although the original authors of this provision and of the House Committee Report on this provision may in fact have intended this result, EPA does not believe that the Congress as a whole, or even the full House of Representatives, believed at the time it voted to pass the CAA Amendments that the words of this provision would impose such severe restrictions. There is no further legislative history on this aspect of the provision, nor was it discussed at all by any member of Congress during subsequent legislative debate and adoption.

Given the susceptibility of the statutory language to these two alternative interpretations, EPA believes it is the Agency's role in administering the statute to take the interpretation most reasonable in light of the practical implications of such interpretation, and the purposes and intent of the statutory scheme as a whole. In the context of the intricate planning requirements Congress established in title I to bring areas towards attainment of the ozone standard, and in light of the absence of any discussion of this aspect of the VMT Offset provision by the Congress as a whole (either in floor debate or in the Conference Report), EPA has consistently concluded that the appropriate interpretation of section 182(d)(1)(A) requires offsetting VMT growth only when such growth would result in actual emissions increases.[2]

Comment 2: The comment asserts that the VMT Offset SIP submitted by the State ''does not contain sufficient measures to limit motor vehicle emissions to the levels needed for attainment'' because ''the area has not adopted sufficient control measures to ensure that total area emissions will attain the NAAQS.'' The comment argues that EPA has not adequately assessed the VMT Offset SIP against the statutory requirement that the SIP provide adequate enforceable control measures. In effect the comment asserts that EPA may not approve the HGA's VMT SIP until the HGA is able to demonstrate that its entire SIP will attain the NAAQS.

Response: As an initial matter, EPA does believe the area has an approvable RFP and attainment demonstration SIP, and we refer you to that corresponding final action for the HGA area taken and published separately in this **Federal Register**. The inclusion of the RFP and attainment demonstration in the corresponding final action satisfies the second and third elements of VMT Offset in 182(d)(1)(A), as discussed below.

As described in the General Preamble and above, the purpose of section 182(d)(1)(A) of the Act is to prevent growth in motor vehicle emissions from cancelling out the emissions reduction benefits of the federally mandated programs in the Act. EPA believes it is appropriate to interpret the VMT Offset provisions of the Act to account for how States can practicably comply with each of the provision's elements, as discussed in detail below.

The VMT Offset provision requires that States submit by November 15, 1992 specific enforceable Transportation Control Measures (TCMs) and Strategies to offset any growth in emissions from growth in VMT or number of vehicle trips, sufficient enough to allow total area emissions to comply with the RFP and attainment requirements of the Act. The EPA has observed that these three elements (i.e. offsetting growth in mobile source emissions, attainment of the RFP reduction, and attainment of the ozone NAAQS) create a timing problem of which Congress was perhaps not fully aware.[3] The SIP submittals showing attainment of the 1996 15 percent Rate-of-Progress (ROP) and the post-1996 RFP and NAAQS attainment demonstration are broader in scope than growth in VMT or in numbers of vehicle trips in that they necessarily address emissions trends and control measures for non motor vehicle emissions sources and, in the case of attainment demonstrations, involve complex photochemical modeling studies. It was neither practicable nor reasonable to expect that the subsequently required submissions could be developed and implemented so far ahead of schedule as to effectively influence the VMT Offset submission.

The EPA does not believe that Congress intended the VMT Offset provisions to advance the dates for these broader submissions. Consequently, EPA believes it is appropriate to interpret the Act to provide for staged deadlines for submittal of the elements of the VMT Offset SIP.

Section 182(d)(1)(A) sets forth three elements that must be met by a VMT Offset SIP. Under EPA's interpretation, the three required elements of section 182(d)(1)(A) are separable, and could be divided into three separate submissions that could be submitted on different dates. Section 179(a) of the Act, in establishing how EPA would be required to apply mandatory sanctions if a State fails to submit a full SIP, also provides that the sanctions clock starts if a State fails to submit one or more SIP elements, as determined by the Administrator. The EPA believes that this language delegates to EPA the authority to determine that the different elements of the SIP submissions are separable. Moreover, given the continued timing problems addressed above, EPA believes it is appropriate to allow States to separate the VMT Offset SIP into three elements, each to be submitted at different times: (1) The initial requirement to submit TCMs that offset growth in emissions; (2) the requirement to comply within the 15 percent periodic reduction requirement of the Act; and (3) the requirement to comply with the post-1996 periodic reduction and attainment requirements of the Act.

Under this approach, the first element—the emissions growth offset element—was due on November 15, 1992. The EPA believes this element is not necessarily dependent upon the development of the other elements. The State could submit the emissions growth offset element independent of an analysis of that element's consistency with the RFP or attainment requirements of the Act. Emissions trends from other sources need not be considered to show compliance with this particular offset element. The first element requires that a State submit a revision that demonstrates the trend in motor vehicle emissions from a 1990 baseline to the year for attaining the NAAQS for ozone, that year is 2007. As described in the General Preamble, and reiterated above, the purpose is to prevent growth in motor vehicle emissions from canceling out the emission reduction benefits realized from the federally mandated programs in the Act. The EPA interprets section

[2] As noted above, EPA has applied this interpretation since the enactment of the 1990 amendments to the Clean Air Act adding section 182(d)(1)(A), even in response to adverse comments submitted on other rulemaking actions. See, e.g., 60 FR 48898 (final approval of Illinois'' SIP) and 60 FR 39720–39721 (final approval of Indiana's SIP).

[3] See, e.g., 61 FR 53624–25; 61 FR 51215; 60 FR 48896; 60 FR 38719; 60 FR 22284, 22285 (May 5, 1995) (final approval of Wisconsin's SIP); and 60 FR 2565–2567.

182(d)(1)(A) to require that sufficient measures be adopted so that projected motor vehicle VOC emissions will never be higher during the ozone season in one year than during the ozone season the year before. When growth in VMT and vehicle trips would otherwise cause a motor vehicle emissions upturn, this upturn must be prevented. The emissions level at the point of potential upturn becomes a ceiling on motor vehicle emissions. This requirement applies to projected emissions in the years between the submission of the SIP revision and the attainment deadline and is above and beyond the separate requirements for the RFP and attainment demonstration.

Comment 3. The comment argues that EPA is allowing emissions reduction credit for elements contributing to reduced VMT and reduced emissions ''without requiring that such measures be enforceable obligations of the SIP.'' The comment claims that EPA has allowed Texas to base its calculations for compliance ''on emissions expected from the implementation of all facilities and services included in the H–GAC regional transportation plan and TIP prior to the attainment date, and not based solely on the TCMs contained in the VMT SIP revision.''

Response: EPA allowed Texas to calculate compliance with the emissions ceiling line using only the TCMs contained in the VMT SIP revision as further described below. The only TCMs EPA allowed Texas to receive credit for are those included in the 15 Percent ROP Plan submitted on July 24, 1996. See the corresponding final action for the HGA area taken and published separately in this **Federal Register**, *see also* the Final Conditional Interim Rule (63 FR 62943) and the Proposed Conditional Interim Rule (62 FR 37175, 37180). These TCMs have been included in the VMT Offset SIP as measurable emission reduction credits. As is stated in the direct final rule to which this comment applies (66 FR 35903), the TCMs approved for emission reduction credit are as follows in Table 1, with their associated emission benefits, as submitted in the VMT Offset SIP State submittal and as corresponds to Appendix 7K of the 15 Percent ROP Plan submittal:

TABLE 1.—TRANSPORTATION CONTROL MEASURES APPROVED FOR VMT OFFSETS

TCM	Quantity	Emissions benefit in 1996
High Occupancy Vehicle Lanes	14.7 miles	Approximately 424 pounds of VOC per day.
Park-and-Ride Lots	3,745 parking spaces	Approximately 69 pounds of VOC per day.
Arterial Traffic Management Systems	41 miles	Approximately 77 pounds of VOC per day.
Computer Transportation Management Systems	22.2 miles	Approximately 169 pounds of VOC per day.
Signalization	2.9 miles	Approximately 3 pounds of VOC per day.
		Total: approximately 742 pounds per day = 0.36 tons per day.

These emission benefits are enforceable, as they are approved in the 15 Percent ROP SIP and all TCMs included in the SIP are enforceable by rule. The direct final rule also stated that no credit is taken in the SIP for any additional TCMs. Thus the lower curve, depicting the mandated controls, the Motorist Choice I/M Program, and TCMs, includes only the enforceable TCMs through FY 1996 described above. The TCMs for FY 1999 and FY 2007, although explained, are not credited for the VMT Offset SIP demonstrations. In addition, although the State chose to include the five 1996 TCMs as enforceable measures, the analysis shows that even these measures are not necessary to offset emissions from growth in VMT.

Modeling of the lower curve in Graph 1 of the Technical Support Document, at no time, shows the emission estimates meeting or exceeding the lowest point in the upper curve, reached in 2007. The upper curve reached its lowest point in 2007, so there is no upward turn demonstrated in this instance. Usually the low point establishes the ceiling, but no true ceiling is established because there is no upward turn of the curve by which to identify the lowest point. Since the curve does not turn upward (indicating the control programs are efficiently offsetting increases from growth in VMT) no TCMs would be necessary to offset emissions from growth in VMT. The State included the five TCMs, although they are not necessary for this plan to be approved.

Three comments were also received in response to the proposed disapproval (referenced above) of the 1993 and 1994 submittals which comprised the VMT Offset requirement. Two comments supported the proposed disapproval because the SIP relied upon the repealed I/M and ETR Programs. The SIP submittal being acted upon in this action does not rely on those two programs. A third comment supported approval of the August 1997 VMT Offset submittal.

3. Final Action

The EPA has determined that Texas has adequately demonstrated that emissions from growth in VMT and number of vehicle trips will not rise above the ceiling, or low point shown as the effects of required reductions from mandatory programs. Therefore, based on the State's submittal and in consideration of the comments received in response to the proposal, we are approving the VMT Offset SIP, submitted by the State on August 25, 1997 and with minor, non-substantive revisions submitted on May 17, 2000, under sections 110 and 182 of the Act, as meeting the requirements of the first element of section 182(d)(1)(A). Please see the corresponding final action for the HGA area on RFP and attainment taken and published separately in this **Federal Register** for EPA's conclusions regarding the State's satisfaction of the second and third elements of section 182(d)(1)(A).

4. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any

unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 14, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (*See* section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons Incorporation by reference, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: October 15, 2001.

Gregg A. Cooke,

Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

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

Subpart SS—Texas

2. In § 52.2270, paragraph (e), in the table entitled ''EPA Approved Nonregulatory Provisions and Quasi-Regulatory Measures in the Texas SIP,'' one entry is added to the end of the table to read as follows:

§ 52.2270 Identification of Plan.

* * * * *

(e) * * *

EPA APPROVED NONREGULATORY PROVISIONS AND QUASI-REGULATORY MEASURES IN THE TEXAS SIP

Name of SIP provision	Applicable geographic or nonattainment area	State submittal date/ effective date	EPA approval date	Comments
* *	*	*	* *	*
Vehicle Miles Traveled Offset Plan	Houston/Galveston Ozone nonattainment area.	05/09/2000	[Insert 11/14/2001 Federal Register cite.].	Originally submitted 11/12/93 and revised 11/06/94, 8/25/97, and 05/17/00.

[FR Doc. 01–27585 Filed 11–13–01; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–133–1–7543; FRL–7092–3]

Approval and Promulgation of Air Quality State Implementation Plans (SIP); Texas Mass Emissions Cap and Trade Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: The EPA is approving the Texas Mass Emissions Cap and Trade (MECT) program as a revision to the Texas State Implementation Plan (SIP). The program was submitted on December 22, 2000. The MECT program will contribute to attainment of the 1-hour ozone National Ambient Air Quality Standard (NAAQS) in the HGA ozone nonattainment area. The EPA is approving these revisions to the Texas SIP to regulate emissions of NO_X in accordance with the requirements of the Federal Clean Air Act (the Act).

The EPA proposed approval of the Texas MECT program on July 23, 2001 on the condition that Texas resolve eight issues. The State revised the MECT rule to adequately address the EPA issues identified in the proposed rulemaking and submitted these revisions to EPA as a SIP revision which EPA is approving in this action by parallel processing. Comments were received on the proposed rulemaking from Environmental Defense, Inc. on September 22, 2001, from Baker and Botts L.L.P. representing the Business Coalition for Clean Air Appeal Group on August 13, 2001, and from Reliant Energy, Inc. on August 13, 2001. The major comments regarded the use of credits from other trading programs for MECT compliance, inflation of the cap, undermining of the attainment demonstration, emissions monitoring and program evaluations. After reviewing the comments and the State response to the eight issues raised in the proposed rulemaking, EPA has concluded that the Texas MECT program fully satisfies all relevant guidance and the Clean Air Act.

DATES: This final rule is effective on December 14, 2001.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. Persons interested in examining these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Environmental Protection Agency, Region 6, Air Planning Section (6PD-L), 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Merrit H. Nicewander, Air Planning Section (6PD-L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–7519. (*nicewander.merrit@epa.gov*)

SUPPLEMENTARY INFORMATION: This supplemental information section is organized as follows:

I. What action is EPA taking?
II. What did EPA propose?
III. What comments did EPA receive?
IV. How did Texas respond to prerequisites for approval?
V. What are EPA's responses to comments?
VI. Administrative requirements

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

I. What action Is EPA Taking?

We are granting final approval of the nitrogen oxides (NO_X) Mass Emissions Cap and Trade program for the Houston/Galveston (HGA) one-hour ozone nonattainment area. The rule was adopted and submitted as a SIP revision by letters of the Governor dated December 22, 2000 and June 15, 2001. We proposed approval of the program at 66 FR 38231 on July 23, 2001 through parallel processing. Other than changes as referenced in the proposed approval, there were no significant changes between the version proposed on July 23, 2001 and the version submitted on October 4, 2001. On September 26, 2001 the State adopted as final rules amendments to 30 TAC Chapter 101 which were proposed on May 30, 2001 with certain revisions. On October 4, 2001 Texas Governor Rick Perry submitted a letter requesting EPA to process the September 26, 2001 final rule amendments to 30 TAC, Chapter 101, as a revision to the MECT SIP. The MECT rule is one element of the control strategy for the HGA nonattainment area to comply with the requirements of the Clean Air Act (CAA) and achieve attainment for ozone.

The HGA ozone nonattainment area is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. The area will need to reduce nitrogen oxides (NO_X) to reach attainment with the one-hour standard. The MECT emissions banking rule was evaluated as an integral component of the HGA control strategy to reduce NO_X emissions. The rule submitted by the TNRCC is the Mass Emission Cap & Trade Program (30 Texas Administrative Code (TAC) Chapter 101, Subchapter H, Division 3). The MECT regulation is found at sections 101.350 through 101.363. As noted in our proposed approval, we are not approving sections 101.353(a)(3)(B) and (D). With the MECT rule revisions submitted on October 4, 2001, the State adopted definitions found at 30 TAC Section 101.1. These revisions to definitions were proposed on June 15, 2001. No comments were received on this section. We are also granting final approval of 30 TAC 101.1.

The MECT program is mandatory for stationary facilities that emit NO_X in the HGA ozone nonattainment area (at sites that have a collective design capacity of 10 tons per year or more) and which are subject to the TNRCC NO_X rules as found at 30 TAC Chapter 117. NO_X is a precursor gas that reacts with volatile organic compounds (VOCs) in the presence of sunlight to form ground-level ozone. The program sets a cap on NO_X emissions beginning on January 1, 2002 with a final reduction to the cap occurring in 2007. Facilities are required to meet NO_X allowances on an annual basis. Facilities may purchase, bank or sell their allowances. The program has a provision to allow a facility to use emission reduction credits (ERCs), discrete emission reduction credits (DERCs) and mobile discrete emission reduction credits (MDERCs) in lieu of allowances if they are generated in the HGA area.[1]

II. What Did EPA Propose?

EPA proposed to approve the Texas Mass Emission Cap and Trade program provided that TNRCC took eight specific steps. The EPA proposed approval of the MECT program was based upon the prerequisites that TNRCC must: (1) Specify the number of days of violation if an annual cap is exceeded, (2) revise the rule to require that deviation from monitoring protocols be approved by both the TNRCC Executive Director and EPA, (3) provide public access to production data necessary to calculate emissions, (4) provide for missing data provisions when monitoring equipment is not functioning properly, (5) clarify that allowances used for offsets will be obtained for the life of the new source, (6) commit to require notification of the

[1] As discussed subsequently in this notice, we are not acting on 30 TAC Chapter 101, Subchapter H, Division 4 and neither DERCs nor MDERCs can be utilized in the MECT program prior to our approval of the rule unless approved as a site-specific SIP revision.

Metropolitan Planning Organization (MPO) when MDERCs are used in the MECT program, (7) demonstrate that Alternative Emission Limitations (AELs) will not increase the allowances for a facility, and (8) revise the rule relating to the executive director discretion to deviate from allocation procedures in ''extenuating circumstances'' by either demonstrating that the allocations would not be inconsistent with the attainment demonstration and would comply with the Act, or by modifying the rule to eliminate executive director discretion or require EPA approval of allocations issued pursuant to the subsection.

III. What Comments Did EPA Receive?

EPA received one comment letter during the public comment period that closed on August 22, 2001. Environmental Defense submitted seven comments in a letter dated August 22, 2001. Two respondents to the HGA attainment demonstration SIP stated that their comments made on September 25, 2000 to TNRCC during the public comment period for the final State MECT rule were to be included by reference. The two respondents were Reliant Energy, Inc. (REI) and Baker and Botts L.L.P. on behalf of The Business Coalition for Clean Air Appeal Group (BCCA). BCCA and REI both in comments on our proposed approval of the attainment demonstration SIP incorporated by reference their comments submitted in response to the State's proposed MECT rule.

Environmental Defense commented that EPA must not defer action on the use of DERCs and MDERCs for MECT compliance. ED commented that EPA should not approve the MECT program as long as it allows the use of MDERCs in lieu of allowances. ED further stated that EPA may not approve the MECT without squarely addressing the issue of whether MDERCs can be used for MECT compliance.

ED questioned EPA's deferral of the decision to separately act on the MDERC rules (30 TAC 101 Subchapter H Division 4). However, they did indicate that it is an entirely separate question whether the MDERC portions of TNRCC's rules are approvable on their own (and used for purposes other than MECT compliance). ED questioned if EPA ultimately decides at some future date that it cannot approve the use of MDERCs for MECT compliance, after having approved the MECT program in this rulemaking, what the effect would be on the approval of the MECT, whether the approval of the MECT would become a disapproval, what the effect of disapproval would be on the proposed approval of the attainment demonstration, and whether a final approval of the attainment demonstration SIP would become a disapproval.

ED further commented that the use of DERCs and MDERCs will undermine the MECT program by allowing sources in the MECT program to use MDERCs, whereby actual emissions during any given control period could exceed the overall MECT cap without contemporaneous reductions having occurred to offset the excess emissions. ED further felt that allowing the use of MDERCs for MECT compliance was improper as there is a lack of a credible baseline to establish whether a reduction that might have been surplus at the time an MDERC was generated continues to be surplus at the time of use. ED commented that predicting results in the integrity element of quantifiable is compromised because it is impossible to predict for any control period what the balance between the generation and use of MDERCs for MECT compliance, and there is an issue of uncertainty in the integrity element of quantifiable by using reductions from one type of source at another type of source. Using emission reductions that generated MDERCs are not permanent ED commented because they took place at some point in the past. Finally, trading between economic incentive programs (EIPs) by allowing sources subject to the requirements of the mass cap and trade program to use credits generated by sources outside of the cap as a compliance option should not be allowed.

ED also commented that the method for determining the allocation of allowances to new sources creates an opportunity to inflate the cap and that additional allowances will further undermine the attainment demonstration. It further commented that requirements for emissions monitoring are inadequate, initial program evaluations should occur earlier than three years after program inception, and there appears to be a discrepancy in the amount of emissions that constitute an allowance.

Comments on the MECT rule were made in commenting on the attainment demonstration SIP by the BCCA and REI by reference to their comments to the TNRCC during the public comment period for the final State MECT rule.

BCCA commented that the MECT program should be strengthened by feasible reduction levels, and a five-year phase-in period. It additionally commented that the cap allocation methodology should be strengthened in a number of respects. The NO_X reductions required by the MECT rule are not technically or economically feasible, the phase-in time-frame should be for five years, the baseline activity level should be derived from a 12-month average, cap reductions should be weighted toward the target year, there is no reasoned justification for the rate of emission reductions, allowances should be allocated for 30 future years, not year-by-year, the additional definitions ''Account'' and ''NO_X Cap Plant'' should be incorporated, allocations should be fixed despite equipment shutdowns or changes, an opt-in mechanism should be incorporated for non-emission standards for the attainment demonstration (ESAD) sources, modified, as well as new, sources should be granted allocations at permitted levels, and the allocation methodology should be simplified. They feel that open-market credits should be fully incorporated, that ERCs should be creditable to allowances, and the 10% assessment should be dropped for credit use in the program. Further comments indicated that daily and 30-day limits should be dropped for sources participating in the MECT program, and an emission cap should be employed to meet new source review requirements. They commented that the true-up period should be extended to April 1, allowances should be divisible in tenth tons, enhanced monitoring should await the target year, VOC credits should be creditable against NO_X allocations upon an appropriate demonstration, and the Economic Incentive Program should be expanded and strengthened.

REI comments indicated generally that it supports a market-based cap and trade program as achieving overall NO_X reductions at the least cost. It contends that a viable cap and trade program depends on feasible reduction levels and that allowances should be allocated for a stream of years, not every year. Open Market Credits should be fully incorporated to preserve investments made to achieve early reductions, it commented. The cap and trade program should incorporate Plant-wide Applicability Limits to satisfy New Source Review requirements for changes in NO_X emissions. In addition, REI commented that the true-up date for the annual cap compliance should be extended to conform to the annual inventory deadline, daily and 30-day limits should be dropped for sources participating in the cap and trade, and VOC reductions should be creditable against NO_X allocations upon an appropriate demonstration.

Our response to these comments is included in Section V of this notice.

IV. How Did Texas Respond to Prerequisites for Approval?

As indicated by the responses below, Texas has satisfied all of EPA's prerequisites to approval.

Prerequisite: Our proposed approval requested the State to clarify in response to comments that the State has authority to impose penalties where every day of a long term violation is a separate violation.

Response: The State in the preamble to the final MECT rule responded that EPA's interpretation of these statutes is correct; each day of noncompliance is a separate violation. Thus, every day that the annual cap is exceeded may be considered as a separate violation.

Prerequisite: Our proposed approval requested the State amend the rules to provide that any use of monitoring protocols other than those specified in Chapter 117 will be approved by EPA.

Response: The State amended section 101.354(a) by adding language clarifying that established protocols in 30 TAC Chapter 117 must be used when quantifying actual emissions for facilities subject to the cap and trade program. The authority of the Executive Director to approve monitoring protocols other than those specified has been eliminated. The authority to quantify actual emissions by means other than those specified in 30 TAC 117 is now limited by section 101.353(b) to circumstances where required monitoring and testing data is missing or unavailable. (*See* subsequent response relating to missing data.)

Prerequisite: Our proposed approval requested the State to clarify in response to comments that the confidentiality provisions will not prevent public disclosure of activity level data necessary to determine emissions under the cap program. We also requested that any exemptions from disclosure be noted in the annual compliance report.

Response: The State clarified that emissions data cannot be held confidential. The State clarification indicated that the Office of the Attorney General makes such a determination in specific cases. Attorney General Opinion No. H–539 (February 26, 1975) ruled that emissions data supplied to the state may not be treated as confidential. Emissions data has been interpreted to include information on the nature and amount of emissions from a facility. The State agreed to include any notice of exemptions from disclosure in the annual report.

Prerequisite: Our proposed approval requested the State amend the rules to specify missing data provisions as described in EIP guidance § 5.2(c).

Response: The State added a new section 101.354(b) that provides a procedure which may be followed to determine actual emissions in the event the data required under section 101.354(a) is missing or unavailable. The procedure establishes the order of missing data methods that must be used as follows: continuous monitoring; periodic monitoring; stack or vent testing data; manufacturer's emissions data; and EPA Compilation of Air Emission Factors (AP–42). These methods must be demonstrated to most accurately represent actual emissions.

Prerequisite: Our proposed approval requested the State to clarify that emissions offsets must be obtained for the life of the NSR source.

Response: The State agreed in the preamble to the final MECT rule that offsets must be provided by the owner or operator of a facility for the life of that facility. The State also agreed in the preamble that, in order for reductions from a facility which is subject to the cap and trade program to be used as offsets, the owner or operator must permanently retire the rights to the allowances associated with that facility. This, in effect, generates ongoing credits which can be used as offsets for the life of a facility. The State wished to clarify that Chapter 101 does not address permitting, and NSR permits issued under Chapter 116 that involve offsets must be issued with the requirement that offsets be obtained for the life of the permitted facility. This requirement is found in § 116.150, New Major Source or Major Modification in Ozone Nonattainment Areas. The banking rules do not modify or supersede that requirement. Chapter 101 does require that new facilities which are subject to Division 3 obtain allowances on an annual basis equal to their actual NO_X emissions in addition to obtaining offsets for the ratio portion of their allowable emissions. The State also wished to clarify that allowances which are obtained by these new facilities are not issued by the State, but are obtained from the existing number of allowances available to existing facilities. The total number of allowances under the cap would remain finite.

Prerequisite: Our proposed approval requested the State to provide notification of MDERC generation to the metropolitan planning organization (MPO).

Response: The State agreed in the preamble to the final MECT rule that MPOs should be made aware of MERC and MDERC generation projects because of the necessity to avoid double counting reductions that may be banked and also used for SIP credit under other programs.

Prerequisite: Our proposed approval requested the State to demonstrate how existing rule provisions will prevent the issuance of Alternate Emission Limits (AELs) that could increase a NO_X emissions cap.

Response: The State responded in the preamble to the final MECT rule that the cap and trade program uses ESADs as listed in sections 117.106 and 117.206, Emissions Specifications for Attainment Demonstrations, and 117.475, Emissions Specifications, when calculating the number of allowances to allocate. AELs may not be used or requested in lieu of ESADs as specified in 117.106(e) (3)–(4) and 117.206(f)(4). There is no provision in the State rules to allow for a variance from the Chapter 117 requirements. The State recognizes that facilities with a capacity factor of 0.0383 have an ESAD of 0.060 lb NO_X/MMBtu regardless of facility type, as allowed in sections 117.106(c)(4), 117.206(c)(17), or 117.475(c)(6). This ESAD is not an ''AEL'' but simply an assigned ESAD for facilities that are rarely utilized.

Prerequisite: Our proposed approval requested the State to modify, or make demonstrations relating to, subsection 101.353(g), stated that in ''extenuating circumstances'' the TNRCC executive director may deviate from the requirements for determining the amount of allowances to be issued to a facility. The FR notice said the state must either (1) demonstrate that the allocations that could be issued pursuant to that subsection would not be inconsistent with the attainment demonstration and would comply with the CAA, or (2) modify the rule to eliminate executive director discretion or require EPA approval of allocations issued pursuant to the subsection.

Response: The State revised section 101.353 of the rule by stating that the owner or operator of a facility may, due to extenuating circumstances, request up to two additional calendar years to establish a baseline period more representative of normal operation as determined by the executive director. The State response is consistent with the NSR definition of actual emissions which allows for an alternate period when the baseline period does not reflect normal operations. EPA's objection relating to Executive Director discretion has been resolved.

V. What Are EPA's Responses to Comments?

Environmental Defense Comment 1

Comment: EPA must not defer action on the use of DERCs and MDERCs for

MECT compliance. EPA should not approve the MECT program as long as it allows the use of MDERCs in lieu of allowances. EPA may not approve the MECT without squarely addressing the issue of whether MDERCs can be used for MECT compliance.

Response: The Clean Air Act does not prohibit EPA from determining at a later date whether or not DERCS or MDERCs may be utilized in the MECT program. The DERC and MDERC rules (30 TAC Chapter 101 Division 4) are separate and independent from the MECT rules since, unlike the MECT rules, the DERC and MDERC rules were not submitted by the state for emission credit in the attainment demonstration. In addition, the use of DERCs or MDERCs in the MECT program is not necessary for that program to achieve emission reductions needed for attainment, or for that program to comply with other applicable Clean Air Act requirements. The purpose of utilizing DERCs or MDERCs in the MECT program is to provide sources with a voluntary compliance option.

As we stated in the **Federal Register** Notice proposing action on the MECT rules, DERCS and MDERCs may not be used for compliance with the MECT rules unless the DERC and MDERC rules are approved by EPA for inclusion into the SIP. In addition, a source-specific SIP revision may be utilized to seek EPA approval for the use of DERCs or MDERCs in the MECT program on a case-by-case basis.

The DERC and MDERC rules, and any individual trades, will be fully evaluated for approvability as a SIP revision when EPA proposes action on them. This evaluation will determine whether or not those rules or trades comply with all applicable Clean Air Act requirements, considering the interaction of the use of DERCs or MDERCs with existing SIP provisions, including the MECT program. The public will be provided an opportunity to comment on the approvability of the DERC and MDERC rules and any individual trades as a SIP revision at the time EPA proposes action on those rules or trades.

If at some future date, EPA determines that the DERC or MDERC rules or an individual trade cannot be approved, MECT facilities would not have the flexibility of using such credits for compliance. Such facilities would, however, still have to achieve all emission reductions required by the MECT program, all other provisions of the MECT program would continue to function, and approval of the MECT program—and the SIP—would remain in effect.

Comment: If EPA ultimately decides at some future date that it can not approve the use of MDERCs for MECT compliance, after having approved the MECT program in this rulemaking, what would be the effect on the approval of the MECT?

Response: As stated above, if at some future date, the MDERC rule cannot be approved, the MECT program could not use MDERCs for compliance with the allowance cap. The use of MDERCs for MECT compliance is for source flexibility. Should the MDERC program be determined to not be approveable at some point in the future, the MECT facilities would no longer have the flexibility of using MDERCs for compliance. All other provisions of the MECT program would continue to function as they were designed, and the approval of the MECT program would not be affected.

Comment: Would the approval become a disapproval?

Response: As stated above, the approval of the MECT program and the SIP would remain in effect.

Comment: What would be the effect of converting the MECT approval to a disapproval on the proposed approval of the attainment demonstration?

Response: Since there would be no conversion of the MECT approval to a disapproval, there would be no effect on the proposed approval of the attainment demonstration. As indicated above, should the MDERC program be disapproved, the MECT program would be required to achieve the required compliance with the allowance cap, but without source flexibility of using MDERCs for cap compliance.

Comment: Since EPA has already stated that it cannot finalize approval of the attainment demonstration SIP until (among other things) it has finalized action on the NO_X MECT program since it is relied upon in the attainment demonstration, then would a final approval of the attainment demonstration SIP thus become a disapproval if EPA later disapproves the MECT program?

Response: Again, as stated above, once the MECT program and the attainment demonstration are SIP approved, a subsequent disapproval of the MDERC program would not change the approval status of the attainment demonstration. The emission reductions relied upon by the implementation of the control technology measures contained in the MECT would be achieved without the source flexibility of MDERC use as provided for in the MDERC rule.

Environmental Defense Comment 2

Comment: ED made a number of comments specific to the DERC and MDERC rules as they relate to the MECT. Generally, ED commented that the use of DERCs and MDERCs will undermine the MECT program by allowing sources in the MECT program to use MDERCs, whereby actual emissions during any given control period could exceed the overall MECT cap without contemporaneous reductions having occurred to offset the excess emissions. ED further felt that allowing the use of MDERCs for MECT compliance was improper as there is a lack of a credible baseline to establish whether a reduction that might have been surplus at the time an MDERC was generated continues to be surplus at the time of use. ED commented that predicting results in the integrity element of quantifiable is compromised because it is impossible to predict for any control period what the balance will be between the generation and use of MDERCs for MECT compliance, and there is an issue of uncertainty in the integrity element of quantifiable by using reductions from one type of source at another type of source. Using emission reductions that generated MDERCs are not permanent, ED commented, because they took place at some point in the past. Finally, trading between economic incentive programs (EIPs) by allowing sources subject to the requirements of the mass cap and trade program to use credits generated by sources outside of the cap as a compliance option should not be allowed.

Response: These issues do not arise unless EPA approves a SIP revision allowing the use of DERCs or MDERCs in the MECT program. EPA is not at this time taking action on the DERC or MDERC rules, or any individual DERC or MDERC trades.

As we stated in the **Federal Register** Notice proposing action on the MECT rules, DERCS and MDERCs may not be used for compliance with the MECT rules unless the DERC and MDERC rules are approved by EPA for inclusion into the SIP. In addition, a source-specific SIP revision may be utilized to seek EPA approval for the use of DERCs or MDERCs in the MECT program on a case-by-case basis.

The DERC and MDERC rules, and any individual trades, will be fully evaluated for approvability as a SIP revision when EPA proposes action on them. This evaluation will determine whether those rules or trades comply with all applicable Clean Air Act requirements, considering the

interaction of the use of DERCs or MDERCs with existing SIP provisions, including the MECT program. The public will be provided an opportunity to comment on the approvability of the DERC and MDERC rules and any individual trades as a SIP revision at the time EPA purposes action on those rules or trades.

EPA will respond to these comments at the time the agency acts on a SIP revision including the DERC and MDERC rules, or any individual trades, if they are submitted in connection with such action.

Until EPA completes its evaluation of the DERC and MDERC rules or an individual trade, the agency has no basis to take final action disapproving the use of DERCs or MDERCs in the MECT program. The acquisition and use of credits generated under one (EIP) to meet the requirements of another EIP is not prohibited by the Clean Air Act, and is specifically contemplated by the EPA EIP guidance document, Improving Air Quality with Economic Incentive Programs (EPA–452/R–01–001) January 2001, as long as certain criteria are met.

Environmental Defense Comment 3

Comment: Environmental Defense's third comment was that the method for determining the allocation of allowances to new sources creates an opportunity to inflate the cap. ED commented that the number of allowances issued to certain new sources lacking a historic emissions baseline will be based on allowable emissions for two years, but only until an actual emission baseline is established. ED contended that these new sources have the incentive to maximize production and/or emissions to establish a baseline that is close to the allowable emissions limit. ED commented that once the artificially high baseline is established, the source can return to normal production and/or emission levels and be left with a windfall of surplus allowances that it would then be free to trade to other sources in the MECT program. ED contended that EPA's review of the MECT program fails to address this possibility.

ED commented that new sources without an established, actual baseline can be viewed as sources that are not covered, because their emissions baselines have not yet been established. ED was concerned that the increment between actual emissions during normal operating conditions and the permit allowables represents a pool of excess allowances that can be captured by these new sources. If new sources can successfully capture this windfall, the overall emissions budget for the MECT program will end up higher than it otherwise would have been.

Response: The attainment demonstration modeling inventory for new sources without a historical baseline consisted of the allowable emissions for these sources. These sources were included in the allowance cap at their allowable level. The State's attainment demonstration for HGA used this level of emissions. Accordingly. we have no basis to challenge this part of the method for allocating allowances. Further, the establishment of a baseline for these sources at actual emission levels below their allowables will reduce or shrink the cap.

Environmental Defense Comment 4

Comment: Environmental Defense's fourth comment was that additional allowances issued under MECT section 101.353(g) will further undermine the attainment demonstration. ED contended that the TNRCC issuance of additional allowances would further undermine the SIP. ED states that they are uncertain how TNRCC can demonstrate that additional allocations ''are not inconsistent with the attainment demonstration.'' Section 101.353(g) in the December 2000 regulation stated that ''in extenuating circumstances, the executive director may deviate from the requirements of this section to determine the amount of allowances allocated to a facility.''

Response: The State revised section 101.353(g) in the October 4, 2001 submittal. The final rule states that ''(t)he owner or operator of a facility may, due to extenuating circumstances, request up to two additional calendar years to establish a baseline period more representative of normal operation as determined by the executive director.'' This revision of the regulation for determination of baseline emissions is consistent with the new source review definition of actual emissions and actual baseline emissions used to determine surplus emission reductions from other trading programs.

Environmental Defense Comment 5

Comment: Environmental Defense's fifth comment was that the requirements for emissions monitoring are inadequate. ED commented that EPA fails to provide any factual basis for its conclusion that TNRCC's selection of emission measurement protocols are adequate. ED stated that they can find no evidence of the TNRCC's adoption of specific monitoring requirements in Chapter 117 to ensure compliance with the MECT. Instead, it appears to ED that monitoring consists of whatever methods were already in place prior to the adoption of ESADs in Chapter 117. ED commented that the creation of a cap and trade program should be accompanied by additional monitoring requirements to ensure the program's success. ED commented that the TNRCC should require monitoring requirements no less stringent than those of the Acid Rain Program and the NO_X SIP Call.

The MECT rules at section 101.354(a) describe the method for determining how many allowances will be deducted from a compliance account. This deduction should be based, to the maximum extent possible, on the measured mass of NO_X emissions and should require Texas to measure and track mass emissions instead of emissions rates and activity levels, the product of which is only a surrogate for mass emissions. Measuring mass emissions will improve the transparency and environmental integrity of the MECT program.

Response: The State submitted the monitoring requirements of Chapter 117 to fulfill the monitoring protocol requirements of the MECT. For electric utility facilities the Chapter 117 monitoring requirements consist of the continuous emission monitoring requirements of the Acid Rain program at 40 CFR part 75 and 40 CFR part 60 Appendix A. Thus the MECT monitoring requirements are the same as those in the Acid Rain program and NO_X SIP Call. The State has estimated that approximately 90% of the total allowances in the MECT program are allocated to sources that are required to have CEMs. EPA can find no basis for the ED statement that the MECT monitoring requirements are less stringent than those of the Acid Rain Program and the NO_X SIP Call.

Environmental Defense Comment 6

Comment: Environmental Defense's sixth comment was that the initial program evaluations should occur earlier than three years after program inception. ED was pleased that the TNRCC included an explicit requirement to perform an audit of the program after three years to ensure that it is achieving the target NO_X emission reduction throughout the control period. The EPA and TNRCC should emphasize that this audit may result in the imposition of additional restrictions (weekly or monthly caps, geographic trading restrictions, e.g.) to ensure the program's integrity. This would encourage capped sources to account for this possibility up front when making investments, trading, or banking decisions. The FR notice refers to the EIP guidance expectation that annual

evaluation of the program is appropriate for at least two years, until the projected emissions have been adequately confirmed (66 FR 38237). Despite this expectation, EPA concluded that MECT program meets the expectations of the EIP guidance, even though TNRCC's audit will only occur triennially. This conclusion is unjustified.

Response: Although the MECT audit will occur triennially as required by the MECT regulation, a review will be conducted in 2002 as a result of the settlement reached in BCCA Appeal Group v. Texas Natural Resource Conservation Commission, No. GN1–00210 (250th Dist. Ct.)(filed on January 19, 2001). The attainment demonstration SIP requires a mid course correction evaluation in 2004. The degree of control technology and implementation schedules are an integral part of both of these audits. EPA believes that with these two audits in 2002 and 2004 plus the triennial MECT audits, the audit frequency is adequate to help assure that the reductions will lead to attainment. The EPA EIP guidance, which in any event is not binding, did not assume the additional audits requested above.

Environmental Defense Comment 7

Comment: Environmental Defense's seventh comment was that there appears to be a discrepancy in the amount of emissions that constitute an allowance. According to section 101.352(g) allowances will be allocated, transferred, or used in tenths of tons. On the other hand, the equations for calculating the number of allowances to be deposited into an account at section 101.353(a) and the allowances to be deducted from an account at section 101.354(a) appear to yield allowances in tons. There is thus an error of a factor of ten in the calculations that needs to be corrected.

Response: The MECT rule defines one MECT allowance to equal one ton of NO_X emissions. The level of accuracy in section 101.352(g) for allocation, transfer or use is in tenths of tons which is consistent with the requirements of sections 101.353(a) and 101.354(a). As in a bank account, the currency denomination is in dollars but the account itself is debited and credited in dollar amounts with an accuracy of two decimal places, i.e. dollars and cents. Thus, there is not an error of a factor of ten but rather an accuracy of allowances to one decimal place.

EPA responses to BCCA and REI comments made on September 25, 2000, are as follows:

Comment: BCCA commented that the proposed NO_X reductions intended to be implemented under MECT rule are not technologically or economically feasible and will not result in an economic incentive under the cap and trade rule because there will be insufficient surplus allowances. The cap and trade system should be based on current California point source controls, which are the most stringent achieved in practice.

Response: This comment is not relevant to our decision whether to approve the MECT rule. We are not authorized to review control requirements for their economic or technological feasibility. In any event, the State made no changes to the MECT rule in response to these comments. EPA notes, however, that combined use of combustion modification and flue gas controls on the majority of large combustion units result in point source NO_X reductions in the range of 90%. Combustion modification capabilities and flue gas controls are well documented in the EPA Alternative Control Technology (ACT) documents, the NO_X control literature, and papers presented at numerous meetings of research and trade organizations for industry, NO_X control vendors, constructors, and the government. These documents report combustion-based reductions from minimal to over 90%, and flue gas controls in the range of 75% to 95%. We agree with the State that both combustion modifications and flue gas cleanup are established technologies. We agree with the State that the market-based approach embodied in the adopted rules give nearly complete freedom on how to achieve the goals and based on experience from California, will stimulate the development of new and innovative reduction technologies and strategies.

Comment: BCCA commented that the rule should afford a five-year phase-in period. In the proposed rule the final, target allocations would be issued in 2005 and remain fixed thereafter. In other words, the necessary controls must be in place by year-end 2004 in order to meet the target allocations under the Proposal. This timeframe is neither practical nor feasible. The Proposal should be amended to incorporate a five-year phase-in period, beginning in 2002 and ending in 2007.

Response: The State revised the rules submitted on December 22, 2000 and October 4, 2001 based on these comments. The State accepted the notion that phasing in compliance with these rules is critical to the success of the program for many reasons including availability of equipment needed to make reductions as well as the need to satisfy the SIP requirement that reductions are made as soon as practicable. The new schedule contained in section 101.353 will ensure that NO_X emission from stationary facilities will be reduced to a level necessary to reach attainment.

Comment: BCCA commented that a consecutive 12-month period would more accurately reflect activity levels and would reduce requests for case-by-case reviews. The TNRCC had proposed the use of an entire 3-year average (1997–1999) to determine baseline activity level. BCCA believes that a 12 month baseline activity period will dramatically reduce the number and complexity of petitions for case-by-case review.

Response: We recognize that the baseline period utilized to establish the cap should be representative of normal source operations. The State took the view that the 1997, 1998, and 1999 period is the most recent and should best represent the emissions of facilities currently in operation. The State did not revise the rule based upon this comment. The State's view is reasonable and we see no basis to disapprove based on the commenter's concerns.

Comment: Both BCCA and REI commented that there is no reasoned justification for the rate of NO_X emission reductions in one-third increments and this rate of reduction is not needed to meet rate-of-progress requirements.

Response: The State revised the rules submitted on December 22, 2000 and October 4, 2001 based on these comments. Phasing in compliance with these rules is critical to the success of the program. Availability of equipment needed to make reductions must be balanced with the SIP requirement that reductions are made as soon as practicable. We concluded that a less rapid reduction of NO_X from affected facilities influenced by equipment availability can be phased in between 2002 and 2007. The State revised the rule with a new schedule contained in section 101.353. We agree with the State that the new schedule will ensure that NO_X emission from stationary facilities will be reduced on the appropriate time frame to a level necessary to reach attainment.

Comment: Both REI and BCCA commented that allowances should be allocated for a stream of 30 years or more rather than allocated yearly to allow for more fluid trading and a defined period, greater than one year, of over-control or under-control for participating sites. This methodology would also simplify allocations.

Response: The State made no revisions to the rule based upon this comment. The State seemed to adopt the view that the allocation of allowances on an annual basis, with an annual compliance report by the State to EPA and the public, is necessary to record and track a successful cap and trade program. The provision for audits and necessary corrective action every three years can best be accomplished by the annual allocation of allowances. The State responded that allocation of allowances on a yearly basis enhances the ability to plan and anticipate effects on air quality and that it also provides an enforcement mechanism for facilities whose actual emissions exceed the allowances in their compliance account through the reduction of subsequent yearly allocations. As the State noted, nothing would prohibit facilities from entering private agreements for the sale of future allocations or rights to allocations. We see no basis to disapprove based on the commentor's concerns.

Comment: BCCA commented that the term ''source'' is used to denote an overall site over the ten-ton applicability trigger but is also used to denote a single emitting unit. BCCA and REI commented that sources not subject to emission specification for attainment demonstration (ESAD) rates under the SIP that can make cost effective reductions should have the option to participate in the cap and trade program and its allowances allocated in the same manner for current ESAD sources.

Response: The State adopted a rule revision on May 23, 2001 which clarified that the applicability of the cap and trade program is determined by the collective emissions at a site and that the ten-ton per year applicability requirement does not apply to individual facilities. The rule revision was effective on June 13, 2001. The State did not create a new definition of '' NO_X Cap Plant'' as requested by this comment. We agree with the State that facilities not subject to the cap and trade program may eventually be able to trade with MECT facilities under the current rule without compromising the attainment demonstration.

Comment: BCCA commented that the State should clarify that target allocation based on 1997–1999 activity will not change despite shutdowns, replacements or changes to equipment.

Response: The State revised the rules submitted on October 4, 2001 by adding section 101.353(h) which clarifies that allowances will not change despite subsequent reductions in activity levels assuming the allowances are based on historical activity levels. These subsequent reductions in activity levels could result from shutdowns, replacements, or changes to equipment. We believe that the clarification by the State in response to this comment maintains the integrity of the program.

Comment: BCCA commented that an opt-in mechanism should be incorporated for non-ESAD sources. An opt-in provision for sources not subject to ESAD rates under the SIP would provide an effective incentive to accomplish surplus reductions.

Response: The rule provides for surplus reductions accomplished by non-ESAD sources to be traded for allowances for each compliance period. Such trades would provide the non-ESAD source with the same economic incentive to obtain surplus emission reductions as if the source had the ability to elect to be in the program. Any such trades would require reductions beyond what was relied upon in the attainment demonstration and could contain DERCs or MDERCs after we act on the DERC and MDERC rules.

Comment: BCCA and REI commented that the rule allows sources newly authorized by permit application or permit by rule to receive allowances based on their permitted or actual activity levels. BCCA and REI support this concept but commented that newly modified sources should be treated identically.

Response: The State revised the rules submitted on December 22, 2000 based on this comment at section 101.353(a) to refer to new and modified facilities. By ''modified facilities'' the State referred to the modification itself. For example if an existing facility is modified to double its capacity in 1998, the emissions from the original facility will be allocated in the same way as facilities existing before 1997. The increase in emission allowable associated with the modification will be treated as a facility which did not exist before 1997. We agree with the State approach to the extent that the attainment demonstration modeling included the actual emissions for the facility, and that for modified facilities that have not begun normal operations, the emissions relied upon in the attainment demonstration are the allowable emissions.

Comment: BCCA commented that the allocation methodology should be simplified. The allocation methodology language in proposed Section 101.353 is overly complicated and confusing. The methodology is based on a complete re-allocation in each of the initial four years, and is structured to revisit allocations for new sources several times. As noted in an earlier comment, the methodology should allow all allocations for 2002 through 2032 to be issued in a single action before program commencement.

Response: The State made no revisions to the rule based upon this comment. The State appeared to accept the view that the allocation of allowances on an annual basis, with an annual compliance report by the State to EPA and the public, is necessary to record and track a successful cap and trade program. The provision for audits and necessary corrective action every three years can best be accomplished by the annual allocation of allowances. The ability to plan and anticipate effects on air quality and to provide an enforcement mechanism for facilities whose actual emissions exceed the allowances in their compliance account through the reduction of subsequent yearly allocations are necessary elements of the program. We see no basis to disapprove based on the commentor's concerns. The allocation methodology is sufficient to achieve the program objectives and we are concerned that any further simplification could lead to a compromise of the program objectives.

Comment: BCCA and REI commented that emission reduction credits should be convertible to allowances and the rule lacks reasoned justification why this is not allowed. By definition all recognized emission credits are real, quantifiable, and surplus to the SIP.

Response: The State revised the rule submitted on October 4, 2001 by adding a new section 101.356(h) which provides that ERCs may be converted into a yearly allocation of allowances if the ERCs were generated prior to December 1, 2000 and were evaluated and included in the HGA attainment demonstration. We proposed to approve and are in this action approving this revision to the rule. We agree that these ERCs, if converted into a stream of allowances would not increase emissions beyond those levels modeled that demonstrated compliance with the NAAQS for ozone.

Comment: REI and BCCA commented that the existing discrete emission reduction credit trading rules require a 10% environmental contribution and a 5% compliance margin. This requirement has been extended to the use of DERCs in lieu of allowances. They stated that there is not a reasoned justification for this requirement and that it is not necessary to meet a region wide cap.

Response: The State revised section 101.356 of the rule submitted on October 4, 2001 based on this comment. Although EPA has not yet acted on

those rules, we note that the requirement of retiring an additional 10% of DERCs and MDERCs for an environmental contribution and an additional 5% for a compliance margin is not required when using DERCs and MDERCs in lieu of allowances under the HGA cap and trade program. In any event, in today's action, we are not taking action on the DERC/MDERC rules.

Comment: REI and BCCA objected to the daily and monthly NO_X limits for utility sources in addition to the annual MECT cap. These limits render the cap and trade flexibility meaningless.

Response: The 30-day average system cap emission limit functions as a flexible but controlling limit which ensures that a specified emission level is achieved during a typical peak ozone season day. The State's actions are consistent with the view that the much less stringent daily maximum limit ensures that the 30-day average is not manipulated to allow higher NO_X emissions on a single day when ozone may be a problem. We see no basis to disapprove based on the commentor's concerns.

Comment: REI and BCCA commented that the rule should be modified to allow compliance with an emission cap to satisfy both nonattainment new source review and prevention of significant deterioration.

Response: The nonattainment new source review and prevention of significant deterioration permitting are requirements of the Act. We agree with the State that any facility having major increases of NO_X should undergo a nonattainment/prevention of significant deterioration review to ensure it is meeting BACT or LAER as applicable, regardless of whether the facility operates under the cap.

Comment: REI and BCCA believe that one month is an inadequate period to calculate a control period's emissions and compare those emissions to cap and trade activity for the control period to balance the account. They recommend April 1 of the succeeding year as the deadline for reconciling accounts.

Response: The facilities have one month for trading allowances after December 31 of the compliance year. Allowance trades must be approved by the State within thirty days. Section 359 of the rule requires a facility to submit the allowance compliance report by March 31. This reporting parallels the State's emission inventory reporting guidelines and we agree with the State that the rule need not be revised. We see no basis to disapprove based on the commentor's concerns.

Comment: REI and BCCA commented that the requirement to trade allowances in whole tons lacks reasoned justification. The number of allowances is rounded up or down whichever provides the holder or buyer less credit. Some credits have been traded with a value of $80,000 per ton and rounding can result in the taking of considerable value. They recommend that trading occur in one-tenth tons. This is consistent with ERC trading. During the years of target allowances, rounding down can result in zero allowances.

Response: The State revised section 101.350(1) by the submission of October 4, 2001 to divide allowances into tenths of a ton. The rounding methodology was not changed from the normal mathematical rounding procedures. However, by allocating, transferring, and using allowances in tenths of tons, the impact of rounding will be reduced. We agree with the State that the incorporation of rounding allowances to a tenth of a ton will provide a more realistic and workable program.

Comment: REI and BCCA commented that the installation of enhanced monitoring equipment should be delayed until the cap and trade target allocation year of 2005, and there is no reasoned justification for advancing the monitoring requirement to 2001, well ahead of the substantive reductions needed for attainment.

Response: The State revised the rules submitted on December 22, 2000 in response to this comment to take into account the practicalities identified by the comments. Both PEMS and CEMS vendors indicated that the number of monitors required in one year would strain their abilities to provide the equipment. The owners identified clear benefits of installing the monitors in conjunction with the control equipment. We agree with the State that since the rules have been revised to require that the monitors will be phased over a four-year period, at the earlier of installing emission controls or December 31, 2004, this phase-in will achieve the end result benefits of specified emissions reduction by 2005. Because the first reduction period has been extended to 2004, the greater uncertainty about NO_X emissions in the first two years of the program (compared to monitors in place by 2002) will be of less consequence. Phasing in CEMS/PEMS with the emission control equipment is a more rational and cost effective approach and remains consistent with attainment needs.

Comment: REI and BCCA commented that the rule should contain a provision allowing volatile organic compound reductions in the place of NO_X allowances where the VOC reductions are demonstrated to reduce ozone an equal amount.

Response: The State modified section 101.356 of the rule submitted on December 22, 2001 based on the comment. EPA is not taking action on the DERC or MDERC rules. Generally, however, EPA agrees that if a demonstration has been made and approved by the executive director and the EPA to show that the use of VOC DERCs or MDERCs is equivalent to the use of NO_X allowances in reducing ozone then we support the State allowing VOC use in place of a NO_X reduction.

Comment: BCCA supports an additional incentive program that would provide funds for use by a wide range of source categories to assist compliance with SIP required reductions. Such a fund would be competitive and, if funded by private sources, would provide appropriate credit or benefit to the parties providing the funding. The plan should incorporate broad executive director authority to approve credits on a case-by-case basis.

Response: The State's actions are consistent with the view that the establishment of a private fund for pollution control projects is outside the scope of the adopted rules and will be left to the discretion of affected industries. This comment is not relevant for EPA's action on this SIP submittal.

VI. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104–4). For the same reason, this rule also does not

significantly or uniquely affect the communities of tribal governments, as specified by Executive Order 13084 (63 FR 27655, May 10, 1998). 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, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999), because it merely approves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. The rule does not involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). As required by section 3 of Executive Order 12988 (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct. The EPA has complied with Executive Order 12630 (53 FR 8859, March 15, 1988) by examining the takings implications of the rule in accordance with the ''Attorney General's Supplemental Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings.'' This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

Dated: October 15, 2001.

Gregg A. Cooke,

Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

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

Subpart SS—Texas

2. In § 52.2270 the table in paragraph (c) is amended under Chapter 101 by:

a. Revising the heading immediately above the entry for section 101.1 to read ''Chapter 101—General Air Quality Rules'' followed on a separate line by the heading ''Subchapter A—General Rules.''

b. Revising the entry for section 101.1.

c. At the end of Chapter 101 following the entry for ''Section 101. Rule 19'' by adding new heading ''Subchapter H—Emissions Banking and Trading'' followed on a separate line by the heading ''Division 3—Mass Emissions Cap and Trade Program'' followed by individual entries for Sections 101.350, 101.351, 101.352, 101.353, 101.354, 101.356, 101.358, 101.359, 101.360, and 101.363.

The revisions and additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/Subject	State approval/submittal date	EPA approval date	Explanation
Chapter 101—General Air Quality Rules,				
Subchapter A—General Rules				
Section 101.1	Definitions	09/26/2001	11/14/01 [Insert [Federal Register citation]	
*	*	*	*	* * * * *
Subchapter H—Emissions Banking and Trading				
Division 3—Mass Emissions Cap and Trade Program				
Section 101.350	Definitions	09/26/2001	11/14/2001 [Insert Federal Register citation.]	
Section 101.351	Applicability	05/23/2001	11/14/2001 [Insert Federal Register citation.]	
Section 101.352	General Provisions	09/26/2001	11/14/2001	

EPA APPROVED REGULATIONS IN THE TEXAS SIP—Continued

State citation	Title/Subject	State approval/submittal date	EPA approval date	Explanation
Section 101.353	Allocation of allowances	09/26/2001	11/14/2001 [Insert Federal Register citation.]	Subsections 101.353(a)(3)(B) 101.353(a)(3)(D) NOT IN SIP.
Section 101.354	Allowance deductions	09/26/2001	11/14/2001 [Insert Federal Register citation.]	
Section 101.356	Allowance Banking and Trading.	09/26/2001	11/14/2001 [Insert Federal Register citation.]	
Section 101.358	Emissions Monitoring and Compliance Demonstration.	12/09/2000	11/14/2001 [Insert Federal Register citation.]	
Section 101.359	Reporting	12/09/2000	11/14/2001 [Insert Federal Register citation.]	
Section 101.360	Level of activity certification	09/26/2001	11/14/2001 [Insert Federal Register citation.]	
Section 101.363	Program audits and reports	09/26/2001	11/04/2001 [Insert Federal Register citation.]	
*	*	*	*	* * *

[FR Doc. 01–27586 Filed 11–13–01; 8:45 am]
BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[TX–134–3–7528; FRL–7092–9]

Approval and Promulgation of Air Quality State Implementation Plans; Texas: Motor Vehicle Inspection and Maintenance Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final Rule.

SUMMARY: The EPA is approving State Implementation Plan (SIP) revisions submitted by the State of Texas on establishing a Vehicle Inspection and Maintenance (I/M) Program for the Dallas/Fort Worth (DFW), Houston-Galveston Area (HGA), and El Paso (ELP) nonattainment areas. EPA proposed approval of the DFW I/M SIP revision on January 22, 2001, and the HGA I/M SIP revision on June 11, 2001. The revisions replace the two-speed idle test in Dallas, Tarrant, and Harris Counties with ASM–2, expand the upgraded I/M program to cover the entire DFW nonattainment area plus five additional counties, and the eight county HGA nonattainment area. The revisions also implement On-Board Diagnostic (OBD) testing in the DFW and HGA testing areas, and El Paso County.

The I/M SIP revisions are part of the DFW and HGA Attainment Demonstrations.

DATES: This final rule is effective on December 14, 2001.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. Persons interested in examining these documents should make an appointment with the appropriate office at least 24 hours before the visiting day. Environmental Protection Agency, Region 6, Air Planning Section (6PD-L), 1445 Ross Avenue, Suite 700, Dallas, Texas 75202–2733. Texas Natural Resource Conservation Commission, 12100 Park 35 Circle, Austin, Texas 78753.

FOR FURTHER INFORMATION CONTACT: Ms. Sandra G. Rennie, Air Planning Section (6PD-L), EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 665–7367.

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

What action is EPA taking today?

We are granting final approval of Texas' Motorist Choice (TMC) vehicleI/M program. The program applies to the HGA and ELP nonattainment areas, and the DFW nonattainment area plus five adjoining attainment counties. EPA proposed approval of the DFW I/M SIP revision on January 22, 2001 (66 FR 6521), and the HGA I/M SIP revision on June 11, 2001 (66 FR 31199).

What are the Clean Air Act Requirements?

EPA approval of this SIP revision is governed by sections 110 and 182 of the Act, and section 348 of the National Highway Systems Designation Act (NHSDA) of 1995.

Section 182 of the Act provides for plan submissions and plan requirements. Section 182 (b)(4) requires vehicle I/M programs in nonattainment areas classified as moderate or above. Section 182(c)(3) requires enhanced vehicle I/M programs in areas classified serious or above.

Under the NHSDA, EPA cannot apply an automatic 50 percent credit discount to I/M SIPs under section 182, 184, or 187 of the Act because the I/M program in the SIP revision is decentralized or a test-and-repair program. (See EPA's I/M program requirements final rule published November 5, 1992, at 57 FR 52950.) The automatic discount has been effectively replaced with a presumptive equivalency criterion, which places the emission reductions credits for decentralized networks on par with credit assumptions for centralized networks, based upon a state's good faith estimate of reductions as provided by the NHSDA.

The NHSDA directs EPA to grant interim approval for a period of 18 months to approve I/M submittals. The NHSDA also directs EPA and the states to review the interim program results at the end of that 18-month period, and to make a determination as to the effectiveness of the interim program. Following this demonstration, EPA will adjust any credit claims made by the state in its good faith effort, to reflect the emission reductions actually measured by the state during the program evaluation periods. Per the NHSDA requirements, this conditional interim rulemaking expired February 11, 1999, 18 months after the interim final rule became effective on August 11, 1997.

Why is EPA taking this action?

We are taking this action because the State submitted an approvable enhanced vehicle I/M program SIP for each nonattainment area requiring a program. The Beaumont-Port Arthur nonattainment area is not required to have a program because the 1995 I/M flexibility amendments (60 FR 48029, September 18, 1995) set a population requirement of 200,000 or more for a 1990 Census-defined urbanized area to implement a program.

Previous actions taken toward full approval of the TMC I/M program include: a proposed conditional interim approval proposed on October 3, 1996 (61 FR 51651); an interim final conditional approval published on July 11, 1997 (62 FR 37138); and a direct final action on April 23, 1999 (64 FR 19910) to remove the conditions.

What does the State's Texas Motorist Choice I/M program include?

The State's TMC program requires that gasoline powered light-duty vehicles, and light and heavy-duty trucks between two and twenty-four years old, that are registered or required to be registered in the I/M program area, including fleets, are subject to annual inspection and testing.

Vehicles in Dallas, Tarrant, Collin, Denton, Ellis, Johnson, Kaufman, Parker, and Rockwall counties in the DFW area, and Harris, Galveston, Brazoria, Fort Bend, Montgomery, Liberty, Waller, and Chambers in the HGA nonattainment area that are 1995 and older will be subject to an ASM–2 tailpipe test. Vehicles in those counties that are 1996 and newer will receive the On-Board Diagnostic (OBD) test in place of the tailpipe test.

Vehicles in El Paso county will be subject to the two-speed idle tailpipe test if they are 1995 or older, or an OBD test if they are 1996 or newer.

All vehicles in the area programs are currently subject to a gas cap pressure check and an antitampering inspection.

The schedule to begin this new testing is as follows:

May 1, 2002. On-Board Diagnostic (OBD) testing will be added to the low-enhanced, two-speed idle test currently being implemented in Harris, Dallas, Tarrant, and El Paso Counties. The shortfall in vehicle coverage for the DFW and HGA nonattainment areas will continue to be made up by remote sensing within Dallas, Tarrant, and Harris Counties to identify gross polluting vehicles commuting in from the surrounding nonattainment counties only until tailpipe testing begins in those counties.

May 1, 2002. ASM–2 and OBD vehicle testing in Dallas, Tarrant, Collin, Denton, and Harris Counties.

May 1, 2003. The State will expand the I/M program to include the DFW attainment counties of Ellis, Johnson, Kaufman, Parker, Rockwall, and the HGA nonattainment counties of Galveston, Brazoria, Fort Bend, and Montgomery. May 1, 2004. The State will expand the I/M program further to include the HGA nonattainment counties of Chambers, Liberty, and Waller.

The vehicle coverage shortfall in the HGA area will continue to be covered by the remote sensing program until all counties become subject to I/M testing. An optional opt-out alternative for Chambers, Liberty, and Waller Counties allows any or all of these counties to opt-out of I/M and substitute an alternative air control strategy. This provision is subject to an expedited timeline and the State's submission of SIP revisions substituting equivalent reductions of VOC and NO_X, based on modeling. Remote sensing would then be used to monitor vehicles from those counties which are not part of the urbanized area.

What did the State submit?

The State submitted SIP revisions for 30 Texas Administrative Code (TAC) 114 on March 14, 1996, April 25, 2000, and December 20, 2000. The submittals contained documentation to support an approval under section 182 of the Act and 40 CFR part 51, Subpart S-Inspection/Maintenance Program Requirements. For further discussion of the submittals, see the proposed approvals, October 3, 1996 (61 FR 51651), January 22, 2001 (66 FR 6521), June 11, 2001 (66 FR 31199) and accompanying Technical Support Documents.

We are not approving as part of the Texas I/M SIP the State's 30 TAC 114.50(b)(2). This rule places an additional reporting burden upon commanders at Federal facilities regarding affected Federal vehicles, that is not imposed upon any other affected non-federal vehicle. The additional reporting requirement is not an essential element for an approvable I/M program, since affected Federal vehicles are also subject to the same reporting requirements as other affected non-federal vehicles. See 30 TAC 114.50(b)(1) and (7). These rules apply to vehicles operated on Federal facilities as well as to non-Federal vehicles. They in turn require compliance with the Department of Public Safety (DPS) annual vehicle inspection requirements. Section 02.25.00 (Details of Inspection) of the DPS manual for vehicle emissions describes how the inspector must enter required data into the exhaust gas analyzer as prompted by the analyzer. Upon completion of the inspection, the report must be signed by the inspector and forwarded to Vehicle Inspection Records. Therefore, the additional reporting requirement for Federal vehicles is not essential for reporting and compliance purposes. The same purposes are served by the other reporting requirement that applies to all affected vehicles, whether Federal or non-federal.

The March 1996 I/M rules were codified differently than the April and December 2000 rules. The State

submitted a Recodification SIP that we approved on July 1, 1998 (63 FR 35839). That approval acted upon the rule numbering alone and did not approve any new or revised rules into the SIP at that time. The rule numbers that appear in this action are the current recodified rule numbers.

On February 8, 1999, the State submitted a program effectiveness demonstration as required by the NHSDA. We reviewed Texas' 18-month program effectiveness demonstration as required by the I/M provisions of the NHSDA. This Act allowed States to claim full (100%) credit for test and repair I/M networks that previously had been allowed to claim only 50% effectiveness credit. We determined that the demonstration is an acceptable approach to meeting the requirement of the NHSDA, and that the State's emission reduction credit estimate was valid. Therefore, we are approving Texas' program effectiveness demonstration.

What comments did EPA receive in response to the proposed rules?

Comments on the October 3, 1996, proposal were addressed in the Interim Final Rule (62 FR 37138, July 11, 1997).

No comments were received on the January 22, 2001, proposal.

EPA received comments on the June 11, 2001, Notice of Proposed Rulemaking (NPR) from citizens of Brazoria, Fort Bend, and Montgomery Counties under a cover letter from the Brazoria County Criminal District Attorney, and the Department of the Air Force on behalf of the Department of Defense (DoD).

Federal Facility Requirements

Comment: The DoD commented that it is illegal for Federal Facility commanders to report to the State, as required by 30 TAC 114.50(b)(2), and the I/M revision should be disapproved by our agency. This is based on the Department of Justice's opinion which concluded that the authority for States to regulate vehicle use activity in 40 CFR 51.356(a)(4) exceeded the waiver of sovereign immunity set forth in 42 U.S.C. 7418(c) and (d).

Response: Texas revised its regulations to include EPA's Federal facilities' reporting requirement found in 40 CFR 51.356(a)(4). This particular Federal regulation requires an approvable State I/M program to have Federal facilities operating vehicles in the I/M program areas(s) report certification of compliance to the State. This requirement appears to be different than those for other non-Federal groups of affected vehicles. EPA is not requiring States to implement or adopt this reporting requirement dealing with Federal installations within I/M areas at this time. The Department of Justice has recommended to EPA that this particular Federal regulation be revised since it appears to grant States authority to regulate Federal installations in circumstances where the Federal government has not waived sovereign immunity. It would not be appropriate to require compliance with this regulation or to require it for an approvable I/M program, if it is not constitutionally authorized. EPA will be addressing this provision in the future and will review State I/M SIPs with respect to this issue whenever a new rule is final. Therefore, for these reasons, EPA is not approving or disapproving the specific requirements of 30 TAC 114.50(b)(2) which apply to Federal facilities at this time as part of the Texas I/M SIP.

Remote Sensing

Comment: Citizens of Brazoria, Fort Bend, and Montgomery counties questioned the scientific validity of remote sensing.

Response: Remote sensing is a non-intrusive tool used to monitor a portion of the vehicle fleet and identify excessive polluters as a complement to the traditional mobile source emission control program. It is designed to detect potentially high-emitting vehicles. We recognize that remote sensing is not currently as accurate as the tailpipe test in characterizing vehicle emissions, and therefore the remote sensing program requires identified vehicles to submit to a confirmatory tailpipe test for validation of remote sensing results.

Comment: Citizens of Brazoria, Fort Bend, and Montgomery counties asked why commuters from Harris county to surrounding counties are not subject to remote sensing?

Response: The remote sensing program serves two functions in the TMC I/M program. One function is to identify commuters coming into Harris County from adjacent nonattainment counties. The other function is to characterize the emissions of the fleet of on-road vehicles as a whole in the entire nonattainment area, as required by Federal rule. To accomplish this objective, high emitting vehicles are also identified regardless of the nonattainment county in which they are registered. This includes Harris County.

Comment: Citizens of Brazoria, Fort Bend, and Montgomery counties also stated that remote testing is unconstitutional as it involves surveillance and documentation of the citizenry when no crime has been committed and for innocent travel.

Response: The remote sensing program is operated on public highways and roadways on which there is no expectation of privacy. The remote sensing program tracks and documents exhaust plumes from high emitting vehicles, not the drivers of those vehicles. Vehicles are identified through license plates which are put on vehicles for law enforcement purposes, of which remote sensing is an example. Vehicle drivers are never tracked or identified.

Being detected as a high-emitter by remote sensing equipment is not a crime. If a vehicle is detected as a high emitter, the operator is required to bring the vehicle in for an emission test. If the operator chooses to repair the vehicle before the test and the vehicle passes, there are no further conditions to be met. If the vehicle fails the test, the operator must repair the vehicle or qualify for a waiver within a certain period of time. If an operator fails to bring the noncompliant vehicle in for a test or does not follow up after a failed test, only then is the operator subject to penalty under the program.

Vehicle Coverage

Comment: Citizens of Brazoria, Fort Bend, and Montgomery counties questioned why newer vehicles that come from the manufacturer equipped with emission control devices are required to submit to emission control testing, when a tampering check would be sufficient.

Response: The antitampering inspection visually identifies that certain emission control equipment is installed on the vehicle and has not been disconnected. It does not guarantee that this equipment is functioning or functioning properly. There is a small percent of newer vehicles on which emission control equipment fails. Because some newer vehicles do fail, and because vehicles subject to testing are more likely to be better maintained, the amount of emission reduction benefits that can be obtained from inspections is reduced as more model years are exempt from the program. In addition, because newer vehicles are still under manufacturer's warranty, identifying emissions-related problems is viewed as consumer protection and may potentially save the vehicle's owner future repair costs.

Repair Assistance

Comment: Citizens of Brazoria, Fort Bend, and Montgomery counties were concerned about repair assistance for low-income owners of non-compliant vehicles. They stated that when a

vehicle owner is told he cannot drive his non-compliant vehicle, that is an unconstitutional taking.

Response: In order to assist the public, the TMC I/M program includes two waiver options: the minimum expenditure waiver and the individual vehicle waiver. The minimum expenditure waiver is available to those who have made repairs to their vehicle within the established criteria an met the dollar limits established by Federal I/M rule. The individual vehicle waiver is for those who cannot meet emissions standards despite every reasonable effort by the motorist. In addition to these two waivers, the TMC I/M program offers the low-income time extension that allows one test cycle (12 months) for the owner to bring the vehicle into compliance.

Furthermore, the Texas Legislature, in the 2001 session, passed a law that provides the opportunity for participating I/M program counties to offer repair assistance to low-income vehicle owners. Also, when it is not cost-effective to repair a noncompliant vehicle, the program offers a vehicle replacement/scrappage program that will assist low-income vehicle owners to obtain cleaner vehicles. Participation in the vehicle replacement/scrappage program is entirely voluntary, and no vehicle owner will be forced to participate.

EPA's Rulemaking Action

We are granting final full approval of Texas I/M program referred to as the Texas Motorist Choice program pursuant to sections 110 and 182 of the Act, and section 348 of the NHSDA.

Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a ''significant regulatory action'' and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355, May 22, 2001). This action merely approves state law as meeting Federal requirements and imposes no additional requirements beyond those imposed by state law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under state law and does not impose any additional enforceable duty beyond that required by state law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4).

This rule also does not have tribal implications because it will not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000). This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely approves a state rule implementing a Federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. This rule also is not subject to Executive Order 13045 ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA, when it reviews a SIP submission, to use VCS in place of a SIP submission that otherwise satisfies the provisions of the Clean Air Act. Thus, the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 14, 2002. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements.

(See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by references, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: October 15, 2001.

Gregg A. Cooke,

Regional Administrator, Region 6.

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

PART 52—[AMENDED]

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

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

Subpart SS—Texas

2. In § 52.2270 the table in paragraph (c) is amended under Chapter 114 (Reg 4).

a. Under Subchapter A, by adding a new entry for Section 114.2;

b. After Subchapter A, by adding a new Subchapter B entitled ''Subchapter B—Vehicle Inspection and Maintenance'' and individual entries for Sections 114.50, 114.51, 114.52, and 114.53.

The additions read as follows:

§ 52.2270 Identification of plan.

* * * * *

(c) * * *

EPA APPROVED REGULATIONS IN THE TEXAS SIP

State citation	Title/subject	State submittal/approval date	EPA approval date	Explanation
* * * * * * *				
Chapter 114 (Reg 4)—Control of Air Pollution from Motor Vehicles				
* * * * * * *				
Subchapter A: Definitions				
* * * * * * *				
Section 114.2	Inspection and Maintenance Definitions.	04/19/2000	11/14/2001 [Insert Federal Register citation.]	
* * * * * * *				
Subchapter B: Vehicle Inspection and Maintenance				
Section 114.50	Vehicle Emission Inspection Requirements.	12/06/2000	11/14/2001 [Insert Federal Register citation.]	Subsection 114.50(b)(2) is NOT part of the approved SIP.
Section 114.51	Equipment Evaluation Procedures for Vehicle Exhaust Gas Analyzers.	12/06/2000	11/14/2001 [Insert Federal Register citation.]	
Section 114.52	Waivers and Extensions for Inspection Requirements..	12/06/2000	11/14/2001 [Insert Federal Register citation.]	
Section 114.53	Inspection and Maintenance Fees	12/06/2000	11/14/2001 [Insert Federal Register citation.]	
* * * * * * *				

[FR Doc. 01–27587 Filed 11–13–01; 8:45 am]
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Federal Register

Wednesday,
November 14, 2001

Part III

Environmental Protection Agency

40 CFR Part 50

National Ambient Air Quality Standards for Ozone: Proposed Response To Remand; Proposed Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 50

[FRL–7099–1]

RIN 2060–ZA11

National Ambient Air Quality Standards for Ozone: Proposed Response To Remand

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed response to remand.

SUMMARY: On July 18, 1997, in accordance with sections 108 and 109 of the Clean Air Act (Act), EPA completed its review of the national ambient air quality standards (NAAQS) for ozone (O_3) by promulgating revised primary and secondary standards (62 FR 38856; henceforth, ''1997 final rule''). On May 14, 1999, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) remanded the O_3 NAAQS to EPA to consider, among other things, the alleged beneficial health effects of O_3 pollution in shielding the public from the ''harmful effects of the sun's ultraviolet rays.'' 175 F. 3d 1027 (D.C. Cir. 1999). Today's action provides EPA's proposed response to that aspect of the court's remand. As explained more fully below, based on its review of the air quality criteria and NAAQS for O_3 completed in 1997, and its additional assessment of the potential beneficial effects of tropospheric O_3, EPA has provisionally determined that the information linking changes in patterns of ground-level O_3 concentrations likely to occur as a result of programs implemented to attain the 1997 O_3 NAAQS to changes in relevant exposures to UV–B radiation of concern to public health is too uncertain at this time to warrant any relaxation in the level of public health protection previously determined to be requisite to protect against the demonstrated direct adverse respiratory effects of exposure to O_3 in the ambient air. Further, the Administrator notes that it is the Agency's view that associated changes in UV–B radiation exposures of concern, using plausible but highly uncertain assumptions about likely changes in patterns of ground-level ozone concentrations, would likely be very small from a public health perspective. As a result, the revised O_3 NAAQS will remain set at a level of 0.08 parts per million (ppm), with a form based on the 3-year average of the annual fourth-highest daily maximum 8-hour average O_3 concentrations measured at each monitor within an area. The primary standard provides increased protection to the public, especially children and other at-risk populations, against a wide range of health effects directly induced by breathing O_3 in the ambient air, including decreased lung function (primarily in children active outdoors), increased respiratory symptoms (particularly in highly sensitive individuals), hospital admissions and emergency room visits for respiratory causes (among children and adults with pre-existing respiratory disease such as asthma), inflammation of the lung, and possible long-term damage to the lungs. The secondary standard provides increased protection to the public welfare against effects on vegetation, such as agricultural crop loss, damage to forests and ecosystems, and visible foliar injury to sensitive species associated with direct exposure to O_3 in the ambient air. Today's action constitutes EPA's proposed response to the part of the remand of the 1997 O_3 NAAQS by the D.C. Circuit related to whether tropospheric O_3 has a beneficial effect with regard to attenuation of naturally occurring solar radiation. Other issues related to the 1997 O_3 NAAQS are now before the D.C. Circuit for proceedings consistent with the February 27, 2001 opinion of the United States Supreme Court in this case, *Whitman* v. *American Trucking Associations,* 531 U.S. 457 (2001), and are not addressed by today's action.

DATES: Comments on this proposed response must be received by January 14, 2002.

ADDRESSES: Submit written comments (in duplicate if possible) on this proposed response to: Air and Radiation Docket and Information Center (6102), Attn: Docket No. A–95–58, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Electronic comments are encouraged and can be sent directly to EPA at: *A-and-R-Docket@epa.gov.* Comments will also be accepted on disks in WordPerfect in 8.0/9.0 file format. All comments in electronic form must be identified by the docket number, Docket No. A–95–58.

FOR FURTHER INFORMATION CONTACT: Susan Lyon Stone, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency (C539–01), Research Triangle Park, NC 27711; e-mail stone.susan@epa.gov; telephone (919) 541–1146.

SUPPLEMENTARY INFORMATION:

Docket

A docket containing information relating to EPA's review of the O_3 primary and secondary standards (Docket No. A–95–58) is available for public inspection at the EPA's Air and Radiation Docket and Information Center, 401 M Street, SW., Washington, DC 20460 in room M–1500, Waterside Mall (ground floor). This docket incorporates the docket from the previous review of the O_3 standards (Docket No. A–92–17) and the docket established for the air quality criteria document (Docket No. ECAO–CD–92–0786). The docket may be inspected between 8 a.m. and 5:30 p.m. on weekdays, excluding legal holidays. A reasonable fee may be charged for copying.

Availability of Related Information

Certain documents are available from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161. Available documents include:

(1) The Review of the National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information (''Staff Paper'') (EPA–452/R–96–007, June 1996, NTIS #PB–96–203435; $67.00 paper copy and $21.50 microfiche). (Add a $3.00 handling charge per order.)

(2) Air Quality Criteria for Ozone and Other Photochemical Oxidants (''Criteria Document'') (three volumes, EPA/600/P–93–004aF through EPA/600/P–93–004cF, July 1996, NTIS #PB–96–185574; $169.50 paper copy and $58.00 microfiche).

A limited number of copies of other documents generated in connection with the review of the standard, such as documents pertaining to human exposure and health risk assessments and the relationships between ground-level O_3, ultraviolet-B (UV–B) radiation, and health effects, can be obtained from: U.S. Environmental Protection Agency Library (MD–35), Research Triangle Park, NC 27711; telephone (919) 541–2777. These and other related documents are also available for inspection and copying in the EPA docket.

Electronic Availability

The Staff Paper and documents pertaining to human health risk and exposure assessments are available on the Office of Air and Radiation, Policy and Guidance Web site at: *http://www.epa.gov/ttn/oarpg/t1sp.html.* The O_3 NAAQS 1996 proposal and 1997 final rule are available at the same Web site, at: *http://www.epa.gov/ttn/oarpg/t1pfpr.html.*

Children's Environmental Health

This proposed response to the court's remand, reaffirming the 1997 8-hour O_3

NAAQS, specifically takes into account children as the group most at risk to the direct inhalation-related effects of O_3 exposure, and was based on studies of effects on children's health (U.S. EPA, 1996a; U.S. EPA, 1996b) and assessments of children's exposure and risk (Johnson et al., 1994; Johnson et al., 1996a,b; Whitfield et al., 1996; Richmond, 1997). The 8-hour O_3 primary standard protects children's health with an adequate margin of safety from the direct adverse effects associated with inhalation exposures to ground-level O_3, after considering potential indirect beneficial effects of ground-level O_3 related to its attenuation of UV–B radiation and resultant adverse health effects. The public is invited to submit or identify peer-reviewed studies and data, of which EPA may not be aware, that assess results of early life exposure to the direct effects of breathing ground-level O_3 or to changes in UV–B radiation, and associated health effects, that may result from changes in ground-level O_3.

Implementation Activities

When the 8-hour primary and secondary O_3 standards are implemented by the States, utility, automobile, petroleum, and chemical industries are likely to be affected, as well as other manufacturing concerns that emit volatile organic compounds (VOC) or nitrogen oxides (NO_X). The extent of such effects will depend on implementation policies and control strategies adopted by States to assure attainment and maintenance of the standards.

The EPA will develop appropriate policies and control strategies to assist States in the implementation of the 8-hour primary and secondary O_3 NAAQS. The resulting implementation strategies will then be published for public comment in the future.

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I. Background

A. 1997 Revision of the O_3 NAAQS

On July 18, 1997, in accordance with sections 108 and 109 of the Act, EPA completed its review of the NAAQS for O_3 by promulgating revised primary and secondary standards (''1997 final rule''). These standards were based on EPA's review of the available scientific evidence linking direct exposures to ambient O_3 to adverse health and welfare effects at levels allowed by the then current O_3 standards. The revised primary and secondary standards were each set at a level of 0.08 ppm, with an 8-hour averaging time and a form based on the 3-year average of the annual fourth-highest daily maximum 8-hour average O_3 concentrations measured at each monitor within an area. [1] The new primary standard was established to provide increased protection to the public, especially children and other at-risk populations, against a wide range of O_3-induced respiratory health effects due to inhalation exposures, including decreased lung function, primarily in children active outdoors; increased respiratory symptoms, particularly in highly sensitive individuals; hospital admissions and emergency room visits for respiratory causes, among children and adults with pre-existing respiratory disease such as asthma; inflammation of the lung; and possible long-term damage to the lungs. The new secondary standard was established to provide increased protection to the public welfare against direct O_3-induced effects on vegetation, such as agricultural crop loss, damage to forests and ecosystems, and visible foliar injury to sensitive species.

1. Legislative Requirements

Two sections of the Act govern the establishment, review, and revision of NAAQS. Section 108 (42 U.S.C. 7408) directs the Administrator to identify certain pollutants which ''may reasonably be anticipated to endanger public health or welfare'' and to issue air quality criteria for them. These air quality criteria are to ''accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of [a] pollutant in the ambient air * * *.''

Section 109 (42 U.S.C. 7409) directs the Administrator to propose and promulgate ''primary'' and ''secondary'' NAAQS for pollutants identified under section 108. Section 109(b)(1) defines a primary standard as one ''the attainment and maintenance of which, in the judgment of the Administrator, based on [the] criteria and allowing an adequate margin of safety, are requisite to protect the public health.'' A secondary standard, as defined in section 109(b)(2), must ''specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on [the] criteria, [are] requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of [the] pollutant in the ambient air.'' [2]

Section 109(d)(1) of the Act requires periodic review and, if appropriate, revision of existing air quality criteria and NAAQS. Section 109(d)(2) requires appointment of an independent scientific review committee to review criteria and standards and recommend

[1] The form of a standard refers to the air quality statistic that is used to determine whether an area attains the standard.

[2] Welfare effects as defined in section 302(h) (42 U.S.C. 7602(h)) include, but are not limited to, ''effects on soils, water, crops, vegetation, man-made materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.''

new standards or revisions of existing criteria and standards, as appropriate. The committee established under section 109(d)(2) is known as the Clean Air Scientific Advisory Committee (CASAC), a standing committee of EPA's Science Advisory Board.

2. Review of Air Quality Criteria and Standards for O_3

An overview of the last review of the O_3 air quality criteria and standards is presented in section I.C of the preamble to the 1997 final rule. In summary, the 1997 review was initiated in August 1992 with the development of a revised Air Quality Criteria Document for Ozone and Other Photochemical Oxidants (henceforth, the ''Criteria Document''). Multiple drafts of the Criteria Document were reviewed by CASAC and the public, resulting in a final Criteria Document (U.S. EPA, 1996a) that reflected CASAC and public comments.[3] The EPA also prepared a staff paper, Review of National Ambient Air Quality Standards for Ozone: Assessment of Scientific and Technical Information (henceforth, the ''Staff Paper'').[4] Multiple drafts of the Staff Paper were also reviewed by CASAC and the public, resulting in a final Staff Paper (U.S. EPA, 1996b) that reflected CASAC and public comments.[5]

On November 27, 1996 EPA announced its proposed decision to revise the NAAQS for O_3 (61 FR 65716, December 13, 1996; henceforth, ''1996 proposal''), as well as its proposed decision to revise the NAAQS for particulate matter (PM). To ensure the broadest possible public input on these proposals, EPA took extensive and unprecedented steps to facilitate the public comment process, including the establishment of a national toll-free telephone hotline and provisions for electronic submission of comments. The EPA also held several public hearings, participated in numerous meetings across the country, and held two national satellite telecasts to provide direct opportunities for public comment and to disseminate information to the public about the proposed standard revisions. As a result of this intensive effort to solicit public input, over 50,000 comments were received on the proposed revisions to the O_3 NAAQS by the close of the public comment period on March 12, 1997.

The final rule, published on July 18, 1997, presented EPA's rationale for its final decision, and addressed the major issues raised in comments on the 1996 proposal. A comprehensive summary of all significant comments, along with EPA's response to such comments (U.S. EPA, 1997; henceforth, ''Response to Comments''), can be found in the docket for the 1997 rulemaking (Docket No. A–95–58[6]). The 1997 final rule presented EPA's decision to replace the existing 1-hour primary and secondary standards[7] (each set at a level of 0.12 ppm, with a 1-expected-exceedance form, averaged over 3 years[8]) with 8-hour standards, each set at a level of 0.08 ppm, with a form based on the 3-year average of the annual fourth-highest daily maximum 8-hour average O_3 concentrations measured at each monitor within an area (as determined by 40 CFR part 50, appendix I).

B. Ozone NAAQS Litigation and Remand

1. Litigation Summary

Following promulgation of the revised 8-hour O_3 NAAQS, numerous petitions for review of the standards were filed in the D.C. Circuit. *American Trucking Associations* v. *EPA,* No. 97–1441 (ATA). Oral argument was held on December 17, 1998 and the Court of Appeals rendered its opinion on May 14, 1999. *American Trucking Associations* v. *EPA,* 175 F. 3d 1027 (D.C. Cir. 1999). A divided panel found that section 109 of the Act, 42 U.S.C. 7409, as interpreted by EPA in setting the revised O_3 (and PM) NAAQS, effected an unconstitutional delegation of legislative authority. *Id.* at 1033–1040. The court remanded the O_3 standards with instructions that EPA should articulate an ''intelligible principle'' for determining the degree of residual risk to public health permissible in setting revised NAAQS. *Id.* In addition, the court also directed that, in responding to the remand, EPA should consider the alleged beneficial health effects of O_3 pollution in shielding the public from the ''harmful effects of the sun's ultraviolet rays.'' *Id.* at 1051–1053.

In 1999, EPA petitioned the Court of Appeals for rehearing *en banc* on a number of aspects of the court's decision in the *ATA* case. Although the petition for rehearing was granted in part and denied in part, the court declined to review its ruling with regard to the potential beneficial effects of O_3 pollution. *American Trucking Associations* v. *EPA,* 195 F. 3d 4, 10 (D.C. Cir. 1999). The court did note, however, that it ''expressed[ed] no opinion, of course, upon the effect, if any, that studies showing the beneficial effects of tropospheric ozone * * * might have upon any ozone standards * * *'' *Id.* On January 27, 2000, EPA petitioned the Supreme Court for certiorari on the constitutional issue and two other issues, but did not request review of the Court of Appeals ruling regarding the alleged beneficial health effects of O_3. The EPA's petition for certiorari was granted on May 22, 2000; oral argument was subsequently held on November 7, 2000; and an opinion was issued on February 27, 2001. *Whitman* v. *American Trucking Associations,* 531 U.S.457 (2001). The U.S. Supreme Court reversed the judgment of the D.C. Circuit on the constitutional issue, holding that section 109 of the Act does not delegate legislative power to the EPA in contravention of the Constitution, and remanded the case to the D.C. Circuit for proceedings consistent with its opinion. Since EPA did not seek Supreme Court review of the Court of Appeals' decision relating to potential beneficial health effects of O_3, EPA is moving forward to address that aspect of the lower court's remand independently.

2. Remand on Health Benefits Issue

The Court of Appeals' ruling concludes that ''EPA cannot ignore the possible health benefits of ozone.''[9] *American Trucking Associations* v. *EPA,* 175 F. 3d 1027, 1033 (D.C. Cir. 1999). According to the court ''[p]etitioners presented evidence that, according to them, shows the health benefits of tropospheric ozone as a

[3] In a November 28, 1995 letter from the CASAC chair to the Administrator, CASAC advised that the final draft Criteria Document ''provides an adequate review of the available scientific data and relevant studies of ozone and related photochemical oxidants'' (Wolff, 1995a).

[4] The Staff Paper evaluates policy implications of the key studies and scientific information in the Criteria Document, identifies critical elements that EPA staff believes should be considered, and presents staff conclusions and recommendations of suggested options for the Administrator's consideration.

[5] In separate letters from the CASAC chair to the Administrator, CASAC advised that the primary standard and secondary standard sections of the final draft Staff Paper provide ''an adequate scientific basis for making regulatory decisions'' concerning the O_3 standards (Wolff, 1995b, 1996).

[6] This docket incorporates by reference the docket from the previous O_3 NAAQS review (Docket No. A–92–17) and the docket established for the Criteria Document (Docket No. ECAO-CD–92–0876).

[7] These 1-hour O_3 standards were originally set in 1979 (44 FR 8202, February 8, 1979) and reaffirmed in 1993 (58 FR 13008, March 9, 1993).

[8] The 1-hour standards are attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 ppm is equal to or less than one, averaged over 3 years (as determined by 40 CFR part 50, appendix H).

[9] For the reasons discussed in the Response to Comments (U.S. EPA, 1997, pp. 128–135), EPA did not consider in the 1997 review adverse health effects caused by the potential increase in UV–B radiation that could result from reductions in ground-level O_3 brought about by control programs implemented to attain a revised O_3 NAAQS.

shield from the harmful effects of the sun's ultraviolet rays—including cataracts and both melanoma and non-melanoma skin cancer.'' *Id.* at 1051. In rejecting EPA's interpretation of the Act that it need not consider alleged indirect beneficial effects of tropospheric O_3 in shielding the public from potentially harmful, but naturally occurring, UV–B radiation from the sun, the court concluded that ''legally * * * EPA must consider the positive identifiable effects of a pollutant's presence in the ambient air in formulating air quality criteria under section 108 and NAAQS under section 109.'' *Id.* at 1052. As a result, the court directed EPA to ''determine whether * * * tropospheric ozone has a beneficent effect and, if so, then to assess ozone's net adverse health effect.'' *Id.* at 1053. Today's action sets forth EPA's proposed response in that regard.

C. Atmospheric Distribution of O_3 and UV–B Radiation

The focus of the 1997 review of the air quality criteria and standards for O_3 and related photochemical oxidants was on public health and welfare effects associated with direct exposure to ambient levels of O_3 in the lower troposphere, essentially at ground level. People are directly exposed to ground-level O_3 simply by breathing ambient air; similarly, plants are directly exposed through their respiratory processes. Ground-level O_3 is not emitted directly from mobile or stationary sources but, like other photochemical oxidants, commonly exists in the ambient air as an atmospheric transformation product. Ground-level O_3 formation is the result of chemical reactions of VOC, NO_X, and oxygen in the presence of sunlight and generally at elevated temperatures. As a principal ingredient in photochemical smog, elevated episodic concentrations of ground-level O_3 typically occur in the summertime. High concentrations may be found in and downwind of major urban centers as well as across broad regions of elevated precursor emissions. A detailed discussion of atmospheric formation, ambient concentrations, and health and welfare effects associated with direct exposure to O_3 can be found in the Criteria Document and Staff Paper.

Naturally occurring O_3 is found in two sections of the earth's atmosphere, the stratosphere and the troposphere. The demarcation between these two layers varies between about 8 and 18 kilometers (km) above the earth's surface. As illustrated in Figure 1, depicting the vertical profile of O_3, most naturally occurring O_3 (> 90 percent) resides in the stratosphere, with the remaining O_3 (< 10 percent) in the troposphere. The band of O_3 between about 15 and 30 km is commonly known as the ''ozone layer.''

Man-made air pollution has significantly perturbed the natural distribution of O_3 in both layers. It is now widely accepted that emissions of long-lived chlorofluorocarbons (CFCs) and other compounds can deplete the natural O_3 layer in the

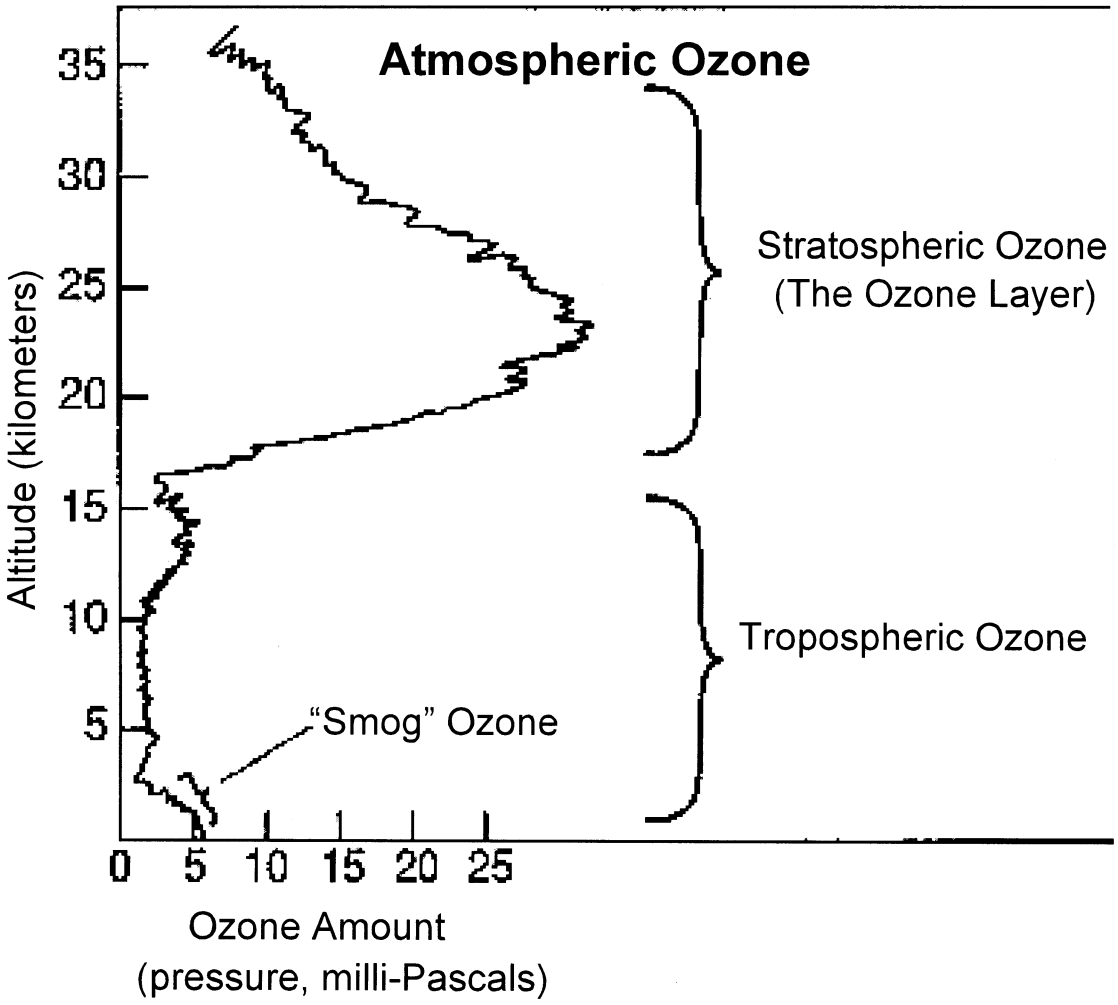

Figure 1. Distribution of Ozone in the Atmosphere (adapted from World Meteorological Organization, 1994, p. 20)

stratosphere. And, as summarized above, much shorter lived emissions of VOC and NO_X can markedly increase ''smog'' O_3 in the lowest portion of the troposphere, which is termed the planetary boundary layer. This fluctuating planetary boundary or ''mixing'' layer of the troposphere can extend as high as 1 to 3 km above the ground. Assuming a fairly high summertime O_3 pollution reservoir of 65 parts per billion (ppb) in a typical 1 km mixing layer, Cupitt (1994) estimated that pollution would add less than 1 percent to the expected total vertical profile of tropospheric and stratospheric O_3 (i.e., ''total column'' O_3) that would occur in the natural environment.

Ozone at ground level and throughout the troposphere is chemically identical to stratospheric O_3. Stratospheric O_3 occurs far too high to present any threat of direct respiratory-related adverse effects to people or plants from ambient ground-level exposures, but is known to provide a natural protective shield from excess radiation from the sun by absorbing UV–B radiation [10] before it penetrates to ground level. Recognizing that exposure to UV–B radiation has been associated with adverse health and welfare effects, EPA and international scientific, regulatory, and legislative organizations have for some time focused on understanding the effects of UV–B radiation and on controlling the man-made pollution that is causing the depletion of the O_3 layer in the stratosphere, as discussed in section I.D below.[11]

During the 1997 review, EPA recognized that tropospheric O_3 also absorbs UV–B radiation (U.S. EPA, 1996a, p. 5–79), such that ground-level O_3 formed by man-made pollution has the potential to provide some degree of additional shielding beyond the natural levels that would otherwise occur in the absence of man-made pollution. The relationship between ground-level O_3 and UV–B radiation, as well as the health effects associated with exposure to UV–B radiation and consideration of the UV–B radiation-related health risks associated with changes in ground-level O_3 are discussed in section II.B below. In response to the remand on the health benefits issue, EPA's assessment of the net adverse health effects of ground-level O_3 is discussed in section II.C below, as a basis for today's proposed decision on the primary O_3 NAAQS, summarized in section II.D below.

D. Related Stratospheric O_3 Program

In the 1970s, scientists first grew concerned that certain chemicals could

[10] UV–B radiation refers to the region of the solar spectrum within the range of wavelengths generally from 280–290 nanometers (nm) at the lower end, to 315–320 nm at the upper end.

[11] For example, in 1977 and again in 1990, Congress added provisions to the Act to address stratospheric O_3 depletion and the resultant increase in exposure to UV–B radiation.

damage the earth's protective stratospheric O_3 layer, and these concerns were validated by the discovery of thinning of the O_3 layer over Antarctica in the southern hemisphere. Because of the risks posed by stratospheric O_3 depletion and the global nature of the problem, leaders from many countries decided to work together to craft a workable solution. Since 1987, over 175 nations have signed a landmark environmental treaty, the Montreal Protocol on Substances that Deplete the Ozone Layer. The Protocol's chief aim is to reduce and eventually eliminate the production and use of man-made O_3 depleting substances, such as CFCs. By agreeing to the terms of the Montreal Protocol, signatory nations ratifying the Protocol—including the United States—commit to take actions to protect the stratospheric O_3 layer and to reverse the damage due to the use of O_3 depleting substances.

In 1990, Congress amended the Act by adding title VI (sections 601–618) to address the issue of stratospheric O_3 depletion.[12] Most importantly, the amended Act required the gradual end to the production of certain chemicals that deplete the O_3 layer.[13] In addition, the Act requires EPA to develop and implement regulations for the responsible management of O_3 depleting substances in the United States. The EPA has developed several regulatory programs under these authorities that include: ending the production and import of O_3 depleting substances (57 FR 33754, July 30, 1992) and identifying safe and effective alternatives (59 FR 13044, March 18, 1994), ensuring that refrigerants and halon fire extinguishing agents are recycled properly (58 FR 28660, May 14, 1993), banning the release of O_3 depleting refrigerants during the service, maintenance, and disposal of air conditioners and other refrigeration equipment (60 FR 40420, August 8, 1995), and requiring that manufacturers label products either containing or made with the most harmful O_3 depleting substances (58 FR 8136, February 11, 1993). Because of their relatively high O_3 depletion potential, several man-made compounds, including CFCs, carbon tetrachloride, methyl chloroform, and halons were targeted first for phaseout. The EPA continues to develop additional regulations for the protection of public health and the environment from effects associated with the depletion of the stratospheric O_3 layer.

Besides implementing and enforcing stratospheric O^3 protection regulations in the U.S., EPA continues to work with other U.S. government agencies and international governments to pursue ongoing changes to the Montreal Protocol and other treaties. These refinements to the Protocol and other treaties are based on ongoing scientific assessments of O_3 depletion that are coordinated by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO), with cooperation from EPA and other agencies around the globe (UNEP, 1998; and WMO, 1998).

In addition to these regulatory and scientific activities, EPA maintains several education and outreach projects to help protect the American public from the health effects of overexposure to ultraviolet (UV) radiation. Chief among these projects is the UV Index, a tool that provides a daily forecast of the next day's likely UV levels across the United States.[14] The UV Index, which EPA launched in partnership with the National Weather Service, serves as the cornerstone of EPA's SunWise School Program, the goal of which is to educate young children and their caregivers about the health effects of overexposure to the sun, as well as simple steps that people can take to avoid overexposure.[15]

II. Rationale for Proposed Response To Remand on the Primary O_3 Standard

Today's action presents the Administrator's proposed response to the remand, reaffirming the 8-hour O_3 primary standard promulgated in 1997, based on: (1) Information from the 1997 criteria and standards review that served as the basis for the 1997 primary O_3 standard, including the scientific information on health effects associated with direct inhalation exposures to O_3 in the ambient air, consideration of the adversity of such effects for individuals, and human exposure and risk assessments (section II.A below); (2) a review of the scientific information in the record of the 1997 review (but not considered as part of the basis for the 1997 standard) on the health effects associated with changes in UV–B radiation, the association between changes in ground-level O_3 and changes in UV–B radiation, and predictions of changes in ground-level O_3 levels likely to result from attainment of alternative O_3 standards[16] (section II.B below); and (3) consideration of the net adverse effects of ground-level O_3, taking into account both direct adverse inhalation-related health effects and the potential for indirect beneficial health effects associated with the shielding of UV–B radiation by ground-level O_3 (section II.C below).

A. Direct Adverse Health Effects From Breathing O_3 in the Ambient Air

This section briefly summarizes information on the direct adverse health effects from breathing O_3 in the ambient air, information as to when those effects become adverse to individuals, and insights gained from human exposure and risk assessments intended to provide a broader perspective for judgments about protecting public health from the risks associated with direct O_3 inhalation exposures.[17]

1. Health Effects Associated With O_3 Inhalation Exposures

Based on information from human clinical, epidemiological, and animal toxicological studies, an array of health effects has been attributed to short-term (1 to 3 hours), prolonged (6 to 8 hours), and long-term (months to years) exposures to O_3. Long-established acute health effects[18] induced by short-term exposures to O_3, generally while individuals were engaged in heavy exertion, include transient pulmonary function responses, transient respiratory symptoms, and effects on exercise performance.[19] The 1997 review included substantial new information on similar effects associated with prolonged exposures at concentrations as low as 0.08 ppm and at moderate levels of exertion. Other health effects associated with short-term or prolonged

[12] Title VI replaced the provisions regarding stratospheric O_3 depletion enacted in 1977. 42 U.S.C. 7671.

[13] Both the Act and the Montreal Protocol, however, provide for limited ''essential use exemptions'' for the continued production and import of very small quantities of CFCs and other O_3 depleting substances needed for certain essential uses, for example, for metered dose inhalers used by people with asthma and other respiratory diseases.

[14] Information about the UV Index is available from the EPA Stratospheric Ozone Hotline at (800) 296–1996 or at http://www.epa.gov/sunwise/uvindex.html.

[15] Information about EPA's SunWise School Program is available at http://www.epa.gov/sunwise/.

[16] In complying with the direction of the Court of Appeals in its remand on the health benefit issue, we have considered the large amount of relevant information in the record of the 1997 review, and in doing so, have based this proposed response on all the information available to the court in reaching its decision.

[17] See the 1996 proposal and 1997 final rule for more complete summaries and the Criteria Document and Staff Paper for more detailed discussion.

[18] ''Acute'' health effects of O_3 are defined as those effects induced by short-term and prolonged exposures to O_3. Examples of these effects are functional, symptomatic, biochemical, and physiologic changes.

[19] The 1-hour O_3 primary NAAQS set in 1979 was generally based on these acute effects associated with heavy exercise and short-term exposures.

O_3 exposures include increased airway responsiveness, susceptibility to respiratory infection, increased hospital admissions and emergency room visits, and transient pulmonary inflammation. The 1997 review also included new information on chronic health effects [20] associated with long-term exposures. This array of effects is briefly summarized below, followed by considerations as to when these physiological effects could become medically significant such that they should be regarded as adverse to the health of individuals experiencing them.

a. Effects of Short-Term and Prolonged O_3 Exposures

(i) Pulmonary function responses. Transient reductions in pulmonary function have been observed in healthy individuals and those with impaired respiratory systems (e.g., asthmatic individuals) as a result of both short-term and prolonged exposures to O_3. The strongest and most quantifiable exposure-response information on such responses has come from controlled human exposure studies, which clearly show that reductions in lung function are enhanced by increased levels of activity involving exertion and by increased O_3 concentrations. Numerous such studies of exercising adults have demonstrated decrements in lung function both for exposures of 1–3 hours at ≥0.12 ppm O_3 and for exposures of 6.6 hours at ≥0.08 ppm O_3, providing conclusive evidence that O_3 levels commonly monitored in the ambient air induce lung function decrements in exercising adults. Further, numerous summer camp studies provide an extensive and reliable data base on comparable lung function responses to ambient O_3 and other pollutants in children and adolescents. The extent of pulmonary function decrements varies considerably among individuals, pulmonary function generally tends to return to baseline levels shortly after short-term exposure, and effects are typically attenuated upon repeated short-term exposures over several days.

(ii) Respiratory symptoms and effects on exercise performance. Various transient respiratory symptoms, including cough, throat irritation, chest pain on deep inspiration, and shortness of breath, have been induced by O_3 exposures of both healthy individuals and those with impaired respiratory systems. Increasing O_3 exposure durations and levels have been shown to elicit increasingly more severe symptoms that persist for longer periods in increasingly larger numbers of individuals. Symptomatic and pulmonary function responses follow a similar time course during an acute exposure and the subsequent recovery, as well as over the course of several days during repeated exposures. As with pulmonary function responses, the severity of symptomatic responses varies considerably among subjects. For some outdoor workers or active people who are highly responsive to ambient O_3, respiratory symptoms may cause reduced productivity, may curb the ability or desire to engage in normal activities, and may interfere with maximal exercise performance.

(iii) Increased airway responsiveness. Increased airway responsiveness is an indication that the airways are predisposed to bronchoconstriction, with a high level of bronchial responsiveness being characteristic of asthma. As a result of increased airway responsiveness induced by O_3 exposure, human airways may be more susceptible to a variety of stimuli, including antigens, chemicals, and particles. For example, healthy subjects after being exposed to O_3 concentrations as low as 0.20 ppm for 1 hour and 0.08 ppm for 6.6 hours have experienced small increases in nonspecific bronchial responsiveness, which usually resolve within 24 hours. Because enhanced response to antigens in asthmatics could lead to increased morbidity (i.e., medical treatment, emergency room visits, hospital admissions) or to more persistent alterations in airway responsiveness, these health endpoints raise concern for public health, particularly for individuals with impaired respiratory systems.

(iv) Increased susceptibility to respiratory infection. When functioning normally, the human respiratory tract, like that of other mammals, has numerous closely integrated defense mechanisms that provide protection from the adverse effects of a wide variety of inhaled particles and microbes. Evidence that inhalation of O_3 may break down or impair these defense mechanisms comes primarily from a very large number of laboratory animal studies with generally consistent results. One of the few studies of moderately exercising human subjects exposed to 0.08 ppm O_3 for 6.6 hours reported decrements in alveolar macrophage function, the first line of defense against inhaled microorganisms and particles in the lower airways and air sacs. While no single experimental human study or group of animal studies conclusively demonstrates that human susceptibility to respiratory infection is increased by exposure to O_3, taken as a whole, the data suggest that acute O_3 exposures can impair the host defense capability of both humans and animals, potentially resulting in a predisposition to bacterial infections in the lower respiratory tract.

(v) Hospital admissions and emergency room visits. Increased summertime hospital admissions and emergency room visits for respiratory causes have been associated with ambient exposures to O_3 and other environmental factors. Numerous studies consistently have shown such a relationship, even after controlling for modifying factors, as well as when considering only O_3 concentrations <0.12 ppm. Individuals with preexisting respiratory disease (e.g., asthma, chronic obstructive pulmonary disease) may generally be at increased risk of such effects, and some individuals with respiratory disease may have an inherently greater sensitivity to O_3. On the other hand, individuals with more severe respiratory disease are less likely to engage in the level of exertion associated with provoking responses to O_3 exposures in healthy humans. On balance, it is reasonable to conclude that evidence of O_3-induced increased airway resistance, nonspecific bronchial responsiveness, susceptibility to respiratory infection, increased airway permeability, airway inflammation, and incidence of asthma attacks suggests that ambient O_3 exposure could be a cause of increased hospital admissions, particularly for asthmatics.

(vi) Pulmonary inflammation. Respiratory inflammation can be considered to be a host response to injury and indicators of inflammation as evidence that respiratory cell damage has occurred. Inflammation induced by exposure of humans to O_3 may have several potential outcomes: (1) Inflammation induced by a single exposure (or even several exposures over the course of a season) could resolve entirely; (2) repeated acute inflammation could develop into a chronic inflammatory state; (3) continued inflammation could alter the structure and function of other pulmonary tissue, leading to disease processes such as fibrosis; (4) inflammation could interfere with the body's host defense response to particles and inhaled microorganisms, particularly in potentially vulnerable populations such as children and older individuals; and (5) inflammation could amplify the lung's response to other agents such as allergens or toxins. Exposures of laboratory animals to O_3

[20] ''Chronic'' health effects of O_3 are defined as those effects induced by long-term exposures to O_3. Examples of these effects are structural damage to lung tissue and accelerated decline in baseline lung function.

for periods ≤8 hours have been shown to result in cell damage, inflammation, and increased leakage of proteins from blood into the air spaces of the respiratory tract. In humans, the extent and course of inflammation and its constitutive elements have been evaluated by using bronchoalveolar lavage (BAL) to sample cells and fluid from the lung and lower airways. Several such studies have shown that exercising humans exposed (1 to 4 hours) to 0.2 to 0.6 ppm O_3 had O_3-induced markers of inflammation and cell damage, with the lowest concentration of prolonged O_3 exposure tested in humans, 0.08 ppm for 6.6 hours with moderate exercise, inducing small but statistically significant increases in these endpoints. Thus, it is reasonable to conclude that repeated acute inflammatory response and cellular damage is potentially a matter of public health concern; however, it is also recognized that most, if not all, of these effects begin to resolve in most individuals within 24 hours if the exposure to O_3 is not repeated. Of possibly greater public health concern is the potential for chronic respiratory damage that could be the result of repeated O_3 exposures occurring over a season or a lifetime.

b. Potential Effects of Long-Term O_3 Exposures

Epidemiologic studies that have investigated potential associations between long-term O_3 exposures and chronic respiratory effects in humans thus far have provided only suggestive evidence of such a relationship. Most studies investigating this association have been cross-sectional in design and have been compromised by incomplete control of confounding variables and inadequate exposure information. Other studies have attempted to follow variably exposed groups prospectively. The findings from such studies conducted in southern California and Canada suggest small, but consistent, decrements in lung function among inhabitants of the more highly polluted communities; however, associations between O_3 and other copollutants and problems with study population loss have reduced the level of confidence in these conclusions. Other epidemiologic studies have attempted to find associations between daily mortality and O_3 concentrations in various cities around the United States. Although an association between ambient O_3 exposure in areas with very high O_3 levels and daily mortality has been suggested by these studies, the data are limited.

In a large number of animal toxicology studies, ''lesions'' [21] in the centriacinar regions of the lung (i.e., the portion of the lung where the region that conducts air and the region that exchanges gas are joined) are well established as one of the hallmarks of O_3 toxicity. Under certain conditions, some of the structural changes seen in these studies may become irreversible. It is unclear, however, whether ambient exposure scenarios encountered by humans result in similar ''lesions'' or whether there are resultant functional or impaired health outcomes in humans chronically exposed to O_3.

The epidemiologic lung function studies generally parallel those of the animal studies, but lack good information on individual O_3 exposure history and are frequently confounded by personal or copollutant variables. Thus, the Administrator recognizes that there is a lack of a clear understanding of the significance of repeated, long-term inflammatory responses, and that there is a need for continued research in this important area. In summary, the collective data on long-term exposure to O_3 garnered in studies of laboratory animals and human populations have many ambiguities. Nevertheless, the currently available information provides at least a biologically plausible basis for considering that repeated inflammation associated with exposure to O_3 over a lifetime may result in sufficient damage to respiratory tissue such that individuals later in life may experience a reduced quality of life, although such relationships remain highly uncertain.

c. Adversity of Effects for Individuals

Some population groups have been identified as being sensitive to effects associated with exposures to ambient O_3 levels, such that individuals within these groups are at increased risk of experiencing such effects. Population groups at increased risk include: (1) Active children and outdoor workers who regularly engage in outdoor activities; [22] (2) individuals with preexisting respiratory disease (e.g., asthma or chronic obstructive lung disease); [23] and (3) some individuals, referred to as ''hyperresponders,'' who are unusually responsive to O_3 relative to other individuals with similar levels of activity or with a similar health status and may experience much greater functional and symptomatic effects from exposure to O_3 than the average individual response.

In making judgments as to when the effects discussed above become significant enough that they should be regarded as adverse to the health of individuals in these sensitive populations, the Administrator has looked to guidelines published by the American Thoracic Society (ATS) and the advice of CASAC. Based on these guidelines, with CASAC concurrence, gradations of individual functional responses (e.g., decrements in forced expiratory volume (FEV_1), increased airway responsiveness) and symptomatic responses (e.g., cough, chest pain, wheeze) were defined, together with judgments as to the potential impact on individuals experiencing varying degrees of severity of these responses.[24]

In judging the extent to which such impacts represent effects that should be regarded as adverse to the health status of individuals, an additional factor considered is whether such effects are experienced repeatedly by an individual during the course of a year or only on a single occasion. While some experts would judge single occurrences of moderate responses to be a ''nuisance,'' especially for healthy individuals, a more general consensus view of the adversity of such moderate responses emerges as the frequency of occurrence increases. Thus, EPA has concluded that repeated occurrences of moderate responses, even in otherwise healthy individuals, may be considered to be adverse since they could well set the stage for more serious illness.

2. Human Exposure and Risk Assessments

To put judgments about health effects that are adverse for individuals into a broader public health context, the Administrator has taken into account the results of human exposure and risk assessments. [25] This broader context

[21] Differing views have been expressed by CASAC panel members regarding the use of the term ''lesion'' to describe the O_3-induced morphological (i.e., structural) abnormalities observed in toxicological studies. Section V.C.8 of the Staff Paper describes and discusses these degenerative changes in more detail.

[22] Exertion increases the amount of O_3 entering the airways and can cause O_3 to penetrate to peripheral regions of the lung where lung tissue is more likely to be damaged.

[23] While not necessarily more responsive than healthy individuals in terms of the magnitude of pulmonary function decrements or symptomatic responses, these individuals may be at increased risk since the impact of O_3-induced responses on already-compromised respiratory systems may more noticeably impair an individual's ability to engage in normal activity or may be more likely to result in increased self-medication or medical treatment.

[24] These gradations and impacts are summarized in the 1996 proposal and discussed in the Criteria Document (Chapter 9) and Staff Paper (section V.F, Tables V–4 and V–5).

[25] See the 1996 proposal (61 FR 65723–6) and 1997 final rule (62 FR 38860–1) for a more complete

Continued

includes consideration, to the extent possible, of the particular population groups at risk for various health effects, the number of people in at-risk groups likely to be exposed to O_3 concentrations shown to cause health effects, the number of people likely to experience certain adverse health effects under varying air quality scenarios, and the kind and degree of uncertainties inherent in these assessments. These quantitative assessments add to our understanding of the overall body of evidence linking O_3 inhalation exposures to adverse health effects. The EPA believes, and CASAC concurred, that the models used in these assessments were appropriate and that the methods used represent the state of the art.

a. Exposure Analyses

The EPA conducted exposure analyses to estimate O_3 exposures for the general population and two at-risk populations, active children who regularly engage in outdoor activity (i.e., ''outdoor children'') and ''outdoor workers,'' living in nine representative U.S. urban areas.[26] Exposure estimates were developed for a baseline year (e.g., 1993, 1994), using monitored O_3 air quality data (i.e., the ''as is'' scenario), as well as for simulated air quality conditions reflecting attainment of the 1-hour NAAQS and various alternative standards. The exposure analyses provide: (1) Estimates of the number of people exposed in each of these population groups to various O_3 concentrations, and the number of occurrences of such exposures, under different regulatory scenarios,[27] which are an important input to the risk assessment conducted for certain adverse health effects (summarized in the next section); and (2) estimates of the frequency of occurrences of O_3 ''exposures of concern,'' [28] which help to put into broader perspective other O_3-related health effects that could not be included in the risk assessment (summarized below).

The computer model used in these analyses, the probabilistic NAAQS exposure model for O_3 (pNEM/O_3), combines information on O_3 air quality with information on patterns of human activity to produce estimates of O_3 inhalation exposures. This model has been developed to take into account the most significant factors contributing to total O_3 inhalation exposure including: the temporal and spatial patterns of ground-level O_3 concentrations throughout an urban area; the variations of O_3 levels within a comprehensive set of ''microenvironments''; [29] the temporal and spatial patterns of the movement of people throughout an urban area; and the effects of variable exertion levels (represented by ventilation rates), associated with a range of activities that people regularly engage in, on O_3 uptake in exposed individuals. The analysis of these key factors incorporated extensive data bases, including, for example, data from ground-level O_3 monitoring networks in these areas, data from numerous research studies that characterized the activity patterns of the general population and at-risk groups as they go about their daily activities (e.g., from indoors to outdoors, moving from place to place, and engaging in activities at different exertion levels),[30] and census data on relevant factors such as age, work status, home location and type of air conditioning system present, and work place location.

The regulatory scenarios examined in the exposure analyses include both 1-hour O_3 standards, at levels of 0.12 ppm (the 1979 NAAQS) and 0.10 ppm, and 8-hour standards, at levels of 0.07, 0.08, and 0.09 ppm, with 1- and 5-expected exceedance forms, i.e., the range of alternative 8-hour standards recommended in the Staff Paper and supported by CASAC as the appropriate range for consideration in this review. These estimates were also used to roughly bound exposure estimates for concentration-based forms of the standards under consideration (e.g., the second- and fifth-highest daily maximum 8-hour average O_3 concentration, averaged over a 3-year period).[31] The estimated exposures are based on a single year of air quality data and reflect what would be expected in a typical or average year in an area just attaining a given standard over a 3-year compliance period; additional analyses were done to estimate exposures that would be expected in the worst year of a 3-year compliance period.

Based on the results of the exposure analyses, children who are active outdoors (representing approximately 7 percent of the population in the study areas) appear to be the at-risk population group examined with the highest percentage and number of individuals likely to experience exposures of concern. Estimated exposures of concern varied significantly across the urban areas examined in this analysis, with far greater variability associated with the 1-hour NAAQS in contrast to the more consistent results associated with alternative 8-hour standards.[32] Despite this variability across areas, general patterns can be seen in comparing alternative standards. For example, for aggregate estimates of the mean percent of outdoor children likely to experience exposures of concern within the seven nonattainment areas: the range of estimates associated with the 1-hour NAAQS is approximately 0.3–24 percent, whereas for alternative 8-hour standards (of the same 1-expected-exceedance form as the 1-hour NAAQS), the ranges are approximately 3–7 percent for a 0.09 ppm standard, 0–1 percent for a 0.08 ppm standard, and essentially zero for a 0.07 ppm standard. Within any given urban area, these

summary of these assessments. A detailed description of the exposure and risk models and their application at the time of the 1996 proposal are presented in the Staff Paper and associated technical support documents (Johnson et al., 1994; Johnson et al., 1996 a,b; McCurdy, 1994a; Whitfield et al., 1996). Following proposal, supplemental exposure and risk analyses were done to analyze the specific standard proposed and alternative standards on which comment was solicited, as well as to refine the procedures used to simulate O_3 concentrations upon attainment of alternative standards (Richmond, 1997).

[26] The areas include a significant fraction of the U.S. urban population, 41.7 million people, the largest urban areas with major O_3 nonattainment problems, and two large urban areas that are in attainment with the 1-hour NAAQS.

[27] Estimates of ''people exposed'' reflect the number of people who experience exposures to a given concentration of O_3, or higher, at least one time during the period of analysis, and estimates of ''occurrences of exposure'' reflect the number of times a given O_3 concentration is experienced by the population of interest.

[28] ''Exposures of concern'' refer throughout to O_3 exposures at and above 0.08 ppm, 8-hour average, at moderate exertion. Such exposures are particularly relevant to a consideration of a number of health effects, discussed in section I.A.1 above, that have been observed in controlled human studies under these exposure conditions, but for which data were too limited to allow for quantitative risk assessment. Exposures at and above 0.12 ppm, 1-hour average, at heavy exertion, are also of concern; however, the focus here is on 8-hour average exposures since exposure estimates are higher for the 8-hour average effects level of 0.08 ppm at moderate exertion than for the 1-hour average effects level of 0.12 ppm at heavy exertion.

[29] The five indoor and two outdoor microenvironments included in this exposure model account for the highly localized variations in O_3 concentrations to which people are exposed that are not directly reflected in the concentrations measured at ambient ground-level O_3 monitoring sites.

[30] See, for example, Tables V–8 and V–9 in the Staff Paper, pp. 83–84.

[31] As discussed in section IV and appendix A of the Staff Paper.

[32] The observed area-to-area variability reflects differences in the shape of air quality distributions and differences in the relationships between 1-hour and 8-hour peak concentrations across urban areas, as well as differences in the percentage of homes with air conditioning (which impacts exposure estimates when individuals are indoors) and the frequency of warm versus cool days (which impacts exposure estimates because different sets of human activity patterns are used for warm versus cool days in the exposure model) across the nine urban areas (Richmond, 1997).

differences in estimated exposures of concern between alternative standards are statistically significant.

In looking more specifically at a comparison between 8-hour standards at the 0.09 ppm and 0.08 ppm levels, aggregate estimates of the mean percentage of outdoor children likely to experience exposures of concern are estimated to be approximately 3 percent at the 0.08 ppm level (ranging from 2–10 percent in the nine areas), increasing to approximately 11 percent at the 0.09 ppm level (ranging from 7–29 percent in the nine areas).[33] Thus, based on these analyses, a standard set at 0.09 ppm would allow more than three times as many children to experience exposures of concern as would a 0.08 ppm standard, with the number of children likely to experience such exposures increasing from approximately 100,000 to more than 300,000 in these nine areas alone. These exposures of concern are judged by EPA to be an important indicator of the public health impacts of those O_3-related effects for which information is too limited to develop quantitative estimates of risk, but which have been observed in humans at a level of 0.08 ppm for 6- to 8-hour exposures. Such effects include increased nonspecific bronchial responsiveness (related, for example, to aggravation of asthma), decreased pulmonary defense mechanisms (suggestive of increased susceptibility to respiratory infection), and indicators of pulmonary inflammation (related to potential aggravation of chronic bronchitis or long-term damage to the lungs).

In taking these observations into account, the Administrator and CASAC recognize the uncertainties and limitations associated with such analyses, including the considerable, but unquantifiable, degree of uncertainty associated with a number of important inputs to the exposure model. A key uncertainty in model inputs results from limitations in the human activity data base that may not adequately account for day-to-day repetition of activities common to children, such that the number of people who experience multiple occurrences of high exposure levels may be underestimated. Small sample size also limits the extent to which ventilation rates associated with various activities may be representative of the population group to which they are applied in the model. In addition, the air quality adjustment procedure used to simulate air quality distributions associated with attaining alternative standards, while based on generalized models intended to reflect patterns of air quality changes that have historically been observed, contains significant uncertainty, especially when applied to areas requiring very large reductions in air quality to attain alternative standards or to areas that are now in attainment with the 1-hour NAAQS.[34]

b. Risk Assessments

The EPA conducted an assessment of health risks for several categories of respiratory effects considering the same population groups, alternative air quality scenarios, and urban areas that were examined in the human exposure analyses described above. The objective of the risk assessment was to estimate to the extent possible the magnitude of risks to population groups believed by EPA and CASAC to be at greatest risk either due to increased exposures (i.e., outdoor children and outdoor workers) or increased susceptibility (e.g., asthmatics) while characterizing, as explicitly as possible, the uncertainties inherent in the assessment. While different risk measures are provided by the assessment, EPA has focused on ''headcount risk'' estimates which include: (1) Estimates of the number of people likely to experience a given health effect and (2) estimates of the number of incidences of a given health effect likely to be experienced by the population group of interest (n.b., some individuals likely experience that given health effect more than once in a year). While the estimates of numbers of people and incidences of effects are subject to uncertainties and should not be viewed as demonstrated health impacts, EPA believes they do represent reasonable estimates of the likely extent of these effects on public health given the available information.

This risk assessment builds upon earlier O_3 risk assessment approaches developed during the previous O_3 NAAQS review. The risk models produce estimates of risk by taking into account: (1) Exposure-response or concentration-response relationships used to characterize various respiratory effects of O_3 exposure; (2) distributions of population exposures upon attainment of alternative standards resulting from the exposure analyses described above; and (3) distributions of 1-hour and 8-hour daily maximum O_3 concentrations upon attainment of alternative standards, developed as part of the exposure analyses. The assessment addresses a number of adverse lung function and respiratory symptom effects as well as increased hospital admissions, as discussed below.

(i) Adverse lung function and respiratory symptom effects. Risk estimates have been developed for several of the respiratory effects observed in controlled human exposure studies to be associated with O_3 exposure for which sufficient quantitative dose-response information was available. These effects include lung function decrements (measured as changes in FEV_1) and pain on deep inspiration (PDI).[35] More specifically, these effects, or health endpoints, are defined not only in terms of physiological responses, but also the amount of change in that response judged to be of medical significance (as discussed in section II.A.3 above). For decrements in FEV_1 responses, risk estimates are provided for the lower end, midpoint, and upper end of the range of response considered to be an adverse health effect (i.e., $\geq$ 10, 15, or 20 percent FEV_1 decrements), while for PDI responses, risk estimates are provided for moderate and severe responses. Although some individuals may experience a combination of responses, risk estimates could only be provided for each individual health endpoint rather than various combinations of functional and symptomatic responses.

The exposure-response relationships used to characterize these functional and symptomatic effects were based on the controlled human exposure studies, and were applied to ''outdoor children,'' ''outdoor workers,'' and the general population.[36] These exposure-response relationships were combined with the results of the exposure analyses, which provided distributions of population exposures estimated to occur upon attainment of alternative standards, in terms of both the number of individuals in the general population, outdoor workers, and outdoor children exposed and the number of occurrences of exposure.

[33] Based on the supplemental analyses that used the third-highest concentration-based form of the standards (Richmond, 1997).

[34] A more complete discussion of uncertainties and limitations is presented in the Staff Paper and technical support documents (Johnson et al., 1996a,b; Richmond, 1997).

[35] Each of the effects is associated with a particular averaging time and, for most of the acute (1- to 8-hour) responses, effects also are estimated separately for specific ventilation ranges [measured as equivalent ventilation rate (EVR)] that correspond to the EVR ranges observed in the studies used to derive exposure-response relationships.

[36] While these studies only included adults aged 18–35, findings from other clinical studies and summer camp field studies in several locations across the U.S. and Canada indicate changes in lung function in healthy children similar to those observed in healthy adults exposed to O_3 under controlled laboratory conditions.

Following from the results of the exposure analyses showing outdoor children to be the population group experiencing the greatest exposures, this population group also has the highest estimated risk in terms of the percent of the population, and the numbers of children, likely to experience the health effects included in the assessment. As expected, the risk estimates exhibit the same general patterns in comparing alternative standards as was observed in the results of the exposure analyses. Estimated risk varied significantly across the urban areas examined, with greater variability associated with the 1-hour NAAQS than with alternative 8-hour standards, and, within any given urban area, the differences in risk estimated for the various 1-hour and 8-hour standards analyzed were statistically significant.

In looking more specifically at a comparison between 8-hour standards at the 0.09 ppm and 0.08 ppm levels, aggregate estimates of the number of outdoor children in the nine areas likely to experience moderate (≥ 15 percent) and large (≥ 20 percent) FEV1 decreases and moderate or severe PDI are summarized in the 1997 final rule.[37] For example, for large FEV_1 decreases (≥ 20 percent), approximately 2 percent of outdoor children (58,000 children) would likely experience this effect one or more times per year (100,000 occurrences) at the 0.08 ppm standard level, increasing to approximately 3 percent of outdoor children (97,000 children and 220,000 occurrences) at the 0.09 ppm standard level. Based on this assessment, a standard set at 0.09 ppm would allow approximately 40–65 percent more outdoor children to experience these functional and symptomatic effects than would a 0.08 ppm standard, and approximately 70–120 percent more occurrences of such effects in outdoor children per year.

In considering these observations, the Administrator and CASAC have recognized that there are many uncertainties inherent in such assessments, not all of which can be quantified. Some of the most important caveats and limitations in this assessment include: (1) The uncertainties and limitations associated with the exposure analyses discussed above; (2) the extrapolation of exposure-response functions, consistent with CASAC's recommendation, that projects some biological responses below the lowest-observed-effects levels to an estimated background level of 0.04 ppm; and (3) the inability to account for some factors which are known to affect the exposure-response relationships (e.g., assigning children the same symptomatic response rates as observed for adults and not adjusting response rates to reflect the increase and attenuation of responses that have been observed in studies of lung function and symptoms upon repeated exposures).[38]

(ii) Excess respiratory-related hospital admissions. A separate risk assessment was done for increased respiratory-related hospital admissions as reported in several epidemiologic studies.[39] The assessment looked only at one urban area, New York City, for which adequate air quality information was available to assess population risk. Increased respiratory-related hospital admissions for individuals with asthma were modeled using a probabilistic concentration-response function based on the results of an epidemiologic study in New York City (Thurston et al., 1992) and estimated distributions of daily maximum 1-hour average O_3 concentrations upon attainment of alternative standards at various monitors in New York City (developed as part of the exposure analysis discussed above).[40] The resulting risk estimates are for excess respiratory-related hospital admissions (i.e., those attributable to O_3 concentrations above an estimated background O_3 level of 0.04 ppm) for asthmatic individuals over an O_3 season.

Similar to the risk assessment discussed above for lung function and respiratory symptom effects, reductions in hospital admissions for respiratory causes for asthmatic individuals and the general population are estimated to occur with each change in the level of alternative 8-hour standards from 0.09 ppm to 0.07 ppm. In looking more specifically at a comparison between 8-hour standards at 0.09 ppm and 0.08 ppm levels, a standard set at 0.09 ppm is estimated to allow approximately 40 more excess hospital admissions of asthmatics within an O_3 season in New York City for respiratory causes as compared to a 0.08 ppm standard, which represents approximately a 40 percent increase in excess O_3-related admissions, but only approximately a 0.3 percent increase in total admissions of asthmatics. The EPA believes that while these numbers of hospital admissions are relatively small from a public health perspective, they are indicative of a pyramid of much larger numbers of related O_3-induced effects, including respiratory-related hospital admissions among the general population, emergency and outpatient department visits, doctors visits, and asthma attacks and related increased use of medication that are important public health considerations.

In taking these observations into account, the Administrator recognizes the uncertainties and limitations associated with this assessment. These include: (1) The inability at this time to quantitatively extrapolate the risk estimates for New York City to other urban areas; (2) uncertainty associated with the underlying epidemiologic study from which the concentration-response relationship used in the analysis was drawn; and (3) uncertainties associated with the air quality adjustment procedure used to simulate attainment of alternative standards for the New York City area.[41]

B. Potential Indirect Beneficial Health Effects Associated With Ground-level O_3

This section is drawn from information in the record of the 1997 review with regard to the effect of ground-level O_3 on the attenuation of UV–B radiation and potential associated health benefits. All relevant record information was reviewed, including EPA documents, published articles, oral testimony at public meetings, and written comments submitted during the rulemaking. This section summarizes information on the health effects associated with UV–B radiation exposure and the relationship between ground-level O_3 and UV–B radiation, and evaluates estimates of UV–B radiation risks that have been attributed to reductions in ground-level O_3 projected to result from attainment of the 1997 O_3 NAAQS.

1. Health Effects Associated With UV–B Radiation Exposure

It has long been recognized that exposure to sunlight has a positive effect on health. Sunlight is essential to the human body because of its biosynthetic action. More specifically, UV radiation induces the conversion of ergosterol and other vitamin precursors

[37] Based on the supplemental analyses that used the third-highest concentration-based form of the standards (Richmond, 1997).

[38] A more complete discussion of assumptions and uncertainties is presented in the Staff Paper and the technical support documents (Whitfield et al., 1996; Richmond, 1997).

[39] Several studies, mainly conducted in the northeastern U.S. and southeastern Canada have reported excess daily respiratory-related hospital admissions associated with elevated O_3 levels within the general population and, more specifically, for individuals with asthma.

[40] The model is described in more detail in Whitfield et al. (1996) and results from the supplemental analysis are presented in Richmond (1997).

[41] A more complete discussion of these uncertainties and limitations is presented in the Staff Paper and technical support documents (Whitfield et al., 1996; Richmond, 1997).

present in normal skin to vitamin D, an essential factor for normal calcium deposition in growing bones.[42] Sunlight is also an important controlling agent of recurrent daily physiological alterations known as circadian rhythms. Lighting cycles have been shown to be important in regulating several types of endocrine function. However, it is also recognized that excessive exposure to solar radiation can result in adverse health effects, which are particularly associated with UV–B radiation.

The following summary of information on the adverse human health effects associated with exposure to UV–B radiation focuses on the three major organ systems whose tissues are commonly exposed to solar radiation: the skin, eyes, and immune system.[43] It is these three systems that are potentially subject to damage from increased UV–B radiation as a result of the absorption of solar energy by molecules present in the cells and tissues of these organs. The biologically effective dose of radiation that actually reaches target molecules generally depends on the duration of exposure at particular locations, time of day, time of year, behavior (i.e., ''sun avoidance,'' which is an intentional decrease in exposure, for example, by using clothing, sunscreens, and sunglasses to shield from solar radiation; and ''sun seeking,'' which is an intentional increase in exposure to solar radiation, for example, by sunbathing), and, for the skin, characteristics that include pigmentation and temporal variations (e.g., changes in the pigmentation due to tanning).

a. Effects on the Skin

The most common form of solar damage to the skin is sunburn. Susceptibility to sunburn and the ability to tan are the basis for a classification system of six skin phenotypes. The most sensitive individuals (skin type I) are very light-skinned, with red or blonde hair and blue or green eyes (U.S. EPA, 1987, ES–33). The most resistant individuals (skin type VI) are darkly pigmented even without exposure to solar radiation. Susceptibility to sunburn may be a risk factor for skin cancer.

Among light-skinned populations, skin cancer is among the most common kinds of cancer. The three types of skin cancer that have been associated with exposure to solar radiation include two common types of nonmelanoma skin cancers, squamous cell carcinoma (SCC) and basal cell carcinoma (BCC), and melanoma, a far less common form of cancer. Various types of evidence support the conclusion that increases in solar radiation in general, and UV–B radiation in particular, increase skin cancer morbidity and mortality. Epidemiological studies are the primary source of information providing evidence of associations between UV–B radiation and the occurrence of skin cancer in humans. In addition, experimental studies on animals, and animal and bacterial cells, have helped define the action spectra for particular biological endpoints, which describe how effective radiation of specific wavelengths is in causing a biological effect, and also the possible mechanisms by which damage can occur.

(i) Nonmelanoma skin cancer (NMSC). Based on surveys, particularly in the U.S. and Australia, prolonged exposure to the sun is considered to be the dominant risk factor for NMSC (U.S. EPA, 1987, ES–33). It has been observed that NMSC tends to develop on sites that are most frequently exposed to the sun (e.g., head, face, and neck). Outdoor workers, who are subject to greater exposure to solar radiation, tend to have higher incidence rates of NMSC. A latitudinal gradient exists for the flux of UV–B radiation (i.e., the amount of radiation transmitted through the atmosphere), with fluxes generally higher in lower latitudes. A similar latitudinal gradient is generally seen in incidence rates of NMSC. Skin pigmentation provides a protective barrier that reduces the risk of developing NMSC, such that light-skinned individuals, who are more susceptible to sunburn and have blue or green eyes, are more likely to develop NMSC. The risk of NMSC is highest among individuals with a genetic predisposition to abnormal skin pigmentation (e.g., people with xeroderma pigmentosum).

Both types of NMSC result from the malignant transformation of keratinocytes, the major structural cells of the skin. Cumulative long-term exposure to UV radiation is the exposure of concern for both types of NMSC. More specifically, the incremental increase in cumulative lifetime exposure to UV–B radiation is the metric used to estimate the risk of increased incidence of NMSC (U.S. EPA, 1987, ES–3). Epidemiological evidence, however, also indicates that exposure to solar radiation may play different roles in the etiology of SCC and BCC. In particular, SCC is more likely to develop on sites receiving the highest cumulative UV radiation doses (e.g., nose), and the development of SCC is more strongly associated with cumulative exposure to UV radiation. Relative to SCC, BCC is more likely to develop on sites that are not normally exposed to the sun, such as the trunk. For a given cumulative level of exposure to solar radiation, the risk of developing SCC may be greater than the risk of developing BCC.

Results from experimental studies suggest that UV–B radiation may be the most important component of solar radiation that causes variations in the incidence of NMSC. UV radiation has been demonstrated to produce nonmelanoma skin tumors in animals, and UV–B wavelengths have been shown to be the most effective part of the UV spectrum in producing these tumors. Mechanisms by which this damage can occur have been demonstrated in laboratory animals. UV–B radiation has been shown to cause a variety of DNA lesions, to induce neoplastic transformation in cells, and to be a mutagen in both animal and bacterial cells.

Dose-response relationships for NMSC are generally estimated in terms of a biological amplification factor (BAF), which is defined as the percent change in tumor incidence that results from a 1 percent change in UV–B radiation. While there is considerable uncertainty in such estimates, results from several studies have produced an overall BAF range that is 1.8 to 2.85 for all nonmelanoma skin tumors (U.S. EPA, 1987, ES–34). The BAF estimates are generally higher for males than females and for SCC than BCC, and generally increase with decreasing latitude. Key uncertainties in these estimates include, for example, uncertainties in the actual doses of UV–B radiation received and in the underlying baseline incidence rates in populations. Additional uncertainty is introduced in estimating the change in mortality from NMSC associated with changes in UV–B radiation, reflecting in part discrepancies of reporting between death certificates and hospital diagnoses. Based on published estimates, rates of metastasis among SCCs and BCCs varied by one to two orders of magnitude, with rates estimated to be approximately 2 to 20 percent for SCC and 0.0028 to 0.55 percent for BCC. The overall fatality rate for NMSC has been estimated to be approximately 1 to 2 percent, with three-fourths to four-fifths of the deaths

[42] Evidence of this effect is found in Galindo et al., (1995), who reported on the increased risk of rickets associated with decreased incident UV–B radiation due to air pollution.

[43] The reference document available in the record for the information in this section is the EPA document ''Assessing the Risk of Trace Gasses that Can Modify the Stratosphere'' (U.S. EPA, 1987.)

attributable to SCC (U.S. EPA, 1987, ES–34).[44]

(ii) Melanoma. Melanoma is a serious, life-threatening skin cancer that is far rarer and generally much more aggressive than NMSC. Melanoma is a malignant cancer of the melanocytes, the pigment producing cells in the skin. While the development of melanoma is associated with cumulative lifetime exposure to UV radiation, there are several histological forms of melanoma that vary in their relationships to exposure to solar and UV–B radiation, sites on the body, skin pigmentation, and possibly in precursor lesions. Assessment of incidence by type is not consistent among registries, thus complicating attempts to evaluate the relationship between melanoma and solar radiation (U.S. EPA, 1987, ES–36).

The relationship between exposure to UV–B radiation and melanoma is not as clear as the relationship between exposure to UV–B radiation and NMSC. The EPA (1987) noted limitations in the evidence linking solar radiation to melanoma. For example, no animal models were identified in which exposure to UV–B radiation experimentally induces melanoma, and no in vitro models for malignant transformation of melanocytes. Despite these limitations, EPA (1987) recognizes that a large array of evidence does support the conclusion that solar radiation is one of the causes of melanoma. Melanin, the principal pigment in the skin, effectively absorbs UV radiation, such that darker skin provides more protection from UV radiation. Light-skinned races, whose skin contains less protective melanin, have higher incidence and mortality rates from melanoma than do dark-skinned races. Lighter members of light-skinned races, including those who are unable to tan or who tan poorly, have a higher incidence of melanoma than do darker members of light-skinned races. In addition, as was the case in NMSC, the risk of melanoma is highest among individuals with a genetic predisposition to abnormal skin pigmentation (e.g., people with xeroderma pigmentosum).

Sun exposure seems to induce freckling, which is an important risk factor for melanoma, and sun exposure leading to sunburn apparently induces melanocytic moles, which are also a risk factor for melanoma. Additional evidence suggests that melanoma risk may be associated with childhood sunburn. However, other evidence suggests that childhood sunburn may be a surrogate for an individual's pigmentation characteristics or be related to mole development, rather than being a separate risk factor (U.S. EPA, 1987, ES–37).

Most studies that have used latitude as a surrogate for sunlight or UV–B exposure have found an increase in melanoma incidence or mortality correlated with proximity to the equator. Other evidence, however, creates uncertainty about the relationship between solar radiation and melanoma. Some ecologic epidemiology studies, conducted primarily in Europe or in countries close to the equator, have failed to find a latitudinal gradient for melanoma. In addition, outdoor workers generally have lower incidence and mortality rates from melanoma than indoor workers, which appears to be incompatible with the hypothesis that the cumulative dose from exposure to solar radiation causes melanoma. Unlike SCC and BCC, most melanoma occurs on sites of the body that are not habitually exposed to sunlight. This evidence suggests that exposure to solar radiation, or UV–B, is not solely responsible for variations in the incidence and mortality from melanoma (U.S. EPA 1987, ES–37).

Considering the available evidence, EPA (1987) concluded that UV–B radiation is a likely component of solar radiation that causes melanoma, either through the initiation of tumors or through suppression of the immune system. The EPA (1987) also recognized that significant uncertainties exist in characterizing associations between solar radiation and melanoma, including the appropriate action spectrum to be used in estimating doses, the best functional form for a dose-response relationship, and the best way to characterize dose (e.g., peak value, cumulative summer exposure).

b. Effects on the Eyes

Evidence suggests that adverse effects on the eye are associated with exposure to UV–B radiation. Effects likely include increases in cataract incidence or severity and increased incidence of retinal disorders and retinal degeneration. Cataracts are characterized by the gradual loss of transparency of the lens due to the accumulation of oxidized lens proteins. Many possible mechanisms exist for the formation of cataracts, and UV–B radiation may play an important role in some mechanisms. Epidemiological and laboratory evidence indicates that the exposure of concern in the development of cataracts is the cumulative lifetime exposure to UV–B radiation.

Although the cornea and aqueous humor of the human eye screen out significant amounts of ultraviolet-A (UV–A) and UV–B radiation, nearly 50 percent of radiation at 320 nm is transmitted to the lens. Transmittance declines substantially below 320 nm, so that less than 1 percent is transmitted below approximately 290 to 300 nm. However, results of laboratory experiments on animals indicate that short-wavelength UV–B (i.e., below 290 nm) is perhaps 250 times more effective than long-wavelength UV–B (i.e., 320 nm) in inducing cataracts. Thus, while epidemiological studies indicate that the prevalence of human cataracts varies with latitude and UV radiation in general (U.S. EPA, 1987, ES–40), significant uncertainty exists about the action spectrum to be used in any estimation of dose associated with variations in solar radiation.

c. Effects on the Immune System

Information on the effects of UV–B radiation on the immune system comes primarily from laboratory animal studies. High doses of UV radiation cause a depression in systemic hypersensitivity reactions, resulting in an inability of the animal to respond to an antigen presented to the animal through unirradiated skin, whereas relatively lower doses cause a depression in local contact hypersensitivity, resulting in an inability to respond to an antigen presented through UV-irradiated skin. Both of these immunosuppressive effects of UV radiation have been found to reside almost entirely in the UV–B portion of the solar spectrum (U.S. EPA, 1987, ES–39).

Information about the effects of UV radiation on the human immune system, however, is much more limited. Preliminary studies indicate the UV radiation may prevent an effective immune response to micro-organisms that infect via the skin. Because UV–B can produce systemic immunologic change, the possibility exists that changes in UV–B radiation exposure could result in effects on diseases whose control requires systemic rather than local immunity. Without more complete information from laboratory or epidemiological studies, the nature of an exposure of concern cannot be estimated. Immunologic studies have not assessed the effects of long-term, low-dose UV–B irradiation, such that the magnitude of risk from this type of exposure cannot be assessed (U.S. EPA, 1987, ES–40).

[44] More recent estimates or mortality rates from NMSC may be found on the American Cancer Society's Web site *http://www.cancer.org,* under cancer type ''Skin, Nonmelanoma,'' then under ''Nonmelanoma Skin Cancer—Overview.''

2. Relationship Between Ground-level O_3 and UV–B Radiation Exposure

a. Relevant Atmospheric Factors

The relationships between ground-level O_3 and UV radiation occur in the context of a much larger dynamic of the earth's atmospheric systems. The sun is, of course, overwhelmingly the main source of a wide band of electromagnetic radiation, including the ultraviolet. The total atmosphere blocks a significant portion of the range of this incoming solar radiation before it reaches ground level, including much of the more energetic wavelengths that are shorter than visible light. The UV spectrum (100–400 nm) is comprised of UV–C (100–280 nm), UV–B (280–320 nm), and UV–A (320–400 nm). The most energetic component, UV–C, is completely blocked or absorbed by oxygen (O_2) and O_3 in the atmosphere. The middle range, UV–B, is efficiently but not completely absorbed by total column O_3. Ultraviolet-A radiation (320–400 nm) in wavelengths above 350 nm is not absorbed by O_2 or O_3, nor is visible light (4000–900 nm)[45] (U.S. EPA, 1987, ES 35). The absorption of UV–B by O_3 varies across the spectrum, being much stronger for wavelengths of 300 nm and below than for the upper region near 320 nm (Cupitt, 1994). Because the amount of atmospheric O_3 traversed by sunlight varies with the sun angle, atmospheric absorption is more complete in winter months and both early and late in the day, as compared to the absorption around mid-day near the summertime solar zenith. Therefore, a decrease in total column O_3 from naturally occurring conditions is of greater concern during times of higher sun angles, and for the more energetic portion of the UV–B range.

The underlying annual and diurnal patterns of UV–B penetration to the ground layer are driven primarily by three factors: (1) The change in apparent sun angle with the surface that occurs as the earth travels around the sun; (2) the diurnal change in apparent sun angle caused by the earth's rotation; and (3) the solar/meteorologically driven annual change in the amount of O^3 in the stratosphere. Stratospheric O_3 over U.S. latitudes shows a characteristic peak in the spring months, falling steadily thereafter through summer and fall (Fishman *et al.,* 1990; Frederic *et al.,* 1993). The combination of the annual sun cycle and the stratospheric O_3 cycle means that peak UV–B radiation reaching the troposphere tends to occur in late June to early July, and falls steadily thereafter (Frederick *et al.,* 1993). The annual peak in ground-level O_3 concentrations, which extends in most areas from May through September, generally overlaps the UV–B radiation peak (e.g., U.S. EPA, 1996a, Figure 4–23).

As noted in the EPA's SunWise Program communications, UV–B radiation exposure is of most concern between the hours of 10 am and 4 pm, peaking around mid-day. Ground-level O_3 patterns vary, but in urban areas, summertime peaks tend to occur between noon and 4 pm (U.S. EPA, 1996a, Section 4.4). This obviously overlaps with peak incoming UV–B radiation. The pattern of vertical mixing in the atmosphere is such that morning ground-level measurements probably do not accurately reflect ''mixing-layer'' concentrations (U.S. EPA, 1996a, p. 3–44).[46]

The relationship between ground-level O_3 and solar radiation, including UV–B radiation, is complex and mediated by a number of atmospheric factors. It is not limited to the simple absorption of energy. At a fundamental level, the variation in apparent solar radiation is a primary cause of meteorological fluctuations that strongly influence the build-up and transport of anthropogenic air pollution. Further, as discussed in Chapter 3 of the Criteria Document, UV–B radiation that penetrates the stratosphere to the mixing layer plays a key role in the processes leading to the formation of photochemical smog, including the formation of ground-level O_3. In fact, increased penetration of UV–B radiation to the troposphere due to stratospheric O_3 depletion would likely increase ground-level concentrations of O_3 in most urban and many rural areas of the U.S. (U.S. EPA, 1996a, p. 3–5). The chain of indirect events triggered by increased penetration of UV–B radiation can result in both increases and decreases in aerosol and acid rain formation (U.S. EPA, 1996a; pp. 3–38 to 39), with attendant further feedbacks through heterogeneous chemistry and aerosol scattering of UV–B radiation. All of these complex processes could, under varying conditions, increase or decrease the amount of UV–B radiation that actually reaches ground level relative to an unperturbed case. The reactions can further affect the concentrations of radiatively important substances such as methane, ozone, and particles, and could affect local, regional, and global climate.

Setting aside the direction and magnitude of these complex indirect effects of UV–B radiation penetration on ground-level air pollution, and assuming appropriate sun angles and cloud density, the marginal effect of ground-level O_3 on the absorption of UV–B radiation by the earth's atmosphere can be considered separately. Because of increased scattering of incident UV–B radiation by the denser layer air molecules, droplets, and particles nearer the surface, tropospheric O_3 can absorb somewhat more UV–B radiation than an equal amount of O_3 in the stratosphere (Brühl and Creutzen, 1989). The extent to which this increase in unit effect occurs depends on the relative concentrations and character of aerosols in the troposphere as compared to the stratosphere.

A further consideration is the relative effectiveness of ground-level O_3 in absorbing those spectra of UV–B radiation wavelengths most likely to cause health effects. The ''effective dose'' of UV–B radiation can be expressed as a function of two factors, the intensity of radiation (by wavelength) reaching the earth's surface and the action spectrum. The wavelength-dependent effect of O_3 on reducing the intensity of radiation in the UV–B range is summarized above. The action spectrum describes how effective radiation at particular wavelengths is at causing a particular biological effect or a response in an instrument. Action spectra allow the estimation of the potential effects of simultaneously changing radiation at different wavelengths by different amounts, as happens with changing O_3 levels. Laboratory and field studies have been used to estimate and adopt action spectra conventions for various biological endpoints (e.g., Madronich, 1992). As noted above, uncertainty exists about the action spectra as well as how to specify appropriate dose metrics for particular health endpoints. Even estimates of the range of wavelengths considered to be generally biologically active vary within the UV–B radiation spectrum. These different action spectra have different sensitivities to changes in total column O_3, which are formalized as numerical radiation amplification factors (RAF).[47] In general, a 1 percent change in total column O_3 will produce greater than a 1 percent change (e.g., 1.1

[45] The shorter (blue) wavelengths of visible light are, however, scattered by atmospheric gases, which is responsible for the ''blue'' sky characteristic of days with low pollution and less than full cloud cover.

[46] The mixing layer (relevant to the vertical ''thickness'' of ground-level O_3) develops and grows in height through the day.

[47] The RAF is defined as the percent increase in effective dose divided by the percent decrease in total column zone (Madronich, 1992).

to 1.8 percent) in effective radiation dose for particular effects.

Nevertheless, as noted above, typical summertime ground-level O_3 pollution in the eastern U.S. is less than 1 percent of total column O_3. Even considering the relative effectiveness of ground-level O_3 in reducing UV–B radiation and the amplification of effective dose, such pollution could add a few percent at most to naturally occurring biologically effective UV–B radiation shielding.[48] Viewed from one perspective and holding all other factors constant, the assumed typical O_3 pollution level is providing some ''improvement'' or incremental UV–B radiation shielding above the natural conditions that would otherwise exist in the mixing layer. It should also be noted that, if typical summertime O_3 levels were assumed to approximate the estimated continental background of about 40 ppb for daylight hours (U.S. EPA, 1996b, p. 20–21), this too would represent an ''improvement'' over the natural conditions that would exist in the mixing layer without the influence of international transport of O_3.[49]

The extent to which changes in ground-level O_3 concentrations would translate into changes in UV–B radiation-related health effects in various locations cannot, however, be adequately viewed by reference to uniform assumptions applicable for specific sun angle, latitude, time of day, cloud cover, and the presence of other pollutants. [50] In the real world, all of these factors vary with location, season, meteorology, and time of day. Moreover, the complex causal relationships noted above among all of these factors mean that neither static calculations holding other factors constant (e.g., Cupitt, 1994) nor simple empirical associations between measured ground-level O_3 and UV–B radiation (e.g., Frederick et al., 1993) provide an adequate basis for assessing the ''net'' shielding associated with control strategy driven changes in ground-level pollution in various locations over an extended time period. Moreover, as for the direct effects of O_3, the extent of resultant UV–B radiation-related health effects is also heavily dependent on the variation of these physical changes superimposed on the activity patterns and other factors that determine population exposures and sensitivities to UV–B radiation, and on the extent to which significant biological responses can be attributed in part to episodic peak exposures as well as to long-term cumulative exposures.

Assessing the effective O_3 layer shielding is considerably more difficult for ground-level O_3 than for stratospheric O_3 because of its far greater spatial and temporal variability and the much smaller contribution made by ground-level O_3. Some insights into the relative variability of these two layers are provided in Fishman et al. (1990), which compares satellite measurements of stratospheric O_3 with ''residual'' tropospheric O_3, a measure that actually excludes the lowest portion of the ground-layer O_3 in the mixing layer. For the summer months, the long-term spatial variability in the amount of ozone in the stratosphere across the lower 48 U.S. States is about 7 percent (Figure 8c), while the variability in the tropospheric ''residual'' is nearly 4 times greater, at about 25 percent (Figure 9c). By comparison, the spatial variability in ground-level O_3 measurements across regions and cities in the U.S. is far greater (U.S. EPA, 1996a, Chapter 4) reaching 200 percent and higher for comparable long-term measurements. Within an area as small as the Los Angeles basin alone, for example, the median ground-level 8-hour O_3 values in different locations varied by more than a factor of 2 (Table 28; Johnson et al., 1996c). The satellite information also shows a marked contrast in the seasonal variations in O_3 for these two layers. The variation in the summer/winter stratospheric O_3 column over the U.S. is only about 2 to 4 percent, while the variation in seasonal ''residual'' tropospheric O_3 is about 50 to 80 percent (Figures 8a,c;9a,c; Fishman et al., 1990). Again, the variability is even greater for ground-level measurements (e.g., U.S. EPA, 1996a, Figure 4–23; Frederick et al., 1993)

Although Fishman et al. (1990) do not compare daily variations in stratospheric O_3 above the U.S., it is reasonable to conclude that the spatial and annual/seasonal temporal stability evidenced by this large stratospheric reservoir would result in far more stable day-to-day and diurnal patterns as compared to ground-level O_3. The high variability of daytime O_3 concentrations for these temporal scales is amply documented in the Criteria Document (U.S. EPA, 1996a, Figure 4–23).

The spatial and temporal stability of the expansive and deep stratospheric O_3 reservoir means that assessments of the effects of long-term declines or restoration can reasonably assume that short-term and local-scale variations in important factors such as cloud cover, other pollutants, temperature, and activity patterns beneath this layer will tend to ''even out'' over time, permitting more confidence in the magnitude and direction of such assessments. In contrast to the stability of the stratospheric O_3 layer, the large spatial and day-to-day variability outlined above for ground-level O_3 means that geographical or temporal variations in other factors such as weather, other pollutants, and human activity patterns may not ''even out'' in particular areas under assessment. Moreover, it is reasonable to assume that the variations in ground-level O_3 are not independent of the variations in many of these other factors. Such variability may have a substantial impact on the outcome of any assessment of the relative effects of a change in ground-level O_3 strategies or standards. This, combined with the many local- and regional-scale interactions among all of these factors, would complicate any such ground-level O_3 assessment.

b. Factors Related to Area-Specific Assessment

An enumeration of factors that would be important in assessing the potential UV–B radiation-related consequences of a more stringent O_3 NAAQS in any geographical area serves to illustrate the complexities discussed above. Analogous to the factors that were important in the respiratory effects exposure and risk assessments discussed above section II.A.2, these UV–B radiation-related factors include: the temporal and spatial patterns of ground-level O_3 concentrations throughout a geographic area where reductions are likely to occur, and the variations in O_3 concentrations within a comprehensive set of ''microenvironments'' relevant to UV–B radiation exposures; the associated temporal and spatial patterns of UV–B radiation flux in such microenvironments; the temporal and spatial patterns of movement of people throughout the microenvironments within the geographic area; and the effects of variable behaviors (e.g., the use of sunscreen, hats, sunglasses) within the range of activities that people

[48] For reasons discussed below, any such shielding would vary widely from day to day, even in the summer O_3 season.

[49] This estimated continental background is due in part to natural sources of emissions in North America and in part to the long-range transport of emissions from both anthropogenic and natural sources outside of North America.

[50] Adding to the complexity of understanding this relationship are the results of high-dose animal toxicology studies that suggest more research is needed into the direct effects of ground-level O_3 on the skin. Tests by Thiele et al. (1997) suggest that long-term exposure to O_3 can deplete vitamin E in the skin, and this could make the skin more susceptible to the effects of UV–B radiation (U.S. EPA, 1997). Therefore, reducing long-term ground-level O_3 exposure might serve to reduce skin problems. Even a relatively small O_3 effect here could partially or completely offset any small UV–B radiation mediated effect estimated based on O_3—UV–B interactions alone.

regularly engage in, on the effective dose of UV–B radiation that reaches target organs such as the skin.

While analogous to the respiratory-related factors, there are a number of important differences between these sets of factors that arise, for example: (1) Due to the indirect nature of the relationship between changes in ground-level O_3 and UV–B radiation-related health effects (in contrast to the direct relationship between ground-level O_3 and inhalation-related health effects); (2) the long-term nature of the relevant exposures that are associated with UV–B radiation's chronic health effects (in contrast to the short-term exposures associated with acute inhalation effects); (3) the different types of parameters that are relevant to assessing dermal exposures (in contrast to those that are important in assessing inhalation exposures); and (4) the importance of skin type in characterizing the sensitive populations (in contrast to characterizing sensitive populations in terms of activity levels and respiratory health status). Further, as was done in EPA's assessment of respiratory effects, it is important to characterize the exposure-related factors specifically to address the relevant at-risk sensitive population groups. As noted in section II.B.1, the sensitivity to UV–B radiation effects varies among U.S. demographic groups, such that it could be important to incorporate census data on relevant characteristics (e.g., age at time of exposure, skin pigmentation) that affect an individual's susceptibility.

Aspects of each of these factors are discussed briefly below, and areas where current information or modeling tools are insufficient to address these factors at this time are noted.

(i) Estimation of area-specific and microenvironment changes in ground-level O_3. Implementation of a more stringent O_3 standard would, over time, further reduce O_3 concentrations across the U.S., but would affect various areas in different ways. Depending on the strategies adopted, in some locations peak concentrations would be reduced significantly during the O_3 season, while the lower concentrations that occur on far more numerous days could increase. In such areas, the long-term cumulative effect could be little net change, or even a small increase in cumulative shielding. In other areas, the entire distribution of O_3 could be reduced. The assessment of the acute respiratory health effects of O_3 appropriately focused on the higher portion of this distribution, using a simple roll-back approach discussed above (section II.A.2.a) to simulate changes in air quality patterns during the O_3 season based on available air quality monitoring data. For assessment of chronic effects such as those associated with UV–B radiation, however, where long-term cumulative exposures are of central importance, the mid to lower portion of the distribution would also be important. Also the distribution across the entire year, for which O_3 monitoring data is not generally available in many parts of the country, could potentially be important. The mid to lower portion of the distribution is much more strongly influenced by complex atmospheric chemistry, such that more sophisticated, area-specific modeling may be needed.

In addition, although not relevant to assessing direct respiratory effects, the vertical distribution of O_3 concentrations up through the mixing layer becomes important in assessing the effect of O_3 in shielding UV–B radiation. The current lack of routine vertical profile measurements means that little is known about the relative effect of ground-level control strategies on O_3 in the mixing layer.

With regard to characterizing changes in O_3 concentrations within microenvironments relevant to UV–B radiation exposure, it is clear that this set of microenvironments would differ in some respects from the set of microenvironments that were relevant for respiratory effects. For example, while indoor microenvironments can reduce exposure to both ambient O_3 and UV–B radiation, outdoor microenvironments that are relevant for inhalation exposure do not reflect the characteristics that are important for UV–B radiation exposure. For example, while not relevant to inhalation exposure, microenvironments shaded by the presence of trees, buildings, and other structures in many heavily occupied areas could be important to characterize because they would tend to have greatly reduced UV–B radiation exposures even when at the same ground-level O_3 concentration as a sunny microenvironment.

(ii) Estimation of temporal and spatial patterns of UV–B radiation flux. Relative to the assessment of respiratory effects, the assessment of the effect of O_3 shielding on UV–B radiation-related health effects requires the additional step of estimating how changes in the temporal and spatial patterns of O_3 concentrations result in changes in the patterns of UV–B radiation. Given a three-dimensional pattern of O_3 levels, a first-order approximation of UV–B penetration to the Earth's surface can be readily made. The factors that influence radiation flux through the stratosphere are fairly well characterized, and most directly related to the modest changes in stratospheric O_3 and large variations in sun angle that depend on latitude, time of year, and time of day (U.S. EPA, 1987). Nevertheless, beyond these factors, and in addition to changes in ground-level O_3, a number of other (second-order) factors in the boundary layer and the rest of the troposphere can affect the amount of UV–B radiation reaching potentially affected populations. One such factor is cloud cover, which can reduce UV–B radiation reaching the earth's surface by 50 percent or more (Cupitt, 1994). Another such factor is the presence of UV–B radiation scattering and absorbing aerosols. Depending on local circumstances and the strategy chosen, aerosol-related UV–B radiation exposure might increase or decrease as a result of ground-level O_3 reductions (U.S. EPA, 1996a, Chapter 3). Both O_3 and aerosols can affect local climate as well as UV–B radiation, and this could affect cloud cover as a further indirect consequence of a reduction strategy. While any such indirect effects might be expected to be small for modest O_3 changes, it is not currently possible to predict the magnitude or the sign of their net effect on UV–B radiation penetration.

(iii) Estimation of temporal and spatial patterns of movement of people throughout microenvironments. While population densities are high in areas with the highest ground-level O_3 concentrations, people may not receive their highest exposure to UV–B radiation in such locations. Reductions in O_3 shielding would presumably be most significant in outdoor recreational areas such as the beach or rural open areas where many people likely receive a disproportionate share of their cumulative sun exposure. Local or regional meteorological factors can, however, cause ground-level O_3 concentrations to be lower in many such areas, particularly in the western United States. For example, O_3 concentrations in the heavily populated Los Angeles area tend to be lowest at the coast and increase inland; in this case, smog-related O_3 would be providing the least shielding where the potential for exposure to UV–B radiation is the highest. The extensive database on human activity patterns, which was used in the assessment of respiratory effects, does not include parameters that relate to people's movement through the types of outdoor microenvironments that are relevant to the assessment of UV–B radiation exposure. For example, additional data would be needed to conduct an exposure analysis that could account for the fraction of UV–B

radiation exposure that is incurred during outdoor recreational activities in non-shaded microenvironments. EPA believes that reliable estimation of the change in UV–B radiation exposure associated with reducing ground-level O_3 would be hindered by not taking such factors into account.

(iv) Effects of variable behaviors on effective dose of UV–B radiation. Another important factor to be considered in assessing the potential UV–B radiation-related effects of a change in ground-level O_3 is that human behavior affects UV–B radiation exposures. When people choose to shield themselves from UV–B radiation exposure with clothing and sunscreens, and by timing their outdoor activities to avoid peak sun conditions, they are affecting a parameter that is important in assessing UV–B radiation-related effects. The generally well-known risks associated with too much sun exposure are such that many people limit their own as well as their children's exposure through such measures, regardless of the status of the protective stratospheric O_3 layer or variable amounts of ground-level O_3 pollution. While some sun exposure is generally beneficial to health, limiting excessive sun exposure would remain important for a person's health even if the stratospheric O_3 layer were fully restored to its natural state.[51]

Since sun-seeking or sun-avoidance behaviors can tend to maximize or minimize exposure to UV–B radiation, not factoring such behavioral data into an area-specific exposure assessment would hinder reliable estimation of the increased exposure associated with reducing ground-level O_3. Changes in behavior in the past, specifically increases in sun-seeking behaviors, are believed to be the primary reason for the increases in skin cancer incidence and mortality observed in the U.S. by the 1980's (U.S. EPA, 1987). Conversely, future rates of skin cancer could be reduced to the extent that people choose to change their behavior by increasing sun-avoidance behaviors.

Public awareness of the risks associated with overexposure to UV radiation seems to be having an effect on behavior. In 1987, EPA noted that behaviors causing increased UV–B radiation exposure were apparently reaching an upper limit (U.S. EPA, 1987, ES–35). The effect of increased awareness of the health consequences of UV–B radiation exposure on decreasing the number of harmful exposures is not likely to show up, in terms of reducing the incidence and mortality rates of skin cancers, for many years. Nevertheless, ignoring its effects would tend to bias exposure estimates in an area-specific assessment of the UV–B radiation-related effects of smog reduction strategies.

Based on the discussion of factors above, the Administrator believes that more information is needed to address these factors before reliable area-specific quantitative assessment of potential UV–B radiation-related consequences of a more stringent O_3 NAAQS would be possible. EPA intends to seek additional information relevant to such quantitative assessment. EPA is now requesting comment on the factors discussed above.

3. Evaluation of UV–B Radiation-Related Risk Estimates for Ground-level O_3 Changes

As should be clear from the discussion above, a full risk assessment of UV–B radiation-related effects resulting from a moderate change in ground-level O_3 would be an extremely challenging enterprise that appears to be beyond current data and modeling capabilities. Nevertheless, three analyses (Cupitt, 1994; U.S. DOE, 1995; Lutter and Wolz, 1997) have developed estimates that attempt to bound the potential indirect UV–B radiation related effects associated with replacing the former 1-hour O_3 NAAQS with an 8-hour O_3 standard. All three analyses essentially reflect a static comparison of two separate O_3 concentrations on a national basis, and include, either explicitly or implicitly, numerous assumptions needed while excluding the important area-specific issues and factors outlined above.

The most thoroughly documented calculations are those provided in Cupitt (1994), an EPA white paper developed as an initial scoping analysis of the issues, in preparation for potential consideration in the Regulatory Impact Analysis (RIA) that would accompany the O_3 NAAQS regulatory package. The paper discusses many of the important factors and uncertainties outlined above, summarizes key background information to provide perspective, and includes a discussion and table summarizing the many simplifying assumptions that were needed to permit the development of quantitative estimates. Cupitt's analysis evaluates changes resulting from cumulative exposures under two scenarios, including one that compares estimates of NMSC incidence associated with an assumed reduction of daytime summer O_3 of 10 ppb in O_3 that would occur uniformly throughout 30 eastern States and the District of Columbia and within an assumed atmospheric mixing layer that ranged up to 2 km in altitude. Assuming no other relevant factors changed over the several decade exposure period that would be required, the resulting increase in NMSC incidence for this extreme scenario was estimated eventually to reach ''between 0.6% and 1%.'' While these percentages are small—indeed too small to be measurable (Cupitt, 1994)—if taken at face value, they would not necessarily be judged as trivial because of the large baseline of NMSC. For reasons outlined below, however, even these small percentage estimates appear to be substantially overstated and cannot be considered reliable.

The Cupitt paper was never formally published, but it was subjected to internal agency peer review and commentary by experts at EPA's Office of Research and Development (ORD) (Childs, 1994; Altshuller, 1994). While finding the exposition, including recognition of the difficulties in such an approach, to be ''very acceptable,'' the reviewers noted substantial uncertainties in basic data and concerns about the numerous simplifying assumptions that called the numerical results into significant question. Examples of data uncertainties noted by the reviewers include: (1) The accuracy of column O_3 (in Dobson units) and UV measurements used; (2) the fact, recognized in Cupitt (1994), that the predicted UV–B radiation flux changes are at the ''noise'' level and could not be reliably detected statistically or attributed to the change in ground-level O_3 concentration; (3) data on effects of aerosols are limited, yet ignoring such effects in estimating the O_3—UV–B radiation relationship was ''erroneous;'' and (4) data to permit dynamic assessment of the feedback between increased UV radiation and increased O_3 is limited to uncertain models, and this potential feedback mechanism was ignored in the analysis (Childs, 1994).

Reviewers also questioned a number of the simplifying assumptions that

[51] Because of the high baseline risk of effects under natural conditions, as well as the increased risk posed by stratospheric O_3 depletion, medical authorities and governmental bodies have developed campaigns to effect such changes in behavior. The EPA and the National Weather Service (NWS) developed the UV Index. The Index provides a forecast of the expected risk of overexposure to the sun and indicates the degree of caution that should be taken when working, playing, or exercising outdoors. The EPA also developed the SunWise School Program to be used in conjunction with the UV Index. This program is designed to educate the public, especially children and their care givers, about the health risks associated with overexposure to UV radiation and encourage simple and sensible behaviors that can reduce the risk of sun-related health problems later in life (U.S. EPA, 1995a, b).

could have ''substantial impact'' on the resulting risk estimates. Among these were: (1) The assumed mixing height of 2 km, which reviewers considered too high on average, especially for the eastern United States (By overstating the thickness of the pollution-related layer of the atmosphere that is the focus of the control strategies designed to attain the NAAQS, this factor would bias the estimates upwards by as much as a factor of 2.); (2) the assumption that the ozone mixing ratio is the same at the earth's surface as it is at 2 km, when the vertical profile varies through the diurnal cycle (Because vertical mixing increases through the day, this assumption would be most important in the earlier portion of daylight hours.); (3) the assumption that neither aerosols nor O_3 production cycles themselves exert either positive or negative feedback on UV–B penetration (As noted in the previous section, a dynamic consideration of these factors could change the direction of the result in particular areas.); (4) the assumption that NMSC might result from episodic exposures, when, in fact, NMSC results from cumulative doses (This assumption affects only separate and far smaller estimates Cupitt made for episodic changes, essentially invalidating those results.); (5) the assumption that all people would be susceptible based on assumed exposure factors; and (6) the assumption that behavioral patterns, demographic patterns, and meteorological factors and other factors related to actual exposures remain constant over time (Childs, 1994; Altschuller, 1994).

These reviewers capsulized their conclusions regarding the quantitative results of this analysis as follows:

> In summary, (1) the numbers resulting from these calculations are quite small, and (2) the limitations of the accuracy and reliability of the input to the calculations produces numbers that cannot be defended, whether large or small. (Childs, 1994).

As noted in the discussion above, this is not simply a matter of uncertain and small risk estimates. On balance, several of the problems noted above served to inflate the overall estimates, and, depending upon local conditions and the control strategy assumed, could even call the direction of the results into question for some locations. Further, a significant bias, not highlighted in the cited reviews, is how well the assumed 10 ppb change in daytime O_3 levels averaged over an entire summer season (and over half the U.S.) reflects what might occur in response to the revised O_3 NAAQS.[52] In fact, this assumed change, as well as the assumptions regarding its spatial and vertical extent, are significantly larger than could reasonably be expected based on the revisions to the O_3 standard promulgated in 1997.

To provide a fair comparison, it is necessary to convert the 1-hour standard into its nearest 8-hour equivalent. As documented in the Staff Paper (U.S. EPA, 1996b), the nearest equivalent 8-hour standard would have a level of about 0.09 ppm. Superficially, this might appear to support a 10 ppb difference compared to the 0.08 ppm 8-hour standard set in 1997, until considering that these standards are stated in reference to extreme high values in the distribution (e.g., the average of the 4th-highest daily maximum concentrations). Cupitt's analysis assumed that a ''mixing layer'' up to 2 km deep over a very large geographical region would experience a change of 10 ppb in daylight average O_3 for an entire O_3 season. This scenario would require a challenging regional strategy that would, on average, reduce each day for the over 150 day O_3 season by 10 ppb. Yet, the 0.08 ppm 8-hour O_3 standard would require that only the fourth-highest day of the ozone season be reduced by about 10 ppb, as compared to the previous standard. Based on available O_3 trends information, strategies that reduce peak O_3 days would have far less effect on the far more numerous days toward the middle and lower-parts of the O_3 season distribution (e.g., U.S. EPA, 1996a, Figures 4–2, 4–3). In fact, as reported in the Response to Comments document, based on earlier RIA projections of long-term O_3 reductions that might occur with the 0.08 ppm 8-hour O_3 standard, the magnitude of the assumed average change appears to be overstated by more than a factor of 3 (U.S. EPA, 1997). When considered with the excessively high assumed mixing layer, the overly large geographical area requiring reductions (over 30 States), and the assumption that the entire population would be at the same risk as the more sensitive subpopulations, it is EPA's judgment, based on the record, that these readily identified biases could well be on the order of a factor of 10. EPA solicits comment on the assumptions discussed above.

More subtle are the uncertainties and potential bias inherent in an essentially static comparison of two different O_3 values that are assumed to be uniform over a very large area. Dynamic, real-world strategies would involve a number of alternative local and regional scale approaches that vary significantly in time and space, with a variety of possible outcomes with respect to the middle and lower portions of the distribution that is most relevant to estimating long-term summer averages over a period of decades into the future. An example of such local strategy-dependent outcomes would be control of NO_X emissions across a metropolitan area, which could reduce O_3 concentrations at downwind peak monitors, but also result in localized increases in lower concentrations in the center city area (National Academy of Sciences, 1991, Figure 11–2). As noted in section II.B.2 above and in Altshuller (1994), the interrelated indirect results from reduced O_3 and UV–B radiation could trigger feedbacks through increased O_3, aerosol, or cloud cover that could partially or fully offset the initial O_3 effects on UV–B radiation. Available data and assessment tools do not permit a reasonable quantitative assessment of these second-and third-order indirect effects (Altshuller, 1994; Childs, 1994).

Other potential problems associated with ignoring area-specific considerations in an O_3/UV–B risk analysis summarized in the previous section include the assessment of local physical factors (e.g., buildings) that reduce UV–B radiation exposure in outdoor microenvironments, meteorological conditions (e.g., sea breeze) or local emissions patterns that reduce pollution in high UV–B radiation exposure microenvironments, behavioral adjustments to information concerning UV–B radiation risk over time, and local differences in the proportion of sensitive populations. Even Cupitt's assumption that 90 percent of exposure occurs during the summer O_3 season embeds an assumption about long-term personal behavior for which little empirical evidence exists.

In summary, the Cupitt (1994) white paper was useful for its intended purpose as a scoping analysis to identify the potential issues arising in any attempt to assess the potential shielding provided by changes in ground-level O_3. It established that any effects of even fairly large long-term O_3 reductions in ground-level O_3 would be quite small, but as evidenced in the comments of the peer review and the discussion above, available data and modeling tools fall far short of permitting reliable quantitative risk estimates for

[52] Cupitt provides no rationale for the selection for this value where it first appears in a Table, which is characterized as addressing ''questions from OMB.''

consideration in standard setting or benefits assessments.

The analysis of this issue by U.S. Department of Energy (DOE) staff (1995) is summarized in a statement submitted as a part of public comments at a CASAC meeting. The exposition is far less complete than that of Cupitt, and it is quite difficult to reconcile the range of estimates for NMSC, the lower bound of which are less than Cupitt, while the upper bound estimates are more than double his. The analysis apparently starts with the same assumptions regarding a constant change in summertime O_3 of 10 ppb through a 2 km mixing layer, but important information about the other assumptions is lacking. In any event, the paper does not appear to improve upon the methodology in the Cupitt analysis.[53] Given that the U.S. DOE statement must share the limitations outlined above for Cupitt and the fact that the analytical approach is not well documented nor peer reviewed, no reliance is placed on the quantitative results presented in the U.S. DOE submission.

The work of economic analysts Lutter and Wolz (1997) provides a ''preliminary analysis'' of UV–B radiation screening by tropospheric O^3. Here, the exposition permits a more direct comparison with that of Cupitt, and it appears that many of the same simplifying assumptions were used—either explicitly or implicitly. This paper relied upon Cupitt's assumption that the NAAQS revision might bring about a summertime average of 10 ppb reduction in O_3 in areas not attaining the standard. As discussed above, based on the record, EPA believes this substantially overstates the likely effect of the NAAQS revision. Their assumption of a constant mixing ratio for the 10 ppb change that would extend well above the planetary boundary layer, up to 10 km, also introduces upward bias into their upper-bound risk estimates. The resultant apparent dose appears to be a factor of 4 larger than the upper bound used by Cupitt and U.S. DOE staff. The other quantitative inputs to the analysis differed to a more modest degree from those used by Cupitt. In the end, the upper bound estimate of NMSC is more than double that of Cupitt, due largely to the unwarranted assumption of a 10 km mixing height.

Again, because the quantitative assessment shares most of the limitations cited above for Cupitt, and actually adds substantial bias in a key assumption, EPA has placed no reliance on the quantitative risk estimates for NMSC from Lutter and Wolz (1997) or to the secondary estimates derived in the U.S. DOE analyses. EPA solicits comment on the assessments discussed above.

At the end of the 1997 O_3 NAAQS review, EPA published the final RIA, containing, among other requirements, an analysis addressing all of the quantifiable benefits of the O_3 NAAQS. This analysis, which was reviewed by other Federal agencies and approved for release by the Office of Management and Budget (OMB), concluded that the available scientific and technical information would not permit reliable quantitative estimates of any effect of changing the O_3 NAAQS on UV–B radiation-related effects. Based on the present examination of all of the available information in the record, the Administrator believes that this remains a sound conclusion.

C. Consideration of Net Adverse Health Effects of Ground-Level O_3

In considering the net adverse health effects of ground-level O_3, EPA has focused on characterizing and weighing the comparative importance of the potential indirect beneficial health effects associated with the attenuation of UV–B radiation by ground-level O_3 (section II.B above) and the direct adverse health effects associated with breathing O_3 in the ambient air (section II.A above). The same key factors considered by EPA in its 1997 review of the O_3 standard are again considered here in characterizing the additional information on potential beneficial effects and in comparatively weighing this information relative to the direct adverse effects. Beyond quantitative assessments of exposure and risk that were central to EPA's 1997 review, these factors include the nature and severity of the effects, the types of available evidence, the size and nature of the sensitive populations at risk, and the kind and degree of uncertainties in the evidence and assessments. In recognition of the complexity and multidimensional nature of such a comparison, no attempt is made to characterize all the relevant effects or associated risks to public health with a common metric.

The available record information on the potential indirect beneficial health effects associated with ground-level O_3 includes information from studies of health effects caused by exposure to UV–B radiation and studies that focus on the consequences of unnaturally high exposures to UV–B radiation due to depletion of the stratospheric O_3 layer, as well as analyses that attempt to focus specifically on the consequences of assumed changes in tropospheric O_3 levels. The nature and severity of the effects of UV–B radiation exposure on the skin, eye, and immune system are discussed above (section II.B.1), as is the nature of sensitive populations at risk for these effects. These effects, especially on the skin and eye, are generally understood to be associated with long-term cumulative exposure to UV–B radiation and to have long latency periods from cumulative exposures, especially those early in life. People with light skin pigmentation make up the primary at-risk population for effects on the skin, especially for NMSC, while at-risk populations for other effects are not as well understood. For NMSC, uncertainties in the evidence generally relate to uncertainties in the relevant action spectra and BAFs, as well as in factors related to characterizing the severity of the different types of NMSC. Based on the record information, for the other effects, the role of UV–B radiation is less well understood (e.g., as to relevant action spectra, BAFs, the nature of exposures of concern), although cumulative exposure to UV–B radiation is thought to play a causal role. These characterizations are derived from the large body of epidemiologic and toxicologic evidence that served as the basis for the reference document by EPA (1987).

The record includes a quantitative assessment conducted by EPA (1987, App. E) of the health risks associated with changes in exposure to UV–B radiation attributable to changes in the stratospheric O_3 layer. This assessment models the relationship between wide-scale changes in global/regional levels of stratospheric O_3, resulting from emissions of O_3 depleting substances with long-atmospheric lifetimes, and changes in UV–B radiation flux as a function of latitude for three broad regions across the United States.[54] As discussed above (section II.B.2), because changes in the stratospheric O_3 layer are relatively uniform across broad regions, varying across the U.S. primarily with

[53] In addition to estimates for NMSC, the U.S. DOE statements also provided estimates for melanoma skin cancers and cataracts. As discussed above, the quantitative relationship between cumulative UV–B exposure and the latter effects are not as well established as for NMSC. Given the lack of documentation and the additional uncertainties over those for NMSC, neither the U.S. DOE estimates of such effects nor the uncritical reliance on them by Lutter and Wolz (1997) should not given quantitative credence.

[54] Since the EPA's 1987 risk assessment on stratospheric ozone depletion, numerous changes have been made to the model to reflect the commitments made since 1987 by the United States, under amendments to the Montreal Protocol, for reductions in production of various ozone depleting chemicals and to incorporate more accurately the latest scientific information.

latitude, information on localized spatial and temporal patterns of exposure-related variables (e.g., changes in ground-level O_3, meteorological conditions, human activity patterns) are not relevant in producing credible estimates of risk associated with changes in stratospheric O_3. This is in sharp contrast to the nature of the information necessary to produce credible estimates of risk associated with changes in exposures to UV–B radiation projected to result from changes in ground-level O_3 that would be associated with attainment of alternative 8-hour standards for O_3.

An evaluation of the available analyses that have produced estimates of health risks associated with changes in ground-level O_3 (section II.B.3 above) identifies major limitations in available information that resulted in the need for the analyses to incorporate broad and unsupportable assumptions. These limitations are particularly important with regard to information on spatial and temporal patterns of changes in ground-level O_3 likely to result from various future emission control strategies, relevant meteorological conditions and atmospheric chemistry leading to a cascade of broader indirect effects, and human demographic and activity patterns likely to result in exposures of concern. For the reasons discussed above, these limitations are judged to be of central importance in any such analysis. Thus, in light of such limitations, the Administrator agrees with internal and external reviewers in proposing to conclude that the available scientific and technical information would not permit credible quantitative estimates of these potential beneficial effects.[55] Thus, available analyses based on such limited information cannot serve as credible estimates of potential beneficial effects associated with the presence of ground-level O_3 due to man-made emissions of O_3 forming substances.

Further, in setting aside the available quantitative analyses, EPA notes that our above evaluation of a number of critical factors in the analyses provides reasons for believing that the public health impacts of any potential beneficial effects associated with ground-level O_3 are likely very small, albeit unquantifiable at this time (section II.B.2). In giving qualitative consideration to the available evidence on potential indirect beneficial effects of ground-level O_3, EPA believes it is appropriate to weigh this information in the context of the body of evidence on adverse effects caused by direct inhalation exposures to ground-level O_3 that formed the basis for the 1997 O_3 primary standard.

As an initial matter, as discussed in the 1997 final rule, the Administrator focused primarily on quantitative comparisons of risk, exposure, and air quality in selecting both the level (62 FR 38867–8) and form (62 FR 38869–72) of the 1997 O_3 primary standard. More specifically, she looked at comparisons of both those risks to public health that can be explicitly quantified in terms of estimated incidences and the size of the at-risk population (e.g., children) likely to experience adverse effects, as well as those for which quantitative risk information is more limited, but for which quantitative estimates of the number of children likely to experience exposures of concern could be developed (as discussed in section II.A.2 above). In considering these comparisons, she recognized that although there were inherent uncertainties in these estimates, the underlying assessments took into account extensive data bases on the spatial and temporal patterns of air quality and directly relevant human activity patterns likely to result in inhalation exposures of concern. Further, the Administrator took into account CASAC's advice that the assessment methods were appropriate and state-of-the-art, and that the results should play a central role in her decision.

Beyond the quantitative information on direct adverse effects, with regard to the qualitative evidence suggestive of potential serious, chronic adverse effects on public health associated with long-term inhalation exposures, the Administrator judged that such information was too uncertain and not well enough understood at the time to serve as the basis for establishing a more restrictive 8-hour standard in terms of either level (62 FR 38868) or form (62 FR 38871). This conclusion was consistent with CASAC's advice that further research into potential chronic adverse effects in humans should be continued, and the results considered in the next review (62 FR 38871).

In weighing the available information on potential indirect beneficial effects of ground-level O_3, the Administrator considers this information in the same light as the information on potential direct chronic adverse effects associated with long-term inhalation exposures to ground-level O_3. In both instances, the potential health effects are serious and likely to develop over many years, with important periods of exposure likely occurring in childhood. Different population groups are likely affected, however, by these potential adverse and beneficial effects. Urban populations and people with impaired respiratory systems (e.g., people with asthma), who are disproportionately from certain minority groups, are most at-risk for the direct inhalation-related effects, whereas fair-skinned populations are most generally, but not exclusively, at-risk for the indirect beneficial effects related to exposure to UV–B radiation. Although different types of uncertainties are inherent in the record information on these effects, in both cases, the uncertainties related to ground-level O_3 are so great as to preclude the development of credible estimates of the size of the affected population or the probability of the occurrence of such effects. In the case of indirect effects related to ground-level O_3, EPA believes that the use of plausible but unsubstantiated assumptions would likely lead to the conclusion that the potential impacts on public health are likely very small; no such conclusions have yet been drawn with regard to the public health impacts of potential direct chronic adverse effects related to inhalation exposures. After considering these factors, the Administrator now provisionally concludes that, much like the qualitative evidence on direct adverse effects potentially associated with long-term inhalation exposures, the newly considered available evidence on potential indirect beneficial effects is not well enough understood at this time to serve as the basis for establishing a less restrictive 8-hour standard than was promulgated in 1997. Rather, the Administrator believes that the most recent evidence and analyses of potential long-term, indirect beneficial effects should be considered in the next review in conjunction with the most recent information on long-term, direct adverse effects.

D. Proposed Response to Remand on the Primary O_3 NAAQS

After carefully considering the scientific information available in the record on adverse effects on public health associated with direct inhalation exposures to O_3 in the ambient air and on the potential for indirect benefits to public health associated with the presence of ground-level O_3 and the resultant attenuation of naturally occurring UV–B radiation from the sun, taking into account the weight of that evidence in assessing the net adverse

[55] This conclusion was also reached by the Health and Ecological Effects Subcommittee of the Advisory Council on Clean Air Compliance Analysis, a part of EPA's Science Advisory Board, in conjunction with their review of the ''The Benefits and Costs of the Clean Air Act 1990 to 2010'' (EPA, 1999b)

health effects of ground-level O_3, and for the reasons discussed above, the Administrator proposes to respond to the remand by reaffirming the 8-hour primary O_3 standard promulgated in 1997. In proposing to leave unchanged the 1997 O_3 standard at this time, the Administrator has fully considered the available information in the record of the 1997 O_3 NAAQS review on potential beneficial health effects of ground-level O_3. Based on such consideration, she has provisionally determined that the information linking changes in patterns of ground-level O_3 concentrations likely to occur as a result of programs implemented to attain the 1997 O_3 NAAQS to changes in relevant exposures to UV–B radiation of concern to public health is too uncertain at this time to warrant any relaxation in the level of public health protection previously determined to be requisite to protect against the demonstrated direct adverse respiratory effects of exposure to O_3 in the ambient air. Further, the Administrator notes that it is the Agency's view that associated changes in UV–B radiation exposures of concern, using plausible but highly uncertain assumptions about likely changes in patterns of ground-level ozone concentrations, would likely be very small from a public health perspective.

In the past, the Administrator has been confronted with situations where there has been both quantifiable and unquantifiable evidence, and has moved forward with a NAAQS decision. The inability to quantify all related effects does not preclude the Agency from making a NAAQS decision, particularly in situations where there is strong quantifiable evidence of significant adverse health effects. Moreover, in this case, as noted above, EPA believes the potential beneficial effects are not quantifiable at this time and likely very small from a public health perspective. Accordingly, the Administrator believes it is inappropriate to wait for additional information on such effects prior to responding to this remand.

The 0.08 ppm, 8-hour primary standard is met at an ambient air quality monitoring site when the 3-year average of the annual fourth-highest daily maximum 8-hour average O_3 concentration is less than or equal to 0.08 ppm. Data handling conventions are specified in a new appendix I to 40 CFR part 50, as discussed in the 1996 proposal and 1997 final rule.[56]

In proposing to respond to the remand by reaffirming the 1997 primary O_3 standard at this time, the Administrator recognizes, however, that relevant information on indirect potentially beneficial health effects of ground-level O_3 is now available that was not part of this rulemaking record. In addition, she notes that the next periodic review of the O_3 NAAQS has now been initiated by EPA's ORD with a call for information (65 FR 57810; September 26, 2000). Thus, to ensure that the next review of the O_3 criteria and standards can be based on a comprehensive and current body of relevant scientific information, EPA encourages the submission of new scientific information on the relationships between ground-level O_3, associated attenuation of UV–B radiation and other indirect effects of the presence of O_3 in the ambient air, and effects on public health such as those associated with changes in relevant exposures to UV–B radiation.

In looking ahead to the next review, EPA anticipates that the available information may warrant a fuller examination of relevant public health policy factors in weighing the net adverse health effects associated with ground-level O_3. Such factors could include, for example, the extent to which the proximate cause of the effects is natural or man-made; the extent to which the effects are in excess of naturally occurring background levels; the extent to which the exposures of concern are affected by human behavior patterns; the time course of exposure-response relationships; and environmental justice issues that arise in any analysis of risk trade-offs involving different sensitive populations. To help inform this aspect of the next review, EPA also solicits comments on whether these and other factors should be considered to be relevant in weighing the net adverse health effects of ground-level O_3.

III. Rationale for Proposed Response To Remand on the Secondary O_3 Standard

This notice also presents the Administrator's proposed response to the remand, reaffirming the 8-hour O_3 secondary standard promulgated in 1997, based on: (1) Information from the 1997 criteria and standards review that served as the basis for the 1997 secondary O_3 standard, including the scientific information on welfare effects associated with direct exposures to O_3 in the ambient air, with a focus on vegetation effects, and assessments of vegetation exposure, risk, and economic values and (2) a review of the scientific information in the record of the 1997 review (but not considered as part of the basis for the 1997 standard) on the welfare effects associated with changes in UV–B radiation, the association between changes in ground-level O_3 and changes in UV–B radiation, and predictions of changes in ground-level O_3 levels likely to result from attainment of alternative O_3 standards.

A. Direct Adverse Welfare Effects

As discussed in the 1997 final rule, direct exposures to O_3 have been associated quantitatively and qualitatively with a wide range of vegetation effects such as visible foliar injury, growth reductions and yield loss in annual crops, growth reductions in tree seedlings and mature trees, and effects that can have impacts at the forest stand and ecosystem level. Visible foliar injury can represent a direct loss of the intended use of the plant, ranging from reduced yield and/or marketability for some agricultural species to impairment of the aesthetic value of urban ornamental species. On a larger scale, foliar injury is occurring on native vegetation in national parks, forests, and wilderness areas, and may be degrading the aesthetic quality of the natural landscape, a resource important to public welfare. Growth and yield effects of O_3 have been well documented for numerous species, including commodity crops, fruits and vegetables, and seedlings of both coniferous and deciduous tree species. Although data from tree seedling studies could not be extrapolated to quantify responses to O_3 in mature trees, long-term observational studies of mature trees have shown growth reductions in the presence of elevated O_3 concentrations. Even where these growth reductions are not attributed to O_3 alone, it has been reported that O_3 is a significant contributor that potentially exacerbates the effects of other environmental stresses (e.g., pests). In addition, growth reductions can indicate that plant vigor is being compromised such that the plant can no longer compete effectively for essential nutrients, water, light, and space. When many O_3-sensitive individuals make up a population, the whole population may be affected. Changes occurring within sensitive populations, or stands, if they are severe enough, ultimately can change community and ecosystem structure. Structural changes that alter the ecosystem functions of energy flow and nutrient cycling can alter ecosystem succession.

[56] Subsequent to the 1997 final rule, EPA has promulgated further revisions to 40 CFR part 50 with regard to the applicability of the 1-hour O_3 standards (65 FR 45182; July 20, 2000). In addition, EPA notes that recent legislation addresses the timing of future actions on nonattainment designations with regard to the 8-hour O_3 standards (Pub. L. No. 106–377, 114 Stat. 1441 (2000)).

Based on key studies and other biological effects information reported in the Criteria Document and Staff Paper, it was recognized that peak O_3 concentrations equal to or greater than 0.10 ppm can be phytotoxic to a large number of plant species, and can produce acute foliar injury and reduced crop yield and biomass production. In addition, O_3 concentrations within the range of 0.05 to 0.10 ppm have the potential over a longer duration of creating chronic stress on vegetation that can result in reduced plant growth and yield, shifts in competitive advantages in mixed populations, decreased vigor leading to diminished resistance to pest and pathogens, and injury from other environmental stresses. Some sensitive species can experience foliar injury and growth and yield effects even when O_3 concentrations never exceed 0.08 ppm. Further, the available scientific information supports the conclusion that a cumulative seasonal exposure index is more biologically relevant than a single event or mean index.

To put judgments about these vegetation effects into a broader national perspective, the Administrator has taken into account the extent of exposure of O_3-sensitive species, potential risks of adverse effects to such species, and monetized and non-monetized categories of increased vegetation protection associated with reductions in O_3 exposures. In so doing, the Administrator recognized that markedly improved air quality, and thus significant reductions in O_3 exposures would result from attainment of the 0.08 ppm, 8-hour primary standard. In looking further at the incremental protection associated with attainment of a seasonal secondary standard, she recognized that areas that would likely be of most concern for effects on vegetation, as measured by the seasonal exposure index, would also be addressed by the 0.08 ppm, 8-hour primary standard.

B. Potential Indirect Beneficial Welfare Effects

This section is drawn from the limited information in the record of the 1997 review with regard to the effect of ground-level O_3 on the attenuation of UV–B radiation and potential associated welfare benefits.[57] While this information suggests the potential for effects on plants and aquatic organisms, EPA (1987, ES–40—ES–43) recognizes that relevant studies are limited and the uncertainties are great due in part to problems in study designs, such that quantitative conclusions cannot be drawn.

With regard to effects on vegetation, while some plant cultivars tested in the laboratory were determined to be sensitive to UV–B radiation exposure, these experiments have been shown to inadequately replicate effects in the field, such that they do not reflect the complex interactions between plants and their environment. The only long-term field studies of crops involved soybeans, producing suggestive evidence of reduced yields under conditions simulating changes in total column O_3 over an order of magnitude greater than those projected to occur as a result of changes in ground-level O_3 associated with attainment of the 1997 O_3 NAAQS. Beyond the limited studies of crops, EPA (1987, ES–41) notes that little or no data exist on UV–B radiation effects on trees and other types of natural vegetation, or on possible interactions with pathogens. While it is noted that changes in UV–B radiation levels could alter the results of competition in natural ecosystems, no evidence is available to evaluate this effect. Further, it is recognized that UV–B radiation may both inhibit and stimulate plant flowering, depending on the species and growth conditions. Recognizing that interactions between UV–B radiation and other environmental factors are important in determining potential UV–B radiation effects on plants, EPA (1987, ES–42) notes that extensive, long-term studies would be required to address these interactions.

With regard to effects on aquatic organisms, EPA (1987, ES–42) notes that while initial experiments show that increased UV–B radiation has the potential to harm aquatic life, difficulties in experimental designs and the limited scope of the studies prevent the quantification of potential risks. Some study results suggest that most zooplankton show no effect due to increased exposure to UV–B radiation up to some threshold exposure level, with exposures above such threshold levels eliciting notable effects. For species under UV–B stress, such effects could include reduced time spent at the surface of the water, which is critical for breeding in some species, possibly leading to changes in species diversity. It is also noted that, as do all other living organisms, aquatic biota cope with exposure to UV–B radiation by avoidance, shielding, and repair mechanisms, although uncertainty exists as to the extent to which such mitigation mechanisms would occur (U.S. EPA, 1987, ES–43). It is recognized that determination of UV–B radiation exposure in aquatic systems is complex because of the variable attenuation of UV–B radiation in the water column, and that further research is needed to improve our understanding of how UV–B radiation exposure affects marine species, particularly given their world-wide importance as a source of protein.

C. Proposed Response To Remand on the Secondary O_3 NAAQS

After considering the scientific information available in the record on adverse welfare effects associated with direct exposure to O_3 in the ambient air and on the potential indirect benefits to public welfare related to attenuation of naturally occurring UV–B radiation, the Administrator provisionally concludes that there is insufficient information available on UV–B radiation-related effects to warrant any relaxation in the level of public welfare protection previously determined to be requisite to protect against the demonstrated direct adverse effects of exposure to O_3 in the ambient air. Thus, the Administrator proposes to respond to the remand by reaffirming the 8-hour secondary O_3 standard promulgated in 1997, which is identical to the 8-hour primary O_3 standard.

As recognized above in section II.B.4 with regard to consideration of health effects, the Administrator also recognizes that relevant information on indirect potentially beneficial welfare effects of ground-level O_3 is now available that was not part of this rulemaking record. In addition, as previously noted, the next periodic review of the O_3 NAAQS is now being initiated by EPA's ORD with a call for information. Thus, to ensure that the next review of the O_3 criteria and standards can be based on a comprehensive and current body of relevant scientific information, EPA encourages the submission of new scientific information on the relationships between ground-level O_3, associated attenuation of UV–B radiation and other indirect effects of the presence of O_3 in the ambient air, and effects on public welfare such as those associated with changes in relevant exposures to UV–B radiation.

IV. Administrative Requirements

A. Executive Order 12866: OMB Review of ''Significant Actions''

Under Executive Order 12866, the Agency must determine whether a regulatory action is ''significant'' and, therefore, subject to OMB review and

[57] The information in this section is drawn primarily from the EPA document ''Assessing the Risk of Trace Gasses that Can Modify the Stratosphere'' (U.S. EPA, 1987).

the requirements of the Executive Order. The order defines ''significant regulatory action'' as one 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 or 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.

In view of its important policy implications, this proposed action has been judged to be a ''significant regulatory action'' within the meaning of the Executive Order. The EPA has submitted this proposed action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record and made available for public inspection at EPA's Air and Radiation Docket and Information Center (Docket No. A–95–58).

Since today's proposed response to the remand is a reaffirmation of the revisions to the O_3 NAAQS previously promulgated in 1997, no new RIA has been prepared. The RIA (1997) prepared in conjunction with the 1997 revision to the O_3 NAAQS is available in the docket, from EPA at the address under ''Availability of Related Information,'' and in electronic form as discussed above in ''Electronic Availability.''

The Clean Air Act and judicial decisions make clear that the economic and technological feasibility of attaining ambient standards are not to be considered in setting NAAQS, although such factors may be considered in the development of State plans to implement the standards. Accordingly, although a RIA was prepared for the 1997 decision to revise the O_3 NAAQS, neither that RIA nor the associated contractor reports have been considered in issuing this proposal.

B. Executive Order 13045: Children's Health

Executive Order 13045, entitled ''Protection of Children from Environmental Health Risks and Safety Risks'' (62 FR 19885, April 23, 1997), requires Federal agencies to ensure that their policies, programs, activities, and standards identify and assess environmental health and safety risks that may disproportionately affect children. To respond to this order, agencies must explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the agency.

Today's proposed response to the remand, reaffirming the 1997 primary O_3 NAAQS, specifically takes into account children as the group most at risk to the direct inhalation-related effects of O_3 exposure, and was based on studies of effects on children's health (U.S. EPA, 1996a; U.S. EPA, 1996b) and assessments of children's exposure and risk (Johnson et al., 1994; Johnson et al., 1996a,b; Whitfield et al., 1996; Richmond, 1997). The 1997 revision to the primary O_3 NAAQS was promulgated to provide adequate protection to the public, especially children, against a wide range of direct O_3-induced health effects, including decreased lung function, primarily in children who are active outdoors; increased respiratory symptoms, primarily in highly sensitive individuals; hospital admissions and emergency room visits for respiratory causes, among children and adults with respiratory disease; inflammation of the lung and possible long-term damage to the lungs. This proposed response to the remand affirming the 1997 primary O_3 NAAQS maintains the level of protection of children's health established by the standard set in 1997. Therefore, today's proposed action does comply with the requirements of E.O. 13045.

C. 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.''

Today's proposed response to the remand does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. The proposed response to the remand only reaffirms the previously promulgated ozone standard and would not alter the relationship that has existed under the Clean Air Act for 30 years, in which EPA sets NAAQS and the states implement them through submission of SIPs, in accordance with the requirements of the Clean Air Act. Thus, Executive Order 13132 does not apply to this action. In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this proposed action from State and local officials.

D. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' ''Policies that have tribal implications'' is defined in the Executive Order to include regulations that have ''substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.''

This proposed response to the remand does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes, as specified in Executive Order 13175. This is because this proposed response to the remand leaves unchanged the 1997 final rule. Thus, Executive Order 13175 does not apply to this rule.

E. 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, local, and tribal 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.

As noted above, EPA cannot consider in setting a NAAQS the economic or technological feasibility of attaining ambient air quality standards, although such factors may be considered to a degree in the development of State plans to implement the standards. Accordingly, and for the reasons discussed in the 1996 proposal and 1997 final rule, EPA has determined that the provisions of sections 202, 203, and 205 of the UMRA do not apply to this proposed action. The EPA acknowledges, however, that any corresponding revisions to associated State implementation plan requirements and air quality surveillance requirements, 40 CFR part 51 and 40 CFR part 58, respectively, might result in such effects. Accordingly, EPA will address unfunded mandates as appropriate when it proposes any revisions to 40 CFR parts 51 and 58.

F. Regulatory Flexibility Analysis/Small Business Regulatory Enforcement Fairness Act

Under the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. Under 6 U.S.C. 605(b), this requirement may be waived if EPA certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and governmental entities with jurisdiction over populations less than 50,000 people.

Today's proposed response to the remand, reaffirming the 1997 primary O_3 NAAQS, does not establish any new regulatory requirements affecting small entities. On the basis of the above considerations and for the reasons discussed in the 1996 proposal and 1997 final rule, EPA certifies that today's proposed action will not have a significant economic impact on a substantial number of small entities within the meaning of the RFA, as affirmed by the D.C. Circuit in *American Trucking Associations* v. *EPA,* 175 F. 3d 1027 (D.C. Cir. 1999). Based on the same considerations, EPA also certifies that the new small-entity provisions in section 244 of the Small Business Regulatory Enforcement Fairness Act (SBREFA) do not apply.

G. Paperwork Reduction Act

Today's proposed response to the remand does not establish any new information collection requirements beyond those which are currently required under the Ambient Air Quality Surveillance Regulations in 40 CFR part 58 (OMB #2060–0084, EPA ICR No. 0940.15). Therefore, the requirements of the Paperwork Reduction Act do not apply to today's proposed action.

H. 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, Section 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. Today's proposed response to the remand does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

I. Executive Order 13211: Energy Effects

This proposed response to remand is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. This is because this proposed response to the remand leaves unchanged the 1997 final rule. Thus, Executive Order 13211 does not apply to this rule.

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List of Subjects in 40 CFR Part 50

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

Dated: October 31, 2001.

Christine Todd Whitman,

Administrator.

[FR Doc. 01–27820 Filed 11–8–01; 8:45 am]

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Federal Register

Wednesday,
November 14, 2001

Part IV

Department of Defense
General Services Administration
National Aeronautics and Space Administration

48 CFR Parts 32 and 152
Federal Acquisition Regulation; Progress Payment Requests Under Indefinite-Delivery Contracts; Proposed Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 32 and 52

[FAR Case 2001–006]

RIN 9000–AJ23

Federal Acquisition Regulation; Progress Payment Requests Under Indefinite-Delivery Contracts

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to require, under indefinite-delivery contracts, the contractor to account for and submit progress payment requests under individual orders as if each order constitutes a separate contract, unless otherwise specified in the contract.

DATES: Interested parties should submit comments in writing on or before January 14, 2002 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVP), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: *farcase.2001-006@gsa.gov.* Please submit comments only and cite FAR case 2001–006 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Jeremy Olson, Procurement Analyst, at (202) 501–3221. Please cite FAR case 2001–006.

SUPPLEMENTARY INFORMATION:

A. Background

FAR 32.503–5(c) provides that under indefinite-delivery contracts, the contracting officer should administer progress payments made under each individual order as if the order constituted a separate contract, unless agencies provide otherwise. However, there is no related language in the clause at FAR 52.232–16, Progress Payments.

The language in FAR 32.503–5(c) recognizes that funds on indefinite-delivery contracts are normally obligated on each individual order; deliveries and contract performance, which factor into progress payment calculations, are monitored at the order level, as opposed to the basic contract level; and that progress payments normally are administered at the order level. However, there is currently an inconsistency between the direction to the contracting officer at FAR 32.503–5(c) and the provisions binding on the contractor in FAR 52.232–16.

This proposed rule revises—

- FAR 32.503–5, Administration of progress payments, to require, when the indefinite-delivery contract will be administered by an agency other than the awarding agency, the contracting officer to coordinate with the contract administration office if the administration of progress payments will be on a basis other than order-by-order; and
- FAR 52.232–16, Progress payments, to require the contractor to account for and submit progress payment requests under individual orders in indefinite-delivery contracts as if each order constitutes a separate contract, unless otherwise specified in the contract.

This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to 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, *et seq.*, because most contracts awarded to small entities have a dollar value less than the simplified acquisition threshold, and, therefore, do not have the progress payment type of financing. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR Parts in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2001–006), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 32 and 52

Government procurement.

Dated: November 5, 2001.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 32 and 52 as set forth below:

1. The authority citation for 48 CFR parts 32 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 32—CONTRACT FINANCING

2. Revise paragraph (c) of section 32.503–5 to read as follows:

32.503–5 Administration of progress payments.

* * * * *

(c) Under indefinite-delivery contracts, the contracting officer should administer progress payments made under each individual order as if the order constituted a separate contract, unless agency procedures provide otherwise. When the contract will be administered by an agency other than the awarding agency, the contracting officer must coordinate with the contract administration office if the awarding agency wants the administration of progress payments to be on a basis other than order-by-order.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend 52.232–16 by—

a. Revising the clause date;

b. Adding paragraph (l);

c. Revising the introductory text of Alternate II;

d. Redesignating paragraphs (l) and (m) of Alternate II as (m) and (n) respectively;

e. Revising the introductory text of the newly designated (m), paragraphs (m)(3) and (n);

f. Revising the introductory text of Alternate III; and

g. Redesignating paragraph (l) of Alternate III as paragraph (m).

52.232–16 Progress Payments.

As prescribed in 32.502–4(a), insert the following clause:

PROGRESS PAYMENTS [DATE]

* * * * *

(l) *Progress Payments under indefinite-delivery contracts.* The Contractor shall account for and submit progress payment requests under individual orders as if the order constituted a separate contract, unless otherwise specified in this contract.

(End of clause)

* * * * *

Alternate II (DATE). If the contract is a letter contract, add paragraphs (m) and (n). The amount specified in paragraph (n) must not exceed 80 percent of the maximum liability of the Government under the letter contract. The contracting officer may specify separate limits for separate parts of the work.

(m) The Contracting Officer will liquidate progress payments made under this letter contract, unless previously liquidated under paragraph (b) of this clause, using the following procedures:

(1) * * *

(2) * * *

(3) If this letter contract is partly terminated and partly superseded by a contract, the Government will allocate the unliquidated progress payments to the terminated and unterminated portions as the Government deems equitable, and will liquidate each portion under the relevant procedure in paragraphs (m)(1) and (m)(2) of this clause.

* * * * *

(n) The amount of unliquidated progress payments will not exceed _____ (specify dollar amount).

Alternate III (DATE). As prescribed in 32.502–4(d), add the following paragraph (m) to the basic clause. If Alternate II is also being used, redesignate the following paragraph as paragraph (o):

* * * * *

[FR Doc. 01–28230 Filed 11–13–01; 8:45 am]

BILLING CODE 6820–EP–P

Federal Register

Wednesday,
November 14, 2001

Part V

Department of Energy

10 CFR Parts 960 and 963
Office of Civilian Radioactive Waste Management; General Guidelines for the Recommnedation of Sites for Nuclear Waste Repositories; Yucca Mountain Site Suitability Guidelines; Final Rule

DEPARTMENT OF ENERGY

10 CFR Parts 960 and 963

[Docket No. RW–RM–99–963]

RIN 1901–AA72

Office of Civilian Radioactive Waste Management; General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories; Yucca Mountain Site Suitability Guidelines

AGENCY: Office of Civilian Radioactive Waste Management, Department of Energy (DOE).

ACTION: Final rule.

SUMMARY: DOE hereby amends the policies under the Nuclear Waste Policy Act of 1982 for evaluating the suitability of Yucca Mountain, Nevada, as a site for development of a nuclear waste repository. Today's final rule focuses on the criteria and methodology to be used for evaluating relevant geological and other related aspects of the Yucca Mountain site. Consistent with longstanding policy to conform DOE suitability guidelines for its nuclear waste repository program to corresponding regulations of the Nuclear Regulatory Commission, DOE's criteria and methodology are based on the Nuclear Regulatory Commission's recently final regulations for licensing a nuclear waste repository at Yucca Mountain.

EFFECTIVE DATE: December 14, 2001.

FOR FURTHER INFORMATION CONTACT: Dr. William J. Boyle, U.S. Department of Energy, Office of Civilian Radioactive Waste Management, Yucca Mountain Site Characterization Office, P.O. Box 364629, North Las Vegas, Nevada 89036–8629.

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I. Introduction

Pursuant to the Nuclear Waste Policy Act of 1982, as amended, (NWPA), (42 U.S.C. 10101, *et seq.*), DOE today concludes a rulemaking which accomplishes two major purposes: (1) Revision of 10 CFR part 960 (''General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories''); and (2) promulgation of new part 963 (''Yucca Mountain Site Suitability Guidelines''). The NWPA provides for a multi-stage siting process including preliminary site screening, site characterization, DOE site recommendation to the President, and Presidential approval of a site for the location of nuclear waste repositories. As originally promulgated in 1984, part 960 governed DOE activities for comparing and selecting sites from preliminary site screening to site recommendation. As revised, part 960 is now limited to preliminary site screening to identify candidates for site characterization activities (i.e., physical site investigation activities). Consistent with 1987 amendments to the NWPA, part 963 deals with the criteria for evaluating the suitability of the potential site at Yucca Mountain, Nevada, based on site characterization activities, as part of the material that will be considered by the Secretary in any site recommendation to the President. This rulemaking, by identifying the types of sound scientific information and methods that will be used in assessing the likely performance of a repository at the Yucca Mountain site, sets forth guidance to assist the Secretary in reaching a judgment on the suitability of that site for a geologic repository.

DOE began this rulemaking by publishing a notice of proposed rulemaking on December 16, 1996 (61 FR 66158). That notice attracted critical comments from members of the public, State and local officials of Nevada, the U.S. Environmental Protection Agency (EPA), and the U.S. Nuclear Waste Technical Review Board (NWTRB). In substance, some comments criticized the omission from the proposed regulations of essential details of the criteria for determining site suitability. Other comments questioned the legal basis for the proposal, disputing DOE's interpretation of sections 112 and 113 of the NWPA. They also disputed the scientific and technical basis for the proposed regulations.

On November 30, 1999, DOE published a supplemental notice of proposed rulemaking that revised the terms of, and its explanation of the legal and technical basis for, amending its site suitability criteria to tailor them, as required by law, to the conditions at Yucca Mountain (64 FR 67054). In explaining its reasons for reproposing, DOE acknowledged there was enough merit in the comments on its 1996 proposal to warrant issuance of a revised and more detailed proposal with an expanded explanation of the legal and technical basis for the proposal. DOE also relied on the implications of its December, 1998, ''Viability

Assessment of a Repository at Yucca Mountain'' (DOE/RW–0508) (Viability Assessment), on the EPA's 1999 notice of proposed rulemaking to establish public health and safety standards for a repository at Yucca Mountain at new 40 CFR part 197, and on the U.S. Nuclear Regulatory Commission's (NRC's) 1999 notice of proposed regulatory amendments to limit its general licensing regulations in 10 CFR part 60 by excluding the Yucca Mountain site and to promulgate a new part 63 to establish licensing regulations exclusively for the Yucca Mountain site. On June 13, 2001, the EPA finalized its rulemaking on Yucca Mountain public health and safety standards (66 FR 32074–32135), followed by the NRC final rulemaking on November 2, 2001 (66 FR 55732–55816). Neither the EPA or NRC changed their respective rules from proposed to final form in any way that materially affects this rulemaking.

In the introductory section of the Supplementary Information portion of the November 30, 1999, supplemental notice of proposed rulemaking, DOE stated that it was seeking to improve its policies for determining site suitability based on site characterization activities by enhancing their transparency, validity, and verifiability. By enhancing transparency, DOE means providing informative and readable regulations, an explanation of the legal and technical basis for the regulatory amendments, and explanations of complex calculations and computer modeling that are suitable for non-technical audiences. By enhancing validity, DOE means providing an explanation of basis and purpose that clearly shows how the regulatory conclusions followed from DOE's legal and technical premises. By enhancing verifiability, DOE means being forthcoming about documented empirical results of experiments and computer analyses of relevant data so as to allow verification of conclusions that DOE may eventually draw from known facts in a supporting statement for a site recommendation to the President under section 114 of the NWPA.

In response to the supplemental notice of proposed rulemaking, DOE received a variety of written and oral comments from State and local officials of Nevada, other Federal agencies, industry sources, regulatory and oversight organizations, Native American organizations, and assorted private citizens and citizen groups. While supportive of much of the content of the proposed regulations, industry sources argued that the NWPA did not require this rulemaking. Although some Nevada local officials supported some features of the supplemental proposal, Nevada State and other local officials continued to take issue with proposed regulatory provisions and the legal and technical bases for them. Especially useful were comments about appropriate arguments to help assess the validity of computer-generated performance assessment calculations, comments which provided the opportunity for DOE to underscore provisions in part 963 requiring multiple lines of argument in backup documentation (eventually to be made available for public comment) on subjects such as uncertainty, variability of parameter values, the technical basis for including or excluding certain features, events, and processes, and the capability of natural and engineered barriers to isolate radioactive waste.

In DOE's view, this rulemaking is necessary in order to correct the nonconformity of DOE's prior suitability guidelines to the EPA's and NRC's current regulatory framework for the licensing of the Yucca Mountain repository, modified from the prior framework by reason of a Congressional direction. It has also provided opportunities for State and local officials and other members of the public to have an impact on DOE's policymaking process. DOE has provided responses below to the relevant major issues that emerged from the comments. These responses appear after sections that substantially repeat portions of the supplemental notice of proposed rulemaking stating the background, basis, and purpose of the supplemental proposal. (These sections are repeated to assist readers who otherwise would have to look back at a copy of the supplemental notice of proposed rulemaking.) DOE has also made conforming changes to the rule consistent with final regulations of the NRC and EPA, and NRC concurrence comments on part 963.

II. Background

This section provides an overview of the developments which have led DOE to propose to revise certain sections of the existing General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories and to adopt a new rule setting out the site suitability criteria for the Yucca Mountain site.

A. Enactment of the Nuclear Waste Policy Act of 1982

1. Development of the Nuclear Waste Policy Act

The NWPA was enacted to provide for the siting, construction, and operation of repositories for which there is a reasonable assurance that the public and the environment will be adequately protected from the hazards posed by spent nuclear fuel and high-level radioactive waste (hereinafter referred to as ''spent fuel'' or ''high-level waste'' or both). The NWPA established the Federal responsibility and defined Federal policy for the disposal of spent fuel and high-level waste. Because this waste remains radioactive for many thousands of years, Congress recognized that disposal involved many complex and novel technical and societal issues. To develop an appropriate framework for the resolution of these issues, several years of intense legislative effort were required before a political consensus emerged to support enactment of the NWPA.

To meet the well-recognized reluctance of communities to host such facilities, the NWPA included a national site selection process that was designed to ensure fairness and objectivity in the identification of potential candidate sites for a repository. To ensure that the DOE would consider only candidate sites that had good potential for being licensed by the NRC, the NWPA required the DOE to obtain NRC concurrence on the DOE's General Siting Guidelines. And to ensure that the regulatory requirements for a repository would be set independently of any responsibility assigned to the DOE to develop that repository, the EPA was authorized to promulgate generally applicable standards for the protection of the environment. The NRC was authorized to establish repository licensing requirements and criteria, although these requirements and criteria could not be inconsistent with any relevant public health standards promulgated by the EPA.

2. Overview of the Nuclear Waste Policy Act

As originally enacted in 1982, the NWPA set forth requirements for selecting sites for the disposal of spent fuel and high-level waste in a geological repository (42 U.S.C. 10101, *et seq.*). Several stages were established for the evaluation of potential sites, and these stages were defined in section 112, Recommendation of Candidate Sites for Site Characterization; section 113, Site Characterization; and section 114, Site Approval and Construction Authorization.

Section 112 of the NWPA addresses the initial stage of the site selection process, and includes four distinct steps: (1) DOE preliminary site screening (42 U.S.C. 10132(a)); (2) DOE nomination of at least five sites as suitable for characterization (42 U.S.C. 10132(b)(1)(A)); (3) DOE

recommendation to the President of three of the five nominated sites as candidates for characterization (42 U.S.C. 10132(b)(1)(B)); and (4) Presidential approval of nominated sites for characterization (42 U.S.C. 10132(c)). Specifically, section 112(a) directed the DOE to issue General Guidelines for the recommendation of candidate sites for repositories, and to use the Guidelines in considering sites for site characterization. Section 112 also directed DOE to consult with several federal agencies and obtain NRC concurrence on these Guidelines.

Under section 112(a), DOE was required to specify in the Guidelines: (1) Detailed geologic considerations that were to be the primary criteria for the selection of sites for characterization in various geologic media; (2) certain factors (e.g., hydrology, geophysics, seismic activity) that would either qualify or disqualify a site from characterization; and (3) population density and distribution factors that would disqualify any site for characterization (42 U.S.C. 10132(a)). Section 112(a) also required DOE to include certain factors related to the comparative advantages among candidate sites. DOE was directed to use the Guidelines to consider candidate sites for recommendation as candidates for characterization. Section 112(a) explicitly authorized DOE to modify the Guidelines consistent with the provisions of section 112(a).

Furthermore, section 112(a) directed DOE to develop certain qualifying or disqualifying factors for the preliminary site screening stage of the site selection process. Except for population density, the specific content of the qualifying or disqualifying factors was left to DOE's discretion. Because these factors are part of the Guidelines, their specific content could be modified in accordance with the authority in section 112(a).

Section 112(b) of the NWPA addressed DOE's recommendation to the President of sites for site characterization, that is, for intensive investigation of geologically related characteristics through surface and subsurface testing, among other investigative techniques. DOE was to nominate at least five sites as suitable for characterization. Each nominated site was to be accompanied by an environmental assessment. Of the five sites, DOE was to recommend three to the President for characterization. Section 112(c) of the NWPA addressed the President's review and approval of candidate sites for characterization.

Section 113 of the NWPA addresses site characterization, which involves activities that could proceed only after the section 112 actions had been completed. Section 113(a) authorizes DOE to conduct site characterization activities at the sites that had been approved by the President for characterization. Section 113(b) establishes the scope of DOE's site characterization activities, and directs the publication of a general plan for these activities (42 U.S.C. 10133(b)(1)(A)). DOE is to report semiannually on its ongoing and planned site characterization activities and the information derived therefrom (42 U.S.C. 10133(b)(3)). Section 113(b) also directs DOE to include in the site characterization plan criteria to be used to determine the suitability of a site for the location of a repository, developed pursuant to section 112(a) (42 U.S.C. 10133(b)(1)(A)(iv)). Section 113(c) limits DOE's site characterization activities to those the Secretary considers necessary to provide the data required to evaluate a site's suitability for an application for a construction authorization as a repository and to comply with NEPA. It also provides direction on how DOE is to proceed if at any time it determines that a site would be unsuitable for development as a repository.

Section 114 addresses site approval and construction authorization. Four distinct steps are defined in this section: (1) DOE recommendation of a site to the President for approval to develop as a repository (42 U.S.C. 10134(a)); (2) recommendation of a site by the President to Congress (42 U.S.C. 10134(a)(2)); (3) Congressional designation of the site (42 U.S.C. 10135(b)); and (4) conduct of a licensing proceeding by the NRC (42 U.S.C. 10134(c)). Further, under section 115, after the President recommends a site to Congress, the Governor and the legislature of the host State may submit a notice of disapproval. If the State disapproves, Congress must enact a resolution of siting approval in order to designate the site (42 U.S.C. 10135(b)). If the designation takes effect, DOE is to submit an application to the NRC for a construction authorization within 90 days of the designation's taking effect. (42 U.S.C. 10134(b)).

Section 114(a) provides for DOE activities preceding the Secretary's preparation of a recommendation to the President for Presidential approval of a site for development as a repository. These activities include public hearings in the vicinity of the site to inform residents of the area and receive their comments, and the completion of site characterization. Upon completion of these hearings and site characterization, the Secretary may decide to recommend the site to the President. A comprehensive statement of the basis for this recommendation is to accompany the recommendation, and be made available to the public (42 U.S.C. 10134(a)(1)). If the President recommends a site to the Congress and that recommendation is permitted to take effect, section 114(b) then directs DOE to apply to the NRC for construction authorization. Sections 114(c)–(e) direct the NRC and DOE on certain aspects of the construction authorization process. Section 114(f) requires that a final Environmental Impact Statement (EIS) accompany the Secretary's recommendation of a site to the President.

B. DOE Promulgation of General Guidelines at 10 CFR Part 960

1. Overview of the General Guidelines

Section 112(a) of the NWPA directed DOE to issue General Guidelines for use in considering and recommending sites for site characterization, in consultation with certain Federal agencies and interested Governors, and with the concurrence of the NRC. These General Guidelines were to be comparative in nature, as DOE was required to consider various geologic media and such considerations as proximity to where spent fuel and high-level waste were stored. The General Guidelines were also to consider non-geologic factors, such as population density and distribution, that would not be examined in site characterization. No other requirements were imposed on the issuance of these Guidelines.

DOE promulgated the section 112(a) Guidelines by notice and comment rulemaking, in addition to the consultation and concurrence process specified in the NWPA. The DOE also conducted several public meetings on the Guidelines. These additional activities, although not required by the NWPA, enabled DOE to receive comments from interested members of the public. The General Guidelines were promulgated on December 6, 1984, and codified in the Code of Federal Regulations at 10 CFR part 960, General Guidelines for the Recommendation of Sites for the Nuclear Waste Repositories. 49 FR 47714.

2. Structure of the General Guidelines

The Guidelines promulgated by DOE defined the basic technical requirements that candidate sites would be expected to meet, and specified how DOE would implement its site-selection process. The Guidelines were structured according to three categories: Implementation guidelines, preclosure guidelines and postclosure guidelines.

The implementation guidelines addressed general application of all the Guidelines, and established the methodology for applying the Guidelines during the various stages of the siting process: Site screening and nomination, recommendation for characterization, and recommendation for repository development. The preclosure guidelines governed the siting considerations that dealt with the operation of a geologic repository before it is closed. The postclosure guidelines governed the siting considerations that dealt with the long-term behavior of a geologic repository after waste emplacement and closure.

Both the preclosure and postclosure guidelines were organized under general categories of interest, for example, geohydrology and geochemistry. Each category was further divided into system guidelines and corresponding technical guidelines. The system guidelines addressed broad requirements for a geologic repository under preclosure and postclosure conditions; the corresponding technical guidelines specified conditions that would qualify or disqualify a site, and conditions that would be considered favorable or potentially adverse. 49 FR 47724. In effect, the technical guidelines and the associated qualifying and disqualifying conditions imposed specific ''subsystem'' performance requirements; each subsystem requirement would be used to evaluate the merits of a site, independent of the other requirements.

Section 112 of the NWPA described the minimum steps that DOE was to take during site screening and prior to site characterization. When promulgating the Guidelines in 1984, DOE determined that application of the Guidelines should extend beyond preliminary site screening to encompass site characterization activities and site recommendation to the President. Appendix III to the Guidelines explained how certain of the Guidelines would be applied at the principal decision points of the siting process: (1) Identification of a site as being potentially acceptable under section 112(b); (2) nomination and recommendation of sites as suitable for characterization under sections 112(b) and (c); and (3) recommendation of a site for development as a repository (sections 113 and 114). 49 FR 47729–47730. With respect to the third decision point, which would be reached only after completion of site characterization activities and non-geologic data gathering activities, DOE did not promulgate separate guidelines. Instead, DOE indicated that the preclosure and postclosure guidelines would be applied to this decision, and appropriate findings issued, in the manner prescribed in Appendix III. Appendix III specified the types of findings that were to be issued from the application of the disqualifying and the qualifying conditions at each of the three decision points. The types of findings corresponded with the level of confidence required to make a finding; that is, a lower level finding required one degree of confidence in the finding, and a higher level finding required an increased level of confidence in the finding over the lower level. 49 FR 47728–47729. Appendix III included a table summarizing the level of the finding required at each of the three decision points.

Appendix III represented the analytical process DOE would follow to issue findings relative to the disqualifying and qualifying conditions of a site, and use in its decision-making on site selection. This analytical process specified a higher-level of confidence in the findings of qualifying or disqualifying conditions at the last stage of the siting process, site selection for repository development, compared to the initial stage of the siting process, site nomination for site characterization. DOE anticipated that the higher-level of confidence in its technical findings would be obtained through the site characterization process undertaken at the later stages of the selection process.

3. Bases for the Structure of the General Guidelines

The structure and development of the Guidelines were based on four primary sources of information and considerations: (1) The direction in the NWPA, as originally enacted; (2) the extant understanding of geologic disposal in the scientific and technical community; (3) applicable regulations proposed by the NRC and the EPA governing the disposal of spent nuclear fuel and high-level radioactive waste in geologic repositories; and (4) public comments.

DOE initiated the rulemaking process by assembling a task force of program experts. 49 FR 47718. The task force developed draft Guidelines based on criteria used earlier in the National Waste Terminal Storage Program, including program objectives, system performance criteria, and site performance criteria. At the time, the task force reviewed other criteria defined for geologic repositories by the National Academy of Sciences and the International Atomic Energy Agency.

The task force also sought consistency with NRC regulations and proposed EPA regulations related to geologic repositories. 49 FR 47718. NRC is the statutory agency responsible for licensing the construction and operation of a geologic repository; EPA is the statutory agency responsible for setting public health and safety standards for a geologic repository. Consistency of the DOE Guidelines with these regulatory standards was essential, since any potential site would be evaluated based on its ability to meet applicable regulatory requirements. 49 FR 47721.

In sum, the structure and content of the Guidelines was based on the state of knowledge in the late-1970s and early-1980s in the regulatory community, as well as the national and international scientific community, regarding the development of geologic repositories and the regulations promulgated by NRC and EPA to govern the licensing of a repository.

DOE sought and received extensive public comments on a draft of the Guidelines before submitting them to the NRC for concurrence. On February 7, 1983, the proposed Guidelines were published in the **Federal Register** (48 FR 5670) for public review and comment. In addition, DOE published a separate notice soliciting comment from the Governors of the six States with potentially acceptable sites, and then met individually with officials from each of these States. DOE also held a series of regional public hearings. After considering the comments received, DOE drafted a set of revised guidelines to address the comments. The revised guidelines and public comments were made available in a second notice on June 7, 1983 (48 FR 26441), followed by a second public comment period. Further regional meetings and consultations with Federal agencies were held before DOE submitted the final version of the Guidelines to NRC for concurrence on November 22, 1983. 49 FR 47718–47719.

4. Consistency With NRC Technical and Procedural Conditions

Of particular importance to DOE's formulation of the Guidelines was consistency with NRC licensing regulations for the disposal of waste in a geologic repository. 49 FR 47718. In June 1983, NRC amended its licensing regulations at 10 CFR part 60 with respect to subpart E, technical criteria addressing siting, design and performance objectives of a geologic repository. 48 FR 28194. NRC concurred in the Guidelines subject to conditions that would satisfy the overall need to maintain consistency between NRC regulations and the DOE Guidelines. Among the NRC conditions were: (1)

DOE clarifications and deletions of certain limiting terms such as ''permanent'' and ''significant'; (2) DOE modifications for consistency with NRC criteria regarding anticipated processes and events, potentially adverse conditions, and the role of engineered barriers during the process for screening candidate sites for characterization; and (3) DOE revisions and additions to disqualifying conditions to ensure that unacceptable sites would be eliminated as early as practicable. 49 FR 47719–47722.

NRC concurrence conditions also addressed general, procedural aspects of how the DOE was to apply the Guidelines. For example, NRC concurrence was conditioned on a lack of conflict between NRC regulations at 10 CFR part 60 and the Guidelines, recognition by DOE that NRC regulations were controlling in the event of any differences, and a commitment that DOE would obtain NRC concurrence on any future revisions to the Guidelines. 49 FR 47719–47720. NRC also requested DOE to specify in greater detail how the Guidelines would be applied at each siting stage. This specificity was provided by the addition of Appendix III to the Guidelines. Appendix III indicated how the Guidelines would be applied at all of the site selection stages, including the recommendations to the President for site characterization and for the development of a site as a repository.

The NRC required additional changes after it met publicly with representatives of several interested states, Indian tribes, and DOE. After DOE committed to making those changes, the NRC voted to concur in the Guidelines. 49 FR 47720. Thus, the part 960 Guidelines took account of the substantial input provided by the NRC in 1984 through the statutory concurrence process.

C. DOE Application of the Guidelines

Consistent with section 112(b) of the NWPA, DOE applied the Guidelines to: (1) nominate five sites as suitable for characterization; and (2) recommend to the President three of those five nominated sites for characterization as candidate sites for the first repository. On May 27, 1986, the President approved each of the sites that had been recommended for characterization. Yucca Mountain was one of the three sites that DOE recommended. The recommendation to the President was documented in a DOE report, Recommendation by the Secretary of Energy for Site Characterization for the First Radioactive-Waste Repository (May 1986; DOE/S–0048). In addition, a draft environmental assessment was prepared for each of the five sites and final environmental assessments were prepared for each of the three sites that were recommended.

This action concluded the process that had been established by the NWPA for identifying sites for characterization. The Guidelines' role of structuring DOE's process for identifying sites for characterization was completed in accordance with the Congressional directives to DOE. Under DOE's formulation of the Guidelines at that time, however, the Guidelines would remain relevant and applicable through the third principal siting decision point, the selection of a site to be recommended for the development of a repository.

D. 1987 Amendments to NWPA

In 1987, Congress amended the NWPA to mandate Yucca Mountain as the sole site to be characterized (42 U.S.C. 10172 (Supp. V 1987)). The processes for site characterization under section 113 and site approval under section 114 were made applicable to only Yucca Mountain. Under sections 113(a) and (b), Yucca Mountain was designated as the site for which site characterization activities would take place, and a site characterization plan would be issued, respectively. Under section 113(c), Congress amended the statute to name Yucca Mountain as the site for which the restrictions on site characterization activities would be applicable. That is, DOE was directed to conduct only such activities at Yucca Mountain that are necessary to evaluate the suitability of the site for an application to the NRC for a construction authorization, and to comply with requirements under the National Environmental Policy Act (NEPA). Section 114 was amended to excuse DOE from analysis of alternative sites in any environmental impact statement (EIS) that may be prepared for the Yucca Mountain site under NEPA. Any such EIS would analyze the Yucca Mountain site, and no other sites, for potential development of a geologic repository. Further, section 160(b) directed DOE to ''terminate all site specific activities (other than reclamation activities) at all candidate sites, other than the Yucca Mountain site.'' (42 U.S.C. 10172(a)(2)).

In sum, Congress made clear its intent for DOE to focus its resources on investigating only Yucca Mountain as a potential site for a high-level radioactive waste repository.

E. Yucca Mountain Site Characterization Plan

1. Statutory Requirements

Under sections 113 and 160 of the NWPA, as amended, DOE was directed to conduct site characterization activities at the Yucca Mountain site. Prior to initiating site characterization under section 113, DOE was required to prepare a general plan for site characterization activities at the Yucca Mountain site. DOE was required to submit the plan to the NRC and the State of Nevada for their review and comment (42 U.S.C. 10133(b)(1)), as well as to members of the public in the vicinity of Yucca Mountain (42 U.S.C. 10133(b)(2)). Certain contents of the plan were mandated by section 113(b), including, among other things, a description of planned excavation and other testing activities, a description of the possible form or packaging of the high-level waste, and the criteria to be used to determine the suitability of the site for the location of a repository, developed pursuant to section 112(a). Section 113(b)(3) also required DOE to report every six months on the progress of site characterization activities at Yucca Mountain, and to provide the reports to the NRC, and the Governor and the legislature of the State of Nevada.

DOE prepared the site characterization plan in draft form in January 1988. In preparing the plan, DOE generally followed NRC guidance, as specified in the document, Standard Format and Content of Site Characterization Plans for High Level Waste Geologic Repositories, Regulatory Guide 4.17 (NRC 1987). After review and comment by NRC, the State of Nevada, and interested members of the public, DOE finalized the Site Characterization Plan: Yucca Mountain Site, Nevada Research and Development Area, Nevada (December 1988; DOE/RW–0198) (hereinafter also the SCP), in December 1988.

2. Structure of the Site Characterization Plan

''Site characterization'' is defined in the NWPA to include research activities undertaken to establish the geologic condition of a site, for example, borings and surface excavations, and in situ testing necessary to evaluate the suitability of a candidate site for the location of a repository (42 U.S.C. 10101(21)). In the SCP, DOE described the purpose of its site characterization program at Yucca Mountain as to obtain the information necessary to determine whether or not the site is suitable for a repository, and could satisfy NRC

licensing requirements (which must be consistent with EPA public health and safety standards). DOE also explained there that the information obtained from site characterization, such as the geologic, geoengineering, hydrologic, and climatological conditions at a site, would be used to develop and optimize repository design and to evaluate the performance of the site and the engineered barriers as an integrated system.

The purpose of the SCP was threefold: (1) To describe the site, and the preliminary designs for the repository and the waste packages in sufficient detail to form the basis for the site characterization program; (2) to identify issues to be resolved during site characterization and present the strategy for resolving the issues; and (3) to describe the plans for the work needed to obtain the information deemed necessary and to resolve outstanding issues. The SCP was organized along two lines: (1) An issues hierarchy, which embodied the DOE, NRC and EPA regulations governing the repository system; and (2) an issue-resolution strategy.

The issues hierarchy was a three-tiered framework laying out what must be known before the Yucca Mountain site could be selected and licensed. ''Issues'' were defined as questions related to performance of the repository that must be resolved to demonstrate compliance with applicable regulations of DOE, NRC and EPA. DOE identified four key issues to be addressed, based on regulatory requirements and the four system guidelines in part 960: (1) Postclosure performance; (2) preclosure performance; (3) environment, socioeconomic, and transportation impacts of a repository; and (4) ease and cost of repository siting, construction, operation and closure. DOE also explained that only the first, second, and part of the fourth key issue would be addressed in the site characterization program, since resolution of these other key issues (that is, key issue 3 and part of key issue 4) were not dependent on information from site characterization activities. The issue-resolution strategy consisted of four parts: issue identification, performance allocation, data collection and analysis, and documentation of issue resolution. This framework was used to develop test programs and explain why the test programs were adequate and necessary. The object was to collect information to be used in a concluding set of analyses to resolve the issues, and to document resolution of the issues.

As required by section 113(b)(1)(A)(iv), the SCP included criteria to determine the suitability of the site for development of a repository. Those ''criteria'' were the provisions within the Guidelines pertinent to site characterization activities, namely, the postclosure guidelines, and the preclosure guidelines related to radiological safety and technical feasibility of repository siting, construction and operation, to be applied in the manner described in Appendix III. Appendix III set out the level of findings DOE would make relative to the system and technical requirements found in the postclosure guidelines (subpart C) and preclosure guidelines (subpart D) at the final decision point of recommending a site for development as a repository. DOE believed that the information gained through site characterization and the issue resolution process would form the basis for these findings.

DOE also explained in the SCP that not all of the Guidelines would be addressed as part of site characterization activities. The SCP would not address the environmental, socioeconomic and transportation guidelines, or certain guidelines related to ease and cost of repository siting, construction, operation, and closure, since DOE would not develop information related to those guidelines through site characterization activities. Those Guidelines would be addressed in other investigations and plans to be conducted concurrently with the site characterization program. Also, in light of the 1987 amendments to the NWPA permitting site characterization to proceed only at Yucca Mountain, DOE stated in the SCP that the comparative portions of the Guidelines would not be applied in the site suitability determination to be made under section 113(b).

In accordance with section 113(b)(3), approximately every six months DOE has issued a report updating information on the conduct of site characterization activities at the Yucca Mountain site. Those reports briefly summarize the characterization activities undertaken at the site, the technical and scientific issues of key interest and their resolution, and issues that remain for further characterization and resolution. In addition, the semiannual reports provide references and a bibliography of other reports and documents containing more detailed information regarding site characterization activities. DOE has been providing the reports to the NRC, the Governor of Nevada, and the legislature of the State of Nevada.

The progress reports also reflect DOE's ongoing interaction with the NRC. In July 1986, the NRC amended its regulations at 10 CFR part 60 (51 FR 27158) to establish the method of interaction between DOE and the NRC on the development and implementation of the site characterization plan. NRC established a system for DOE to report on the results of site characterization, identify issues, plan for additional studies, eliminate planned studies no longer necessary, and identify decision points reached. In this manner, the NRC established a clear pathway to interact with DOE in the management and direction of the site characterization program.

Site characterization activities have continued up to and including the present, and are described in greater detail below in section II.G.

F. Energy Policy Act of 1992

In 1992, Congress enacted certain provisions in the Energy Policy Act of 1992 (Pub. L. No. 102–486) affecting the nation's nuclear waste repository program. In section 801(a) of the Energy Policy Act of 1992 (EPACT), Congress directed EPA to promulgate a new, health-based standard to ensure protection of the public health from high-level radioactive waste that may be disposed in a geologic repository located at Yucca Mountain. The new standard could depart from the generic EPA standards promulgated at 40 CFR part 191, and would be specific to Yucca Mountain. In section 801(b), Congress also directed the NRC, within one year of EPA's adopting a new standard, to modify its technical requirements and criteria under section 121(b) of the NWPA (42 U.S.C. 10141(b)) (i.e., 10 CFR part 60), as necessary, to be consistent with the new EPA standard.

Before setting the new standard, however, EPA was required to contract with the National Academy of Sciences (NAS) to conduct a study to provide findings and recommendations on reasonable standards for protection of the public health and safety. Under section 801(a) of the EPACT, EPA was required to promulgate its new standards based on, and consistent with, the NAS findings and recommendations. Under the EPACT and accompanying congressional instruction, NAS's charge was to answer three specific questions embodied in section 801(a)(2), and to advise EPA on the technical basis for the health-based standards it was mandated to prepare. The three questions posed in section 801(a)(2) addressed: (1) Whether or not a health-based standard based on doses to individual members of the public would provide a reasonable basis for

protecting public health and safety; (2) whether or not it is reasonable to assume that a system for postclosure oversight of the repository, using active institutional controls, will prevent an unreasonable risk of breaching the repository's engineered or natural barriers, or of increasing the exposure of individual members of the public to radiation beyond allowable limits; and (3) whether or not it is possible to make scientifically supportable predictions of the probability that the repository's engineered or natural barriers will be breached as a result of human intrusion over a period of 10,000 years.

In August 1995, NAS published the statutorily mandated report, entitled Technical Bases for Yucca Mountain Standards. In sum, NAS issued findings that: (1) A health standard for Yucca Mountain based on risk to individuals of adverse health effects from releases from the repository (rather than EPA's generic standards which contain both individual dose and release limits) was an appropriate standard that would adequately protect the health and safety of the general public; (2) it is not reasonable to assume that a system for postclosure oversight can be developed, based on active institutional controls, which will itself prevent an unreasonable risk of breaching the repository's engineered barriers or of increasing the exposure of individual members of the public to radiation beyond allowable limits; and (3) it is not possible to make scientifically supportable predictions of the probability that a repository's engineered or geologic barriers will be breached as a result of human intrusion over a period of 10,000 years. Notwithstanding the latter two findings, the NAS recommended EPA include in its standards a stylized human intrusion event. The NAS reasoned that such an analysis may provide useful insight into the degree to which the ability of a repository to protect the public health and safety would be degraded by an intrusion.

In reaching its findings and recommendations, the NAS consulted with numerous entities, including local, state and federal government agencies, private organizations, and scientists and engineers, both national and international, familiar with the technical issues under study, and held five open technical meetings to ensure a thorough review of the scientific literature on the subject. In the Technical Bases for Yucca Mountain Standards, the NAS provided a detailed explanation of the assumptions and analyses underlying the study, and the reasons for NAS's findings and recommendations. Among the more important of these is the NAS assumption, confirmed by its technical review, that it is possible to conduct scientifically justifiable analyses of repository behavior over thousands of years in order to assess whether or not a repository can comply with the applicable public health standard. In addition, based on its analyses, the NAS concluded that the proper way to evaluate the risks of adverse health effects, and to compare those risks to the proposed standard, is to assess the estimated potential future behavior of the entire repository system and its potential effect on humans. The procedure used to perform this analysis is called total system performance assessment (alternately called performance assessment).

In discussing the possible implications of its conclusions, the NAS noted that, if EPA issued standards based on individual risk (as recommended by the NAS), then the NRC would be required to revise its regulations embodied in 10 CFR part 60 to be consistent with EPA. This is because NRC's 10 CFR part 60 is directed in part to subsystem technical requirements, whereas the NAS concluded that it is the performance of the total system, rather than that of its individual elements in isolation, that is crucial in the context of a risk-based standard. Under a risk-based standard, imposing subsystem performance requirements might result in a deficient repository design even if each subsystem element meets or exceeds a certain performance standard. The NAS also observed that its recommendations, if adopted, implied the development by EPA of different regulatory and analytical approaches from those employed in the past, and that the process of establishing the new standards would require significant time and opportunity for public comment and review. Nevertheless, NAS noted that these potential changes should not impede site characterization work by DOE at Yucca Mountain.

G. Evolution of the Site Characterization Program

Since publication of the SCP in 1988, DOE's site characterization program at Yucca Mountain has made substantial progress in developing information and data about the site and resolving outstanding technical issues. Over time, the site characterization program has evolved and been driven by advances in science and technology, as well as legislative and managerial changes. The following summarizes the evolution and status of the site characterization program.

Technical Components of the Site Characterization Program. The three main technical components of the site characterization program are testing, design, and performance assessment. Testing encompasses the investigation of natural features and processes at the site through field testing, conducted above and below ground, and laboratory testing of rock and water samples. Design refers to work on development of the description of a repository and waste packages tailored to the site features, supported by laboratory testing of candidate materials for waste packages and design-related testing in underground tunnels similar to those in which waste would be emplaced. Performance assessment refers to the quantitative estimates of the performance of the total repository system, over a range of possible conditions and for different repository configurations, by means of computer modeling techniques that are based on site and materials testing data and accepted principles of physics and chemistry.

Through the testing program, DOE has learned a great deal about the geologic conditions of the site. The single largest effort undertaken in this regard has been construction of the Exploratory Studies Facility (ESF). Construction of this facility began in 1992 and was completed in 1998. The ESF, a 4.9 mile long underground tunnel, has enabled DOE to conduct testing and exploration activities in Yucca Mountain at the depth of the proposed repository. Utilization of this facility has formed the basis for increased knowledge and understanding of the mechanical and hydrologic characteristics of the geologic formation in which the repository would be constructed. Ongoing work at this facility will focus primarily on thermal and hydrologic testing in the cross drift to extend and, where necessary, modify this understanding of the properties of the host rock.

The design component of the site characterization program comprises those activities aimed at developing concepts for the engineered components of the geologic repository. Design activities use information about the site gained through the testing program, and information about the engineered barrier system gained through other scientific investigations, to generate and develop design concepts that can meet the requirements placed on the engineered components of the repository. Site characterization activities are structured to acquire data needed to support the

design. For example, a number of the site characterization program tests focus on the hydrological, geomechanical and thermal properties of Yucca Mountain. These tests are significant because they provide the fundamental information needed to specify the approach to be used in developing the geologic repository thermal loading and underground support schemes. Also, under the design program, DOE examines various approaches to meeting engineered facility requirements, and conducts comparative evaluations of the costs and benefits of different approaches to developing design concepts.

The performance assessment component of site characterization represents the analytical method (i.e., computer modeling) DOE uses to forecast the performance of the repository within the Yucca Mountain setting and assess that performance against regulatory standards. Put in simplified terms, performance assessment uses the information and data collected under the testing and design programs to feed computer models that describe how the site would behave in the presence of a repository and how the engineered system would behave within the environmental setting of the mountain. Each model, called a process model, is designed to describe the behavior of individual and coupled physical and chemical processes. A total system performance assessment (TSPA) links the results of individual process models to construct a computer model of the repository system and surrounding environment that are important to assessment of overall repository performance. With the TSPA model, DOE can estimate releases of radionuclides from a repository under a range of conditions, over thousands of years, and forecast the consequent probable doses to persons.

Performance assessment (or TSPA), as described above, is an accepted method to assess the performance of a repository at Yucca Mountain. DOE's use of performance assessment models began even before issuance of the SCP in 1988. Since that time, however, significant advancements have been made in the technical capability, acceptance, and use of this analytical tool. In 1991, the Nuclear Energy Agency Radioactive Waste Management Committee and the International Atomic Energy Agency International Radioactive Waste Management Advisory Committee confirmed that TSPA provides an adequate means to evaluate long-term radiological impacts of a waste disposal system. On a national level, the NRC, the NAS and the Nuclear Waste Technical Review Board (''NWTRB'') (a Congressionally mandated committee of experts chartered to evaluate the technical and scientific validity of activities undertaken by DOE to characterize Yucca Mountain to determine its suitability as a location for a repository) have acknowledged the value of this method for evaluating postclosure performance for a repository at Yucca Mountain.

A significant portion of the DOE site characterization program has been aimed at developing the scientific bases that serve as the foundation for the process models used in performance assessment. DOE developed performance assessment models and conducted benchmark performance assessments of the total repository system in 1991, 1993 and 1995. Between these benchmark assessments, DOE conducted many performance assessments to evaluate selected features of the site and the evolving design. DOE used these total system and subsystem performance assessments to evaluate design options and to determine further data needed from site investigations. Another TSPA was conducted in 1998, the results of which are contained in the Viability Assessment.

Redirection of the Site Characterization Program. In 1994, DOE conducted extensive internal and external reviews of the program. As a result of those reviews, documented in the Civilian Radioactive Waste Management Program Plan (December 1994; DOE/RW–0458) (Program Plan), DOE identified cost-cutting measures to reduce the cost of completing site characterization. In response to Congressional concern about the 1994 Program Plan, DOE submitted a revised Program Plan to Congress that was designed to maintain scientific investigations at the site and retain target dates for determining site suitability and recommendation for construction authorization. Civilian Radioactive Waste Management Program Plan, Revision 1 (May 1996; DOE/RW–0458). As part of the revised strategy, DOE redirected project efforts to address the major unresolved technical questions and to complete an assessment of the viability of licensing and constructing a repository at Yucca Mountain. Congress indicated its approval of the revised Program Plan in the Conference Report on the Energy and Water Development Appropriations Act, 1997, H.R. Rep. No. 782, 104th Cong., 2d Sess. 82 (1996), by directing that the appropriated funds be used in accordance with the revised Program Plan issued by DOE in May 1996.

In the Fiscal Year 1997 Energy and Water Development Appropriations Act (Pub. L. No. 104–206) (referenced above), Congress directed DOE to provide the viability assessment of the Yucca Mountain site, referenced in DOE's revised Program Plan, to Congress and the President as a basis for making future decisions on program funding and direction. DOE issued the Viability Assessment in December 1998. Drawing on 15 years of scientific investigation and design work, the Viability Assessment summarized a large technical basis of field investigations, laboratory tests, models, analyses and engineering. The Viability Assessment also identified major uncertainties relevant to the technical defensibility of DOE's analyses and designs, the approach to managing these uncertainties, and the status of work relative to the target dates of 2001 for a determination on recommendation of Yucca Mountain and 2002 for submittal of a license application to NRC. The Viability Assessment also included an iteration of the TSPA conducted in 1998, and the results of that process.

Coordination with NRC. DOE's implementation of its site characterization program and the issue resolution strategy embodied in the SCP has been conducted in close coordination with the NRC. In 1995, the NRC revised its prelicensing repository program as a result of changes in the DOE civilian radioactive waste management program, the findings of the NAS committee recommending changes to the public health standard for a potential Yucca Mountain repository, and budgetary constraints imposed by Congress. The NRC adjusted the scope of its program to focus only on those topics most critical to repository performance, termed ''key technical issues.'' These issues were intended to be a vehicle to communicate to DOE those technical matters for which the NRC had remaining unanswered questions regarding the performance of the Yucca Mountain site, or the data needed to assess that performance. DOE's management of the site characterization program has included activities to obtain information to address the NRC key technical issues. DOE has structured the site characterization program in such a manner that one of its goals is for DOE and NRC to reach consensus that the remaining key technical issues have been addressed adequately, or that adequate plans are in place to address the issues.

H. The 1993–1995 Public Dialogue on the Guidelines

In the SCP, issued in December 1988, DOE described how it would apply the part 960 Guidelines as part of the site characterization program to evaluate the suitability of the site. DOE indicated in the SCP that the Guidelines related to site characterization activities would be applied as the suitability criteria. DOE also indicated there that the comparative provisions of those requirements would not be applied in light of the 1987 amendments to the NWPA limiting site characterization activities to Yucca Mountain. Notwithstanding this explanation, a number of interested parties suggested it remained unclear how DOE would apply the Guidelines in the future. Because of this continuing stated uncertainty, the DOE instituted an ongoing dialogue with external parties on the Guidelines.

In October 1993, DOE briefed the representatives of the affected units of local government and the State of Nevada on its plans for activities related to site suitability evaluation. DOE followed this briefing with a Notice of Inquiry in the **Federal Register** (59 FR 19680), dated April 25, 1994, eliciting the views of the public on the appropriate role of the Guidelines. A public meeting was held on May 21, 1994 in Las Vegas, Nevada. The purposes of the meeting were to follow-up on a previous public meeting held in August 1993; to update the public on site characterization activities; and to provide an opportunity to discuss the development of a process to evaluate site suitability. DOE then published a second **Federal Register** notice (59 FR 39766) on August 4, 1994, announcing that it intended to use the Guidelines as currently written, subject to the programmatic reconfiguration directed in the 1987 NWPA amendments. Through that notice, DOE also announced the availability of a draft description of the proposed process and its intention to hold two additional public meetings to discuss the matter. Although several options were discussed, DOE discerned no clearly preferred option from this public comment process. In response to public comments at the meetings, DOE committed to provide background information and its rationale for maintaining the use of the Guidelines as originally promulgated, with modification to eliminate application of the comparative portions of the Guidelines. In September 1995, DOE published in the **Federal Register** the background information and its rationale, as committed to in previous public meetings. 60 FR 47737.

In the September 1995 public notice, DOE explained that amending the Guidelines, either to remove those portions that are primarily used for comparative purposes or to develop Guidelines tailored to evaluation of the suitability of the Yucca Mountain site, was not required at that time. DOE recognized then that the Guidelines might have to be amended at some future date to be consistent with any changes to EPA or NRC requirements. 60 FR 47740. Among the options considered in the 1993–1995 public dialogue was abandonment of the Guidelines and adoption of the NRC siting criteria in 10 CFR 60.122. DOE noted that the Guidelines were expressly derived from, and tied to, the part 60 siting criteria. In addition, DOE noted that, should any differences between 10 CFR part 960 and 10 CFR part 60 be identified, 10 CFR part 60 would prevail in the licensing process. While recognizing that much of 10 CFR part 960 subpart B, the implementation guidelines, was no longer applicable, DOE concluded that the Guidelines could be selectively interpreted to avoid the comparative aspects while applying the relevant provisions of subparts C and D, the postclosure and preclosure guidelines.

I. The 1996 Notice of Proposed Rulemaking

For many of the reasons described earlier in this notice, including changes in congressional direction of the repository program and advancements in site characterization, on December 16, 1996, DOE published in the **Federal Register** a notice of proposed rulemaking for 10 CFR 960.61 FR 66158. In that notice, DOE proposed to clarify and focus the Guidelines and to add a new, site-specific subpart E to the Guidelines. Subpart E would apply only to the Yucca Mountain site, and would contain preclosure and postclosure system guidelines, each with a single qualifying condition. 61 FR 66163. In each of the periods, the qualifying condition would be that a repository at Yucca Mountain be capable of limiting radiological releases within applicable standards to be set by EPA and implemented by the NRC through the repository licensing process. DOE would demonstrate this capability through performance assessments. 61 FR 66164. These performance assessments would forecast the performance of a proposed geologic repository at Yucca Mountain and compare the results of the assessments to the applicable regulatory standards to determine whether or not the site would be suitable for development as a repository.

The 1996 proposal was consistent with the system-level evaluation originally envisioned for the conclusion of site characterization. DOE recognized in 1984 in the Guidelines that, only after the entire process of narrowing the number of potentially acceptable sites to one and after site characterization, would it be possible to conduct complete performance assessments. Such assessments require detailed information that can be obtained only during site characterization. 49 FR 47717. In addition, the 1996 proposal was consistent with DOE's longstanding position that the Guidelines must complement and not conflict with EPA and NRC regulations, since the ability to meet applicable public health and safety standards and develop information adequate to support a license application has always been central to the site suitability determination.

The 1996 proposal attracted a wide variety of comments from members of the public, the NRC, the EPA, and the Nuclear Waste Technical Review Board. The major issues that emerged from the public comment process were discussed in detail in the Supplementary Information to the supplemental notice of proposed rulemaking, issued on November 30, 1999 (discussed below at section L).

J. Proposed NRC Regulation, 10 CFR Part 63

1. Background

On February 22, 1999, the NRC published in the **Federal Register** a proposed new rule, 10 CFR part 63, containing licensing criteria for disposal of spent nuclear fuel and high-level radioactive waste in the proposed geologic repository at Yucca Mountain, along with proposed revisions to 10 CFR part 60 and other related regulations. 64 FR 8640. The proposed licensing criteria at part 63 apply exclusively to Yucca Mountain; part 60 is revised to limit its applicability to geologic repositories other than one at Yucca Mountain. NRC's proposal seeks to establish a new system of risk-informed, performance-based regulation. Under this approach, risk insights, engineering analysis and judgment, and performance history are used to: (1) Focus attention on the most important activities; (2) establish objective criteria based upon risk insights for evaluating performance; (3) develop measurable or calculable parameters for monitoring system and licensee performance; (4) provide flexibility to determine how

performance criteria are met; and (5) focus on results as the primary basis for regulatory decision-making. 64 FR 8643.

The NRC's rationale for proposing part 63 stemmed from the requirements of the EPACT. 64 FR 8641–8643. Section 801(b) of EPACT required that, within one year after EPA promulgates its new standards for protection of public health and safety, the NRC modify its technical requirements and criteria for repository licensing (i.e., part 60) to be consistent with the new EPA standards. In addition, the EPACT requires NRC to include in its modifications, consistent with the NAS findings and recommendations, certain assumptions that are specified in the EPACT with regard to the effectiveness of DOE's postclosure oversight of the repository.

As noted above, the NAS issued its findings and recommendations in the report, Technical Bases for Yucca Mountain Standards, August 1995. The NAS findings and recommendations reported there, along with consultation NRC had with EPA, provided the basis for NRC's proposed modifications. 64 FR 8641, 8643. The NAS' recommended approach to setting a public health and safety standard has a different objective from the NRC approach reflected in the pre-existing part 60 requirements and criteria. 64 FR 8643. Accordingly, the modifications proposed by the NRC, based on the NAS report, and the subsequently proposed EPA rule marked a change in methodology and licensing philosophy.

The NRC has now promulgated part 63 in final form. The final version closely resembles the proposed rule, however the final rule and changes made by the NRC to the proposed rule are discussed below at section II. M. Accordingly, we retain the discussion of the proposed version here, in order to facilitate an understanding of the development of part 963 by adhering to the chronological narrative of relevant events.

2. Structure of Proposed Part 63

Preclosure Requirements. In order to obtain a license to construct, operate and close a repository at Yucca Mountain, proposed part 63 would require DOE to demonstrate compliance with the applicable preclosure regulatory standards by the use of an integrated safety analysis. 64 FR 8652. An integrated safety analysis is a systematic examination of the geologic repository operations area's hazards and their potential for initiating events (for example, accidents), the potential consequences of the events, and the site, structures, systems, components, equipment and activities of personnel. The analysis would be conducted to ensure that all relevant hazards that could result in unacceptable consequences have been adequately evaluated and appropriate protective measures have been identified. ''Integrated'' means joint consideration of safety measures that otherwise might conflict, including such measures as fire protection, radiation safety, criticality safety, and chemical safety. The results of the analysis would be used to support a finding of compliance with a performance objective for the preclosure period of limiting radiation exposures and releases within a dose limit of 25 millirem (mrem) to any member of the public beyond the site boundary.

Postclosure Requirements. In order to obtain a license to construct, operate and close a repository at Yucca Mountain, proposed part 63 would require DOE to demonstrate compliance with the applicable postclosure regulatory standards by the use of a performance assessment of the potential repository. It should be noted that, in this regard, while certain parts of proposed part 63 are similar to part 60, in particular with respect to many procedural and administrative regulations, this part of the proposed rule, that is, the regulations governing postclosure performance objectives, is fundamentally different. The part 60 technical criteria for postclosure relied on several quantitative, subsystem performance objectives. In 1983–4, NRC believed this approach was best suited to meet its statutory requirement under section 121(b)(1)(B) of the NWPA to prescribe criteria that would involve use of a system of multiple barriers in the design of the repository. 64 FR 8648. At the time part 60 was written, NRC's technical opinion was that compliance with this requirement could be best demonstrated by specifying subsystem technical requirements, thereby assuring multiple, independent and redundant systems and barriers. Given advancements in technical understanding and analytical capability, and information acquired through site-characterization at Yucca Mountain, the NRC no longer believes this approach is an optimal and reliable approach to assure compliance with public health and safety standards. 64 FR 8648–8649.

Accordingly, in its criteria for postclosure system performance and method for evaluating compliance with those criteria, part 63 does not contain subsystem performance requirements, or analogs for those requirements, as found in part 60. The part 63 requirements are based on only one quantitative standard—demonstrating compliance with an individual dose limit. The part 63 technical criteria are compatible with the NRC's current philosophy of risk-informed, performance-based regulation. This approach is consistent with NAS recommendations that would require compliance with a health-based standard as the only quantitative standard for postclosure repository performance. 64 FR 8643. NRC's final rule conforms its approach on this question to EPA's, and DOE's final guidelines accordingly do likewise.

This approach is also consistent with the NWPA's directive to NRC in section 121(b)(1)(B) to provide use of a multiple barrier system (i.e., consisting of both natural and engineered barriers) in the design of the repository. This objective is attained by requiring DOE to demonstrate that the natural barriers and the engineered barriers will work in combination to enhance overall performance of the repository.

Proposed part 63 would require DOE to demonstrate compliance with the applicable postclosure regulatory standard by the use of performance assessment. 64 FR 8650. Performance assessment is a systematic analysis that identifies the features, events, and processes that might affect performance of the geologic repository, examines their effects on performance, and estimates the resulting expected annual dose. Demonstrating compliance with the postclosure performance of 10 CFR part 63 would require a performance assessment to quantitatively estimate the expected annual dose, over the compliance period, to the average member of a critical group. The critical group would be a hypothetical group of individuals reasonably expected to receive the greatest exposure to radioactive materials released from the geologic repository. Consistent with the EPACT and the 1995 NAS report, the NRC proposed that the results of the performance assessment be the sole quantitative measure used to demonstrate compliance with the individual dose limit. 64 FR 8650.

Because of the importance of the performance assessment, proposed part 63 was structured to establish certain minimum requirements governing the content and validation methods for the performance assessment. 64 FR 8650–8651. For example, DOE would be required to include in the performance assessment data related to the geology, hydrology and geochemistry of Yucca Mountain, as well as data related to the design of the engineered barrier system; to account for uncertainties and variabilities in the data used to model performance of the repository; to provide the technical basis for either

inclusion or exclusion of specific features, events, and processes of the geologic setting; and to provide the technical basis for the models used in the overall performance assessment by providing, for example, comparisons of the output of detailed process-level models and empirical observations. In addition, proposed part 63 would prescribe the characteristics of the reference biosphere and receptor to be used in the performance assessment. DOE also would be required to conduct a separate performance assessment based on a limited human intrusion scenario prescribed by the NRC.

K. Proposed EPA Regulation, 40 CFR Part 197

1. Background

On August 27, 1999, the EPA published in the **Federal Register** a proposed new rule, 40 CFR part 197, to establish public health and safety standards governing the storage and disposal of spent nuclear fuel and high level waste in a potential repository at Yucca Mountain, Nevada. 64 FR 46975. EPA promulgated this rulemaking pursuant to section 801(a) of the EPACT. As explained earlier in this preamble (section I.F.), in section 801(a)(1) of the EPACT Congress directed EPA to promulgate a health-based standard for the protection of the public from releases from radioactive materials stored or disposed of in a repository at the Yucca Mountain site. Also under EPACT, Congress directed that the EPA standard was to be the only standard applicable to the Yucca Mountain site, and that the EPA standard must be based upon and consistent with NAS'' findings and recommendations. 64 FR 46977.

As directed by Congress in the EPACT, it is EPA's role to establish the public health and safety standard, and NRC's role to implement that standard in any licensing process NRC may conduct for a repository at Yucca Mountain. It was therefore anticipated that NRC would conform its proposed licensing regulation at 10 CFR part 63 to the final EPA radiation protection standards, as necessary and appropriate. EPA has now promulgated its final standards as is discussed below in section II. M. 66 FR 32074. NRC's final part 63 contains modifications from its proposal necessary to make conforming changes. The NRC final rule and EPA's final standards closely resemble the standards as proposed. Changes are discussed at section II. M. below, but as in the case of the NRC rule, we likewise retain our discussion of the proposed EPA rule here on the ground that this chronological approach best advances understanding of the development of DOE's guidelines.

2. Structure of Proposed part 197

The proposed EPA part 197 was structured in two subparts. Subpart A of the rule would establish the public health and safety standards for storage of spent nuclear fuel and high level waste at Yucca Mountain; subpart B would establish the public health and safety standards for disposal of spent nuclear fuel and high level waste at Yucca Mountain. 64 FR 47013–47016. The following is an overview of the main components of EPA's proposed rule; in many areas of the rule EPA proposed alternative language and requirements for public review and consideration. For simplicity, not all of those alternative possibilities are presented here.

For storage of spent nuclear fuel and high level waste, EPA proposed a standard limiting the annual committed effective dose equivalent (CEDE) to no more than 150 microsieverts (15 millirems (mrem)) to any member of the public in the general environment. 64 FR 47013. This limit would apply to releases from the combination of management and storage of spent nuclear fuel and high level waste that is within the Yucca Mountain repository (below ground) and outside the Yucca Mountain repository but within the Yucca Mountain site (aboveground). EPA proposed this standard to be consistent with the risk level set in its generic standards for management and storage of spent nuclear fuel, high level waste, and transuranic waste, codified at subpart A of 40 CFR 191 and with its interpretation of section 801 of EPACT requiring it to set site-specific standards for storage of waste at Yucca Mountain. 64 FR 46983–46984. In EPA's view, storage of waste, whether inside the Yucca Mountain repository or outside the Yucca Mountain repository but within the Yucca Mountain site, presents the same technical situation and is analogous to the storage of radioactive waste at other facilities covered by 40 CFR part 191. Accordingly, EPA proposed the storage standard for Yucca Mountain be essentially the same as the standard applicable to other facilities subject to subpart A of 40 CFR part 191.

For disposal of spent nuclear fuel and high level waste, EPA proposed three standards—an individual protection standard, a human intrusion standard, and a ground water standard—compliance with which DOE would need to demonstrate to the satisfaction of the NRC to ensure protection of public health and safety. 64 FR 47013–47016. Under the individual protection standard, DOE would be required to demonstrate that there is a reasonable expectation that for 10,000 years following disposal a hypothetical reasonably maximally exposed individual (RMEI) receives no more than an annual committed effective dose equivalent (CEDE) of 150 microsieverts (15 millirems (mrem)) from releases from the undisturbed Yucca Mountain disposal system. All potential pathways must be included in this analysis. In proposing this individual protection standard, EPA concluded that radiation containment requirements, such as those embodied in 40 CFR part 191, were not necessary in order to protect members of the general public from releases from a repository at Yucca Mountain.

For the proposed human intrusion standard, EPA proposed two alternative rules, one of which would impose an annual CEDE limit of 150 microsieverts (15 mrem) to a RMEI based on an assumed human intrusion event, while the alternative rule would impose the dose limit if complete waste package penetration can be shown to occur before 10,000 years after disposal. EPA also proposed a rule outlining the elements of the human intrusion scenario to be used in the analysis. 64 FR 47015.

Under the proposed ground water protection standard, EPA would require DOE to provide in its license application a reasonable expectation that for 10,000 years of undisturbed performance after disposal, releases of radionuclides from radioactive material in the Yucca Mountain disposal system will not cause the level of radioactivity in the representative volume of ground water at the point of compliance to exceed certain limits (e.g., combined beta and photon emitting radionuclides cannot exceed a limit of 40 microsieverts (4 millirems) per year to the whole body or any organ). EPA presented for public review and comment several alternatives for the selection of the representative volume of water and for the location of the point of compliance. 64 FR 47015–47016.

EPA's proposed approach to setting public health and safety standards for a repository at Yucca Mountain followed the NAS recommendations and findings. Although EPA proposed some requirements in its rulemaking that differ from certain NAS findings and recommendations (for example, EPA proposed use of a dose standard instead of a risk standard, and use of the RMEI concept instead of critical group), EPA's proposed rule is consistent with the

primary NAS findings and recommendations that a public health standard based on risk or dose to an individual member of the public can be protective of general public health and safety, and that the Yucca Mountain-related physical and geologic processes are sufficiently quantifiable and the related uncertainties sufficiently boundable that the performance can be assessed over certain time frames. 64 FR 46980–46983.

In the case of the individual protection standard, EPA would expressly require DOE to use performance assessment to calculate the dose limits established in its proposed radiation protection standards for disposal. 64 FR 47014. Although EPA generally would not prescribe requirements on how the performance assessments would be conducted, it would impose certain limitations. For example, proposed section 197.40 would not require consideration by DOE in its performance assessments of events that are estimated to have less than one chance in 10,000 of occurring within 10,000 years of disposal. 64 FR 47016. In addition, EPA acknowledged certain inherent limitations in DOE's ability to demonstrate compliance with the public health and safety standard through use of performance assessment, but nevertheless mandated the use of that method of assessment. EPA's proposed rule recognized, through the concept of reasonable expectation, that, among other things, there are inherent uncertainties in making long-term projections of the performance of the Yucca Mountain disposal system, that performance assessments and analyses should be focused upon the full range of defensible and reasonable parameter distributions, and that assessments should not exclude important parameters simply because they are difficult to quantify precisely to a high degree of confidence. 64 FR 46997–46998; 64 FR 47014.

L. DOE's 1999 Notice of Proposed Rulemaking

On November 30, 1999, DOE published a revised notice of proposed rulemaking (64 FR 67054) in order to revise its December 16, 1996, proposal (61 FR 66158) to amend 10 CFR part 960, the ''General Guidelines for the Recommendation of Sites for Nuclear Waste Repositories'' and to issue proposed Yucca Mountain Site Suitability Guidelines under a new part 963.

In its December 16, 1996, proposal, DOE had published proposed regulatory amendments to the Guidelines to reflect the prevailing scientific view on how to evaluate the suitability of the Yucca Mountain site for the development of a nuclear waste repository. Because the preliminary site screening stage was complete and Congress had required DOE to focus on Yucca Mountain, Nevada, DOE's proposed regulatory amendments dealt with provisions of the Guidelines applicable to the site recommendation stage. In its November 30, 1999, revised proposal, DOE revised the terms of its proposal for three reasons.

First, during the comment period on the December 16, 1996, proposal, DOE received comments from members of the public, State and local officials of Nevada, the EPA, and the NWTRB, that in substance criticized the omission from the proposed regulatory amendments of essential details of the criteria and methodology for evaluating the suitability of the Yucca Mountain site for the location of a nuclear waste repository. Some of the comments made pointed recommendations for Guidelines at a more definitive level of specificity than the proposed regulatory text provided. Also, there were comments critical of the legal basis for DOE's proposal and its consistency with what those commenters viewed as DOE's past position on the meaning of sections 112(a) and 113(b) of the Act. As explained in detail later in this notice, DOE concluded that there was enough merit in these comments to warrant revision of the proposed regulatory amendments and expansion of the explanation of the factual and legal bases for them.

Second, in December, 1998, DOE issued, pursuant to Congressional direction, the Viability Assessment. This document, which is available through the Internet on the web site (www.ymp.gov) or in hard copy upon request (see **FOR FURTHER INFORMATION CONTACT**) set forth the bases for the site suitability criteria DOE is proposing to use and the methodology for applying the criteria to a design for a proposed repository at the Yucca Mountain site. DOE can now assist commenters in responding to DOE's proposal with appropriate descriptions of, and references to, key portions of the Viability Assessment in the Supplementary Information.

Third, after the close of the comment period, as noted above, the NRC, consistent with Congressional direction to the EPA to develop a site-specific radiation protection standard for the Yucca Mountain site, proposed site-specific licensing requirements for that site in a new 10 CFR part 63 and to eliminate the site from coverage under 10 CFR part 60. Thereafter, EPA issued the Congressionally-mandated proposal for site-specific public health and safety standards for a repository at Yucca Mountain, to be codified at 40 CFR part 197. Section 113(c) of the NWPA provides that a determination of site suitability for development as a repository is largely an *estimate* that an application to the NRC for a construction authorization would be successful (42 U.S.C. 10133(c)). Thus, the details of the EPA and NRC proposals, which were not available when DOE formulated its December 16, 1996, proposal, affected the likely continuing usefulness of existing 10 CFR part 960, the text of DOE's proposed regulatory amendments, and the bases for those proposed amendments in performing the analysis required by section 113. For reasons explained in detail in its 1999 revised proposal, DOE presented the view that the proposed part 63, if finalized without significant change, would make it illogical to apply the existing provisions of 10 CFR part 960, which are explicitly linked to provisions of the NRC's part 60. Moreover, the details of the NRC's proposal suggested the need for making conforming changes to the December 16, 1996, proposal to set forth the requirements for carrying out a total system performance assessment as the method for applying the site suitability criteria to the data developed during site characterization of the Yucca Mountain site.

Consistent with EPA's proposal for site-specific public health standards and NRC's proposal to limit part 60 and to establish a new part 63 for the Yucca Mountain site, DOE proposed regulations to: (1) Limit 10 CFR part 960 to preliminary site screening for repositories located elsewhere than Yucca Mountain; and (2) establish a new part 963 to set out the site suitability criteria and the methods for considering the potential of the Yucca Mountain site for a nuclear waste repository under those criteria. Although closely linked to the NRC's proposed part 63 licensing criteria and requirements, as is necessary and appropriate, DOE's proposed regulations in part 963 in no way determined that the site necessarily will or will not meet all requirements to obtain a license from the NRC, or to be recommended by the Secretary for development as a geologic repository. Rather, DOE issued the proposed rule to better define policies and criteria to guide the determination of the suitability of the Yucca Mountain site in terms of, and based on, the information and data developed through the program of site characterization

activities DOE has conducted over the years at Yucca Mountain under section 113(b) of the NWPA.

In issuing the revised notice, DOE sought to improve its policies for determining site suitability by enhancing their transparency, validity, and verifiability. In terms of enhancing transparency, DOE aimed at regulations that are easier to read and understand. In terms of enhancing validity, DOE aimed at an explanation of the legal and scientific basis for the regulations that shows how DOE's policies logically follow from scientifically supportable and legally sound premises. In terms of enhancing *verifiability,* DOE aimed at showing that the scientific conclusions underlying its policies are based on documented empirical results of experiments, and computer analyses of relevant data so as to allow verification of the conclusions DOE might eventually draw from known facts in evaluating the suitability of Yucca Mountain as a potential repository site.

DOE followed the consultation procedures set forth in section 112(a) of the NWPA for promulgation of the Guidelines in seeking review and comment on this revised proposal.

M. Final EPA and NRC Regulations

On June 13, 2001, EPA issued 40 CFR part 197 (66 FR 32074–32135), establishing public health and environmental radiation protection standards for a geologic repository at the Yucca Mountain site. The final standards are consistent with the proposed standards, and reflect changes largely associated with the selection, from among proposed alternatives, of certain implementing assumptions and conditions. Consistent with the EPA proposed rule, final 40 CFR part 197 subpart A prescribes a standard for storage limiting the annual committed effective dose equivalent to no more than 15 millirems (mrem) to any member of the public in the general environment from the management and storage of spent nuclear fuel and high-level waste that is within the Yucca Mountain repository (below ground) and outside the Yucca Mountain repository but within the Yucca Mountain site (above ground). Similarly, consistent with the EPA proposed rule, final 40 CFR part 197 subpart B prescribes three public health and environmental standards for disposal—an individual protection standard, a groundwater standard, and a human intrusion standard—governing the disposal of spent nuclear fuel and high level waste at a Yucca Mountain repository. The numerical radiation limits associated with each of the three standards are the same as in EPA's proposal. For the individual protection standard, the dose limit is 15 mrem annual committed effective dose to the reasonably maximally exposed individual. 40 CFR part 197.20. For the human intrusion standard, the dose limit is 15 mrem in the case where a stylized human intrusion event is projected to occur before 10,000 years without recognition by the driller. 40 CFR part 197.25. For the ground water protection standard, the limit for radionuclide concentrations in the representative volume of water is 4 mrem per year to the whole body or any organ, and radionuclide concentration limits of 5 and 15 picocuries per liter, respectively, for radium-226 and radium-228, and gross alpha activity. 40 CFR part 197.30. Consistent with the EPA proposed rule, the final rule requires that DOE demonstrate compliance with the individual protection standard by means of performance assessment. 40 CFR part 197.20.

In finalizing the rule, EPA selected and refined the requirements for certain implementing assumptions and conditions for which EPA sought public comment on the draft rule. For example, the location of the reasonably maximally exposed individual was selected to be the point above the highest concentration of radionuclides in the plume of contamination (40 CFR part 197.21), but not further from the repository than the southernmost boundary of the Nevada Test Site, that is, line of latitude 36° 40′ 13.6661″ North. 66 FR 32093. With respect to the ground water standard, EPA defined the size of the representative volume of water to be used in the compliance calculation to be 3,000 acre-feet based on a cautious but reasonable estimate of the size of the ground water resources in the area of compliance and the current and projected uses of that resource. 66 FR 32113. In determining compliance with the human intrusion standard, EPA selected a standard that requires DOE to determine the earliest time after disposal that a waste package would degrade to such an extent that a driller would not recognize the waste package. 40 CFR part 197.25. If this could occur at or before 10,000 years after disposal, then DOE must demonstrate the dose to the RMEI does not exceed 15 millirem; otherwise, the results of the analysis must be included in the Yucca Mountain environmental impact statement as an indicator of long-term performance. 40 CFR part 197.25.

Following promulgation of 40 CFR part 197, the NRC promulgated 10 CFR part 63 on November 2, 2001. In finalizing part 63, the NRC made changes to its technical requirements and criteria necessary to be consistent with the final environmental standards for Yucca Mountain promulgated by EPA. The NRC identified three categories of changes to incorporate the EPA standards into its rule: (1) the addition of two subparts—Subpart K for storage and Subpart L for disposal—corresponding to Subparts A and B of part 197, respectively; (2) the adoption of provisions (e.g., EPA definitions) precisely as they appear in part 197 and nonsubstantive changes to conform to the regulatory style of the NRC; and (3) the adoption of additional specifications and requirements where necessary to carry out the NRC's responsibilities as the implementing agency for the standards. 66 FR 55733.

Accordingly, in final form, 10 CFR part 63 incorporates the public health and environmental standards for the preclosure (management and storage) and postclosure (disposal) periods as defined in 40 CFR part 197, along with many of the assumptions and requirements to be met in demonstrating compliance with those standards. With respect to demonstrating compliance with preclosure management and storage requirements, the NRC adopted the standard set forth in 40 CFR 197.4, and made clarifying changes to the titles and descriptions of the requirements for the analysis of preclosure operations and safety. With respect to demonstrating compliance with postclosure requirements, NRC adopted the standards in 40 CFR part 197, Subpart B, added some implementing provisions, and clarified language in the rule. For example, NRC adopted the reasonably maximally exposed individual, instead of the average member of the critical group, as the hypothetical person for whom radiation dose limits are to be calculated to demonstrate compliance with the individual protection and human intrusion standards. 10 CFR 63.311, 63.312. In addition, the NRC added standards for ground water protection, and the associated requirements for calculating radionuclide releases to the ground water, which were not addressed in proposed part 63. 10 CFR 63.331. NRC also revised its human intrusion standard to conform to 40 CFR part 197 requirements that require DOE to estimate when a waste package will be fully breached within 10,000 years after disposal to such an extent that the driller would not recognize the package, and, based on this analysis, determine whether the 15 millirem dose limits

would apply or whether the analysis need only be incorporated into the Yucca Mountain environmental impact statement. 10 CFR 63.321. Other prescribed assumptions, such as the characteristics of the RMEI and the reference biosphere (10 CFR 63.312 and 63.305, respectively), and the definition of representative volume of water for calculating the radionuclide releases to the ground water (10 CFR 63.332), were adopted by the NRC as promulgated by the EPA.

As explained in section VI of this **SUPPLEMENTARY INFORMATION,** DOE has modified part 963 as necessary to conform to the changes made in final part 63. These changes to part 963 do not require a reopening of the public comment period on part 963, as they consist of minor clarifications and non-discretionary, conforming changes to make part 963 consistent with final part 63, as it implements final part 197.

N. NRC Concurrence

DOE provided a draft final version of the part 963 rule to the NRC for its concurrence. NRC's concurrence on this rule was obtained by DOE on October 19, 2001; a notice of this decision was published in the **Federal Register** on October 26, 2001. 66 FR 54303. NRC concurrence was contingent on a final part 963 rule that was not substantively different from the draft final version reviewed by the NRC for concurrence. As explained above and in section VI of this **SUPPLEMENTARY INFORMATION,** DOE has made only minor clarifications and non-discretionary, conforming changes to part 963 to make it consistent with final NRC and EPA regulations.

III. Basis for Final Rule

A. Legal Authority and Necessity to Amend the Guidelines and Criteria

1. Overview

Section 112(a) of the NWPA explicitly establishes DOE authority to ''issue general guidelines for the recommendation of sites for repositories'' and to ''use [the] guidelines established under this subsection in considering candidate sites for recommendation under subsection (b).'' Subsection (b) of section 112 provides for a process, to be conducted following promulgation of the Guidelines that would result in: (1) The nomination of 5 potential sites for characterization; and (2) the selection of 3 of those 5 sites for recommendation to the President as suitable for site characterization activities. Section 112(a) also includes explicit authority to revise the Guidelines, from time to time, consistent with the provisions of 112(a).

Shortly after the enactment of the NWPA, DOE promulgated Guidelines (codified at 10 CFR part 960) to implement section 112. The approach taken at that time was to structure the Guidelines to provide a framework not only for the section 112 decisions (for which it was statutorily required) but also for subsequent steps in the site selection process. Consistent with this approach, the Guidelines as originally promulgated also addressed actions to be taken under sections 113 and 114. Section 113(b) provided that DOE should include in its site characterization plan ''criteria to be used to determine the suitability of [a] site for the location of a repository, developed pursuant to section 112(a).'' 49 FR 47730. DOE did not need to decide whether this meant that it had to use the same Guidelines it had previously developed under section 112(a) or whether it was free to use other criteria provided it developed them pursuant to the procedures set out in 112(a). It rejected the alternative suggested, that it use the NRC licensing standards, because (1) the Guidelines had been written to be consistent with the licensing standards, and (2) the Guidelines were more relevant than the licensing standards to the particular decision at issue, that is, they were ''intended to be used in deciding *which among* the characterized sites is to be recommended to the President, the Congress, and finally to the NRC for appropriate approvals.'' 49 FR 47730. (emphasis added) That approach was understandable in 1984 when DOE anticipated the need to evaluate by comparison multiple characterized sites, a comparison similar to the choosing of sites for characterization for which the Guidelines were required by section 112(a) of the NWPA. After the 1987 amendments to the NWPA designated Yucca Mountain as the only site to be characterized, DOE indicated that it nevertheless need not revise the Guidelines because it could apply some, but not all, of the Guideline provisions in the Site Characterization Plan prepared under section 113(b) of the NWPA as criteria to determine site suitability. DOE/RW–0199 (1988). DOE reiterated that conclusion in 1995 when it reconsidered the Guidelines in the context of evaluating the suitability of the Yucca Mountain site under the Site Characterization Plan. DOE decided then that ''[b]ecause DOE need apply only the relevant provisions'' of the Guidelines, amending or supplanting them with ''Guidelines specifically tailored'' to evaluating the suitability of the Yucca Mountain site was ''not required at this time.'' 60 FR 47737, 47740 (1995).

As discussed in greater detail below, DOE has now determined that a new approach is called for in light of the cumulative effect of the intervening legislative, regulatory, and technical developments that have occurred since 1984. As a result of these developments, neither explanation that DOE gave in 1984 for using the part 960 Guidelines—that they were consistent with the NRC's licensing criteria and that they were an appropriate tool because they were developed to assist in making comparative judgements about sites—remains valid in today's circumstances. Congress and the regulatory agencies acting pursuant to Congressional directive have changed the regulatory landscape in such a way that the part 960 Guidelines no longer fit comfortably within that framework. And the 1987 amendments to the NWPA have eliminated any obligation on DOE's part to make comparative judgements about sites in the course of making the suitability determination. Accordingly, DOE has now developed criteria, using section 112(a) procedures in the development of these criteria, but not adopting the particular section 112(a) Guidelines as these criteria, to form the basis for a determination of the suitability of the Yucca Mountain site for the location of a repository. The rationale for this approach stems from the combination of the 1987 amendments' directive to DOE to focus on Yucca Mountain alone, the basic analysis for assessing repository performance recommended by the National Academy of Sciences, which differs from that embedded in the 1984 Guidelines, and the adoption by the NRC of new regulations for licensing repositories which, under the NWPA's structure, must define the areas and methodology of DOE's inquiries into Yucca Mountain's suitability.

Accordingly, DOE today issues final revisions to the existing Guidelines at 10 CFR part 960 to limit their application to only the initial site selection process set forth in section 112. DOE may make additional revisions to these Guidelines if, in the future, circumstances were to change and DOE were to reinitiate a preliminary site screening process under section 112. Further, DOE today promulgates a new rule, consistent with section 113(b)(1)(A)(iv), to establish criteria to be used in determining the suitability of Yucca Mountain for the location of a geologic repository. The criteria identified in this new rule allow for consideration of the impact of the geologic factors and considerations

referenced in section 112(a), as they relate to DOE's current scientific understanding and methodology for assessing the suitability of the Yucca Mountain site as a location for a repository.

2. Section 112

DOE's approach in today's final rule is consistent with the text of section 112(a) and the basic structure of the NWPA, as originally enacted and as amended. As originally enacted, the NWPA set up a sequential process for selecting, comparing, and evaluating potential sites for the development of a geologic repository for high-level waste. The 1987 amendments eliminated any continued comparison of sites; only Yucca Mountain is authorized for site characterization activities leading to possible recommendation as a repository site. Beyond the first step in the process, recommendation of multiple sites for site characterization (section 112), there is no explicit direction in the Act (in its original enactment or amendment) whether or how to utilize the Section 112(a) Guidelines in the succeeding site selection processes (sections 113 and 114). Instead, section 112(a) specifies the intended use of the Guidelines: ''[t]he Secretary shall use guidelines established under this subsection in considering sites to be recommended for site characterization under section 112(b).'' Likewise, the environmental assessment of the various sites nominated for characterization pursuant to section 112 is to include ''evaluation'' of each nominated site under each Guideline not requiring characterization for its application and all the Guidelines pertinent to whether or not a site is ''suitable for site characterization'' (42 U.S.C. 10132(b)(1)(D)(I)&(ii)). Nowhere in its text does section 112 require any additional use of the Guidelines.

In sum, the text of section 112 and its relation to other provisions in the NWPA indicate that the Guidelines are to govern the process of selecting and comparing among potential sites to determine which sites are appropriate to proceed to the next, more detailed evaluation stage, site characterization. In contrast, nothing in the text of section 112 specifies that the Guidelines it requires are also to govern the process for determining site suitability and site recommendation under sections 113 and 114.

3. Section 113

Section 113 of the NWPA requires DOE to prepare a site characterization plan for a candidate site selected under section 112 for site characterization activities. A required element of a site characterization plan is ''criteria to be used to determine the suitability of such candidate site for the location of a repository, developed pursuant to section 112(a)'' (42 U.S.C. 10133(b)(1)(A)(iv) (emphasis added)). The NWPA does not define the term ''criteria,'' thereby suggesting the Secretary has broad discretion to determine the scope and content of the criteria in question.

Section 113(b) requires that the ''criteria'' to be included in the Site Characterization Plan be ''developed pursuant to section 112(a)'' of the NWPA. Because section 112(a) of the NWPA is devoted to the ''Guidelines'' for selecting candidate sites while section 113(b) is devoted to the ''criteria'' under which selected candidate sites subsequently are to be characterized, it is necessary to consider what section 113's requirement that the criteria be ''developed pursuant to section 112(a)'' means in terms of any required correspondence or other relationship between the Guidelines and the 113(b) criteria.

It is unlikely that the Congress intended to require the ''criteria'' to be the Guidelines themselves. It would have been simple enough for Congress to have legislated that policy in section 113(b) by a straightforward requirement that the Site Characterization Plan specify that the ''*Guidelines* developed pursuant to section 112(a)'' would be used ''to determine the suitability of each candidate site'' (*Compare* 42 U.S.C. 10133(b)(1)(A)(iv)). Had Congress intended this policy result it is unlikely that it would have chosen such an elliptical and opaque way of expressing it as the actual statutory text that does not use the term ''Guidelines'' at all. And a construction of section 113(b) requiring the suitability ''criteria'' to be the same as the section 112 Guidelines would risk tension with section 113(c)'s restriction that limits DOE to conducting ''only'' characterization activities ''necessary to provide the data required'' to prepare an NRC license application. The NRC, of course, is not required to base its licensing standards on the Guidelines adopted by DOE under section 112(a) of the NWPA (although it was required to concur in them), nor does section 112 afford the NRC the ability to compel DOE to reformulate the Guidelines should the NRC determine to amend or supplant its licensing standards.

On the other hand, section 112(a) contains specific procedural mandates required to be employed by DOE in issuing or revising the Guidelines. Before DOE may promulgate the Guidelines, DOE must consult with several specified federal agencies and with ''interested Governors'' (42 U.S.C. 10132(a)). In addition, the NRC must ''concur[]'' in the issuance of the Guidelines. *Id.* These distinctive procedural requirements obviously are tailored to the particular circumstances of site decision-making under the NWPA and specify procedural requirements that would not otherwise obtain under the rulemaking provisions of the Administrative Procedure Act or the rulemaking provisions of the Department of Energy Organization Act that were in force when the NWPA was adopted. It would therefore make sense that Congress would want these procedures used for developing the section 113 ''criteria'' as well as the section 112 ''guidelines.''

The requirement of section 113(b) that the SCP's ''criteria'' for characterizing sites be ''developed pursuant to section 112(a)'' therefore is best understood as mandating observance of the special procedural requirements of section 112(a) in formulating or altering the section 113(b) ''criteria.'' This understanding of the statutory text seems the most faithful to its explicit terms and the larger statutory context in which it occurs. Moreover, it seems the only understanding of section 113(b) that is consistent with the 1987 changes to the NWPA (which mandated exclusive characterization work for the Yucca Mountain site without amending section 113(b) despite amending the statute elsewhere to remove the element of comparing sites, to which the Guidelines of section 112(a) were devoted). This understanding of the requirements of section 113(b) also comports with DOE's prior understanding, as was described in the 1995 notice, that not all the original Guideline elements need be applied in site characterization under section 113 of the NWPA. To the extent the statutory provisions are ambiguous, this interpretation seems best designed to result in the establishment of ''criteria'' that comport with what DOE believes to be the better policy approach to determining site suitability.

B. Events Necessitating Amendment of the Guidelines and Criteria

1. Congressional Redirection of the Program

Since the NWPA was enacted in 1982 and the Guidelines promulgated in 1984, Congress has made major changes to the framework for developing a geologic repository. These changes are described below and, in part, form the basis for the revisions to 10 CFR part

960 and the promulgation of a new 10 CFR part 963 as presented in this notice of final rulemaking.

1987 Amendments to the NWPA. Congress amended the NWPA in 1987 to select Yucca Mountain as the only site to be characterized. Congress, accordingly, directed DOE to terminate site-specific activities at the two other sites that had been recommended for site characterization in 1986 (42 U.S.C. 10172). Further, Congress restricted DOE's characterization activities at Yucca Mountain to only those the Secretary considers necessary to provide the data required for evaluation of the suitability of the site for NRC construction authorization (i.e., license application), and for compliance with the National Environmental Policy Act of 1969, as modified to excuse DOE from conducting analyses of alternatives that NEPA would otherwise require. A provision was added to the NWPA to provide for termination of site characterization activities at Yucca Mountain if at any time the Secretary determines that Yucca Mountain is unsuitable for development as a repository.

Although the 1987 amendments to the Act were decisive in focusing the repository program and DOE's efforts on one specific site, for many years DOE maintained that these changes were not so significant as to warrant amendment of the Guidelines. Instead, DOE believed the Guidelines, for the most part, could be applied to Yucca Mountain for purposes of determining the suitability of the site (because Yucca Mountain already had been found suitable for characterization under other provisions of the Guidelines) in support of a possible site recommendation by the Secretary. DOE believed that the only changes to the Guidelines necessitated by the 1987 amendments were to eliminate consideration of those parts of the Guidelines related to comparative analysis. Similarly, the NRC had not made significant modifications to its technical requirements and criteria in 10 CFR part 60 as a result of the 1987 amendments to the Act.

1992 Energy Policy Act. In the 1992 Energy Policy Act, Congress reinforced its directive that Yucca Mountain was to be the exclusive focus of the nation's repository program, by explicitly extending that directive not only to DOE activities, but also to activities of EPA and NRC, the other federal agencies with authority and responsibility over the repository program. Section 801 of the EPACT directed the EPA to promulgate, by rule, new public health and safety standards for the protection of the public from releases from radioactive materials stored or disposed of in a repository at the Yucca Mountain site. Unlike EPA's previous standard, which applied generally to geologic repositories and included limits on radioactive releases to the environment, the new standards were required to prescribe the maximum annual effective dose equivalent to individual members of the public from releases to the accessible environment from radioactive materials stored or disposed of at Yucca Mountain. To aid EPA in this process, Congress directed a National Academy of Sciences (NAS) study to provide findings and recommendations on reasonable standards for protection of the public health and safety. EPA was required to base its new standards on the findings and recommendations of the NAS. For Yucca Mountain, these standards would replace the generally applicable standards for the protection of the general environment that the EPA had promulgated at 40 CFR part 191 pursuant to section 121 of the NWPA.

The EPACT also directed the NRC to modify its technical requirements and criteria, as necessary, to be consistent with the EPA's new standards. In addition, NRC was directed to ensure that, consistent with the NAS findings and recommendations, its requirements and criteria for postclosure oversight of a Yucca Mountain repository would be sufficient to prevent any activities at the site from posing an unreasonable risk of breaching the engineered and natural barriers of the site, and to prevent any increase in exposure of individual members of the public beyond allowable limits.

These changes were significant because they set the stage for future regulatory changes governing the standards a Yucca Mountain repository must meet to ensure public health and safety, and to obtain a license for construction. The ability to meet regulatory standards has always been a dominant factor in the site selection process. This requirement is reflected in the structure of the Guidelines, is reinforced by the 1987 amendments to the Act, and is a prime focus of DOE's site characterization program. Thus, the Congressional mandate in the EPACT directing new and revised regulations governing geologic disposal at Yucca Mountain necessarily affected DOE's formulation of the criteria that will be used to determine the suitability of Yucca Mountain as a site for development of a repository. Until recently, however, the full extent and nature of those impacts had not been defined. The NRC's proposal to amend 10 CFR part 60, its technical requirements and criteria for licensing a repository to exclude Yucca Mountain from their scope, to add a new part 63 specific to Yucca Mountain, provided DOE with an outline of anticipated regulatory changes, and signaled for DOE how and why it must conform its Guidelines and criteria for determining the suitability of the Yucca Mountain site for the location of a repository.

Fiscal Years 1996 and 1997 Appropriations Acts and the Viability Assessment. Finally, in response to budgetary concerns, the Conference Report on the Energy and Water Development Appropriations Act, 1996 (Pub. L. No. 104–46) (H.R. Rep. No. 293, 104th Cong., 1st Sess. 68 (1995)) directed the DOE to focus on only those activities necessary to assess the performance of a repository at the Yucca Mountain site and to collect the scientific information needed to determine the site's suitability. DOE responded by revising its Program Plan for 1996 in which it indicated that, among other changes, DOE would complete a viability assessment of the Yucca Mountain site in 1998, and would develop a proposal to amend the Guidelines and develop new regulations specific to the Yucca Mountain site. Congress indicated its approval of the changes by directing that appropriated funds be used in accordance with the revised program plan. Congress reinforced this direction in the Fiscal Year 1997 Energy and Water Appropriations Act, where it mandated that DOE provide to the Congress and the President a viability assessment of the Yucca Mountain site in 1998.

These changes in budget for DOE's civilian radioactive waste management program indicate congressional intent for DOE to focus site characterization activities on assessing the viability and suitability of Yucca Mountain, and to complete those activities in the near term. In light of this congressional direction, it is reasonable for DOE to amend the Guidelines in a manner that acknowledges Yucca Mountain as the only site at which site characterization has occurred and for which DOE would need to conduct a suitability evaluation under section 113(b).

2. Consistency Between DOE and NRC Regulations

Procedural Consistency. The DOE's site characterization suitability criteria must be consistent with the NRC's licensing criteria if the DOE is to present a potentially successful license application to the NRC. Such consistency originally was attained in the Guidelines through the NRC's concurrence process, as required by section 112(a) of the NWPA. DOE stated

in proposed part 963 that it would preserve this consistency in the final suitability criteria by ensuring that they reflect the changes to the licensing criteria in NRC's new rule 10 CFR part 63, and by soliciting NRC concurrence on DOE's final amendments to the guidelines and the promulgation of a new regulation at 10 CFR part 963.

Substantive Consistency. NRC's proposed new rule establishing the technical requirements and criteria for repository licensing at Yucca Mountain, proposed 10 CFR part 63, was different from its prior general rule on repository licensing, 10 CFR part 60. DOE accordingly had little choice but to propose site suitability criteria that would be consistent with the NRC's proposed licensing requirements. The suitability of a site for the location of a repository is a function of the DOE's ability to demonstrate the site can meet applicable regulatory requirements. Section 113 makes clear that the evaluation of ''suitability'' is an evaluation of the ''suitability of [the Yucca Mountain] site for an application to be submitted to the [NRC] for a construction authorization for a repository at such site'' and that the function of site characterization is to generate the data to evaluate whether a site can meet that standard. DOE has conducted the site characterization program at Yucca Mountain with that statutory objective of evaluating its ability to obtain construction authorization from the NRC for a repository at that site (i.e., to meet NRC licensing requirements and EPA health and safety standards, as implemented by NRC through the license). DOE could not scientifically and technically arrive at a suitability determination, without conforming its criteria for suitability to the proposed NRC technical requirements and criteria for a repository license. Such conforming criteria are finalized in this notice.

The NRC proposed rule part 63 was a departure from the philosophy and technical requirements of 10 CFR part 60. It was based on the 1995 NAS report recommending a risk-limit standard for a repository at Yucca Mountain. The NRC timed publication of its proposal to ensure NRC would have sufficient time, once EPA issued its new standard, to put the new licensing standards in effect. The proposed rule embodied a new approach of risk-informed, performance-based regulation, and was specific to Yucca Mountain. The old rule relied on subsystem performance objectives and a release limit standard. Under the proposed rule, the performance of a Yucca Mountain repository would be evaluated against a health-based standard in consideration of risk to a hypothetical critical group and this standard would be the only quantitative standard for the postclosure performance of the repository. The new rule would require DOE to demonstrate compliance with postclosure technical criteria through performance assessments, and preclosure criteria through an integrated safety analysis. The new approach embodied in the proposed rule would eliminate current part 60 design and siting criteria, as well as quantitative subsystem requirements, but would add specific requirements for the content of performance assessments to ensure their sufficiency and adequacy. In other words, a proposed Yucca Mountain repository would be evaluated as an entire system, not by assessing its individual parts in isolation, in order to determine whether or not it meets applicable standards to protect public health and safety.

It was clear that if this proposal was finalized in substantially the same form as proposed the current structure of DOE's part 960 guidelines, which is premised on a demonstration of system and subsystem technical requirements, would no longer be consistent with, and in some cases might conflict with, the NRC technical requirements to support a license application. For example, several of DOE's part 960 guidelines require compliance with the siting and design requirements set forth in 10 CFR 60.113, 60.122 and 60.133. Those requirements did not exist in proposed part 63 and would not be applicable to Yucca Mountain under proposed amendments to part 60. Those requirements are subsystem performance requirements that are inconsistent with the NRC's new approach of evaluating the technical merits of a potential site based on the performance of the repository system as an integrated whole, and not on the performance of each part independent of the other parts.

A good example of this is the geohydrology guideline at part 960.4–2–1. Under this guideline, DOE set qualifying and disqualifying conditions for the geohydrology of a site. The qualifying condition for geohydrology requires that a site be capable of compliance with radionuclide release limits set by EPA in 40 CFR part 191, and by NRC in 10 CFR 60.112, as well as compliance with DOE subsystem performance requirements that mirror NRC requirements in 60.113. The Yucca Mountain site has been exempted by the EPACT from compliance with the containment limits set by EPA under 40 CFR part 191, and the NRC's proposed amendments to 10 CFR part 60 nullified the applicability of 60.113 to Yucca Mountain and create a new part 63 for which there is no analogous release limit or subsystem performance objective for geohydrology. Accordingly, it was clear that it would be illogical for DOE to reach a finding relative to this qualifying condition, as required by Appendix III, based on regulatory requirements that no longer would be applicable to the Yucca Mountain site and therefore could not support a determination regarding site suitability for the Yucca Mountain site.

The DOE Guideline 960.4–2–1 also contains a disqualifying condition. Under this condition, DOE would disqualify a site if the pre-waste emplacement ground water travel time from the disturbed zone to the accessible environment is expected to be less than 1,000 years along any pathway of likely and significant radionuclide travel. Under the analogous NRC provision, 60.113, there is a performance objective directing that the pre-waste emplacement ground water travel time along the fastest path of likely radionuclide travel from the disturbed zone to the accessible environment must be at least 1,000 years or such other travel time as approved by the NRC. Under NRC's proposed revisions to its regulations, this subsystem performance requirement would no longer apply to a repository at Yucca Mountain under part 60, and it would not exist, nor would there be any requirement similar to it, under new part 63. Accordingly, it would be illogical for DOE to reach a finding relative to this disqualifying condition, as required by Appendix III, based on regulatory requirements that no longer would be applicable to the Yucca Mountain site and therefore could not support a determination regarding the site suitability of the Yucca Mountain site.

Below is a table further illustrating the inconsistencies between the current Guidelines and the proposed part 63. Table 1 provides a cross walk between the technical guidelines to be applied as the criteria under section 113(b), their analog in existing part 60, and their analog, if any, in proposed part 63.

TABLE 1

Section	Guideline	Condition	10 CFR part 60	New 10 CFR part 63
4–1(a)	System	Qualifying	60.112	63.113
4–2–1(a)	Geohydrology	Qualifying	60.112/113	63.113/None
4–2–1(d)	.....do	Disqualifying	60.113(a)(2)	None
4–2–2(a)	Geochemistry	Qualifying	60.112/113	63.113/None
4–2–3(a)	Rock Characteristics	Qualifying	60.112/113	63.113/None
4–2–4(a)	Climatic Changes	Qualifying	60.112	None
4–2–5(a)	Erosion	Qualifying	60.112	None
4–2–5(d)	.....do	Disqualifying	60.122(b)(5)	None
4–2–6(a)	Dissolution	Qualifying	60.112	None
4–2–6(d)	.....do	Disqualifying	60.112	None
4–2–7(a)	Tectonics	Qualifying	60.112	None
4–2–7(d)	.....do	Disqualifying	60.112	None
4–2–8(a)	Natural Resources	Qualifying	60.122(c)(1)	None
4–2–8(d)(1)	.....do	Disqualifying	60.122(c)(1)	None
4–2–8(d)(2)	.....do	Disqualifying	60.122(c)(1)	None
4–2–9 (a)	Site Ownership and Control	Qualifying	60.121	63.121
5–1(a)(1)	System	Qualifying	60.111	63.111
5–1(a)(3)	System	Qualifying	None	None
5–2–1(a)	Population Density and Distribution.	Qualifying	60.111	63.111
5–2–1(a)(1)	.....do	Disqualifying	60.122(6)	None
5–2–1(a)(2)	.....do	Disqualifying	60.122(6)	None
5–2–1(a)(3)	.....do	Disqualifying	None	None
5–2–2(a)	Site Ownership and Control	Qualifying	60.121	63.121
5–2–3(a)	Meteorology	Qualifying	60.111	63.111
5–2–4(a)	Offsite Installations and Operations.	Qualifying	None	None
5–2–4(d)	.....do	Disqualifying	None	None
5–2–8(a)	Surface Characteristics	Qualifying	60.122(c)(1)	None
5–2–9(a)	Rock Characteristics	Qualifying	60.133(a)(1)	None
5–2–9(d)	.....do	Disqualifying	None	None
5–2–10(a)	Hydrology	Qualifying	60.111	None
5–2–10(d)	.....do	Disqualifying	None	None
5–2–11(a)	Tectonics	Qualifying	60.122(b)(1)	None
5–2–11(d)	.....do	Disqualifying	None	None

As demonstrated in the above table, in most cases there is no analog between the DOE Guidelines and NRC's proposed part 63. In addition, the Guidelines could not continue to reference and rely on revised part 60, since NRC's proposed revisions to part 60 would make them inapplicable to a repository at Yucca Mountain. Under the circumstances, it would be irrational and difficult, if not impossible, for DOE to apply the Guidelines in their current form.

Under these changed circumstances, DOE felt it had to act to amend its outdated Guidelines and conform its site suitability criteria to the NRC rule for licensing a Yucca Mountain repository.

3. Improvements in Analytical Methods

DOE's final changes will also serve to conform the rules for assessing the suitability of a site with the current scientific and technical methods developed and utilized by DOE in its site characterization program. The final changes in the regulatory scheme reflect the advances in the scientific and technological understanding of the processes relevant to assessing the long-term performance of a geologic repository. The regulatory revisions issued by EPA, NRC and DOE, mark a change from generic regulations based on limited information about geologic disposal developed early in the Nation's quest for sites for geologic disposal, to regulations promulgated specifically for the Yucca Mountain site that reflect over 20 years of data collection and intensive site characterization activities at the Yucca Mountain site. It would be irrational for DOE to ignore these changes, and continue to rely on technical requirements that are not aligned with, and are not supported by, the prevailing scientific knowledge and understanding.

As recognized by the NRC in its proposed part 63, during the more than 15 years since the NRC promulgated its initial technical criteria at 10 CFR part 60 (and DOE promulgated matching technical requirements in 10 CFR part 960), there has been considerable evolution in the capability of technical methods for assessing the performance of a geologic repository at Yucca Mountain. 64 FR 8640–8641. These advances result from both improved computer capability and better analytical methods. Indeed, these changes for the first time enable the vast quantities of data that have been collected through site characterization to all be used in models that more accurately model site performance. NRC stated that these new methods were not envisioned when the part 60 criteria were established, and that their implementation allows for the use of more effective and efficient methods of analysis for evaluating conditions at Yucca Mountain than the NRC generic criteria in part 60. 64 FR 8641. Moreover, NRC believes that implementation of these new analytical methods for evaluating Yucca Mountain will avoid the imposition of unnecessary, ambiguous, or potentially conflicting criteria that could result from the application of some of the generic requirements of 10 CFR part 60. 64 FR 8641.

The evolution in performance assessment methodology formed the

basis for DOE's 1996 proposal to amend the Guidelines. In that proposal, DOE explained that only by assessing how specific design concepts will work within the natural system at Yucca Mountain and comparing the results of these assessments to the applicable regulatory standards, can DOE reach a meaningful conclusion regarding the site's suitability for development as a repository. The 1996 proposed amendments to the Guidelines would have required a comprehensive evaluation focused on whether or not a geologic repository at Yucca Mountain would adequately protect the public and the environment from the hazards posed by high-level radioactive waste and spent nuclear fuel (61 FR 66160). DOE explained that recent results in four major areas have advanced the ability to evaluate the Yucca Mountain site, and geologic disposal, to the point that a system approach is now appropriate. These four areas are: (1) Analysis and integration of data collected from surface-based testing and regional studies; (2) examination of the potential repository horizon made possible by the excavation of the Exploratory Studies Facility; (3) the site-specific conceptual design of the engineered facilities; and (4) performance assessment analyses (61 FR 66161).

Like the NRC, DOE recognized that this improved understanding counseled in favor of reexamining General Guidelines that may be unnecessary or ambiguous, or that may present conflicting requirements for Yucca Mountain. Based on the DOE's accumulated knowledge, and significantly enhanced understanding, DOE has determined that a system performance approach provides the most meaningful method for evaluating whether or not the Yucca Mountain site is suitable for development as a repository. In today's final rule, DOE expands on its 1996 and 1999 proposals to modify the Guidelines and incorporates performance assessment as the appropriate approach to assess the forecasted performance of a repository. This final rule provides greater detail, comprehension and transparency of information describing the performance assessment methodology, and how it serves as a foundation for site characterization suitability criteria.

IV. Response to Public Comments on the 1999 Proposal

DOE published the supplemental notice of proposed rulemaking on November 30, 1999, in the **Federal Register** (64 FR 67054), and posted it on the Internet that same day. The public comment period on the supplemental notice extended from the date of publication until February 28, 2000. Public hearings were held on the supplemental notice: two sessions in Pahrump, Nevada and two sessions in Las Vegas, Nevada.

DOE received numerous comments on the supplemental notice, both oral and written, from members of the public, State and local officials, Native Americans, regulatory and oversight organizations, and representatives of various non-governmental organizations, and the nuclear power industry. Opinions about the supplemental notice were divided. Some comments were critical of DOE's conduct of this rulemaking. In particular, several commenters expressed a desire for greater dialogue on the rulemaking, additional time to review the proposed rulemaking, and frustration regarding the overlapping public comment periods on this rulemaking and DOE's draft Environmental Impact Statement for a Geologic Repository for the Disposal of Spent Nuclear Fuel and High-Level Radioactive Waste at Yucca Mountain, Nye County, Nevada (hereafter ''Yucca Mountain EIS''). DOE acknowledges the comments, questions, and concerns raised by members of the public during this rulemaking, and has considered them in preparing this notice of final rulemaking. However, DOE believes that the comment period on this rulemaking, lasting 89 days, and the comprehensive background and description of the proposed rulemaking contained in the supplemental notice, provided the public with sufficient time and information to review the supplemental notice and provide meaningful comments. In addition, the public hearings on this rulemaking, although they coincided with some other public hearings on the Yucca Mountain EIS outside the State of Nevada, did not deprive the public of a full and fair opportunity to comment on both proceedings. The public comment period on the Yucca Mountain EIS was initiated in July of 1999, lasted for 199 days, and included 21 public hearings, 10 of which were held within Nevada.

Several comments received by DOE did not directly address this notice of proposed rulemaking, but dealt with other aspects of DOE's civilian radioactive waste program. For example, several commenters expressed dissatisfaction with the disposal of spent fuel and high-level waste in a geologic repository, raised claims of limited federal authority over Yucca Mountain, criticized the nation's dependence on nuclear power, and raised concerns about the transportation of high-level waste and spent nuclear fuel to a repository. Many of these comments were similar to those raised during the public comment period on the 1996 proposal to amend the guidelines. As explained in response to public comments on that, many of these comments are outside the scope of this rulemaking. DOE recognizes that there are strong differences of opinion on these matters of public policy. But DOE's responsibility in this proceeding is to determine how best to carry out Congress' directive in section 113(b) of the NWPA to develop criteria for evaluating the suitability of Yucca Mountain as a potential site for a repository for nuclear waste, not to reexamine disputes whose resolution Congress has specified—as would be required were DOE to respond to the broader public policy comments. Accordingly, presented below is DOE's response to the major issues emerging from the public comments and questions directly related to the supplemental notice.

A. The Statutory Basis and Regulatory Need for Part 963

Several commenters, including representatives of the State of Nevada, asserted that DOE's legal rationale for revising the guidelines was flawed and in violation of the NWPA, and that there is no statutory or legal basis for the proposed amendments. In support of this position, many commenters noted, among other things, that section 112(a) of the NWPA directs DOE to promulgate guidelines for the recommendation of sites for a repository, not merely for site characterization; that the substantive requirements of section 112(a), such as the use of qualifying and disqualifying factors and consideration of transportation impacts, must be part of any site suitability criteria proposed by DOE; that Congress' failure to direct DOE to revise its guidelines in the 1987 Amendments Act and the 1992 Energy Policy Act is an indication that Congress did not believe the guidelines required modification; and that the intent of section 112(a) was to require DOE to evaluate sites based on geology (e.g., natural barriers), and not engineered barriers (e.g., waste package design). Several commenters also noted that it was premature to revise the guidelines since the EPA and NRC have not yet finalized their regulations regarding a repository at Yucca Mountain and that, in any event, there is no requirement that the guidelines closely conform to the EPA and NRC regulations.

DOE also received comments in support of the statutory and regulatory need for the revisions to part 960 and

the establishment of Yucca Mountain-specific-suitability criteria. Those comments noted that the proposed revisions to the guidelines are legally appropriate and timely under the NWPA; that there is no statutory connection between the content of the section 112(a) guideline requirements and the content of the section 113(b) suitability criteria; that there is no need to establish site suitability criteria in a rulemaking proceeding; and that DOE appropriately is updating its site suitability criteria to comport with current scientific understanding and regulatory revisions proposed by the EPA and NRC.

As explained in detail in the **SUPPLEMENTARY INFORMATION** under the section III. A, entitled, ''Legal Authority and Necessity to Amend the Guidelines and Criteria,'' and in section III. B, above, DOE believes that there is a sound statutory and regulatory basis upon which to revise part 960 and promulgate part 963. DOE believes that this rulemaking effectively harmonizes the statutory language and purposes of relevant sections of the NWPA and the 1992 Energy Policy Act with the current state of scientific and technical understanding of how best to evaluate the performance of a geologic repository, as well as with the revised regulatory framework governing the public health and safety and licensing of a repository at Yucca Mountain. While DOE does not believe there was any misrepresentation of the statutory language of section 112(a) of the NWPA, as some commenters asserted, minor modifications were made in the background section and section III above of the Supplemental Information to avoid any confusion.

As previously stated, the approach DOE elected to take in 1984 to implement section 112(a) and formulate the 960 guidelines was understandable at that time, when DOE anticipated the need to evaluate, by comparison, multiple characterized sites under section 113 leading to the selection of one site under section 114, and the NRC licensing regulations were premised on a demonstration of both system and subsystem performance requirements. In the supplemental notice of proposed rulemaking and in this notice, DOE has discussed in detail the numerous intervening events, of a regulatory, technical and legislative nature, that necessitated DOE's revisions to the 960 guidelines and the need to add a new part 963 to establish the site suitability criteria and methodology to be used in assessing the suitability of the Yucca Mountain site.

Several commenters correctly note that Congress has not changed the language of the NWPA in section 112(a), despite opportunities for such change in the 1987 Amendments and the 1992 Energy Policy Act. Congressional silence on this point is hardly dispositive, however. As previously noted, there is no explicit language or direction in section 112 that requires or directs DOE to use the 112(a) guidelines as the criteria to assess the suitability of a characterized site under section 113(b). Therefore, the failure of Congress to revise section 112 has no particular bearing here.

Other commenters stated that it seems specious to argue that Congress meant the 112(a) guidelines, including the requirement of qualifying and disqualifying factors, to be abandoned once a site was designated for site characterization, and that any suitability guidelines must include qualifying and disqualifying factors. But that is not the argument DOE has advanced. Rather, DOE's view is that Congress did not legislate at all regarding whether DOE should or should not use the section 112(a) guidelines for site suitability, but did require DOE's suitability evaluation to revolve around the potential licensability of the site. Hence, when the NRC modified its licensing criteria in such a way as to focus on system rather than subsystem performance, DOE could no longer use guidelines that were inconsistent with that approach.

We also note that in this final rule, DOE is not abandoning the concept embodied in section 112(a) that a site should be evaluated based on such criteria as the geology, hydrology and geophysics of the site. Nor is DOE inappropriately accounting for engineered barriers in setting site suitability criteria under the NWPA. Table 2, VI. B of this **SUPPLEMENTARY INFORMATION** provides a crosswalk between the section 112(a) geologic considerations and the criteria for evaluating site suitability in part 963. In addition, section 113 directs DOE to engage in activities related to developing waste form and packaging designs and describing the relationship between the waste form and the geologic medium. Thus, those barriers are also appropriately included in the criteria for assessing the suitability of a repository at Yucca Mountain. As is necessary, DOE has articulated the site suitability criteria in a manner that is consistent with the technical and analytical approach in the applicable EPA and NRC regulations for a geologic repository at Yucca Mountain.

Moreover, as explained above, DOE interprets the language in section 113(b)(1)(A)(iv), referring to section 112(a), to mean that only the procedural requirements of section 112(a) should be followed in setting the criteria for site suitability under section 113(b). The inclusion of qualifying and disqualifying factors is in the nature of a substantive requirement of the guidelines promulgated under section 112(a); it is not a statutory requirement for the establishment of suitability criteria under section 113(b)(1)(A)(iv). In addition, DOE does not believe that it is reasonable or necessary to retain explicit qualifying and disqualifying conditions in the present site suitability guidelines. Such conditions do not comport with either the revised regulatory framework established for a repository at Yucca Mountain, nor the current state of scientific and technical understanding of how best to evaluate the performance of a repository. Accordingly, DOE has established site suitability guidelines that are reasonable and fully consistent with the mandates of the NWPA.

In response to other comments regarding the allegedly premature nature of this rulemaking, DOE believes that the rulemaking is timely and not premature. Although the NRC and EPA regulations were in proposed and not final form at the issuance of the proposed rulemaking on part 963, DOE deemed it necessary and appropriate to initiate the process for promulgating this rule in advance of the finalization of the EPA and NRC regulations. It was necessary to initiate the rulemaking process in order to allow sufficient time to obtain public review and comment, and NRC concurrence on the rule, prior to the time of a possible DOE site recommendation then planned for mid-2001. In addition, it was appropriate to initiate the process since the EPA and NRC proposed regulations provided sufficient substance to enable DOE to formulate its proposed rulemaking and solicit public comment on that rulemaking. By initiating the process in this manner, DOE did not intend, nor did it preclude, the option that DOE might reopen the comment period for this rulemaking as necessary to accommodate changes from the proposed to final rules of the EPA and NRC. DOE has reviewed the final rules of EPA and NRC, and determined that reopening the comment period on part 963 is not necessary. As explained in the description of the final rule (section VI of this **SUPPLEMENTARY INFORMATION**), the changes made to 963 from the draft to final stage have been made for purposes of clarity and conformance with final 63; the changes are not

substantive and do not change the basic structure, intent or analyses performed pursuant to the rule.

Furthermore, DOE has fully explained in the supplemental notice and this notice the reasons why it is necessary and reasonable for DOE to conform its suitability criteria and methodology with the NRC licensing criteria and EPA standard, in accordance with the NWPA. As illustrated in Table 1 of this notice of final rulemaking, DOE does not believe that the 960 guidelines are substantively consistent with the newly developed EPA and NRC rules, thereby necessitating the amendments promulgated today.

B. The Proposed Rules Use (or Allow the Use of) Engineered Barriers To Compensate for the Inadequacies of the Site

Several commenters stated that the proposed rule inappropriately allows the use of engineered barriers to compensate for inadequacies in the performance of the natural system. Certain of these commenters suggested that the NWPA, in particular section 112(a), prohibits reliance on the performance of engineered barriers in evaluating the suitability of a site for a repository system, reasoning that the performance of the repository must rely solely on the performance of the natural barriers.

As explained above, DOE does not believe that the provisions of the NWPA limit or prohibit DOE's investigation and use of engineered barriers to assess the suitability of siting a geologic repository at Yucca Mountain. Section 113(b)(1)(B) of the NWPA directs DOE to describe the waste packages and waste forms to be used and their relation to the geology of the site; section 113(c) restricts DOE activities conducted under section 113 to those necessary to provide data required for a repository construction authorization application to the NRC (and to comply with NEPA). In turn, section 121(b)(1)(B) requires the NRC, in setting licensing criteria for a repository, to provide for the use of a system of multiple barriers in the design of the repository. In this context, multiple barriers means engineered and natural barriers. Thus, DOE believes that the NWPA, as originally enacted and as amended, contemplates that any site undergoing characterization for possible development as a repository would include investigation of, and reliance on, multiple barriers—natural and engineered barriers.

Indeed, the NRC's original repository licensing requirements, 10 CFR part 60, made clear that the use of both natural and engineered barriers would be required for repository licensing. Nevertheless, the NRC was also concerned, at the time of the promulgation of part 960 in 1984, that DOE not use engineering barriers to compensate for deficiencies in any comparison of candidate sites. The NRC, through its concurrence process on the original part 960 guidelines, required DOE to make clear that engineered barriers would not constitute a compensating measure for deficiencies in the geologic media during site screening. This was accommodated by provisions at 10 CFR 960.3–1–5 that address comparisons of the sites in the basis for site evaluations. That provision states that comparisons of sites shall be structured so that engineered barriers are not relied upon to compensate for deficiencies in the geologic media. Furthermore, it states that engineered barriers shall not be used to compensate for an inadequate site; mask the innate deficiencies of a site; disguise the strengths and weaknesses of a site and the overall system; and mask differences between sites when they are compared. (emphasis added). In its final decision to concur in 10 CFR part 960, the NRC noted that the revisions made to 960.3–1–5 showed that DOE would not select sites where engineered barriers must be used to compensate for deficiencies in the geologic media (49 FR 28136).

At present, DOE is not in a situation of comparing multiple sites for possible development as a repository. Part 963 applies only to a determination of the suitability of the Yucca Mountain site for possible development as a repository. Importantly, absent in NRC's current requirements for licensing, 10 CFR part 63, and in NRC's concurrence on this rule, are any requirements that DOE demonstrate repository performance based solely on natural barriers.

The NRC expects that, in any licensing proceeding for a repository at Yucca Mountain, DOE will demonstrate that the natural barriers and the engineered barrier system will work in combination to enhance the overall performance of the geologic repository. NRC regulations require an engineered barrier system in addition to the natural barriers provided by the geologic setting, and that natural barriers and the engineered barrier system work in combination to enhance the resiliency of the geologic repository and increase confidence that the postclosure performance objective at 10 CFR 63.113(b) will be achieved.

NRC's expectation is shared by the EPA, and other oversight entities. In 40 CFR part 197, EPA defines the Yucca Mountain disposal system as the combination of underground engineered and natural barriers at the Yucca Mountain site that prevents or substantially reduces releases from the disposed radioactive material, and emphasizes the importance of engineered barriers as a method, within human control, to delay the release of radionuclides from the repository. Oversight entities, such as the NWTRB and the NRC's Advisory Committee on Nuclear Waste, have been consistent in their recommendations to pursue robust, long lived waste packages to protect the health and safety of the public.

In consideration of this information, DOE incorporated in its proposal specific criteria to address the performance of the engineered components of the repository system. The Department believes that the criteria are consistent with the Congressional intent in the NWPA, and the regulatory expectations of the EPA and the NRC, that there be performance contributions from both the natural and engineered barriers. DOE does not believe that reliance on such barriers would mask or compensate for inadequacies in the natural system, but rather, such barriers enhance and prolong the ability of the natural system to contain, and mitigate the rate of release of, individual radionuclides.

C. The Rules Should Not Be Changed To Fit the Site

1. The Site Would Be Disqualified Under Existing Guidelines

Several commenters stated their belief that Yucca Mountain would be disqualified under the existing guidelines and, on that basis, DOE is attempting to change the rules to fit the site. This same comment was made in response to DOE's 1996 proposal to amend part 960. The primary reason for this comment, then as now, is the argument that the site cannot meet the disqualifying condition in 960.4–2–1(d) pertaining to groundwater travel time. Many commenters also questioned what condition would disqualify the site under part 963, and how far contaminated groundwater may travel under part 963.

As stated in the preamble to the supplemental notice of proposed rulemaking (64 FR 67071), DOE's reasons for amending the guidelines are not based on a belief or finding that the Yucca Mountain site would be disqualified if the 960 guidelines were applied without amendment. With respect to groundwater travel time, the Department continues to evaluate

groundwater movement and other hydrological properties of the site to assess the performance of a repository at Yucca Mountain. Based on the results of the 1998 Viability Assessment and ongoing evaluations, the Department believes there is no basis at this time to find that conditions that would disqualify the site if 10 CFR part 960 were applied, exist at Yucca Mountain.

With regard to the question of what condition would disqualify the Yucca Mountain site, part 963 requires the Secretary of Energy to evaluate the suitability of the site based on the likelihood that a repository at the site could meet the applicable radiation protection standard. Accordingly, if the Secretary determines this requirement cannot be met, the site may not be determined suitable by the Secretary and thus would be ''disqualified'' for consideration for further development. With regard to the question of how groundwater travel time will be assessed under part 963, groundwater flow and transport will be analyzed as suitability criteria, section 963.17(a)(7), unsaturated zone flow and transport, and section 963.17(a)(8), saturated zone flow and transport. Accordingly, groundwater flow and transport will continue to be studied for their role in repository performance and the ability of the site to meet applicable radiation protection standards.

2. DOE Is Changing the Rules in the Middle of the Game

Several commenters claimed that DOE is inappropriately establishing suitability guidelines as a result of ongoing site characterization work, instead of setting the guidelines in advance of that work. In that regard, one commenter questioned whether the guidelines would affect the design of the repository. Stated otherwise, DOE understands the concern to be that it is perceived as setting guidelines to meet a specific repository design or other site characteristic, rather than setting guidelines based on predetermined criteria for repository design or other site characteristics.

DOE has explained previously, however, that the reason it is issuing these guidelines now is based on events beyond its control that have made its prior guidelines an inappropriate tool for evaluating suitability. Under the NWPA, suitability is linked to licensability. Congress's decisions to change the NWPA to focus on Yucca Mountain and to direct the EPA and NRC to revise their standards bearing on licensability set in motion a chain of regulatory changes to the licensing rules that in turn necessitated this rulemaking.

DOE also notes that the fact that the final site suitability guidelines are being issued now, instead of earlier in the site characterization process, is to the public's advantage, since they reflect the most recent developments in regulatory requirements and standards and technical understanding. For example, the guidelines are structured to evaluate repository performance against a set of criteria potentially important to waste isolation. The repository design, although not directly affected by the guidelines, will be structured to take advantage of the features of the natural and engineered barriers that are important to waste isolation.

Moreover, DOE's current approach is consistent with earlier opinions expressed by the National Academy of Sciences, Board on Radioactive Waste Management (Board). In its report, Rethinking High-Level Radioactive Waste Disposal (1990), the Board addressed this issue and discussed the relative merits of an approach that presets technical criteria for evaluation of a repository site versus an approach that remains flexible and responsive to data and information as it is developed. In that report, the Board criticized the U.S. high-level waste program for its approach, at that time, of defining in advance the technical requirements for every part of the multi-barrier system, and in its emphasis on the geologic component of the barrier. The Board opined that the better approach, consistent with geologic and mining practice, is to remain flexible instead of setting rigid predefined goals. The Board observed that, instead of trying to anticipate all the complexities of a natural geologic environment, the better approach would be to define the goal broadly in ultimate performance terms, rather than anticipatory requirements, so that increased knowledge can be incorporated in the design at a specific site.

D. The Part 963 Guidelines Would (a) Mask the Degree of Safety, Which Can Lower or Eliminate Public Confidence, and (b) Lower, or Eliminate the Degree of Safety

(a) Some commenters believed that the proposed revisions, that is, the use of a total system performance assessment instead of individual, subsystem requirements, mask the degree of safety of the site. These commenters felt that the TSPA method, with its heavy reliance on computer modeling, is too uncertain and subject to mishandling to form the basis for assessing the safety of the site and ensuring public confidence in the resulting assessment. Other commenters expressed the view that use of the TSPA method is appropriate. One commenter, Nye County, Nevada, commented that the criteria provide for greater transparency and verifiability than DOE's initial proposed amendments to part 960 in 1996, and that the TSPA approach is preferred to DOE's previous consideration of site-specific revisions to the 960 guidelines.

As explained in other sections of this notice of final rulemaking, the prevailing view in the relevant scientific community supports use of the TSPA method to assess and evaluate expected performance of a geologic repository over thousands of years. This is the evaluation method required by the NRC and the EPA in assessing repository performance for licensing purposes. It would be unreasonable for DOE to establish criteria to determine the suitability of the Yucca Mountain site that are not based on the prevailing scientific and regulatory view of performance assessment.

Over the past several years, DOE and other entities involved in oversight and regulation of high level waste programs have undertaken significant efforts to make the results of total system performance assessment calculations more transparent to non-technical audiences. This is in response to the type of concerns expressed by the commenters here, that the complex calculations are difficult to visualize and verify, and, hence, may mask the degree of safety provided. While DOE acknowledges the difficulty in comprehending TSPA for the lay person, DOE has attempted, through this rulemaking and in other public forums, to enhance transparency in presenting the results of TSPA and associated complex technical calculations and modeling. For example, in the Viability Assessment, DOE provided a detailed explanation of the TSPA method and the computer models and technical data and information supporting those modes. This explanation has been augmented by presentations and other briefings provided by DOE to oversight agencies and other members of the public.

One of DOE's primary considerations in drafting and finalizing this rulemaking was to make the TSPA process and method more transparent and verifiable. As explained in the Viability Assessment, transparency is manifested through the ease of a reader in understanding the process by which a study was carried out, which assumptions are driving the results, how they were arrived at, and the rigor of the

analyses leading to the results. Transparency is achieved when a reader can understand what was done in the analyses, what the outcome was, and why. Part 963, at sections 963.16(b)(1), (5), (6), (7), and (9), provides a framework for the listed system performance assessment that should assist in accomplishing this end.

Additionally, confidence in the results of the performance assessment calculations can be enhanced if the presentation illustrates: (1) The system's expected evolution, as defined by the spatial and temporal response of the system to waste emplacement; and (2) the uncertainty in the system's expected evolution and the significance of that uncertainty to the system performance goals. Part 963 incorporates these kind of considerations under 963.16(b)(2), (3), (8), (9), (10), and (12).

Further, section 963.17 lists criteria that reflect both the processes and the models that are important to the total system performance. Those criteria are expressly identifiable and traceable components of the TSPA, thereby increasing transparency and traceability of the results. In addition, DOE intends to make available to the public the documentation underlying any TSPA analyses and results. With this material, the public will have an opportunity to review the technical information and data underlying the analyses supporting the postclosure performance assessment.

(b) Some commenters expressed the view that the use of TSPA, and the lack of qualifying or disqualifying subsystem requirements, would lower or eliminate the degree of safety.

Part 963 is structured to align DOE's site suitability determination with the EPA public health and safety standard, as implemented by the NRC regulations, and to base a suitability determination on the likelihood that the site could meet applicable radiation protection standards. Through Congressional direction, EPA modified the basis for a public health and safety standard from a release-based standard to a health-effects standard. In turn, Congress directed the NRC to conform its licensing regulations to the EPA standard and implement that standard. Both regulators predicate a demonstration that the standard can be met on the use of performance assessment.

DOE is in agreement with the Congress, the National Academy of Sciences, the EPA and the NRC that a dose-based standard, that explicitly limits the risk of adverse health effects and considers health effects to the potentially affected public, is an appropriate basis upon which to assess public health and safety. Further, DOE believes that the risk or dose approach provides additional and better protection to the health and safety of the public in the vicinity of Yucca Mountain than the release based approach reflected in the 960 guidelines. The part 963 guidelines explicitly require DOE to consider health effects to the public in the vicinity of the Yucca Mountain site. Under the part 960 guidelines, the DOE would only have been required to calculate releases from the repository, not the potential health effects. Hence, the part 963 guidelines enhance the degree of safety provided to the public in the vicinity of the Yucca Mountain site, rather than lowering it.

E. The Appropriateness of the Proposed Criteria

One commenter questioned the postclosure criteria proposed by DOE stating that the criteria were simply a list of physical characteristics with no bases for the discrimination that would be necessary for a suitability determination, while other commenters supported the Department's proposal indicating that the proposed postclosure criteria were appropriate for decisionmaking.

As DOE noted in its supplemental notice of proposed rulemaking, we believe we may properly opt to use one dictionary definition of criteria as ''characterizing traits'' rather than the other possible definition ''benchmarks'' or ''pass-fail standards.'' This is because, among other reasons, section 112(a) of the NWPA uses the term ''primary criteria'' synonymously with the term ''detailed geologic considerations,'' a term that is more naturally understood as ''characterizing traits'' than ''benchmarks.'' Although the specific section 113 criteria addressed herein are different from the specific ''primary criteria'' referred to in section 112(a), it seems likely that Congress used the word ''criteria'' in both places to have the same general meaning, i.e., ''considerations'' rather than ''benchmarks.'' In addition, we believe the ''characterizing traits'' definition is more plausible where what is at issue are criteria that are part of a site *characterization* effort, as 113(b) specifies.

In discussing this definition of criteria in the proposed rule, DOE noted that criteria are not necessarily quantitative. To illustrate this point, DOE pointed to NRC's Quality Assurance criteria, found then in Appendix B of 10 CFR part 50 (now incorporated into final part 63, subpart G). NRC was concerned that this may have mischaracterized the importance and nature of the NRC requirements by noting that they are not expressed as quantitative, pass-fail standards. We agree that our discussion on this point was confused at best. This is partly because the two definitions of criteria, ''benchmark'' versus ''characterizing trait,'' represent a continuum as well as a dichotomy. NRC's Appendix B QA criteria and the suitability criteria of sections 963.14 and 963.17 resemble each other in that they are non-quantitative. But NRC's QA criteria are also benchmarks, in that a QA plan must have them and describe how they will be satisfied to pass muster. In that respect they differ from the part 963 criteria.

Accordingly, the sentence in the Supplementary Information describing the suitability criteria should have read as follows: ''For example, in 10 CFR part 63, Subpart G, the NRC sets forth quality assurance ''criteria'' that are factors that must be present, including a description of how they will be satisfied, for DOE's QA program to be judged adequate. However, although these QA criteria are required factors, they are not, nor do they contain, quantitative, pass-fail, benchmark standards.''

F. DOE Should Consider Preclosure Issues, Including Environmental, Socioeconomic, and Transportation Issues

Several commenters objected to DOE's exclusion in part 963 of certain 960 preclosure guidelines such as environmental quality, socioeconomics and transportation, on the basis that section 112(a) of the NWPA requires consideration of those factors, along with qualifying or disqualifying conditions for those factors. Additionally, several commenters questioned where such topics would be addressed, and expressed their belief that the draft Yucca Mountain EIS did not fully or adequately address those topics.

As previously explained, DOE does not agree that the site suitability criteria established under section 113(b) must be the same as the guidelines promulgated under section 112(a). Part 963 establishes the criteria and methodology for determining the suitability of the site under section 113(b)(1)(A)(iv) as part of DOE's site characterization activities and site characterization plan. Since 1988 and the publication of the Site Characterization Plan, DOE has indicated that information relative to socioeconomics, transportation and environmental quality guidelines referred to in part 960 would be

obtained through means other than site characterization activities. Accordingly, DOE does not agree that socioeconomics, transportation and environmental quality must be included in part 963 as criteria to determine the suitability of the site under section 113(b).

DOE agrees that socioeconomics, environmental quality and transportation are appropriate factors for the Secretary to consider in determining whether to recommend the Yucca Mountain site for development. As stated in the rule and in this notice, those factors and other relevant information that will be considered in any Secretarial recommendation under section 114 of the NWPA will be addressed by DOE through other mechanisms in which the public will also have the opportunity to participate, such as the Yucca Mountain EIS process. While some commenters may be critical of the adequacy of the Yucca Mountain EIS analysis, or the extent of coverage, DOE believes that the 960 guidelines on socioeconomics, transportation and environmental quality are appropriately addressed in the Yucca Mountain EIS. DOE is in the process of evaluating public comments on the draft Yucca Mountain EIS, including those comments submitted under this rulemaking. Upon completion of the EIS, DOE believes that coverage of these factors will be fully adequate for consideration in any Secretarial site recommendation.

G. DOE Should Define the Margin by Which it Will Meet the Radiation Protection Standard, or the Way in Which it Will Meet the Standard

At least one commenter suggested that DOE should be more definitive or restrictive for the determinations to be made in section 963.12, preclosure suitability, and section 963.15, postclosure suitability. Specifically, it was suggested that DOE be more definitive or clarify what is meant by the phrase ''likely to meet'' in those sections, such as specifying the mean result of the TSPA calculation as the basis for a determination of postclosure suitability.

DOE does not believe it is useful to be more definitive or restrictive regarding the phrase ''likely to meet.'' By this phrase DOE is indicating, as it must, that site suitability is largely a DOE judgment call as to the likelihood that the site will qualify for a license from the NRC for repository construction. This determination is not the equivalent of a license application by DOE, nor is it the equivalent of an NRC determination that a license application will be successful. Under the circumstances, DOE believes this phrase accurately captures the level of information and confidence required by the Secretary to make a suitability determination. With regard to the comment that DOE should use only the mean result of the TSPA to judge the likelihood of meeting the standard, DOE believes more than the mean result would be appropriate in estimating the ability to meet licensing regulations. Under NRC regulations, 10 CFR subpart 63.101, DOE must demonstrate, at the time of licensing, reasonable assurance (for the preclosure period) and reasonable expectation (for the postclosure period) that the performance objectives can be met. This requirement necessitates that DOE develop and provide more than just the mean result in demonstrating compliance with the standard. Therefore, the use of ''results'' is appropriate for the suitability assessment under sections 963.12 and 963.15, instead of something more singular, such as a mean or expected result only.

In addition, some commenters noted that the rule should require performance in excess of the standard; stated otherwise, that DOE should specify a margin or level of confidence regarding performance results. This same comment was made in response to the 1996 proposed rulemaking. DOE has reconsidered this comment here, but nevertheless maintains the same response as provided in response to comments on the 1996 proposal. That is, DOE does not believe it is appropriate or most effective to specify or quantify a level of confidence or margin of safety as part of the rule. The public, as well as the Secretary of Energy, will have access to data and information underlying the TSPA analyses and supporting analyses. This information will include the probabilistic distribution of values around the expected value, in order to assess the level of confidence in the performance calculation.

H. Whether DOE Should Revoke the Guidelines in 10 CFR Part 960 in Making the Site Suitability Determination for the Yucca Mountain Site or Continue To Use Them in Addition to Part 963

DOE proposed amendments to modify part 960 so that it would apply only to competitive site selection for the purpose of nominating sites for site characterization activities. Opinion about this part of the November 30, 1999, proposal was divided. Some commenters argued for complete revocation of part 960 because it embodies a methodology for site comparisons that is: (1) obsolete; (2) inconsistent with internationally accepted practice; and (3) inconsistent with currently proposed NRC and EPA rules for the Yucca Mountain site. Other commenters disagreed, arguing that the sub-system approach in part 960 can and should be applied in addition to the rules for total system performance assessments in part 963. They viewed the provisions of part 960 as a viable and better method than proposed part 963 for assessing the suitability of the Yucca Mountain site for the location of a nuclear waste repository.

With regard to the comments favoring complete revocation of part 960, DOE does not think that reaching final conclusions on their continued utility for competitive selection of sites for site characterization is appropriate for two reasons. First, the 1987 amendments to the Nuclear Waste Policy Act of 1982 require DOE to focus its efforts exclusively on evaluation of Yucca Mountain. Second, if there is ever a need to return to competitive selection of sites for site characterization, that would be the time to replace part 960 with a methodology that reflects scientific advances since part 960 became effective in 1984, as well as then applicable statutory and regulatory requirements.

With regard to commenters who favored application of the subsystem requirements of part 960 in addition to part 963, DOE thinks that this approach is scientifically unsound and impossible to carry out. As explained at length above, the subsystem methodology of part 960 is scientifically unsound because it largely ignores the crucial interactions of various features, events, and processes that should be determinative. In DOE's view, reliance on the methodology of part 960 would result in conclusions that are too likely to be erroneous. Even if the subsystem methodology of part 960 were a scientifically sound basis for evaluating site suitability, DOE could not use it in evaluating suitability for licensing because of the NRC's revisions to its licensing regulations. In the notice of supplemental proposed rulemaking, DOE included a table, reproduced above (Table 1), which sets forth the cross references in part 960 to the NRC's part 60 and demonstrates the lack of any substitutable cross reference to the NRC's part 63. The table was accompanied by a narrative exploring the groundwater guidelines in particular to show the impossibility of applying them after the NRC substituted part 63 for part 60. None of the commenters

disputed this table, and in DOE's view, it shows continued use of part 960 in the evaluation of the Yucca Mountain site is not a viable option.

I. Response to NRC Comments

a. Coordination With NRC

NRC made the comment that proposed part 963 did not address the potential matter of a conflict between the proposed DOE regulation and the applicable NRC regulations. NRC recommended that DOE explain how it would address this matter in this statement of consideration.

NRC correctly noted that proposed part 963 did not contain a provision expressly requiring NRC regulations to take precedence in the event of a conflict or inconsistency between the DOE regulations and NRC regulations. DOE does not believe such a provision is necessary, given the nature and structure of part 963. Moreover, DOE believes this provision could create confusion in the implementation of the DOE regulation, since it suggests that in certain circumstances not presently identified DOE would need to substitute an NRC regulation for its own.

DOE recognizes that its site suitability guidelines must assist the Secretary in judging the ability of the Yucca Mountain site to meet licensing requirements, pursuant to section 113(c) of the NWPA, but that the license application process, over which NRC has jurisdiction, is distinct and separate from the Secretary's judgment regarding site suitability. Accordingly, part 963, which is specific to the Yucca Mountain site, is carefully crafted to conform to pertinent parts of the NRC's part 63, the NRC's licensing requirements specific to the Yucca Mountain site, that serve DOE's need for assessing the suitability of the site as a basis for a possible site recommendation. Under this structure, the necessary consistency between the DOE and NRC regulations is obtained during the drafting of the DOE regulation. Any conflicts between the DOE and NRC regulations have been resolved through the NRC concurrence process on the regulation.

b. Quality Assurance

The NRC also commented that DOE should recognize in the preamble to part 963 the importance and role of quality assurance in DOE site characterization activities, and the expected pedigree of the technical information and data underlying the suitability determination.

As the NRC acknowledges in its comments, the Department expects to use essentially the same data for both its site suitability determination and any potential license application, even though the site suitability determination is not the equivalent of a determination that the site will meet all the requirements needed to obtain a construction authorization under NRC regulations. DOE acknowledges that the site suitability determination must be based on credible and verifiable data and information, and that assurance of the quality of that data and information is a factor in that determination. Therefore, due consideration will be given by the Department to any outstanding quality assurance issues that may affect the pedigree of technical information underlying the part 963 suitability determination.

c. Definition of Cladding

In response to a comment from the NRC that the proposed definition of cladding found at 10 CFR subpart 963.2 conveyed an inaccurate notion that all cladding is corrosion resistant, the Department has modified the proposed definition as follows: cladding is the metallic outer sheath of a fuel rod element; it is generally made of a corrosion resistant zirconium alloy or stainless steel, and is intended to isolate the fuel from the external environment. Also, the Department has clarified the use of the term cladding in section VI(B)(h)(2) of this **SUPPLEMENTARY INFORMATION,** and in the rule at section 963.17(a)(5)(i).

J. Response to Nuclear Waste Technical Review Board Comments

The NWTRB provided comments on the 963 rulemaking, noting several considerations for DOE to address in its suitability guidelines. The NWTRB endorsed the use of performance assessment in support of a site suitability determination, but also noted that additional lines of argument and evidence should be used. In particular, the NWTRB supported use of other lines of evidence such as safety margins, defense-in-depth, performance confirmation, consideration of disruptive process and events, and reference to insights from natural and man-made analogs noting that such topics were addressed in revision 3 of the report, ''Repository Safety Strategy: Plan to Prepare the Postclosure Safety Case to Support Yucca Mountain site Recommendation and Licensing Considerations'' (''Repository Safety Strategy'') (TRW–WIS–RL–000001, January 2000). The NWTRB emphasized that understanding uncertainties in the performance assessment analysis is a critical component to attain technical credibility and sound decisionmaking. In that regard, the NWTRB recommended that DOE include in its representation of performance uncertainty: (a) A description of critical assumptions; (b) an explanation of why particular parameter ranges were chosen; (c) a discussion of possible data limitations; (d) an explanation of the basis and justification for using expert judgments; (e) an assessment of confidence in the conceptual models used; and (f) identification and quantification of uncertainties associated with the performance estimates.

DOE agrees with much of the NWTRB's comments and recommendations. In fact, part 963, in its proposed and final form, is addressed to eliciting much of the information and analysis the NWTRB recommends and that was identified in revision 3 of the Repository Safety Strategy. Under section 963.16(b), DOE will conduct TSPAs in a manner to satisfy twelve enumerated conditions. Those conditions correspond to a large degree with the specific recommendations of the NWTRB repeated above, and provide the additional lines of evidence and argument beyond the performance assessment calculations. DOE structured this section of the rule to correspond to NRC's licensing regulation, particularly sections 63.114 and 63.115. To clarify this point, DOE added language to the description of this rule, in section VI of this **SUPPLEMENTARY INFORMATION,** to better articulate how the additional lines of evidence and other recommendations will be accounted for in the suitability determination. Presented below is additional explanation of how the NWTRB's comments are addressed in part 963.

The additional lines of evidence and argument recommended by the NWTRB are addressed in section 963.16(b), except for performance confirmation. DOE believes that performance confirmation is important, and will develop a performance confirmation plan in conjunction with the licensing process. DOE will provide in the underlying documentation of the TSPA calculation, performed in accordance with section 963.16(b), the ''margin'' by which the expected performance of the repository exceeds the applicable radiation protection standards. Although DOE does not agree that it is necessary to quantify or specify the margin of safety as part of the rule, information and data about the margin will be available to decision-makers for review and consideration in reaching a suitability determination. Under sections 963.16(b)(8), (9), and (10), DOE

will identify and evaluate multiple and independent barriers to waste isolation, thereby providing information on defense-in-depth. Disruptive processes and events are analyzed and included in the TSPA under sections 963.16(b)(4) and (5), and are express criteria of suitability in section 963.17(b). Insights from natural and man-made analogs are also analyzed and included in the TSPA under section 963.16(b)(7), which requires DOE to provide the technical basis for the TSPA models, including comparisons made with empirical observations, such as natural analogs.

The other specific NWTRB recommendations, described above, are also addressed in part 963. NWTRB recommendation (a), describe critical assumptions, is addressed by section 963.16(b)(2), regarding accounting for uncertainties and variabilities in parameter values; section 963.16(b)(3), regarding consideration of alternative models of features and processes and evaluation of the effects of the alternative models; and section 963.16(b)(12), regarding conduct of appropriate sensitivity analyses. In addition, the analyses and documentation underlying the TSPA will contain an explanation of assumptions to assure the quality of the information.

NWTRB recommendation (b), explain why particular parameter ranges are chosen, is addressed by section 963.16(b)(1), regarding data related to the postclosure suitability criteria, and section 963.16(b)(2), regarding an accounting of uncertainties and variabilities in parameter values and identification of the technical basis for parameter ranges, probability distributions, and bounding values.

NWTRB recommendation (c), include a discussion of possible data limitations, is addressed by section 963.16(b), regarding explanation of the technical bases of the data and models (e.g., sections 963.16(b)(2), (3), (5), (6), (7), and (10)). For example, section 963.16(b)(6) states that DOE will provide the technical basis for either inclusion or exclusion of degradation, deterioration, or alteration processes of engineered barriers. This will entail a discussion of possible data limitations.

NWTRB recommendation (d), provide an explanation of the basis and justification for using expert judgment, is included in the portions of section 963.16(b) regarding explanations of technical bases (e.g., sections 963.16(b)(2), (5), (6), (7), and (10)). In those explanations, DOE will explain where expert judgment has been used.

NWTRB recommendation (e), provide an assessment of confidence in the conceptual models used, is addressed by sections 963.16(b)(3) and (5). Under those sections of the rule, DOE will consider alternative models of features and processes and their effects on performance, and provide the technical basis for either inclusion or exclusion of specific features, events and processes (FEPs) of the geologic setting. In essence, these analyses will help DOE and others to assess the validity of the conceptual models and estimates of the significance of those models to repository performance.

NWTRB recommendation (f), identify and quantify the uncertainties associated with the performance estimates, is addressed by sections 963.16(b)(2), (3), (5), (6), (7), (9) and (10). Under these provisions, DOE will identify and quantify uncertainties associated with the performance estimates.

V. Description of Final Rule—10 CFR Part 960

A. Subpart A—General Provisions

This section of the Guidelines contains the statement of applicability and definitions. The final revisions to section 960.1, Applicability, limit the application of the Guidelines to evaluations of the suitability of sites for site characterization under section 112(b) of the NWPA. The revisions eliminate the applicability of the Guidelines to determinations of suitability of a site at the site characterization stage under section 113, or the site recommendation stage under section 114. These revisions clarify that the applicability of the Guidelines is limited to the preliminary site screening stage, which entails a comparative analysis process. The final revisions to the third and fourth sentences update the reference to other regulatory requirements of the NRC and EPA, in light of the current status of applicable NRC and EPA regulations relative to high-level waste geologic repositories. The fifth through seventh sentences remain unchanged.

The final revisions to the definitions section make the terms consistent with the NWPA and with the other revisions to the Guidelines limiting applicability of subparts B, C, and D of the Guidelines to determinations of site suitability for site characterization under section 112 of the NWPA.

B. Subpart B—Implementation Guidelines

The final revisions to the implementation guidelines limit the procedures and basis for application of the postclosure and preclosure guidelines of subparts C and D, respectively, to evaluations of the suitability of sites for site characterization.

Section 960.3, entitled implementation guidelines, is revised to eliminate the sentences in that section setting forth the procedures and basis for application of subparts C and D in evaluations and determinations of the suitability of a site under section 113 and section 114 of the NWPA. These revisions remove section 960.3–1–4–4, Site Recommendation for Repository Development, in its entirety. That section pertained to procedure and evidence for making a site recommendation decision under section 113 and 114. The part 960 guidelines are no longer relevant to those decisions and therefore reference to them is removed. Section 960.3–1–5, entitled Basis for Site Evaluation, is revised to eliminate all references to Appendix III in making suitability determinations at the site characterization or site recommendation stages. Only the last sentence of section 960.3–2, Siting Process, is revised. This revision limits the applicability of the siting process to the recommendation of sites for site characterization. Section 960.3–2–4, Recommendation of Sites For the Development of Repositories, is removed in its entirety. These paragraphs pertain to the comparison of characterized sites, leading to a recommendation by the Secretary to the President of a site for development as a repository. The final revisions eliminate that decision process from evaluation under the Guidelines, and the section in its entirety is removed.

C. Appendix III

The final revisions to Appendix III remove and eliminate the applicability of this Appendix to decisions for repository site selection and siting decisions. The qualifying and disqualifying conditions of the technical guidelines in subparts C and D now apply only to the decision point for selecting sites for site characterization. All references to the site selection and site recommendation decisions under sections 113 and 114 are removed, including the tabular column in Appendix III referencing the repository site selection siting decision.

With respect to the Guidelines listed in Appendix III that apply to environmental quality, socioeconomics and transportation considerations, DOE considered whether to continue to require their applicability to a Yucca Mountain site recommendation under section 114 of the NWPA. DOE decided not to do so because the issues

addressed by these Guidelines will be substantially covered in the environmental impact statement for the Yucca Mountain site, and section 114(a)(1)(D) requires that the final environmental impact statement be part of the comprehensive statement of the basis for a site recommendation to the President (42 U.S.C. 10134(a)(1)(D)). Opportunities for public comment on the analysis of environmental quality, socioeconomics and transportation issues have been provided as part of the public review and comment process on the draft environmental impact statement. In sum, DOE believes that the environmental quality, socioeconomics and transportation guideline requirements are substantially and unnecessarily duplicative of requirements under the procedures for developing an environmental impact statement and for formulating and informing a site recommendation under section 114.

VI. Description of Final Rule—10 CFR Part 963

The purpose of this part of the Supplementary Information is to explain the meaning and basis for those provisions of the final part 963 that are not self-explanatory and to identify and explain the main changes in the rule from proposed to final. The following is a section by section analysis of the final rule.

A. Subpart A—General Provisions

Subpart A comprises two parts, the statement of Purpose, section 963.1, and Definitions, section 963.2.

(a) Purpose—section 963.1. The purpose of the final rule is as stated in this section: to establish the methods and criteria to help guide DOE's determination regarding the suitability of the Yucca Mountain site for the location of a geologic repository. The suitability evaluation methods in question are consistent with the methods the NRC has promulgated for assessing whether a geologic repository at the Yucca Mountain site meets licensing criteria and requirements. The suitability criteria allow for evaluation of the geologic considerations derived from section 112(a) and reflect the current scientific understanding and regulatory expectations (both NRC and EPA) regarding the performance and safety of a geologic repository during the preclosure and postclosure periods of operation. Because the suitability criteria are part of the site characterization program, these criteria relate to site characterization activities. Site characterization activities relate to scientific and technical investigations of the site to determine its natural properties and features, for example, studying the geohydrology and geochemistry of the site, as distinct from consideration of other *factors*, such as cost, socioeconomics and transportation of waste to the repository. An explanation of how the suitability criteria were derived is provided below.

It should be noted that the final rule does not address the site recommendation process in its entirety. Suitability is only one aspect of the Secretary's recommendation. Section 114(a)(1) of the NWPA sets out other information not addressed by this rule that the Secretary must consider, some of which the Secretary must submit to the President and make available to the public if the Secretary recommends the site for development as a geologic repository. Section 114(a)(1)(G) also indicates that the Secretary has discretion to base his recommendation on ''such other information as the Secretary considers appropriate.''

Finally, we note that the guidelines established by this rule are just that: guidelines. Their function is to assist the Secretary in reaching a conclusion concerning a question that is quintessentially predictive and requires the exercise of judgment: how a repository that has not yet been built will function thousands of year in the future. The purpose of these guidelines is to make tools and information available to the Secretary to assist him in reaching this judgment, not to cabin his discretion in doing so.

(b) Definitions—section 963.2. The final rule includes definitions of certain words and terms. The definitions clarify DOE's intent and meaning in the context of this rule. The definitions are also intended to make the terms consistent with the NRC regulations governing the construction and licensing of a repository at the Yucca Mountain site. Several of the terms are important to understanding the suitability evaluation process, and are addressed here.

Applicable radiation protection standard has been added to the definitions section to clarify use of the phrase in the rule. By applicable radiation protection standard, DOE means the numerical radiation dose or concentration limits contained within 10 CFR part 63, specifically identified in our definition. Those NRC-regulatory provisions in turn incorporate the public health and environmental standards promulgated by the EPA in 40 CFR part 197. These are the same standards compliance with which DOE will have to demonstrate during licensing.

The numeric radiation dose limits applicable in the preclosure period refer to the numerical dose limits in 10 CFR 63.111(a) and (b) and 63.204. Subpart K of 10 CFR part 63 contains the preclosure public health and environmental standards, adopted from 40 CFR part 197. The preclosure standard will require DOE to demonstrate at licensing that there is reasonable assurance no member of the public in the general environment (i.e., outside the Yucca Mountain site, the Nellis Air Force Range and the Nevada Test Site) will receive more than an annual dose of 15 mrem from the management and storage of radioactive material inside the Yucca Mountain repository and outside the repository but within the site (10 CFR part 63.204).

In addition, the preclosure performance objectives contained in part 63.111(a)(2) will require DOE to demonstrate at licensing that there is a reasonable assurance that during normal operations any radiation exposures and releases of radioactive materials to any real member of the public outside the Yucca Mountain site are within the numerical radiation dose limits contained in part 63.204 and a related NRC regulation, 10 CFR part 20, specifying radiation protection standards for workers and the public involving NRC licensees. The performance objectives also include numerical guides for design of the geologic operations area (10 CFR part 63.111(b). The numerical guides will require DOE to demonstrate at licensing that it has designed the geologic repository operations area in such a manner that there is reasonable assurance that aggregate radiation exposures and aggregate releases of radioactive material will be within prescribed dose limits during Category 1 event sequences and that any single Category 2 event sequence will be within prescribed limits.

The numeric radiation limits applicable in the postclosure period refer to the numerical dose limits in 10 CFR 63.311 and 63.321, and the numeric radionuclide concentration limits in 10 CFR 63.331. The postclosure public health and environment standards are contained in Subpart L of 10 CFR 63, and are comprised of three separate standards. First, the individual protection standard, at 10 CFR 63.311, requires DOE to demonstrate at licensing, using performance assessment, that there is a reasonable expectation that for 10,000 years following disposal, the reasonably maximally exposed individual receives no more than an annual dose (total effective dose equivalent) of 15 mrem

from releases from the undisturbed Yucca Mountain disposal system. Second, the human intrusion standard, at 10 CFR 63.321, requires DOE to determine the earliest time that the waste package would degrade sufficiently that a human intrusion could occur without recognition by the drillers. If DOE determines that complete waste package penetration will occur at or before 10,000 years, then DOE will have to demonstrate at licensing, using performance assessment, that there is a reasonable expectation that the repository will meet the individual protection standard of no more than an annual dose of 15 mrem to the reasonably maximally exposed individual 10,000 years following disposal. If complete waste package failure occurs after 10,000 years, then DOE must include the results of the analysis indicating the exposures to the reasonably maximally exposed individual at the time it occurs in the environmental impact statement for Yucca Mountain as an indicator of long-term disposal system performance. Third, the ground water standard, at 10 CFR 63.331, requires DOE to demonstrate at licensing that there is a reasonable expectation that for 10,000 years of undisturbed performance after disposal, releases of specified radionuclides from waste in the Yucca Mountain disposal system into the accessible environment will not cause the level of radioactivity in the representative volume of ground water to exceed certain limits. The limits for radionuclide concentrations in the representative volume of ground water are provided in Table 1 of part 63.331, and specify a limit of 4 mrem per year to the whole body or any organ from combined beta and photon emitting radionuclides, and limits of 5 picocuries per liter for combined radium-226 and radium-228 (including natural background) and 15 picocuries per liter of gross alpha activity (excluding radon and uranium).

Barriers are defined as any material, structure or feature that prevents or substantially reduces the rate of movement of water or radionuclides from the Yucca Mountain repository to the accessible environment, or prevents the release or substantially reduces the release rate of radionuclides from the waste. Several examples of a barrier are provided, *e.g.,* a geologic feature and engineered structure, or a waste form with physical and chemical characteristics that significantly decrease the mobility of radionuclides. This definition of barrier is slightly different from the definition in proposed part 963, which was based on the definition in proposed part 63. The NRC modified its definition in final part 63.2 to be consistent with EPA's definition of barrier in 40 CFR 197.12. DOE is now modifying its definition of barrier to be consistent with the final NRC definition at part 63.2.

The definition adopted here differs from the NRC definition only in regard to the phrase ''for a period to be determined by the NRC.'' This phrase is in the *final* NRC definition, but has not been included in part 963. The NRC clarified this aspect of the definition stating the description of each barrier includes the information on the time period over which each barrier will perform its intended function including any changes during the compliance period. Under part 963.16(b), DOE's performance assessment analyses will include descriptions of barriers, both natural and engineered, that are important to isolating radioactive waste. Those descriptions will include information on the time period over which the barriers will perform their intended functions, including any changes during the compliance period. Therefore, DOE believes it is not necessary to adopt this phrase in its definition of barrier for purposes of DOE's assessment of the suitability of the Yucca Mountain site.

Criteria are defined as those characterizing traits that are relevant to assessing the performance of a geologic repository at the Yucca Mountain site. The criteria will allow for evaluation of the impact of those geologic considerations identified in section 112(a) of the NWPA that are relevant to the assessment of the performance of a geologic repository at the Yucca Mountain site. The geologic repository includes the natural barriers of the geologic setting and the engineered barriers of the repository design. The suitability criteria of the final rule are specific characterizing traits of the Yucca Mountain site that, through the site characterization process, DOE has identified as important indicators of the performance of the total repository system (that is, the integrated natural and engineered barrier systems).

Consistent with varying definitions in standard dictionaries, DOE considered defining the term ''criteria'' as benchmark, pass-fail standards rather than as ''characterizing traits.'' DOE decided not to adopt the ''pass-fail'' definition for two reasons. First, in section 112(a) of the NWPA, the term ''primary criteria'' is used synonymously with the term ''detailed geologic considerations,'' which are more naturally understood as ''characterizing traits'' than as ''benchmarks.'' Although, as explained above, the section 113 criteria are not the same as the section 112 criteria, it seems likely Congress used the same words in a similar general sense to mean ''characterizing traits'' in both places (rather than ''characterizing traits'' in section 112 and ''benchmarks'' in section 113). Second, under section 113(b), the suitability criteria are to be included in the site characterization plan. This further suggests they are better understood as ''characterizing traits.'' If a point be made of it, however, the proposed and final part 963 rule also contain a benchmark for the site's suitability. Section 963.11 states that the Secretary may find the site suitable if he concludes, using the evaluation methods set out in other portions of the rule, *that it is likely to meet the applicable radiation protection standards* set by the EPA and contained in the NRC's licensing rules. Hence even if section 113(b) is read to require the Secretary to establish benchmarks that the site must meet to be found suitable, he has done that as well.

DOE's proposed rule contained a somewhat confused discussion of the relationship of NRC's use of the word ''criteria'' in its QA program to the interpretation we give it here. That discussion was confused because it conflated ''benchmark'' and ''quantitative,'' thereby suggesting that NRC's non-quantitative criteria were therefore also not benchmarks. We clarify that confusion in our response to comments in section IV of this **SUPPLEMENTARY INFORMATION**, and reiterate here that our prior statement should have read as we state it there.

During the postclosure period, DOE will evaluate the performance of the total system using a computer modeling tool called total system performance assessment. For clarity and consistency with the NRC's final rules, the definition of total system performance assessment has been changed to match the definition of performance assessment in 10 CFR 63.2. DOE views the change in definition as a clarifying, nonsubstantive change, as the series of analyses that are encompassed within DOE's definition of total system performance assessment, or performance assessment as defined by the NRC, are the same. Total system performance assessment identifies the features, events and processes that might affect the performance of the Yucca Mountain disposal system, as well as their probabilities and significance. Total system performance assessment examines the effects of those features, events and processes on that

performance by estimating the mean annual dose to the reasonably maximally exposed individual, including associated uncertainties, as a result of releases from the Yucca Mountain disposal system.

DOE has added or modified other definitions associated with analyses conducted for the postclosure period either to conform 963 to 10 CFR 63 or to make nonsubstantive clarifications. The definitions of engineered barrier system and reference biosphere have been modified to be consistent with the NRC's definitions in part 63.2. Some new definitions have been *also* added to conform to part 63. For example, the terms Yucca Mountain disposal system, reasonably maximally exposed individual, and human intrusion have been added to the definition section of part 963 and are the same definitions as provided in 10 CFR 63.2. Other parts of the 963 rule which reference these terms, e.g., the definition of total system performance assessment (963.2) and the postclosure suitability evaluation method (963.16), have been updated to reflect these new terms.

For the preclosure period, DOE will evaluate suitability using a preclosure safety evaluation method. The preclosure safety evaluation will consider site characteristics and preliminary engineering specifications to assess the adequacy of the repository facilities to perform their intended functions and to mitigate the effects of initiating events and event sequences that could affect the ability of the geologic repository operations area to operate safely.

In part 63, the NRC clarified certain titles and descriptions of the analyses to be performed for the preclosure period. The preclosure objectives and performance analysis requirements in parts 63.111(a) and (b) and 63.112 are stated in terms of analyzing ''initiating events and event sequences,'' rather than ''design basis events,'' to determine radiation exposures and releases in the preclosure time period within the geologic repository operations area. Accordingly, DOE has deleted the definition of design basis event in part 963.2 and added definitions of design bases, event sequence, initiating event, and geologic repository operations area. These definitions track those used by the NRC in its final rule, and therefore, DOE considers these changes to be conforming, nonsubstantive changes to part 963 that leave the analytical requirements for the preclosure safety evaluation the same in substance.

Under these new definitions, the geologic repository operations area refers to the high-level radioactive waste facility that is part of a geologic repository, including both surface and subsurface areas, where waste handling activities are conducted. To add clarity to the rule, DOE has deleted the term repository support facilities and incorporated it into the term surface facilities, to match the usage of the term surface facilities within part 963.13, the preclosure suitability evaluation method.

Event sequence is defined as a series of actions and/or occurrences within the natural and engineered components of a geologic operations area that could potentially lead to exposure of individuals to radiation. Event sequences include one or more initiating events, and are categorized in two ways: (1) Those events, both natural and human-induced, that are expected to occur one or more times before permanent closure (*i.e.,* Category 1 event sequences); or (2) those events, both natural and human-induced, that have at least one chance in 10,000 of occurring before permanent closure (*i.e.,* Category 2 event sequences). The preclosure safety evaluation will assess the ability of the geologic repository operations area to meet the applicable radiation protection standard for the preclosure period under both categories of event sequences.

DOE's evaluation of the suitability of a geologic repository at the Yucca Mountain site will be based on consideration of a preliminary design for the geologic repository. The design is the description of the potential geologic repository, which includes multiple barriers to the release and transport of radionuclides. These multiple barriers consist of both the natural barriers and an engineered barrier system. The geologic repository includes not only the facilities and areas where radioactive wastes are handled, but also that portion of the geologic setting that provides isolation of the radioactive wastes. As used in the final rule, and in NRC's part 63, isolation means inhibiting the movement of radioactive material from the repository to the location where the reasonably maximally exposed individual resides, so that postclosure radiation doses and radiation concentrations will not exceed the limits prescribed in NRC's regulation.

B. Subpart B—Site Suitability Determination, Methods and Criteria

(a) Scope—section 963.10. Subpart B describes, for both the preclosure and postclosure periods, various facets of DOE's suitability determination for the Yucca Mountain site. There are separate sections of the final rule for the preclosure and postclosure time periods. These sections also describe the site suitability criteria DOE will apply in accordance with section 113(b) of the NWPA, the methods it will use in applying the criteria and evaluating suitability, and the way it will reach the resulting suitability determination.

The final rule is divided into two sections corresponding to the preclosure and postclosure periods, and within each period, three subsections. The subsections present for each period: (1) The suitability determination; (2) the suitability evaluation method; and (3) the criteria to be used for the evaluation. The preclosure and the postclosure periods are addressed separately because DOE will use different approaches to each arising out of the different considerations relevant to the suitability of a geologic repository during these two periods. This separation is consistent with the structure of DOE's prior Guidelines, and the structure of the original and revised NRC licensing regulations, which also have separate performance objectives for the preclosure and the postclosure periods. The preclosure method and criteria will guide DOE's evaluation of the suitability considerations that deal with the operation of the repository before it is closed, while waste is being received, stored and emplaced. They also allow for the possibility of retrieval. These are the considerations important in protecting the public and repository workers from exposures to radiation during repository operations, especially if an accident should occur. The postclosure method and criteria will guide DOE's evaluation of the suitability considerations that deal with the long-term behavior of the repository. The behavior of interest here is after waste emplacement and repository closure.

(b) Suitability determination—section 963.11. This section describes how DOE will determine the suitability of the site based on the information and data developed through the program of site characterization activities at Yucca Mountain. DOE may find the Yucca Mountain site suitable for the location of a repository based on its determinations relative to the preclosure and postclosure suitability evaluations under sections 963.12 and 963.15. Those determinations, in turn, entail assessment of preclosure and postclosure suitability using the designated evaluation method and criteria for each time period. The overall suitability determination, if affirmative, will be one part of the Secretary's decision, under section 114 of the NWPA, whether or not to recommend the Yucca Mountain site to the

President for development of a repository.

(c) Preclosure suitability determination—section 963.12. The suitability evaluation of the Yucca Mountain site will consider the safety of the geologic repository during the operational or preclosure time period. The preclosure criteria to evaluate the suitability of a geologic repository operations area at Yucca Mountain will be considerations that are important to determining safety during construction and active operation and to demonstrating compliance with the applicable radiation protection standard.

(d) Preclosure suitability evaluation method—section 963.13. The preclosure suitability criteria will be applied through a preclosure safety evaluation method. The preclosure safety evaluation will guide the evaluation of the suitability of the site with respect to preclosure operations. The NRC provides a framework indicating how to conduct this type of evaluation in 10 CFR part 63.112. DOE designed the preclosure safety evaluation method in this final rule based on this NRC framework and a DOE assessment of what information would be useful to determine, at the site suitability stage, whether or not a proposed geologic repository at Yucca Mountain is likely to meet the applicable radiation protection standards for the preclosure period.

The preclosure safety evaluation method, using preliminary engineering specifications, will assess the adequacy of the repository facilities to perform their intended functions and prevent or mitigate the effects of postulated event sequences. The preclosure safety evaluation will consider: a preliminary description of the site characteristics, the surface facilities, and the underground facilities; a preliminary description of the design for the operating facilities and a preliminary description of any associated limits on operation; a preliminary description of potential hazards (for example, seismic activity, flooding and severe winds), event sequences, and their consequences; and a preliminary description of the structures, systems, components, equipment, and operator actions intended to mitigate or prevent accidents. The purpose of the preclosure safety evaluation is to help assess whether relevant hazards that could result in unacceptable consequences have been adequately evaluated and appropriate protective measures have been identified, so as to help determine whether the geologic repository operations area is likely to comply with the preclosure requirements for protection against radiation exposures and releases of radioactive material.

The preclosure safety evaluation will emphasize performance requirements, analytical bases and technical justifications, and evaluations that show how safety functions will be accomplished. The adequacy of the facility design will be evaluated by consideration of postulated event sequences viewed as sufficiently credible that the facility should be designed to prevent or mitigate their effects. Event sequences are those natural and human-induced events that are either expected to occur before closure, or have one chance in 10,000 of occurring before permanent closure.

(e) Preclosure suitability criteria—section 963.14. DOE will evaluate the suitability of the Yucca Mountain site during the preclosure period using the following criteria: (a) Ability to contain and limit releases of radioactive materials; (b) ability to implement control and emergency systems to limit exposures to radiation; (c) ability to maintain a system and components that perform their intended safety functions; and (d) ability to preserve the option to retrieve wastes during the preclosure period. These criteria are considerations important to determining the performance of a potential repository at Yucca Mountain during this preclosure period. For example, the first criterion will help assess whether repository facilities are capable of keeping the radioactive materials confined in order to limit releases of radioactive material. The second and third criteria help assess whether emergency controls and procedures have been developed that are adequate to limit releases should an accident occur, and whether the system and its components will perform their safety function as intended. The fourth criterion, the capability to retrieve or recover the wastes from the repository should conditions warrant, is also plainly relevant to the safe functioning of a repository.

These criteria will allow for evaluation of the impact of those geologic considerations derived from section 112(a) of the NWPA that are relevant to the preclosure period. These considerations are hydrology, geophysics, seismic activity, atomic energy defense activities, proximity to water supplies and proximity to populations. These considerations are relevant to the evaluation of preclosure suitability because they bear on the evaluation of repository system safety during the preclosure period. The hydrology and geophysics of the site are important to preclosure safety because they are indicators of possible initiating events for accidents. Seismic activity is also important in this regard, as it is an indication of the potential for earthquake activity to disrupt normal functioning of a repository surface facility. The location of atomic energy defense activities in relation to the Yucca Mountain site is important to preclosure safety and would be considered to the extent these activities exist and may impact operations of the repository facility. Proximity to water supplies and proximity to populations are important to preclosure safety because they relate to potential locations where people could eventually be exposed to radionuclides either through airborne transport or through a water pathway.

(f) Postclosure suitability determination—section 963.15. The postclosure suitability evaluation of the Yucca Mountain site will consider the safety of the geologic repository during the time after operations cease, the postclosure period. DOE will determine the suitability of the Yucca Mountain site for the postclosure period by examining the results of a TSPA conducted under section 963.16. If the results indicate a repository at Yucca Mountain is likely to meet the applicable radiation protection standard, then DOE may determine, on the basis of site characterization activities, that the site is suitable for the postclosure period.

(g) Postclosure suitability evaluation method—section 963.16. DOE will evaluate the suitability of a potential repository at the Yucca Mountain site using the TSPA method (described in greater detail below). Using the TSPA method, DOE will estimate quantitatively the mean annual dose to the reasonably maximally exposed individual and the level of radioactivity in the representative volume of ground water over the compliance period (10,000 years). With these estimates, DOE will evaluate the performance of the repository and its ability to limit radiological exposures within the applicable radiation protection standard.

(1) Section 963.16(a). Section 963.16(a) describes how DOE will conduct separate performance assessments in order to evaluate the postclosure performance of a geologic repository at Yucca Mountain. One TSPA will be conducted in accordance with the method described in 963.16(b), using the criteria identified in section 963.17, and assuming no human intrusion into the repository (i.e., an undisturbed Yucca Mountain disposal system). A separate TSPA will be

conducted in accordance with the method described in part 963.16(b) (except not all engineered and natural barriers will be considered), using the criteria in section 963.17, and assuming a human intrusion into the repository in accordance with the scenario specified in 10 CFR 63.322 and the conditions of the human intrusion standard specified in 10 CFR part 63.321. This section of 963.16(a) has been modified from its proposed form to add clarity to the evaluation process in light of changes in the NRC regulations governing the human intrusion standard and associated analyses. The results of each performance assessment will be examined by DOE to determine the suitability of the site for the postclosure period.

The conduct of separate assessments is consistent with 40 CFR part 197 and 10 CFR part 63. The EPA and NRC regulations, in turn, are based on NAS recommendations in the report, Technical Bases for Yucca Mountain Standards, on how best to assess the performance and resilience of a potential repository. Because the manner and likelihood of human intrusion occurring many hundreds or thousands of years into the future cannot be estimated reliably by examining either the historic or geologic record, the NAS recommended an approach that will assess how resilient the geologic repository would be against a postulated intrusion. The consequences of the assumed human intrusion event will be addressed in a ''stylized'' manner, that is, by assuming a particular human intrusion event occurs in a certain way. DOE will conduct the human intrusion analysis, and use the results of the performance assessment, in the manner set out in the NRC regulations (e.g., parts 63.321 and 63.322).

(2) Section 963.16(b). Section 963.16(b) provides an outline of the contents and manner in which DOE will conduct its performance assessments. As described previously in this notice, and briefly summarized here, performance assessment in this context is a method of forecasting how a system or parts of a system designed to contain radioactive waste will behave over time. Its goal is to aid in determining whether or not the system can meet established performance requirements. A TSPA is a type of performance assessment analysis in which the components of a system are integrated or linked into a single analysis.

The TSPA addresses both the engineered and natural system components. The engineered system is to some extent controllable, but the natural system generally is not. The responses of the total system extend over periods beyond those for which data have been or can be obtained. The relationship of the components of a TSPA is often described as a pyramid. The lowest level of the pyramid represents the complete suite of process and design data and information (that is, field and laboratory studies that are the first step in understanding the system). The next higher level indicates how the data feed into conceptual models that portray the operation of the individual system components. The next higher level represents the synthesis of information from the lower levels of the pyramid into computer models. The term abstraction often is used to indicate the extraction of essential information from large quantities of data. The TSPA models are usually referred to as abstracted models. At this point, the subsystem behavior may be described by linking models together into representations; this is the point at which performance assessment modeling is usually thought to begin. This is also the basis for the identification of the Yucca Mountain specific suitability criteria contained in the final rule.

The upper level is the final level of distillation of information into the most significant aspects to represent the total system. At this point, the models are linked together. These are the models used to forecast system performance and estimate the likelihood that the performance will comply with regulations and ensure long-term safety.

As information flows up the pyramid, it generally is distilled into progressively more simplified or essential forms, or becomes more abstracted. However, abstraction is not synonymous with simplification. If a particular component model cannot be simplified without losing essential aspects of the model, then the model becomes part of the TSPA calculation tool. Thus, an abstracted model in a TSPA may take the form of something as simple as a table of values that were calculated using a complex computer model, or the abstraction may take the form of a fully three dimensional computer simulation.

The TSPA method described in section 963.16(b) is a systematic analysis that identifies the features, events, and processes (i.e., specific conditions or attributes of the geologic setting, degradation, deterioration, or alteration processes of engineered barriers, and interactions between the natural and engineered barriers) that might affect performance of the Yucca Mountain disposal system; examines their effects on performance; and estimates the *mean* annual dose to the reasonably maximally exposed individual and the radionuclide concentrations in the representative volume of water. The features, events, and processes considered in the TSPA will represent a wide range of effects on system performance. According to EPA and NRC regulations, those features, events, and processes expected to affect compliance significantly or be potentially adverse to performance are included, while events of very low probability (less than one chance in 10,000 of occurring within 10,000 years of disposal) should be excluded from the analysis. The annual dose to the reasonably maximally exposed individual is estimated using the selected features, events, and processes, and incorporating the probability that the estimated dose will occur.

The TSPA that will be used to assess the postclosure performance of the Yucca Mountain repository will be conducted in the manner described in section 963.16(b). It will synthesize data and information into a set of models that simulate the behavior of the individual system components. DOE will abstract essential information from its initial models and refine them into linked models, including computer models, that represent important aspects of system performance. DOE will use these models to forecast system behavior and the likelihood of system compliance with the applicable radiation protection standard.

The TSPA method described in section 963.16(b) contains twelve enumerated conditions DOE will satisfy in conducting the TSPA for the postclosure suitability determination. Those conditions will provide DOE with multiple lines of argument and evidence in support of the resultant TSPA calculation. For example, as part of the TSPA calculation, DOE will consider disruptive processes and events, identify and evaluate multiple barriers to waste isolation, produce information relative to the margin by which the site will meet the applicable radiation protection standard, and include analysis of insights from man-made analogs. Development of this information will build confidence in the TSPA result and aid decision-makers in reaching a suitability determination. Through documentation of the technical basis for much of the analysis, DOE will identify and quantify uncertainties associated with the performance estimates, explain and describe the critical assumptions used and possible data limitations, and identify the areas

where expert judgment and natural analogs were used in the analyses.

The TSPA calculations will be used to address conditions in the natural and engineered components of a Yucca Mountain disposal system over the time that the standards apply. The TSPA calculations will also be used to consider disruptive events that are improbable, but that are important to understanding the repository behavior in the future. To prepare the TSPA, DOE will identify those natural features of the geologic setting and the design features of the engineered barrier system that are considered barriers important to waste isolation. TSPA will be used to assess the capability of the barriers identified as important to waste isolation to isolate waste, taking into account uncertainties in characterizing and modeling the barriers. By conducting these analyses and documenting the technical basis for them, DOE will account for multiple and independent barriers to waste isolation. DOE notes that in final 10 CFR part 63, the NRC reorganized its requirements pertaining to analysis of multiple barriers by creating a new section, part 63.115, to reflect these requirements. These requirements, although presented in a new section, are not substantively different from proposed part 63 and do not require a change to part 963. The TSPA will also include and consider information derived from the performance of various sensitivity studies. Sensitivity studies and the regulatory definition of very unlikely events will provide the technical basis for inclusion or exclusion of specific features, events, and processes of the geologic setting in the TSPA.

Specific features, events, and processes of the geologic setting will be evaluated through sensitivity analyses to determine if the magnitude and time of the resulting annual dose would be significantly changed by their omission. Sensitivity analysis is a technique that is used to examine how a system responds if one of its components is changed. Systems are said to be sensitive to such a component if the results of the calculation are changed significantly in response to changes in that component's values. The sensitivity calculations will also provide the technical basis for either inclusion or exclusion of degradation or alteration processes of engineered barriers in the TSPA. Degradation or alteration processes will be evaluated further if the magnitude and timing of the resulting expected annual dose would be significantly changed by their omission.

Using the TSPA results, DOE can examine the sensitivity of one or more components of the calculations in the assessment. DOE can examine the response of the geologic repository system with regard to sensitivities of the system to the suitability criteria, in order to evaluate whether or not the geologic repository meets the applicable radiation protection standard.

As part of the TSPA, DOE will account for uncertainties and variabilities in both calculations and data, and provide the technical bases for parameter ranges, probability distributions, and bounding values. This accounting will enable DOE to identify critical assumptions, address uncertainties in those assumptions, and understand possible data limitations. The reason for this accounting is that it is recognized, by the NRC and others, that there are inherent uncertainties in the understanding of the evolution of the geologic setting, biosphere, and engineered barrier system. DOE will evaluate compliance and the performance of the potential repository using sophisticated, complex predictive models that are supported by data from field and laboratory tests, site-specific monitoring, and natural analog studies that may be supplemented with expert judgment.

Another aspect of DOE's conduct of the TSPA is the analysis of alternative models of features and processes. Under part 963.16(b)(3), DOE will consider alternative models of features and processes that are consistent with available data and current scientific understanding, and evaluate the effects that alternative models would have on the estimated performance of the geologic repository. These analyses will help DOE and others assess the validity of the conceptual models and estimates of the significance of those models to repository performance. In this regard, if other interested persons suggest and present to DOE alternative models that are consistent with available data and current scientific understanding, DOE will evaluate those other models. DOE does not believe, however, that it would be scientifically or technically useful, and may be administratively burdensome, to require that, in every case, DOE provide the bases for not using an alternative model suggested by another party. However, DOE may decide, on a case-by-case basis, to document consideration of alternative models that were suggested by other interested persons, but not used because, among other things, the model is not consistent with available data and current scientific understanding.

(h) Postclosure suitability criteria—section 963.17. The postclosure criteria to evaluate the suitability of a geologic repository at Yucca Mountain will be considerations that reflect both the processes that are important to the total system performance of the geologic repository and the models used to simulate those processes. These criteria are characterizing traits that are relevant and important in the processes to be modeled in the TSPA that DOE will use in evaluating the suitability of the Yucca Mountain site for the postclosure period. These criteria also allow for evaluation of the impact of those geologic considerations derived from section 112(a) of the NWPA that are relevant to the postclosure period. Following is a description of how the section 112(a) geologic considerations relate to the postclosure suitability criteria, as well as a discussion of the criteria as they relate to the processes and computer models to be used in evaluating the performance of a geologic repository in the postclosure period.

(1) Section 112(a) geologic considerations. The geologic considerations derived from section 112(a) of the NWPA that are relevant to the postclosure performance of a repository at Yucca Mountain are: hydrology, geophysics, seismic activity, proximity to water supplies, and proximity to populations. These considerations are relevant to postclosure performance because they affect components and processes of the repository system related to potential transport of radionuclides via ground water to members of the public.

Hydrology- and geophysics-related conditions are relevant because they describe some of the geologic features of the site that are related to safety and the physical characteristics that are related to potential transport of radionuclides to the biosphere. Seismic activity is relevant to postclosure performance because it is related to the potential for changes in geologic structures that could lead to enhanced transport of radionuclides. Proximity to water supplies and populations are relevant to postclosure performance because they are related to potential locations where people could eventually be exposed to radionuclides in their water.

Table 2 provides a cross-reference between the geologic considerations derived from section 112(a), and the postclosure suitability criteria. As previously stated, the postclosure suitability criteria largely represent the process model components of the total system performance assessment that DOE will use to evaluate the performance of the repository during the

postclosure period. DOE has identified these processes as pertinent to assessing the performance of a repository at Yucca Mountain through information and data developed under its site characterization program.

One of the considerations found in section 112(a), location of natural resources, is no longer addressed through a site suitability criterion, and instead is addressed through the separate performance assessment provision, part 963.16(a)(2). Proposed part 963 included a criterion for inadvertent human intrusion, which was related to the consideration under section 112(a) of the location of valuable natural resources, because that is a factor that could lead to human intrusion through exploratory drilling or excavation and a consequent breach of the repository's safety barriers. Because this factor will be addressed through a separate performance assessment provision, part 963.16(a)(2), which requires assessment of potential human intrusion events in a manner consistent with NRC regulations governing a human intrusion standard and event scenario, DOE does not believe it is necessary to retain this suitability criterion in final part 963.

TABLE 2

[Postclosure]

NWPA § 112(a) geologic considerations	Suitability criteria
(a) Processes pertinent to total system performance	
Hydrology, geophysics, seismic activity.	(1) Site characteristics
Hydrology, geophysics, seismic activity.	(2) Unsaturated-zone flow characteristics
Hydrology, geophysics, seismic activity.	(3) Near-field environment characteristics
Hydrology, geophysics seismic activity.	(4) Engineered barrier system degradation , characteristics
Hydrology, geophysics, seismic activity.	(5) Waste form degradation characteristics
Hydrology, geophysics, seismic activity.	(6) Engineered barrier system degradation, flow, and transport characteristics
Hydrology, geophysics, seismic activity.	(7) Unsaturated-zone flow and transport characteristics
Hydrology, geophysics, seismic activity.	(8) Saturated-zone flow and transport characteristics
Hydrology, proximity to water supplies, proximity to populations.	(9) Biosphere characteristics

TABLE 2—Continued

[Postclosure]

NWPA § 112(a) geologic considerations	Suitability criteria
(b) Disruptive processes and events	
Hydrology, geophysics.	(1) Volcanism
Seismic activity, geophysics.	(2) Seismic events
Hydrology, geophysics, seismic activity.	(3) Nuclear criticality

(2) *Suitability criteria.* DOE has developed its site characterization program to address those processes of the repository system that are pertinent to understanding how a repository at Yucca Mountain would be evaluated for suitability using the applicable radiation protection standard. The program also has been developed to better understand these processes, and resolve or put in place methods to resolve issues related to those processes. DOE has described these processes, and the methods to resolve issues related to the processes, in the SCP, in semi-annual progress reports on site characterization program activities, and in several TSPAs conducted over the years, including the Viability Assessment. These processes are simulated through performance assessment models; those models are integrated and refined to a point resulting in a representation of the performance of the system in total.

Put in simple terms, the processes that are pertinent to understanding the performance of a repository at Yucca Mountain, and that form the basis for the numerical models in the TSPA and the suitability criteria in section 963.17, are those physical processes of water falling on Yucca Mountain as rain and snow, moving into the mountain, down through the unsaturated zone to the potential repository level, from the repository level to the saturated zone, and from there to the accessible environment. At the repository level, the water would be affected by the physical processes associated with the repository and with the waste packages and the waste forms. Eventually, the water could move out of the repository horizon and further downward through the unsaturated zone. Subsequently, it could move into the saturated zone where it could be transported to a point where humans could be exposed to any radionuclides carried in the water. Disruptive events could potentially affect these processes and, therefore, will be considered. This set of physical processes is simulated in the numerical modeling method of the TSPA that will be used to assess quantitatively the radionuclide releases to the public and, consequently, the safety and suitability of the Yucca mountain site.

The suitability criteria presented in this final rule are derived from these pertinent physical processes. These criteria represent the characteristic traits pertinent to assessing the performance of a geologic repository at the Yucca Mountain site. They also allow for evaluation of the impact of geologic considerations derived from section 112(a) of the NWPA such as hydrology, geophysics, seismic activity, and proximity to water supplies and populations.

The sequence in which the suitability criteria are presented in the final rule generally corresponds to the process of water flow presented above. In general, the criteria can be thought of as building blocks; each criterion in the sequence is evaluated on its own, with the results of that evaluation incorporated into the evaluation of the succeeding criteria, and so on until the final analysis. DOE may refine these process models to better reflect and assess the processes pertinent to performance of a geologic repository at the Yucca Mountain site. It is possible that the processes, as well as the design selected, could dictate other ways to arrange the information included under the individual criteria. While the individual components of the process models may vary according to improvements in data and information, DOE's suitability determination will be based on an evaluation of each of the postclosure suitability criteria.

The criteria are separated into two categories. The first category, presented in section 963.17(a), represents those criteria important to the total system performance assessment without accounting for disruptive processes and events that could impact that performance. The second category, presented in section 963.17(b), are those criteria representing disruptive processes and events that could adversely affect the characteristics of the repository system, and consequently release radionuclides to the human environment. Each criterion in the first category is linked to a specific TSPA model component that will be used to evaluate the performance of that criterion. Each criterion in the second category is generally treated as an effect imposed on the system at a time that reflects the probability of occurrence of the disruptive event.

Under section 963.17(a), the first and a fundamental criterion that will be modeled to assess performance of a repository at the Yucca Mountain site is the representation of pertinent site

characteristics. The criterion of site characteristics includes: (a) The geologic properties of the site—for example, stratigraphy, rock type and physical properties, and structural characteristics; (b) the hydrologic properties of the site—for example, porosity, permeability, moisture content, saturation, and potentiometric characteristics; (c) the geophysical properties of the site—for example, thermal properties, densities, velocities and water contents, as measured or deduced from geophysical logs, and (d) the geochemical properties of the site—for example, precipitation, dissolution characteristics, and sorption properties of mineral and rock surfaces. Together, as reflected in the performance assessment, these characteristics enable a representative simulation of the behavior of a geologic repository at the Yucca Mountain site.

The second criterion, unsaturated zone flow characteristics, relates to the processes affecting the limitations and amount of water entering the unsaturated zone above the repository and contacting wastes in the repository. The unsaturated zone flow characteristics include: (a) Climate—for example, precipitation and postulated future climatic conditions; (b) infiltration—for example, precipitation entering the mountain in excess of water returned to the atmosphere by evaporation and plant transpiration; (c) unsaturated-zone flux—for example, water movement through the pore spaces, or flowing along fractures or through perched water zones above the repository; and (d) seepage—for example, water dripping into the underground repository openings from the surrounding rock. Together, the first and second criteria will be used to define the temporal and spatial distribution of water flow through the unsaturated zone above the water table at Yucca Mountain, and the temporal and spatial distribution of water seepages into the underground openings of the repository.

The third criterion, near field environment characteristics, also relates to processes important to limiting the amount of water that could contact wastes. This criterion includes: (a) Thermal hydrology—for example, effects of heat from the waste on water flow through the site, and the temperature and humidity at the engineered barriers; and (b) near-field geochemical environment—for example, the chemical reactions and products resulting from water contacting the waste and the engineered barriers materials. The thermal regime generated by the decay of the radioactive wastes can mobilize water over the first hundreds to thousands of years. For these reasons, the amount of water flowing in the rock and seeping into drifts is expected to vary with time.

The fourth criterion, engineered barrier system degradation characteristics, relates to the processes important to long waste package lifetimes. This criterion includes: (a) Engineered barrier system component performance—for example, drip shields, backfill, coatings, or chemical modifications; and (b) waste package degradation—for example, the corrosion of the waste package materials within the near-field repository environment. This criterion and the first criterion, site characteristics, define the spatial and temporal distribution of the time periods when waste packages are expected to breach. The thermal, hydrologic, and geochemical processes acting on the waste package surface are the most important environmental factors affecting the waste package lifetime. In addition, the degradation characteristics of the waste package materials significantly affect the timing of waste package breaches.

The fifth criterion, waste form degradation characteristics, addresses the initial aspects of low rate of release of radionuclides. This criterion includes: (a) Cladding degradation—for example, corrosion or break-down of the cladding on the spent fuel pellets; and, (b) waste form dissolution—for example, the ability of individual radionuclides to dissolve in water that penetrates breached waste packages. This criterion is important to understanding how and in what manner the waste forms could break down, permitting the release of radionuclides to the immediately surrounding environment.

The sixth criterion, engineered barrier system degradation, flow, and transport characteristics, addresses the processes important to the manner in which radionuclides can begin to move outward once the engineered barrier system has been degraded. This criterion includes : (a) colloid formation and stability—for example, the formation of colloidal particles and the ability of radionuclides to adhere to these particles as they may be washed through the remaining barriers; and (b) engineered barrier transport—for example, the movement of radionuclides dissolved in water or adhering to colloidal particles to be transported through the remaining engineered barriers and in the underlying unsaturated zone. This criterion and the first criterion, site characteristics, lead to a determination of the spatial and temporal distribution of the mass of radioactive wastes released from the waste packages. Each characteristic depends on the thermal, hydrologic, and geochemical conditions inside the waste package, which change with time.

The next two criteria—unsaturated zone flow and transport characteristics (criterion seven), and saturated zone flow and transport characteristics (criterion eight)—relate to processes important to radionuclide concentration reduction during transport. To assess the movement of radionuclides away from the degraded engineered barrier system, the first important process to understand is the unsaturated zone flow characteristics in combination with the unsaturated zone transport characteristics. The unsaturated zone flow and transport characteristics criterion includes: (a) unsaturated-zone transport—for example, the movement of water with dissolved radionuclides or colloidal particles through the unsaturated zone underlying the repository, including retardation mechanisms such as sorption on rock or mineral surfaces; and (b) thermal hydrology—for example, effects of heat from the waste on water flow through the site. The next criterion, saturated zone flow and transport characteristics, addresses similar radionuclide transport processes, only in the saturated zone. This criterion includes: (a) saturated zone transport—for example, the movement of water with dissolved radionuclides or colloidal particles through the saturated zone underlying and beyond the repository, including retardation mechanisms such as sorption on rock or mineral surfaces; and (b) dilution—for example, diffusion of radionuclides into pore spaces, dispersion of radionuclides along flow paths, and mixing with non-contaminated ground water.

The ninth criterion, biosphere characteristics, addresses the characteristics that describe the lifestyle and habits of individuals who potentially could be exposed to radioactive material at a future time. Because of the difficulty in predicting the lifestyles and habits of future generations, such assessments are to be based on representative current conditions. Both the EPA and the NRC's final rules require DOE to apply current conditions (with consideration of climate evolution) in assessments of the reference biosphere. This criterion includes: (a) A reference biosphere and reasonably maximally exposed individual defined, for example, by considering pathways, location and behavior ; and (b) biosphere transport

and uptake—for example, the consumption of ground or surface waters through direct extraction or agriculture, including mixing with non-contaminated waters and exposure to contaminated agricultural products.

Together, the criteria of unsaturated zone flow and transport characteristics, saturated zone flow and transport characteristics, and biosphere characteristics, address the spatial and temporal variations of radionuclide concentrations in ground water. The ground water concentration ultimately yields the mass of radionuclides that may be ingested or inhaled by individuals exposed to that ground water, which in turn leads to a level of radiological dose or risk associated with that potential exposure. The concentration depends on both the mass release rate of the radionuclides as well as the volumetric flux of water along the different pathways in the different components.

We note that the NRC modified its definition of groundwater in its final rule to be consistent with the EPA's definition of groundwater. This new definition limits groundwater to water that is in the saturated zone, for purposes of demonstrating compliance with radionuclide concentration limits in groundwater that is within the representative volume of water, i.e., water that is located within the accessible environment. DOE did not have a definition of groundwater in its proposed rule and has decided not to add one now. DOE's historical groundwater evaluations include a comprehensive evaluation of water characteristics above the drift in the unsaturated zone, below the drift in the unsaturated and the saturated zones, to the repository site boundary and into the accessible environment beyond the controlled area of the site. Hence, these evaluations include, as they should, evaluation of groundwater in both unsaturated and saturated zones. DOE does not believe a conforming definition is necessary for purposes of estimating likely compliance with NRC's groundwater standard. In estimating likely compliance with the NRC groundwater protection standard, DOE will evaluate radionuclide concentration limits in groundwater in the saturated zone (in the representative volume of water), in accordance with NRC's rule.

Section 963.17(b) presents three final criteria (separately enumerated from section 963.17(a)) under the category of disruptive processes and events. These criteria relate to disruptive processes and events that could potentially release radionuclides directly to the human environment, or otherwise adversely affect the characteristics of the system. The criteria pertinent to assessing repository performance that fall in this category include: (1) Volcanism—for example, the probability and potential consequences of a volcanic eruption intersecting the repository; (2) seismic events—for example, the probability and potential consequences of an earthquake on the underground facilities or hydrologic system; and (3) nuclear criticality—for example, the probability and potential consequences of a self-sustaining nuclear reaction as a result of chemical or physical processes affecting the waste either in or after release from breached waste packages.

In proposed part 963, DOE included a fourth disruptive process and event criterion of inadvertent human intrusion. This criterion was not included in final 963 because the treatment of a possible human intrusion event for the postclosure period is dealt with through a prescribed human intrusion standard, part 63.321, and a prescribed set of assumptions for the human intrusion scenario, part 63.322. A separate performance assessment analysis is required to assess the impacts of the postulated human intrusion event to determine whether the individual protection standard in the case of human intrusion is applicable (i.e., if the human intrusion is determined by DOE to occur at or before 10,000 years), or whether the information and analyses relative to the exposures from the human intrusion event should be included in the environmental impact statement for the Yucca Mountain site as an indication of long-term performance. To make consistent the NRC requirements for human intrusion analyses and the structure of performance analyses required under part 963, DOE believes it preferable not to retain an inadvertent human intrusion event as a separate criterion. This change does not change the substance or requirements for the human intrusion analysis, and therefore DOE views this as a clarification of its rule.

VII. Regulatory Review

A. Review for Compliance With the National Environmental Policy Act (NEPA)

One commenter questioned whether or not this rulemaking would require compliance with NEPA. The issuance of these amendments to the Guidelines is a preliminary decision-making activity pursuant to subsections 112 (d) and 113(d) of the Act and therefore does not require the preparation of an environmental impact statement pursuant to subsection 102(2)(C) of the NEPA or any other environmental review under subsection 102(2)(E) or (F) of the NEPA.

B. Review Under the Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) was enacted by Congress to ensure that a substantial number of small entities do not unnecessarily face significant negative economic impact as a result of Government regulations. The DOE certifies that the rule amending the Guidelines will not have a significant impact on a substantial number of small entities. The final rule will not regulate or otherwise economically burden anyone outside of the DOE. It merely articulates considerations for the Secretary of Energy to use in determining whether or not the Yucca Mountain site is suitable for development as a repository. Moreover, in response to the revised notice of proposed rulemaking, a few entities who commented were small entities, and none of them identified economic burdens that the regulations would impose. Accordingly, no regulatory flexibility analysis is required under the Regulatory Flexibility Act.

C. Review Under the Paperwork Reduction Act

The DOE has determined that this final rule contains no new or amended record keeping, reporting, or application requirements, or any other type of information collection requirements subject to the Paperwork Reduction Act (Pub. L. No. 96–511).

D. Review Under Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (Pub. L. No. 104–4) generally requires Federal agencies to closely examine the impacts of regulatory actions on State, local, and tribal governments. Subsection 101(5) of Title I of that law defines a Federal intergovernmental mandate to include any regulation that would impose an enforceable duty upon State, local, or tribal governments, except, among other things, a condition of Federal assistance or a duty arising from participating in a voluntary federal program. Title II of that law requires each Federal agency to assess the effects of Federal regulatory actions on State, local, and tribal governments, in the aggregate, or to the private sector, other than to the extent such actions merely incorporate requirements specifically set forth in a statute. Section 202 of that title requires

a Federal agency to perform a detailed assessment of the anticipated costs and benefits of any rule that includes a Federal mandate which may result in costs to State, local, or tribal governments, or to the private sector, of $100 million or more. Section 204 of that title requires each agency that proposes a rule containing a significant Federal intergovernmental mandate to develop an effective process for obtaining meaningful and timely input from elected officers of State, local, and tribal governments.

This final rule is not likely to result in any 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 or more in any one year. Further, the Guidelines in 10 CFR part 960, the final amendments to part 960 and the final part 963 largely incorporate requirements specifically provided in sections 112 and 113 of the Act. Moreover, sections 112, 113 and 114 of the Act provide for meaningful and timely input from elected officials of State, local and tribal governments. Accordingly, no assessment or analysis is required under the Unfunded Mandates Reform Act of 1995.

E. Review Under the Treasury and General Government Appropriations Act, 1999

Section 654 of the Treasury and General Government Appropriations Act, 1999 (Public Law 105–277) requires Federal agencies to issue a Family Policymaking Assessment for any final rule or policy that may affect family well-being. Today's final rulemaking would not have any impact on the autonomy or integrity of the family as an institution. Accordingly, DOE has concluded that it is not necessary to prepare a Family Policymaking Assessment.

F. Review Under Executive Order 12866

Section 1 of Executive Order 12866 (''Regulatory Planning and Review''), 58 FR 51735, establishes a philosophy and principles for Federal agencies to follow in promulgating regulations. Section 1(b)(9) of that Order provides: ''Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, agencies shall seek to harmonize Federal regulatory actions with regulated State, local and tribal regulatory and other governmental functions.''

Section 6 of Executive Order 12866 provides for a review by the Office of Information and Regulatory Affairs (OIRA) of a ''significant regulatory action,'' which is defined to include an action that may have an effect on the economy of $100 million or more, or adversely affect, in a material way, the economy, competition, jobs, productivity, the environment, public health or safety, or State, local, or tribal governments. The Department has concluded that this final rule is a significant regulatory action that requires a review by the OIRA. DOE submitted this rule for OIRA clearance, and OIRA has completed its review.

One commenter suggested that, under Executive Order 12866, DOE should assess the effects of this rulemaking on State, local, and tribal governments including reasonable efforts to minimize any burdens that uniquely or significantly affect such governmental entities. The commenter argued that ongoing characterization and development of the Yucca Mountain site affected the economy, jobs, the environment, and public health and safety. While certain determinations in DOE's nuclear waste repository program may have such effects that can be analyzed, the decision to promulgate today's rule is not one of them. It will not regulate anyone other than DOE officials. It will affect preliminary decision-making in a way that does not have specific identifiable economic, environmental, or health effects.

G. Review Under Executive Order 12875

Executive Order 12875 (Enhancing Intergovernmental Partnership), provides for reduction or mitigation, to the extent allowed by law, of the burden on State, local and tribal governments of unfunded Federal mandates not required by statute. The analysis under the Unfunded Mandates Reform Act of 1995, above, satisfies the requirements of Executive Order 12875. Accordingly, no further analysis is required under Executive Order 12875.

H. Review Under Executive Order 12898

Executive Order 12898 (Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations) requires Federal agencies to achieve environmental justice by identifying and addressing, as appropriate, disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority and low-income populations. One commenter on the proposed rule said that DOE should fully apply this Executive Order to this rulemaking, but did not provide any supporting reasons. In DOE's view, the requirements of Executive Order 12898 are not implicated by this rulemaking. This rulemaking has direct effects or regulates only DOE, and therefore will not have disproportionate and adverse human health effects on minority and low-income populations.

I. Review Under Executive Order 12988

With respect to the review of existing regulations and the promulgation of new regulations, section 3(a) of Executive Order 12988, ''Civil Justice Reform,'' 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction. With regard to the review required by section 3(a), section 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulation: (1) Clearly specifies the preemptive effect, if any; (2) clearly specifies any effect on existing Federal law or regulation; (3) provides a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specifies the retroactive effect, if any; (5) adequately defines key terms; and (6) addresses other important issues affecting clarity and general draftsmanship under any Guidelines issued by the Attorney General. Section 3(c) of Executive Order 12988 requires Executive agencies to review regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The DOE has completed the required review and determined that, to the extent permitted by law, the final rule meets the relevant standards of Executive Order 12988.

J. Review Under Executive Order 13084

Under Executive Order 13084, ''Consultation and Coordination with Indian Tribal Governments,'' DOE may not issue a discretionary rule that significantly or uniquely affects Indian tribal governments and imposes substantial direct compliance costs.

This final rulemaking would not have such effects. Accordingly, Executive Order 13084 does not apply to this rulemaking.

K. Review Under Executive Order 13132

Executive Order 13132 creates special requirements for preemption and inter-governmental consultation with regard to rules that have federalism implications. According to the Executive Order, a policy has federalism implications if it has ''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.''

One of the county governments in Nevada asserted that DOE should be demonstrating consideration of the effects of the rule on State and local governments, the relationship between the Federal government and the States, or the distribution of power and responsibility among various levels of government. The comment was conclusory and did not identify any ''substantial direct'' effects that would warrant consideration under the executive order. For a variety of reasons, DOE is of the view that the special requirements of the Executive Order 13132 do not apply to this rule. First, the rule does not preempt State law. Second, the rule applies directly only to DOE and deals with a preliminary stage in a decision-making process about the Yucca Mountain site that calls for additional inter-governmental consultation and public hearings. Third, the rule does not regulate or alter the relationship between the United States and State, local, and tribal governments because the terms of that relationship are set forth in the NWPA. Fourth, the rule has no impact on the distribution of power and responsibilities among various levels of government.

L. Review Under Executive Order 13211

Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,'' 66 FR 28355 (May 22, 2001) requires Federal agencies to prepare and submit to the Office of Information and Regulatory Affairs (OIRA), Office of Management and Budget, a Statement of Energy Effects for any proposed significant energy action. A ''significant energy action'' is defined as any action by an agency that promulgates or is expected to lead to the promulgation of a final rule, and that: (1) Is a significant regulatory action under Executive Order 12866, or any successor order; and (2) is likely to have a significant adverse effect on the supply, distribution, or use of energy; or (3) is designated by the Administrator of OIRA, as a significant energy action. For any proposed significant energy action, the agency must give a detailed statement of any adverse effects on energy supply, distribution, or use should the proposal be implemented, and of reasonable alternatives to the action and their expected benefits to energy supply, distribution, and use.

Today's rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy, and has not been designated by OIRA as a significant energy action. Accordingly, DOE has not prepared a Statement of Energy Effects.

M. Congressional Notification

As required by 5 U.S.C. 801, DOE will submit to Congress a report regarding the issuance of today's final rule prior to the effective date set forth at the outset of this notice of final rulemaking. The report will state that it has been determined that the rule is not a ''major rule'' as defined by 5 U.S.C. 801(2).

List of Subjects in 10 CFR Parts 960 and 963

Criteria, Environmental protection, Geologic repositories, Nuclear energy, Nuclear materials, Radiation protection, Suitability, Waste disposal.

Issued in Washington, DC, on November 8, 2001.

Lake H. Barrett,

Acting Director, Office of Civilian Radioactive Waste Management.

For the reasons stated in the preamble, DOE hereby amends part 960, and adds a new part 963 to Chapter II of Title 10 of the Code of Federal Regulations as follows:

PART 960—GENERAL GUIDELINES FOR THE PRELIMINARY SCREENING OF POTENTIAL SITES FOR A NUCLEAR WASTE REPOSITORY

1. The authority citation for 10 CFR part 960 is revised to read as follows:

Authority: 42 U.S.C. 2011 *et seq.*, 42 U.S.C. 7101 *et seq.*, 42 U.S.C. 10101 *et seq.*

2. The part heading for Part 960 is revised to read as set forth above.

§ 960.1 [AMENDED]

3. Section 960.1 is amended by removing the phrase ''for the development of repositories'' from the first sentence and removing the phrase ''and any preliminary suitability determinations required by Section 114(f)'' from the second sentence.

4. Section 960.2 is amended by revising the definitions of ''Act,'' ''Application'' and ''Determination'' to read as follows:

§ 960.2 Definitions.

* * * * *

Act means the Nuclear Waste Policy Act of 1982, as amended.

* * * * *

Application means the act of making a finding of compliance or noncompliance with the qualifying or disqualifying conditions specified in the guidelines of subparts C and D of this part.

* * * * *

Determination means a decision by the Secretary that a site is suitable for site characterization for the selection of a repository, consistent with applications of the guidelines of subparts C and D of this part in accordance with the provisions set forth in subpart B of this part.

* * * * *

Subpart B—Implementation Guidelines

§ 960.3 [Amended]

5. Section 960.3 is amended by removing the phrase ''for the development of repositories'' from the first sentence.

§ 960.3–1–4–4 [Removed]

6. Section 960.3–1–4–4 is removed.

7. Section 960.3–1–5 is revised to read as follows:

§ 960.3–1–5 Basis for site evaluations.

(a) Evaluations of individual sites and comparisons between and among sites shall be based on the postclosure and preclosure guidelines specified in subparts C and D of this part, respectively. Except for screening for potentially acceptable sites as specified in § 960.3–2–1, such evaluations shall place primary significance on the postclosure guidelines and secondary significance on the preclosure guidelines, with each set of guidelines considered collectively for such purposes. Both the postclosure and the preclosure guidelines consist of a system guideline or guidelines and corresponding groups of technical guidelines.

(b) The postclosure guidelines of subpart C of this part contain eight technical guidelines in one group. The preclosure guidelines of subpart D of this part contain eleven technical guidelines separated into three groups that represent, in decreasing order of importance, preclosure radiological safety; environment, socioeconomics, and transportation; and ease and cost of siting, construction, operation, and closure.

(c) The relative significance of any technical guideline to its corresponding system guideline is site specific. Therefore, for each technical guideline, an evaluation of compliance with the qualifying condition shall be made in the context of the collection of system elements and the evidence related to that guideline, considering on balance the favorable conditions and the potentially adverse conditions identified at a site. Similarly, for each system guideline, such evaluation shall be made in the context of the group of technical guidelines and the evidence related to that system guideline.

(d) For purposes of recommending sites for development as repositories, such evidence shall include analyses of expected repository performance to assess the likelihood of demonstrating compliance with 40 CFR part 191 and 10 CFR part 60, in accordance with § 960.4–1. A site shall be disqualified at any time during the siting process if the evidence supports a finding by the DOE that a disqualifying condition exists or the qualifying condition of any system or technical guideline cannot be met.

(e) Comparisons between and among sites shall be based on the system guidelines, to the extent practicable and in accordance with the levels of relative significance specified above for the postclosure and the preclosure guidelines. Such comparisons are intended to allow comparative evaluations of sites in terms of the capabilities of the natural barriers for waste isolation and to identify innate deficiencies that could jeopardize compliance with such requirements. If the evidence for the sites is not adequate to substantiate such comparisons, then the comparisons shall be based on the groups of technical guidelines under the postclosure and the preclosure guidelines, considering the levels of relative significance appropriate to the postclosure and the preclosure guidelines and the order of importance appropriate to the subordinate groups within the preclosure guidelines. Comparative site evaluations shall place primary importance on the natural barriers of the site. In such evaluations for the postclosure guidelines of subpart C of this part, engineered barriers shall be considered only to the extent necessary to obtain realistic source terms for comparative site evaluations based on the sensitivity of the natural barriers to such realistic engineered barriers. For a better understanding of the potential effects of engineered barriers on the overall performance of the repository system, these comparative evaluations shall consider a range of levels in the performance of the engineered barriers. That range of performance levels shall vary by at least a factor of 10 above and below the engineered-barrier performance requirements set forth in 10 CFR 60.113, and the range considered shall be identical for all sites compared. The comparisons shall assume equivalent engineered barrier performance for all sites compared and shall be structured so that engineered barriers are not relied upon to compensate for deficiencies in the geologic media. Furthermore, engineered barriers shall not be used to compensate for an inadequate site; mask the innate deficiencies of a site; disguise the strengths and weaknesses of a site and the overall system; and mask differences between sites when they are compared. Releases of different radionuclides shall be combined by the methods specified in appendix A of 40 CFR part 191.

(f) The comparisons specified in paragraph (e) of this section shall consist of two comparative evaluations that predict radionuclide releases for 100,000 years after repository closure and shall be conducted as follows. First, the sites shall be compared by means of evaluations that emphasize the performance of the natural barriers at the site. Second, the sites shall be compared by means of evaluations that emphasize the performance of the total repository system. These second evaluations shall consider the expected performance of the repository system; be based on the expected performance of waste packages and waste forms, in compliance with the requirements of 10 CFR 60.113, and on the expected hydrological and geochemical conditions at each site; and take credit for the expected performance of all other engineered components of the repository system. The comparison of isolation capability shall be one of the significant considerations in the recommendation of sites for the development of repositories. The first of the two comparative evaluations specified in the paragraph (e) of this section shall take precedence unless the second comparative evaluation would lead to substantially different recommendations. In the latter case, the two comparative evaluations shall receive comparable consideration. Sites with predicted isolation capabilities that differ by less than a factor of 10, with similar uncertainties, may be assumed to provide equivalent isolation.

8. In § 960.3–2, the last sentence is revised to read as follows:

§ 960.3–2 Siting process.

* * * The recommendation of sites as candidate sites for characterization shall be accomplished in accordance with the requirements specified in § 960.3–2–3.

§ 960.3–2–4 [Removed]

9. Section 960.3–2–4 is removed.

Appendix III to Part 960—[Amended]

10. Appendix III to Part 960 is amended as follows:

a. In paragraph 1, introductory text, first sentence, revise the phrase ''the principal'' to read ''certain''.

b. In paragraph 1, remove the definition for ''Repository site selection''.

c. In paragraph 3, remove the definition for the numeral ''4'' and paragraphs ''(a)'' and ''(b)'' which follow.

d. The table to Appendix III is revised to read as follows:

FINDINGS RESULTING FROM THE APPLICATION OF THE QUALIFYING AND DISQUALIFYING CONDITIONS OF THE TECHNICAL GUIDELINES AT MAJOR SITING DECISIONS

Section 960	Guideline	Condition	Siting decision	
			Potentially acceptable	Nomination and recommendation
4–1(a)	System	Qualifying		3
4–2–1(a)	Geohydrology	.....do		3
4–2–1(d)	.....do	Disqualifying		1
4–2–2(a)	Geochemistry	Qualifying		3
4–2–3(a)	Rock Characteristics	.....do		3
4–2–4(a)	Climatic Changes	.....do		3
4–2–5(a)	Erosion	.....do		3

FINDINGS RESULTING FROM THE APPLICATION OF THE QUALIFYING AND DISQUALIFYING CONDITIONS OF THE TECHNICAL GUIDELINES AT MAJOR SITING DECISIONS—Continued

Section 960	Guideline	Condition	Siting decision	
			Potentially acceptable	Nomination and recommendation
4–2–5(d)	.....do	Disqualifying	1	1
4–2–6(a)	Dissolution	Qualifying	.....	3
4–2–6(d)	.....do	Disqualifying	1	1
4–2–7(a)	Tectonics	Qualifying	.....	3
4–2–7(d)	.....do	Disqualifying	1	1
4–2–8–1(a)	Natural Resources	Qualifying	.....	3
4–2–8–1(d)(1)	.....do	Disqualifying	1	1
4–2–8–1(d)(2)	.....do	.....do	.....	1
4–2–8–2(a)	Site Ownership and Control	Qualifying	.....	3
5–1(a)(1)	System	.....do	.....	3
5–1(a)(2)	.....do	.....do	.....	3
5–1(a)(3)	.....do	.....do	.....	3
5–2–1(a)	Population Density and Distribution	.....do	.....	3
5–2–1(d)(1)	.....do	Disqualifying	1	1
5–2–1(d)(2)	.....do	.....do	1	1
5–2–1(d)(3)	.....do	.....do	.....	1
5–2–2(a)	Site Ownership and Control	Qualifying	.....	3
5–2–3(a)	Meteorology	.....do	.....	3
5–2–4(a)	Offsite Installations and Operations	.....do	.....	3
5–2–4(d)	.....do	Disqualifying	1	1
5–2–5(a)	Environmental Quality	Qualifying	.....	3
5–2–5(d)(1)	.....do	Disqualifying	.....	1
5–2–5(d)(2)	.....do	.....do	1	1
5–2–5(d)(3)	.....do	.....do	1	1
5–2–6(a)	Socioeconomic Impacts	Qualifying	.....	3
5–2–6(d)	.....do	Disqualifying	.....	1
5–2–7(a)	Transportation	Qualifying	.....	3
5–2–8(a)	Surface Characteristics	.....do	.....	3
5–2–9(a)	Rock Characteristics	.....do	.....	3
5–2–9(d)	.....do	Disqualifying	.....	1
5–2–10(a)	Hydrology	Qualifying	.....	3
5–2–10(d)	.....do	Disqualifying	.....	1
5–2–11(a)	Tectonics	Qualifying	.....	3
5–2–11(d)	.....do	Disqualifying	1	1

11. New part 963 is added to read as follows:

PART 963—YUCCA MOUNTAIN SITE SUITABILITY GUIDELINES

Subpart A—General Provisions

963.1 Purpose.
963.2 Definitions.

Subpart B—Site Suitability Determination, Methods and Criteria

963.10 Scope.
963.11 Suitability determination.
963.12 Preclosure suitability determination.
963.13 Preclosure suitability evaluation method.
963.14 Preclosure suitability criteria.
963.15 Postclosure suitability determination.
963.16 Postclosure suitability evaluation method.
963.17—Postclosure suitability criteria.

Authority: 42 U.S.C. 2011 *et seq.;* 42 U.S.C. 7101 *et seq.;* 42 U.S.C. 10101, *et seq.*

Subpart A—General Provisions

§ 963.1 Purpose.

(a) The purpose of this part is to establish DOE methods and criteria for determining the suitability of the Yucca Mountain site for the location of a geologic repository. DOE will use these methods and criteria in analyzing the data from the site characterization activities required under section 113 of the Nuclear Waste Policy Act.

(b) This part does not address other information that must be considered and submitted to the President, and made available to the public, by the Secretary under section 114 of the Nuclear Waste Policy Act if the Yucca Mountain site is recommended for development as a geologic repository.

§ 963.2 Definitions.

For purposes of this part:

Applicable radiation protection standard means (1) For the preclosure period, the preclosure numerical radiation dose limits in 10 CFR 63.111(a) and (b) and 63.204; and

(2) For the postclosure period, the postclosure numerical radiation dose limits in 10 CFR 63.311 and 63.321 and radionuclide concentration limits in 10 CFR 63.331.

Barrier means any material, structure or feature that prevents or substantially reduces the rate of movement of water or radionuclides from the Yucca Mountain repository to the accessible environment, or prevents the release or substantially reduces the release rate of radionuclides from the waste. For example, a barrier may be a geologic feature, an engineered structure, a canister, a waste form with physical and chemical characteristics that significantly decrease the mobility of radionuclides, or a material placed over and around the waste, provided that the material substantially delays movement of water or radionuclides.

Cladding is the metallic outer sheath of a fuel rod element; it is generally made of a corrosion resistant zirconium alloy or stainless steel, and is intended

to isolate the fuel from the external environment.

Closure means the final closing of the remaining open operational areas of the underground facility and boreholes after termination of waste emplacement, culminating in the sealing of shafts and ramps, except those openings that may be designed for ventilation or monitoring.

Colloid means any fine-grained material in suspension, or any such material that can be easily suspended.

Criteria means the characterizing traits relevant to assessing the performance of a geologic repository, as defined by this section, at the Yucca Mountain site.

Design means a description of the engineered structures, systems, components and equipment of a geologic repository at Yucca Mountain that includes the engineered barrier system.

Design bases means that information that identifies the specific functions to be performed by a structure, system, or component of a facility and the specific values or ranges of values chosen for controlling parameters as reference bounds for design. These values may be constraints derived from generally accepted ''state-of-the-art'' practices for achieving functional goals or requirements derived from analysis (based on calculation or experiments) of the effects of a postulated event under which a structure, system, or component must meet its functional goals. The values for controlling parameters for external events include:

(1) Estimates of severe natural events to be used for deriving design bases that will be based on consideration of historical data on the associated parameters, physical data, or analysis of upper limits of the physical processes involved; and

(2) Estimates of severe external human-induced events to be used for deriving design bases, that will be based on analysis of human activity in the region, taking into account the site characteristics and the risks associated with the event.

DOE means the U.S. Department of Energy, or its duly authorized representatives.

Engineered barrier system means the waste packages, including engineered components and systems other than the waste package (e.g., drip shields), and the underground facility.

Event sequence means a series of actions and/or occurrences within the natural and engineered components of a geologic repository operations area that could potentially lead to exposure of individuals to radiation. An event sequence includes one or more initiating events and associated combinations of repository system component failures, including those produced by the action or inaction of operating personnel. Those event sequences that are expected to occur one or more times before permanent closure of the geologic repository operations area are referred to as Category 1 event sequences. Other event sequences that have at least one chance in 10,000 of occurring before permanent closure are referred to as Category 2 event sequences.

Geologic repository means a system that is intended to be used for, or may be used for, the disposal of radioactive wastes in excavated geologic media. A geologic repository includes the engineered barrier system and the portion of the geologic setting that provides isolation of the radioactive waste.

Geologic repository operations area means a high-level radioactive waste facility that is part of a geologic repository, including both surface and subsurface areas, where waste handling activities are conducted.

Geologic setting means geologic, hydrologic, and geochemical system of the region in which a geologic repository is or may be located.

High-level radioactive waste means

(1) The highly radioactive material resulting from the reprocessing of spent nuclear fuel, including liquid waste produced directly in reprocessing and any solid material derived from such liquid waste that contains fission products in sufficient concentration; and

(2) Other highly radioactive material that the Commission, consistent with existing law, determines by rule requires permanent isolation.

Human intrusion means breaching of any portion of the Yucca Mountain disposal system within the repository footprint by any human activity.

Infiltration means the flow of a fluid into a solid substance through pores or small openings; specifically, the movement of water into soil and fractured or porous rock.

Initiating event means a natural or human induced event that causes an event sequence.

Near-field means the region where the adjacent natural geohydrologic system has been significantly impacted by the excavation of the repository and the emplacement of the waste.

NRC means the U.S. Nuclear Regulatory Commission or its duly authorized representatives.

Perched water means ground water of limited lateral extent separated from an underlying body of ground water by an unsaturated zone.

Preclosure means the period of time before and during closure of the geologic repository.

Preclosure safety evaluation means a preliminary assessment of the adequacy of repository support facilities to prevent or mitigate the effects of postulated initiating events and event sequences and their consequences (including fire, radiation, criticality, and chemical hazards), and the site, structures, systems, components, equipment, and operator actions that would be relied on for safety.

Postclosure means the period of time after the closure of the geologic repository.

Radioactive waste or waste means high-level radioactive waste and other radioactive materials, including spent nuclear fuel, that are received for emplacement in the geologic repository.

Reasonably maximally exposed individual means the hypothetical person meeting the criteria specified at 10 CFR 63.312.

Reference biosphere means the description of the environment, inhabited by the reasonably maximally exposed individual. The reference biosphere comprises the set of specific biotic and abiotic characteristics of the environment, including, but not limited to, climate, topography, soils, flora, fauna, and human activities.

Seepage means the inflow of ground water moving in fractures or pore spaces of permeable rock to an open space in the rock such as an excavated drift.

Sensitivity study means an analytic or numerical technique for examining the effects on model outcomes, such as radionuclide releases, of varying specified parameters, such as the infiltration rate due to precipitation.

Site characterization means activities, whether in the laboratory or in the field, undertaken to establish the geologic conditions and the ranges of the parameters of a candidate site relevant to the location of a repository, including borings, surface excavations, excavations of exploratory shafts, limited subsurface lateral excavations and borings, and in situ testing needed to evaluate the suitability of a candidate site for the location of a repository, but not including preliminary borings and geophysical testing needed to assess whether site characterization should be undertaken.

Surface facilities means all permanent facilities within the restricted area constructed in support of site characterization activities and repository construction, operation, and closure activities, including surface

structures, utility lines, roads, railroads, and similar facilities, but excluding the underground facility.

System performance means the complete behavior of a geologic repository system at Yucca Mountain in response to the features, events, and processes that may affect it.

Total system performance assessment means a probabilistic analysis that is used to:

(1) Identify the features, events and processes (except human intrusion) that might affect the Yucca Mountain disposal system and their probabilities of occurring during 10,000 years after disposal;

(2) Examine the effects of those features, events, processes, and sequences of events and processes (except human intrusion) on the performance of the Yucca Mountain disposal system; and

(3) Estimate the dose incurred by the reasonably maximally exposed individual, including associated uncertainties, as a result of releases caused by all significant features, events, processes, and sequences of events and processes, weighted by their probability of occurrence.

Underground facility means the underground structure, backfill materials, if any, and openings that penetrate the underground structure (e.g., ramps, shafts and boreholes, including their seals).

Waste form means the radioactive waste materials and any encapsulating or stabilizing matrix.

Waste package means the waste form and any containers, shielding, packing, and other absorbent materials immediately surrounding an individual waste container.

Yucca Mountain disposal system means the combination of underground engineered and natural barriers within the controlled area that prevents or substantially reduces releases from the waste.

Yucca Mountain site means the candidate site in the State of Nevada recommended by the Secretary to the President under section 112(b)(1)(B) of the Nuclear Waste Policy Act of 1982 (NWPA) (42 U.S.C. 1032(b)(1)(B)) on May 27, 1986.

Subpart B—Site Suitability Determination, Methods, and Criteria

§ 963.10 Scope.

(a) The scope of this subpart includes the following for both the preclosure and postclosure periods:

(1) The bases for the suitability determination for the Yucca Mountain site as a location for a geologic repository;

(2) The suitability evaluation methods for applying the site suitability criteria to a geologic repository at the Yucca Mountain site; and

(3) The site suitability criteria that DOE will apply in accordance with section 113(b)(1)(A)(iv) of the NWPA.

(b) DOE will seek NRC concurrence on any future revisions to this subpart.

§ 963.11 Suitability determination.

DOE will evaluate whether the Yucca Mountain site is suitable for the location of a geologic repository on the basis of the preclosure and postclosure determinations described in §§ 963.12 and 963.15. If DOE's evaluation of the Yucca Mountain site for the location of a geologic repository under §§ 963.12 and 963.15 shows that the geologic repository is likely to meet the applicable radiation protection standards for the preclosure and postclosure periods, then DOE may determine that the site is a suitable location for the development of such a repository.

§ 963.12 Preclosure suitability determination.

DOE will apply the method and criteria described in §§ 963.13 and 963.14 to evaluate the suitability of the Yucca Mountain site for the preclosure period. If DOE finds that the results of the preclosure safety evaluation conducted under § 963.13 show that the Yucca Mountain site is likely to meet the applicable radiation protection standard, DOE may determine the site suitable for the preclosure period.

§ 963.13 Preclosure suitability evaluation method.

(a) DOE will evaluate preclosure suitability using a preclosure safety evaluation method. DOE will evaluate the performance of the geologic repository at the Yucca Mountain site using the method described in paragraph (b) of this section and the criteria in § 963.14. DOE will consider the performance of the system in terms of the criteria to evaluate whether the geologic repository is likely to comply with the applicable radiation protection standard.

(b) The preclosure safety evaluation method, using preliminary engineering specifications, will assess the adequacy of the repository facilities to perform their intended functions and prevent or mitigate the effects of postulated Category 1 and 2 event sequences. The preclosure safety evaluation will consider:

(1) A preliminary description of the site characteristics, the surface facilities and the underground operating facilities;

(2) A preliminary description of the design bases for the operating facilities and a preliminary description of any associated limits on operation;

(3) A preliminary description of potential hazards, event sequences, and their consequences; and

(4) A preliminary description of the structures, systems, components, equipment, and operator actions intended to mitigate or prevent accidents.

§ 963.14 Preclosure suitability criteria.

DOE will evaluate preclosure suitability using the following criteria:

(a) Ability to contain radioactive material and to limit releases of radioactive materials;

(b) Ability to implement control and emergency systems to limit exposure to radiation;

(c) Ability to maintain a system and components that perform their intended safety functions; and

(d) Ability to preserve the option to retrieve wastes during the preclosure period.

§ 963.15 Postclosure suitability determination.

DOE will apply the method and criteria described in §§ 963.16 and 963.17 to evaluate the suitability of the Yucca Mountain site for the postclosure period. If DOE finds that the results of the total system performance assessments conducted under § 963.16 show that the Yucca Mountain site is likely to meet the applicable radiation protection standard, DOE may determine the site suitable for the postclosure period.

§ 963.16 Postclosure suitability evaluation method.

(a) DOE will evaluate postclosure suitability using the total system performance assessment method. DOE will conduct a total system performance assessment to evaluate the ability of the geologic repository to meet the applicable radiation protection standard under the following circumstances:

(1) DOE will conduct a total system performance assessment to evaluate the ability of the Yucca Mountain disposal system to limit radiological doses and radionuclide concentrations in the case where there is no human intrusion into the repository. DOE will model the performance of the Yucca Mountain disposal system using the method described in paragraph (b) of this section and the criteria in § 963.17. DOE will consider the performance of the system in terms of the criteria to evaluate whether the Yucca Mountain disposal system is likely to comply with

the applicable radiation protection standard.

(2) DOE will conduct a separate total system performance assessment to evaluate the ability of the Yucca Mountain disposal system to limit radiological doses in the case where there is a human intrusion as specified by 10 CFR 63.322. DOE will model the performance of the Yucca Mountain disposal system using the method described in paragraph (b) of this section and the criteria in § 963.17. If required by applicable NRC regulations regarding a human intrusion standard, § 63.321, DOE will consider the performance of the system in terms of the criteria to evaluate whether the Yucca Mountain disposal system is likely to comply with the applicable radiation protection standard.

(b) In conducting a total system performance assessment under this section, DOE will:

(1) Include data related to the suitability criteria in § 963.17;

(2) Account for uncertainties and variabilities in parameter values and provide the technical basis for parameter ranges, probability distributions, and bounding values;

(3) Consider alternative models of features and processes that are consistent with available data and current scientific understanding, and evaluate the effects that alternative models would have on the estimated performance of the Yucca Mountain disposal system ;

(4) Consider only events that have at least one chance in 10,000 of occurring over 10,000 years;

(5) Provide the technical basis for either inclusion or exclusion of specific features, events, and processes of the geologic setting, including appropriate details as to magnitude and timing regarding any exclusions that would significantly change the dose to the reasonably maximally exposed individual;

(6) Provide the technical basis for either inclusion or exclusion of degradation, deterioration, or alteration processes of engineered barriers, including those processes that would adversely affect natural barriers, (such as degradation of concrete liners affecting the pH of ground water or precipitation of minerals due to heat changing hydrologic processes), including appropriate details as to magnitude and timing regarding any exclusions that would significantly change the dose to the reasonably maximally exposed individual;

(7) Provide the technical basis for models used in the total system performance assessment such as comparisons made with outputs of detailed process-level models and/or empirical observations (for example, laboratory testing, field investigations, and natural analogs);

(8) Identify natural features of the geologic setting and design features of the engineered barrier system important to isolating radioactive waste;

(9) Describe the capability of the natural and engineered barriers important to isolating radioactive waste, taking into account uncertainties in characterizing and modeling such barriers;

(10) Provide the technical basis for the description of the capability of the natural and engineered barriers important to isolating radioactive waste;

(11) Use the reference biosphere and reasonably maximally exposed individual assumptions specified in applicable NRC regulations; and

(12) Conduct appropriate sensitivity studies.

§ 963.17 Postclosure suitability criteria.

(a) DOE will evaluate the postclosure suitability of a geologic repository at the Yucca Mountain site through suitability criteria that reflect both the processes and the models used to simulate those processes that are important to the total system performance of the geologic repository. The applicable criteria are:

(1) Site characteristics, which include:

(i) Geologic properties of the site—for example, stratigraphy, rock type and physical properties, and structural characteristics;

(ii) Hydrologic properties of the site—for example, porosity, permeability,moisture content, saturation, and potentiometric characteristics;

(iii) Geophysical properties of the site—for example, densities, velocities and water contents, as measured or deduced from geophysical logs; and

(iv) Geochemical properties of the site—for example, precipitation, dissolution characteristics, and sorption properties of mineral and rock surfaces.

(2) Unsaturated zone flow characteristics, which include:

(i) Climate—for example, precipitation and postulated future climatic conditions;

(ii) Infiltration—for example, precipitation entering the mountain in excess of water returned to the atmosphere by evaporation and plant transpiration;

(iii) Unsaturated zone flux—for example, water movement through the pore spaces, or flowing along fractures or through perched water zones above the repository;

(iv) Seepage—for example, water dripping into the underground repository openings from the surrounding rock.

(3) Near field environment characteristics, which include:

(i) Thermal hydrology—for example, effects of heat from the waste on water flow through the site, and the temperature and humidity at the engineered barriers.

(ii) Near field geochemical environment—for example, the chemical reactions and products resulting from water contacting the waste and the engineered barrier materials.

(4) Engineered barrier system degradation characteristics, which include:

(i) Engineered barrier system component performance—for example, drip shields, backfill, coatings, or chemical modifications, and

(ii) Waste package degradation—for example, the corrosion of the waste package materials within the near-field environment.

(5) Waste form degradation characteristics, which include:

(i) Cladding degradation—for example, corrosion or break-down of the cladding on the spent fuel pellets;

(ii) Waste form dissolution—for example, the ability of individual radionuclides to dissolve in water penetrating breached waste packages.

(6) Engineered barrier system degradation, flow, and transport characteristics, which include:

(i) Colloid formation and stability—for example, the formation of colloidal particles and the ability of radionuclides to adhere to these particles as they may migrate through the remaining barriers; and

(ii) Engineered barrier transport—for example, the movement of radionuclides dissolved in water or adhering to colloidal particles to be transported through the remaining engineered barriers and in the underlying unsaturated zone.

(7) Unsaturated zone flow and transport characteristics, which include:

(i) Unsaturated zone transport—for example, the movement of water with dissolved radionuclides or colloidal particles through the unsaturated zone underlying the repository, including retardation mechanisms such as sorption on rock or mineral surfaces;

(ii) Thermal hydrology—for example, effects of heat from the waste on water flow through the site.

(8) Saturated zone flow and transport characteristics, which include:

(i) Saturated zone transport—for example, the movement of water with dissolved radionuclides or colloidal particles through the saturated zone

underlying and beyond the repository, including retardation mechanisms such as sorption on rock or mineral surfaces; and

(ii) Dilution—for example, diffusion of radionuclides into pore spaces, dispersion of radionuclides along flow paths, and mixing with non-contaminated ground water.

(9) Biosphere characteristics, which include:

(i) Reference biosphere and reasonably maximally exposed individual—for example, biosphere water pathways, location and behavior of reasonably maximally exposed individual; and

(ii) Biosphere transport and uptake—for example, the consumption of ground or surface waters through direct extraction or agriculture, including mixing with non-contaminated waters and exposure to contaminated agricultural products.

(b) DOE will evaluate the postclosure suitability of the Yucca Mountain disposal system using criteria that consider disruptive processes and events important to the total system performance of the geologic repository. The applicable criteria related to disruptive processes and events include:

(1) Volcanism—for example, the probability and potential consequences of a volcanic eruption intersecting the repository;

(2) Seismic events—for example, the probability and potential consequences of an earthquake on the underground facilities or hydrologic system; and

(3) Nuclear criticality—for example, the probability and potential consequences of a self-sustaining nuclear reaction as a result of chemical or physical processes affecting the waste either in or after release from breached waste packages.

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Federal Register

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November 14, 2001

Part VI

Federal Emergency Management Agency

44 CFR Parts 2, 9, 10, 204 and 206
Disaster Assistance; Fire Management Assistance Grant Program; Final Rule

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Parts 2, 9, 10, 204 and 206

RIN 3067–AD24

Disaster Assistance; Fire Management Assistance Grant Program

AGENCY: Federal Emergency Management Agency.

ACTION: Final rule.

SUMMARY: This rule implements section 420 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act as amended by the Disaster Mitigation Act of 2000, and provides overall program guidance on the operation and administration of the Fire Management Assistance Grant Program.

DATES: This rule is effective October 30, 2001.

Applicability Date: The rule applies for fires declared on or after October 30, 2001.

FOR FURTHER INFORMATION CONTACT: Curtis Carleton, Chief, Community and Family Services Branch, Federal Emergency Management Agency, 500 C Street SW., room 713, Washington, DC 20472, 202–646–4535; (facsimile) 202–646–2723; or (e-mail) *Curtis.Carleton@fema.gov.*

SUPPLEMENTARY INFORMATION: On August 1, 2001, at 66 FR 39715, we published a proposed rule for the Fire Management Assistance Grant Program in the **Federal Register**. After careful consideration of the comments received in response to the proposed rule, we are publishing this final rule to implement the Fire Management Assistance Grant Program as directed by the Disaster Mitigation Act of 2000, Pub. L. 106–390. The Disaster Mitigation Act of 2000 established a new program under Section 420 of the Stafford Act, 42 U.S.C. 5187—the Fire Management Assistance Grant Program. By statute, the Fire Management Assistance Grant Program is to be implemented on October 30, 2001, one year from enactment of the Disaster Mitigation Act of 2000. Once implemented, the Fire Management Assistance Grant Program replaces the Fire Suppression Assistance Program currently authorized under Section 420 of the Stafford Act.

We received comments from 12 State emergency managers and foresters on the proposed rule for the Fire Management Assistance Grant Program. The majority of comments addressed our proposals for a fire cost threshold, including the possibility of establishing a cumulative fire cost threshold; a State operations plan; and pre-positioning. Other comments received addressed the 90 percent cost-share, the ineligibility of regular time for permanently employed personnel, the definition of the Wildland/Urban Interface, and the payment and role of the Principal Advisor.

Fire Cost Threshold

A majority of commenters, 11 of 12, expressed concern with the calculation and application of the individual fire cost threshold. In particular commenters objected to the individual fire cost threshold being applied to each and every declared fire, and expressed support for a cumulative fire cost threshold which would recognize numerous smaller fires burning throughout a State.

As presented in the proposed rule, the individual fire cost threshold is based on a calculation of five percent × $1.04 [1] × the State population, or $100,000, whichever is higher. Almost all the 11 commenters indicated that this individual fire cost threshold is too high a threshold and would penalize States nationwide, regardless of population, if applied to every declared fire.

One goal in developing the Fire Management Assistance Grant Program was to ensure as much consistency as possible with the Public Assistance Program, which is also designed to provide assistance to State and local governments. In evaluating a State's request for public assistance under a Presidential major disaster, the $1.07 per capita of the State population is used as a financial indicator that a disaster is of such a size and magnitude that it may be beyond State and local resources and capabilities to respond and Federal assistance may be warranted. Similarly, in evaluating a State's initial grant application under a fire management assistance declaration, five percent of $1.07 per capita statewide will be used as a financial indicator that a declared fire was of such a size and magnitude that it was beyond State and local resources and capabilities to respond and that Federal assistance is warranted.

Although we feel that the individual fire cost threshold published in the proposed rule is reasonable and justified and will help serve as a means of ensuring that Federal assistance remains supplemental to State and local capabilities, in response to these comments, we have included a calculation for a cumulative fire cost threshold, while retaining the individual fire cost threshold in the final rule (§ 204.51).

To meet the cumulative fire cost threshold, the total costs of all declared and non-declared fires for which a State assumes responsibility in a given calendar year must meet the threshold. The cumulative fire cost threshold will be 3x the individual fire cost threshold presented in the proposed rule or $500,000, whichever is higher. Assistance will only be provided for the declared fire responsible for meeting or exceeding the cumulative fire cost threshold and any future declared fires for that calendar year. Any previously declared fires during the calendar year which failed to meet the individual fire cost threshold and did not trigger the cumulative fire cost threshold will be ineligible for any assistance under the Fire Management Assistance Grant Program. The cumulative fire cost threshold does not replace the individual fire cost threshold, but is an alternative threshold created to ensure the fullest level of assistance is provided to States when fires are of a such magnitude and severity as would constitute a major disaster.

The fire cost threshold concept is new and untested. We will therefore, closely monitor its implementation to assure that it facilitates the fair and consistent distribution of assistance under the new program, as intended. Should significant weaknesses or inequities surface, we will correct them with a rule change as appropriate.

Operations Plan

Seven commenters provided us with input regarding the State Operations Plan for the Fire Management Assistance Program. Most commenters agreed that the Operations Plan is a good concept, but expressed concern with the developmental requirements of the plan as well as the role the plan would have in the declaration and grants management processes.

In particular, many commenters expressed concern that FEMA would interpret the Operations Plans differently than States intended, and that the information to be collated in the Operations Plan is too restrictive if the purpose of the plan is to assist us in evaluating State requests for fire management assistance declarations. Commenters also disagreed with the

[1] On October 9, 2001, a Notice of Adjustment of Statewide Per Capita Impact Indicator was published. In the notice, the Statewide per capita was increased from $1.04 to $1.07. This increase was based on an increase in the Consumer Price Index for All Urban Consumers of 2.7 percent for the 12-month period ending in August 2001. The Bureau of Labor Statistics of the U.S. Department of Labor released the information on September 18, 2001. The final rule for the Fire Management Assistance Grant uses $1.07. This figure will be adjusted annually.

requirement prohibiting States from submitting an Operations Plan that reduced or lowered capabilities and resources from prior year levels. These commenters cited budgetary limitations and legislative decisions that may reduce funding levels from previous years, and asked us to reconsider this requirement.

Based upon these comments, it appears to us that the Operations Plan has exceeded the scope we had initially intended and has become unduly burdensome. From a time and resources perspective to a planning and implementation perspective, the Operations Plan no longer seems to be an appropriate tool for the Fire Management Assistance Grant Program. Additionally, we believe that, to the extent that the Operations Plan may have helped indicate State capability, the fire cost threshold will adequately ensure that federal funding remains supplemental to State and local capabilities and resources. Therefore, we have decided to eliminate the Operations Plan from the final rule.

In the final rule, however, we have ensured that certain information, which we had proposed would be included in the Operations Plan, will still be available to us through other provisions. A State will identify its legislative authorities for firefighting and its compliance with the laws and provisions applicable to the Fire Management Assistance Grant Program in the FEMA-State Agreement for the Fire Management Assistance Grant Program. A State also will still be required to develop and submit a Hazard Mitigation Plan and a State Administrative Plan to the Regional Director for approval. A State can always provide the mobilization plan, as well as staffing and resource and jurisdictional information from the State Fire Plan, should it be appropriate.

Pre-positioning

Seven commenters opposed our proposal on pre-positioning. Specifically, commenters indicated that pre-positioning only Federal resources for an initial two-week period is shortsighted. Many commenters supported the inclusion of out-of-State and compact resources in the two-week period, while others not only supported these additional resources, but also the use of in-State and local resources.

Commenters also asked us to define what was considered to be an ''extraordinary fire event,'' for which States could possibly be eligible to receive funding for pre-positioned resources for up to 30 days. Many commenters pointed out that typically whenever a State requests Federal assistance something ''extraordinary'' has occurred. A few commenters suggested that rather than separating pre-positioning into finite periods of time which must be directly associated with a declared fire (an initial period of up to 2 weeks, with a maximum of up to 30 days), that we base eligibility on the severity of conditions existing that would be conducive to a catastrophic fire happening if resources were not available for immediate response.

As a result of these comments, in the final rule costs for the pre-positioning of Federal, out-of-State (including compact), and international resources may be eligible for pre-positioning, but only for the period, up to a maximum of 21 days before the declared fire, that the State can demonstrate such pre-positioning was warranted based on recognized scientific indicators. These indicators include, but are not limited to drought indices, short-term weather forecasts, the current number of fires burning in the State, and the availability of in-state firefighting resources, and may also include other quantitative indicators with which to measure the increased risk of the threat of a major disaster.

The Regional Director will determine the number of days of pre-positioning to be approved for Federal funding, up to a maximum of 21 days before the declared fire. All eligible pre-positioning will still need to be directly associated with a declared fire to be eligible since Section 420 is very clear that all assistance authorized must be for the ''mitigation, management, and control *of any fire on public or private forestland or grassland that threatens such destruction as would constitute a major disaster.''* (Emphasis added).

Cost Share

Four commenters provided input on the cost share. All four commenters welcomed streamlining the cost-share to 75 percent Federal, 25 percent non-Federal. The commenters revealed, however, that the possibility of receiving a 90 percent cost-share was more confusing than helpful and added an element of complexity not keeping with the original intent of a simple formula of 75 percent Federal cost-share for all declared fires.

Based on these comments and the fact that the 90 percent Federal cost-share would be used infrequently, we have decided to eliminate the 90 percent Federal cost-share in the final rule.

Grants Management

Four commenters wrote to provide us with suggestions to improve our grants management process. Most of the discussion was focused on our requirement that the Standard Form (SF) 424 (Request for Federal Assistance) document actual costs. Commenters, citing the application process for other Stafford Act disaster assistance programs, such as the Public Assistance Program, suggested that the SF 424 be submitted based on estimated costs. As actual costs are received, the SF 424 then can be amended to reflect any adjustments. Commenters also provided a myriad of other changes we could implement to overhaul our grants management process. The proposed changes included using forms other than the FEMA forms listed, and instituting new deadlines for submittal of these forms and the completion of the grants management process.

Generally, costs under the Fire Management Assistance Grant Program will be submitted after all eligible work has been completed and will be documented on the SF 424 as non-construction costs; whereas costs under the Public Assistance Program are submitted before eligible work has begun and are documented on the SF 424 primarily as construction costs.

Since eligible work under the Public Assistance Program can take several months to years to complete and is a longer-term process in which we provide progress payments as work is completed, it is not uncommon for the SF 424 to be submitted by the Grantee based on the estimated costs of the disaster. For the purposes of the Fire Management Assistance Grant Program, however, all eligible work should be completed no later than 30 days after the close of the incident period for a declared fire. Due to the short-term, non-construction nature of the work performed and costs incurred, we do not see the need to base approval of the initial grant award on estimated costs. Therefore, under the Fire Management Assistance Grant Program, we will continue to approve the initial grant application based on actual costs. Once a State has documented that its actual costs meet the fire cost threshold, we may approve the initial grant award and the State may submit amendments to the grant award as necessary.

Based on our consultation with our Financial and Acquisition Management Division, as well as our Regional program staff, no changes will be made to our grants management process at this time. We appreciate the comments received and will be closely monitoring the grants management process under the Fire Management Assistance Program once the program takes effect on October 30, 2001.

Regular Time

Three commenters expressed concern that regular-time for permanently employed personnel is ineligible under the Fire Management Assistance Grant Program. These three commenters explained that there are real costs to States when permanently employed personnel are deployed in support of firefighting efforts. We understand that there are real costs to the State; however, the regular time salaries of permanently employed personnel, including those reassigned to the fire line, would still be incurred in the absence of a fire management assistance declaration. In addition, this approach is consistent with our practice in the Public Assistance Program. Therefore, regular time for permanently employed personnel will remain ineligible in the final rule.

Definition of Wildland/Urban Interface

Three commenters suggested an alternative definition for wildland/urban interface. The three commenters suggested that we use the definition of wildland/urban interface contained in the publication *Fire in the West, the Wildland Urban Interface Problem.* While a very thorough definition of wildland/urban interface, our discussions with the National Fire Protection Association and the Forest Service, United States Department of Agriculture, have led us to believe that this definition is by no means the definitive or nationally accepted definition of wildland/urban interface. Since we do not mention the wildland/urban interface anywhere in the final regulations, we are deleting it from the definitions section of the final rule (§ 204.3).

Payment of the Principal Advisor

Three commenters asked why we pay for the Principal Advisor east of the Mississippi, but not west of the Mississippi. In 1996, we were advised by the Forest Service, USDA, that Principal Advisors west of the Mississippi do not require any reimbursement, while Principal Advisors east of the Mississippi require reimbursement beyond regularly scheduled hours. We have operated under this guidance ever since. Since this is a Federal policy, we have decided to delete this section from the final rule.

Role of the Principal Advisor

The commenters who questioned our payment for the Principal Advisor also questioned the role of the Principal Advisor and indicated that the role was not made clear in the proposed rule. We feel that the role was clear in the proposed rule. We rely on the Principal Advisor to provide us with technical assistance in gathering the appropriate information to help us assess the potential threat posed by a fire or fire complex. Although we will not be providing any additional clarification in the final rule on the role of the Principal Advisor, we may consider doing so in related guidance materials still to be developed for the Fire Management Assistance Grant Program.

Criteria

Two commenters discussed ''the potential impact on environmental and historic/cultural resources'' declaration criterion. One commenter suggested that we rethink the inclusion of this criterion since these resources are not eligible for assistance under the Fire Management Assistance Grant Program. Another commenter applauded the inclusion of this criterion in our overall evaluation criteria. Although it was our intent to recognize these resources and acknowledge them as important, we recognize that it is not appropriate to include this criterion in the content of the final rule. Therefore, this criterion has been removed from the final rule.

Other Comments

We received various individual comments addressing demolition of damaged facilities and removal of demolition debris under Section 403, soil restoration/reseeding efforts under repair of firefighting damage, unreasonableness of the requirement to develop a hazard mitigation plan, and delegation of declaration authority to the Regional Director. While the discussions were thoughtful, and we understand the rationale for their proposal, we do not agree with these comments and have not made any changes in the final regulations to reflect these suggestions.

We have made several changes to the proposed rule intended to improve the overall operation of the Fire Management Assistance Grant Program and the delivery of assistance under the program. These changes include the adoption of a cumulative fire cost threshold, the elimination of the State Operations Plan, the modification of our proposal for pre-positioning, and the elimination of a 90 percent Federal cost-share.

This final rule also contains a new provision, § 206.42(d), that was not in the proposed rule. The section reiterates the statutory provision concerning recovery of assistance for intentional acts contained in 42 U.S.C 5160.

National Environmental Policy Act

This rule is excluded from the preparation of an environmental assessment or environmental impact statement under 44 CFR 10.8(d)(2)(ii), where the rule is related to actions that qualify for categorical exclusion under 44 CFR 10.8(d)(2)(xix).

Regulatory Planning and Review

We have formally submitted this rule to OMB for review. This rule, however, is not economically significant under Executive Order 12866, Regulatory Planning and Review, September 30, 1993; it would not have an annual effect on the economy of $100 million or more, or adversely affect in a material way the economy or State governments or communities. The rule sets out the administrative requirements for applying for and receiving Federal fire management assistance grants. Based on the history of the Fire Suppression Assistance Program currently authorized by Section 420 of the Stafford Act, and the components in this rule, we anticipate that the total of grants we provide annually will typically not exceed $15 million, though in years with extraordinary fire conditions and activity, we could provide grants totaling over $50 million. We do not anticipate providing over $100 million annually. We have vetted thoroughly all proposed policy changes with the affected constituents.

Regulatory Flexibility Act

We certify that this rule will not have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. This rule deals with assistance to States and local governments to provide supplemental Federal assistance to fight fires burning on publicly or privately owned forest or grassland which threaten such destruction as would constitute a major disaster; it provides program guidance and outlines administrative requirements for the Fire Management Assistance Grant Program as they relate to States and local governments. We developed this rule in consultation with the States and we estimate that the cost impacts of the changes are neutral. Thus, we do not expect the final rule (1) to affect adversely the availability of funding to small entities, (2) to have significant secondary or incidental effects on a substantial number of small entities, or (3) to create any additional burden on small entities. We have not prepared a regulatory flexibility statement.

Paperwork Reduction Act

In accordance with the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*, we have submitted the collections of information applicable to this rule to the Office of Management and Budget for review and approval. OMB has reviewed and approved the information collections in this rule and assigned OMB control number 3067–0290.

During the comment period we solicited public comment on:

(1) Whether the proposed collection of information is necessary for the proper performance of the functions of FEMA, including whether the information will have practical utility;

(2) Whether our estimate of the burden of the proposed collection of information is accurate, including the validity of the methodology and assumptions that we used;

(3) What we might do to enhance the quality, utility, and clarity of the information that we are to collect; and

(4) What other measures we can take to minimize the burden of the collection of information on those who are to respond, including the use of automated, electronic, mechanical, electronic submission of responses, or other technological collection techniques.

Following is a summary of how each form will be used:

(a) *FEMA-State Agreement.* We provide Federal assistance under section 420 of the Stafford Act and a FEMA-State Agreement for the Fire Management Assistance Grant Program. The Governor and the Regional Director sign the Agreement, which contains the necessary terms and conditions consistent with the provisions of applicable laws and Executive Orders, and specifies the type and extent of Federal assistance to be provided. Supplemental agreements may be executed as necessary to update the agreement.

(b) *FEMA Form 90–58 Request for Fire Management Assistance* is used by the State to provide information to support the need for a declaration. Additional supporting information may be furnished by the State or requested by FEMA after the initial request has been received. Since the program will operate on a ''real-time'' incident basis, a request for a declaration must be submitted while a fire(s) is burning and uncontrolled. A State may request a declaration by telephone, promptly following up the conversation with the FEMA Form 90–58.

(c) *Standard Form 424 Request for Federal Assistance* must be completed by the State when applying for a grant under a declared fire. The 424 and accompanying documentation must be submitted by a State to FEMA's Regional Director within 9 months of declared fire. The 424 documents the incident period of the fire, the performance period of the grant, and all costs claimed under the approved declaration.

(d) *FEMA Form 90–91 Project Worksheet* is prepared by the Principal Advisor and FEMA and State staff working with the applicant. The PW is used to report on the costs incurred by applicant for mitigation, management, and control activities and is used by FEMA to reimburse applicants based on eligible costs as described in the proposed regulation for the Fire Management Assistance Program.

(e) A State *Administrative Plan* must be developed by the State for the administration of the fire management assistance grant. The plan must designate the State agency that has responsibility for program administration and ensure State compliance with the provisions of law and regulation applicable to fire management assistance grants.

(f) *FEMA Form 20–10, Financial Status Report*, is used by the State in its final reporting of costs under the Fire Management Assistance Grant Program.

(g) *Standard Form 270, Request for Advance or Reimbursement*, is used by the State as an option to receive funds. The other option is use of FEMA's Letter of Credit procedures.

(h) *Operations Plan*, Based on comments received regarding the use of the Operations Plan, we have eliminated the requirement from the final rule.

(i) *Hazard Mitigation Plan.* A plan to develop actions the State, local, or tribal government will take to reduce the risk to people and property from all hazards. The intent of hazard mitigation planning under the Fire Management Assistance Grant Program is to identify wildfire hazards and cost-effective mitigation alternatives that produce long-term benefits. We address mitigation of fire hazards as part of the State's comprehensive Hazard Mitigation Plan, described in 44 CFR subpart M.

(j) *Appeals.* When a State's request for a fire management assistance declaration is denied, the Governor of a State or Governor's Authorized Representative may appeal the decision in writing. Likewise, applicants may appeal any cost or eligibility determination under an approved declaration. Appeals usually consist of a letter briefly describing the reason for the appeal and any new supporting documentation the State or applicant submits to FEMA for review.

(k) *Duplication of Benefits.* Applicants are required to notify FEMA of all benefits, actual or anticipated, received from other sources for the same loss for which they are applying to FEMA for assistance. Notification can be accomplished in a letter, accompanied by supporting documentation.

The estimated hour burden is:

Burden item	Hours per respondent	Respondents per year	Burden hours per year (in hours)	Comments
FEMA-State Agreement	5 minutes	9	1	We estimate 5 minutes for the Governor to sign this agreement which has the terms and conditions for the Fire Management Assistance Grant Program (FMAGP) .
FEMA Form 90–58	1 hour	9	9	States use this form to support their request for a declaration.
Standard Form 424	1 hour	9	9	The State must complete this form and attachments when applying for a grant under a declared fire.
FEMA Form 90–91	30 minutes	1,000	500	Prepared by the Principal Advisor, FEMA and State staff, and the applicant This form documents the costs incurred by an applicant for mitigation, management, and control activities associated with a declared fire and to reimburse applicants based on eligible costs described in the proposed regulations for the FMAGP.

Burden item	Hours per respondent	Respondents per year	Burden hours per year (in hours)	Comments
FEMA Form 20–10	1 hour	9	9	The State uses this to submit a final reporting of costs for a fire management assistance grant (FMAG).
Standard Form 270 or Letter of Credit.	30 minutes	9	5	The State uses this form as an option to receive funds. The other option is use of FEMA's Letter of Credit procedures
State Administrative Plan	8 hour	9	72	The State must develop this plan for administration of the FMAG.
State Hazard Mitigation Plan.	160	9	1440	A plan to develop actions the State, local, or tribal government will take to reduce the risk to people and property from all hazards. The State Hazard Mitigation Plan is to identify wildfire hazards and to implement actions that produce continual benefits and have a long-term impact. Mitigation of fire hazards are part of the State's comprehensive Hazard Mitigation Plan, 44 CFR Part 206, Subpart M.
Appeals	1 hour	20	20	Appeals usually consist of a letter briefly describing the reason for the appeal and any new supporting evidence for review.
Duplication of Benefits	1 hour	20	20	Notification consists of a letter and supporting documentation.
Total Burden Hours			2,085	

For the purposes of this rule we estimate the following annual cost burdens:

Requests from:	Number requests	Est'd hours/ requester	Cost/hour	Costs/year
States	9	172	$40	$61,812
Local Governments	1,000	0.52	20	10,400
Totals Costs/Year				$80,240

Executive Order 13132, Federalism

This rule involves no policies that have federalism implications under Executive Order 13132, Federalism, dated August 4, 1999. The rule establishes the administrative requirements for the Fire Management Assistance Grant Program in applying for and receiving Federal grants. It involves no preemption of State law nor does it limit State policymaking discretion. Nevertheless, in the course of designing the Fire Management Assistance Grant Program, we met with State emergency managers and foresters, and representatives from Tribal governments and the Forest Service, USDA, in January 2001 to gather input on the failings of the Fire Suppression Assistance Program and to see what steps we could take to improve the delivery of assistance under the Fire Management Assistance Grant Program. Based upon their input, we drafted this rule. Both FEMA and State concerns and the extent to which this rule meets those concerns are set out earlier in the preamble.

Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

We have reviewed the proposed rule under Executive Order 13175, which became effective on February 6, 2001. Under the Fire Management Assistance Grant Program, tribal governments will have the option to submit requests for fire management assistance declarations directly to us and to serve as ''Grantee,'' carrying out ''State'' roles when a grant application under the declaration has been approved

In reviewing the rule, we find that the rule does not have ''tribal implications'' as defined in Executive Order 13175 because it will not have a substantial direct effect on one or more Indian tribal governments, on the relationship between the Federal Government and Indian tribal governments, or on the distribution of power and responsibilities between the Federal Government and Indian tribal governments. Moreover, the rule does not impose substantial direct compliance costs on tribal governments, nor does it preempt tribal law, impair treaty rights or limit the self-governing powers of tribal governments.

List of Subjects

44 CFR Part 2

Administrative practice and procedure.

44 CFR Part 9

Flood Plains, Reporting and recordkeeping requirements.

44 CFR Part 10

Environmental impact statements.

44 CFR Part 204

Administrative practice and procedure, Fire management assistance, Grant programs-fire management, Reporting and recordkeeping requirements.

44 CFR Part 206

Administrative practice and procedure, Community facilities, Disaster Assistance, Grant programs, Loan programs, Reporting and recordkeeping requirements.

Accordingly, amend 44 CFR, chapter I as follows:

PART 2—ORGANIZATION, FUNCTIONS, AND DELEGATIONS OF AUTHORITY

1. The authority citation for Part 2 continues to read as follows:

Authority: 5 U.S.C. 552; Reorganization Plan No. 3 of 1978, 5 U.S.C. App. 1; E.O. 12127, 3 CFR, 1979 Comp., p. 376; E.O. 12148, as amended, 3 CFR, 1979 Comp., p. 412.

§ 2.81 [Amended]

2. In 44 CFR 2.81 amend the list of current OMB control numbers by inserting ''204.....3067–0290'' between ''151 subpart B'' and ''205.33''.

PART 9—FLOODPLAIN MANAGEMENT AND PROTECTION OF WETLANDS

3. Revise the authority for Part 9 to read as follows:

Authority: E.O. 11988 of May 24, 1977. 3 CFR, 1977 Comp., p. 117; E.O. 11990 of May 24 1977, 3 CFR, 1977 Comp. p. 121; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of March 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148 of July 20, 1979, 44 FR 43239, 3 CFR, 1979 Comp., p. 412, as amended.; E.O. 12127; E.O. 12148; 42 U.S.C. 5201.

§ 9.5 [Amended]

4. Revise 44 CFR 9.5 (c)(6), to read ''Fire Management Assistance (Section 420).''

PART 10—ENVIRONMENTAL CONSIDERATIONS

5. The authority for Part 10 continues to read as follows:

Authority: 42 U.S.C. 4321 *et seq.*; E.O. 11514 of March 7, 1970, 35 FR 4247, as amended by E.O. 11991 of March 24, 1977, 3 CFR, 1977 Comp., p. 123; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127 of March 31, 1979, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148 of July 20, 1979, 44 FR 43239, 3 CFR, 1979 Comp., p. 412, as amended.

§ 10.8 [Amended]

6. Revise 44 CFR 10.8 (d)(2)(xix)(N) to read ''Fire Management Assistance Grants.''

7. Add Part 204 to read as follows:

PART 204—FIRE MANAGEMENT ASSISTANCE GRANT PROGRAM

Subpart A—General

Sec.
204.1 Purpose.
204.2 Scope.
204.3 Definitions used throughout this part.
204.4–204.20 [Reserved]

Subpart B—Declaration Process

204.21 Fire management assistance declaration criteria.
204.22 Submitting a request for a fire management assistance declaration.
204.23 Processing a request for a fire management assistance declaration.
204.24 Determination on request for a fire management assistance declaration.
204.25 FEMA-State Agreement for Fire Management Assistance Grant Program.
204.26 Appeal of fire management assistance declaration denial.
204.27–204.40 [Reserved]

Subpart C—Eligibility

204.41 Applicant eligibility.
204.42 Eligible costs.
204.43 Ineligible costs.
204.44–204.50 [Reserved]

Subpart D—Grant Application Procedures

204.51 Application and approval procedures for a fire management assistance grant.
204.52 Application and approval procedures for a subgrant under a fire management assistance grant.
204.53 Certifying costs and payments.
204.54 Appeals.
204.55–204.60 [Reserved]

Subpart E—Grant Administration

204.61 Cost share.
204.62 Duplication and recovery of assistance.
204.63 Allowable costs.
204.64 Reporting and audit requirements.

Authority: Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121–5206; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; and E.O. 12673, 54 FR 12571, 3 CFR, 1989 Comp., p. 214.

Subpart A—General

§ 204.1 Purpose.

This part provides information on the procedures for the declaration and grants management processes for the Fire Management Assistance Grant Program in accordance with the provisions of section 420 of the Stafford Act. This part also details applicant eligibility and the eligibility of costs to be considered under the program. We (FEMA) will actively work with State and Tribal emergency managers and foresters on the efficient delivery of fire management assistance as directed by this part.

§ 204.2 Scope.

This part is intended for those individuals responsible for requesting declarations and administering grants under the Fire Management Assistance Grant Program, as well as those applying for assistance under the program.

§ 204.3 Definitions used throughout this part.

Applicant. A State or Indian tribal government submitting an application to us for a fire management assistance grant, or a State, local, or Indian tribal government submitting an application to the Grantee for a subgrant under an approved fire management assistance grant.

Associate Director. The Associate Director or Assistant Director, as applicable, of the Readiness, Response and Recovery Directorate of FEMA, or his/her designated representative.

Declared fire. An uncontrolled fire or fire complex, threatening such destruction as would constitute a major disaster, which the Associate Director has approved in response to a State's request for a fire management assistance declaration and in accordance with the criteria listed in § 204.21.

Demobilization. The process and procedures for deactivating, disassembling, and transporting back to their point of origin all resources that had been provided to respond to and support a declared fire.

FEMA Form 90–91. see Project Worksheet.

Fire complex. Two or more individual fires located in the same general area, which are assigned to a single Incident Commander.

Governor's Authorized Representative (GAR). The person empowered by the Governor to execute, on behalf of the State, all necessary documents for fire management assistance, including the request for a fire management assistance declaration.

Grant. An award of financial assistance, including cooperative agreements, by FEMA to an eligible Grantee. The grant award will be based on the projected amount of total eligible costs for which a State submits an application and that FEMA approves related to a declared fire.

Grantee. The Grantee is the government to which a grant is awarded which is accountable for the use of the funds provided. The Grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document. Generally, the State, as designated in the FEMA-State Agreement for the Fire Management Assistance Grant Program, is the Grantee. However, after a declaration, an Indian tribal government may choose to be a Grantee, or it may act as a subgrantee under the State. An Indian tribal government acting as Grantee will assume the responsibilities of a ''state'', as described in this Part, for the purpose of administering the grant.

Hazard mitigation plan. A plan to develop actions the State, local, or tribal government will take to reduce the risk to people and property from all hazards. The intent of hazard mitigation planning under the Fire Management Assistance Grant Program is to identify wildfire hazards and cost-effective mitigation alternatives that produce long-term benefits. We address mitigation of fire hazards as part of the State's comprehensive Hazard Mitigation Plan, described in 44 CFR part 206, subpart M.

Incident commander. The ranking official responsible for overseeing the management of fire operations, planning, logistics, and finances of the field response.

Incident period. The time interval during which the declared fire occurs. The Regional Director, in consultation with the Governor's Authorized Representative and the Principal Advisor, will establish the incident period. Generally, costs must be incurred during the incident period to be considered eligible.

Indian tribal government. An Indian tribal government is any Federally recognized governing body of an Indian or Alaska Native tribe, band, nation, pueblo, village, or community that the Secretary of Interior acknowledges to exist as an Indian tribe under the Federally Recognized Tribe List Act of 1994, 25 U.S.C. 479a. This does not include Alaska Native corporations, the ownership of which is vested in private individuals.

Individual assistance. Supplementary Federal assistance provided under the Stafford Act to individuals and families adversely affected by a major disaster or an emergency. Such assistance may be provided directly by the Federal Government or through State or local governments or disaster relief organizations. For further information, see subparts D, E, and F of part 206.

Local government. A local government is any county, municipality, city, town, township, public authority, school district, special district, intrastate district, council of governments (regardless of whether the council of governments is incorporated as a nonprofit corporation under State law), regional or interstate government entity, or agency or instrumentality of a local government; any Indian tribal government or authorized tribal organization, or Alaska Native village or organization; and any rural community, unincorporated town or village, or other public entity, for which an application for assistance is made by a State or political subdivision of a State.

Mitigation, management, and control. Those activities undertaken, generally during the incident period of a declared fire, to minimize immediate adverse effects and to manage and control the fire. Eligible activities may include associated emergency work and pre-positioning directly related to the declared fire.

Mobilization. The process and procedures used for activating, assembling, and transporting all resources that the Grantee requested to respond to support a declared fire.

Performance Period. The time interval designated in block 13 on the Application for Federal Assistance (Standard Form 424) for the Grantee and all subgrantees to submit eligible costs and have those costs processed, obligated, and closed out by FEMA.

Pre-positioning. Moving existing fire prevention or suppression resources from an area of lower fire danger to one of higher fire danger in anticipation of an increase in fire activity likely to constitute the threat of a major disaster.

Principal advisor. An individual appointed by the Forest Service, United States Department of Agriculture, or Bureau of Land Management, Department of the Interior, who is responsible for providing FEMA with a technical assessment of the fire or fire complex for which a State is requesting a fire management assistance declaration. The Principal Advisor also frequently participates with FEMA on other wildland fire initiatives.

Project worksheet. FEMA Form 90–91, which identifies actual costs incurred by eligible applicants as a result of the eligible firefighting activities.

Public assistance. Supplementary Federal assistance provided under the Stafford Act to State and local governments or certain private, nonprofit organizations for eligible emergency measures and repair, restoration, and replacement of damaged facilities. For further information, see Subparts G and H of Part 206.

Regional Director. A director of a regional office of FEMA, or his/her designated representative.

Request for Federal Assistance. See Standard Form (SF) 424.

Standard Form (SF) 424. The SF 424 is the Request for Federal Assistance. This is the form the State submits to apply for a grant under a fire management assistance declaration.

Subgrant. An award of financial assistance under a grant by a Grantee to an eligible subgrantee.

Subgrantee. An applicant that is awarded a subgrant and is accountable to the Grantee for the use of grant funding provided.

Threat of a major disaster. The potential impact of the fire or fire complex is of a severity and magnitude that would result in a presidential major disaster declaration for the Public Assistance Program, the Individual Assistance Program, or both.

Uncontrolled fire. Any fire not safely confined to predetermined control lines as established by firefighting resources.

We, our, us mean FEMA.

§§ 204.4–204.20 [Reserved]

Subpart B—Declaration Process

§ 204.21 Fire management assistance declaration criteria.

(a) *Determinations.* We will approve declarations for fire management assistance when the Associate Director determines that a fire or fire complex threatens such destruction as would constitute a major disaster.

(b) *Evaluation criteria.* We will evaluate the threat posed by a fire or fire complex based on consideration of the following specific criteria:

(1) Threat to lives and improved property, including threats to critical facilities/infrastructure, and critical watershed areas;

(2) Availability of State and local firefighting resources;

(3) High fire danger conditions, as indicated by nationally accepted indices such as the National Fire Danger Ratings System;

(4) Potential major economic impact.

§ 204.22 Submitting a request for a fire management assistance declaration.

The Governor of a State, or the Governor's Authorized Representative (GAR), may submit a request for a fire management assistance declaration. The request must be submitted while the fire is burning uncontrolled and threatens such destruction as would constitute a major disaster. The request must be submitted to the Regional Director and should address the relevant criteria listed in § 204.21, with supporting documentation that contains factual data and professional estimates on the fire or fire complex. To ensure that we can process a State's request for a fire management assistance declaration as expeditiously as possible, the State should transmit the request by telephone, promptly followed by written documentation (FEMA Form 90–58).

§ 204.23 Processing a request for a fire management assistance declaration.

(a) In processing a State's request for a fire management assistance

declaration, the Regional Director, in coordination with the Principal Advisor, will verify the information submitted in the State's request.

(b) The Regional Director will then forward the State's request to the Associate Director for determination along with the Principal Advisor's Assessment and the Regional Summary.

(1) *Principal Advisor's Assessment.* The Principal Advisor, at the request of the Regional Director, is responsible for providing us with a technical assessment of the fire or fire complex for which the State is requesting a fire management assistance declaration. The Principal Advisor may consult with State agencies, usually emergency management or forestry, as well as the Incident Commander, in order to provide us with an accurate assessment.

(2) *Regional summary and recommendation.* Upon obtaining all necessary information on the fire or fire complex from the State and the Principal Advisor, the Regional Director will provide the Associate Director with a summary and recommendation to accompany the State's request. The summary and recommendation should include a discussion of the threat of a major disaster.

§ 204.24 Determination on request for a fire management assistance declaration.

The Associate Director will review all information submitted in the State's request along with the Principal Advisor's assessment and Regional summary and render a determination. The determination will be based on the conditions of the fire or fire complex existing at the time of the State's request. When possible, the Associate Director will evaluate the request and make a determination within several hours. Once the Associate Director makes a determination, the Associate Director will promptly notify the Regional Director. The Regional Director will then inform the State of the determination.

§ 204.25 FEMA–State agreement for fire management assistance grant program.

(a) After a State's request for a fire management assistance declaration has been approved, the Governor and Regional Director will enter into a standing FEMA–State Agreement (the Agreement) for the declared fire and for future declared fires in that calendar year. The State must have a signed and up-to-date FEMA–State Agreement before receiving Federal funding for fire management assistance grants. FEMA will provide no funding absent a signed and up-to-date Agreement. An Indian tribal government serving as Grantee, must sign a FEMA–Tribal Agreement, modeled upon the FEMA–State Agreement.

(b) The Agreement states the understandings, commitments, and conditions under which we will provide Federal assistance, including the cost share provision and articles of agreement necessary for the administration of grants approved under fire management assistance declarations. The Agreement must also identify the State legislative authority for firefighting, as well as the State's compliance with the laws, regulations, and other provisions applicable to the Fire Management Assistance Grant Program.

(c) For each subsequently declared fire within the calendar year, the parties must add a properly executed amendment, which defines the incident period and contains the official declaration number. Other amendments modifying the standing Agreement may be added throughout the year to reflect changes in the program or signatory parties.

§ 204.26 Appeal of fire management assistance declaration denial.

(a) *Submitting an appeal.* When we deny a State's request for a fire management assistance declaration, the Governor or GAR may appeal the decision in writing within 30 days after the date of the letter denying the request. The State should submit this one-time request for reconsideration in writing, with appropriate additional information, to the Associate Director through the Regional Director. The Associate Director will notify the State of his/her determination on the appeal, in writing, within 90 days of receipt of the appeal or the receipt of additional requested information.

(b) *Requesting a time-extension.* The Associate Director may extend the 30-day period provided that the Governor or the GAR submits a written request for such an extension within the 30-day period. The Associate Director will evaluate the need for an extension based on the reasons cited in the request and either approve or deny the request for an extension.

§§ 204.27–204.40 [Reserved]

Subpart C—Eligibility

§ 204.41 Applicant eligibility.

(a) The following entities are eligible to apply through a State Grantee for a subgrant under an approved fire management assistance grant:

(1) State agencies;

(2) Local governments; and

(3) Indian tribal governments.

(b) Entities that are not eligible to apply for a subgrant as identified in (a), such as privately owned entities and volunteer firefighting organizations, may be reimbursed through a contract or compact with an eligible applicant for eligible costs associated with the fire or fire complex.

(c) Eligibility is contingent upon a finding that the Incident Commander or comparable State official requested the applying entity's resources.

(d) The activities performed must be the legal responsibility of the applying entity, required as the result of the declared fire, and located within the designated area.

§ 204.42 Eligible costs.

(a) *General.* (1) All eligible work and related costs must be associated with the incident period of a declared fire.

(2) Before obligating Federal funds the Regional Director must review and approve the initial grant application, along with Project Worksheets submitted with the application and any subsequent amendments to the application.

(3) Grantees will award Federal funds to subgrantees under State law and procedure and complying with 44 CFR part 13.

(b) *Equipment and supplies.* Eligible costs include:

(1) Personal comfort and safety items normally provided by the State under field conditions for firefighter health and safety, including:

(2) Firefighting supplies, tools, materials, expended or lost, to the extent not covered by reasonable insurance, will be replaced with comparable items.

(3) Operation and maintenance costs of publicly owned, contracted, rented, or volunteer firefighting department equipment used in eligible firefighting activities to the extent any of these costs are not included in applicable equipment rates.

(4) Use of U.S. Government-owned equipment based on reasonable costs as billed by the Federal agency and paid by the State. (Only direct costs for use of Federal Excess Personal Property (FEPP) vehicles and equipment on loan to State Forestry and local cooperators may be eligible.)

(5) Repair of equipment damaged in firefighting activities to the extent not covered by reasonable insurance. We will use the lowest applicable equipment rates, or other rates that we determine, to calculate the eligible cost of repairs.

(6) Replacement of equipment lost or destroyed in firefighting activities, to the extent not covered by reasonable

insurance, will be replaced with comparable equipment.

(b) *Labor costs.* Eligible costs include:

(1) Overtime for permanent or reassigned State and local employees.

(2) Regular time and overtime for temporary and contract employees hired to perform fire-related activities.

(d) *Travel and per diem costs.* Eligible costs include:

(1) Travel and per diem of employees who are providing services directly associated with eligible fire-related activities may be eligible.

(2) Provision of field camps and meals when made available in place of per diem;

(e) *Pre-positioning Costs.* (1) The actual costs of pre-positioning Federal, out-of-State (including compact), and international resources for a limited period may be eligible when those resources are used in response to a declared fire.

(2) The Regional Director must approve all pre-positioning costs.

(i) Upon approval of a State's request for a fire management assistance declaration by the Associate Director, the State should immediately notify the Regional Director of its intention to seek funding for pre-positioning resources.

(ii) The State must document the number of pre-positioned resources to be funded and their respective locations throughout the State, estimate the cost of the pre-positioned resources that were used on the declared fire and the amount of time the resources were pre-positioned, and provide a detailed explanation of the need to fund the pre-positioned resources .

(iii) The State will base the detailed explanation on recognized scientific indicators, that include, but are not limited to, drought indices, short-term weather forecasts, the current number of fires burning in the State, and the availability of in-State firefighting resources. The State may also include other quantitative indicators with which to measure the increased risk of the threat of a major disaster.

(iv) Based on the information contained in the State's notification, the Regional Director will determine the number of days of pre-positioning to be approved for Federal funding, up to a maximum of 21 days before the fire declaration.

(3) Upon rendering his/her determination on pre-positioning costs, the Regional Director will notify the Associate Director of his/her determination.

(f) *Emergency work.* We may authorize the use of section 403 of the Stafford Act, Essential Assistance, under an approved fire management assistance grant when directly related to the mitigation, management, and control of the declared fire. Essential assistance activities that may be eligible include, but are not limited to, police barricading and traffic control, extraordinary emergency operations center expenses, evacuations and sheltering, search and rescue, arson investigation teams, public information, and the limited removal of trees that pose a threat to the general public.

(g) *Temporary repair of damage caused by firefighting activities.* Temporary repair of damage caused by eligible firefighting activities listed in this subpart involves short-term actions to repair damage directly caused by the firefighting effort or activities. This includes minimal repairs to bulldozer lines, camps, and staging areas to address safety concerns; as well as minimal repairs to facilities damaged by the firefighting activities such as fences, buildings, bridges, roads, etc. All temporary repair work must be completed within thirty days of the close of the incident period for the declared fire.

(h) *Mobilization and demobilization.* Costs for mobilization to, and demobilization from, a declared fire may be eligible for reimbursement. Demobilization may be claimed at a delayed date if deployment involved one or more declared fires. If resources are being used on more than one declared fire, mobilization and demobilization costs must be claimed against the first declared fire.

(i) *Fires on co-mingled Federal/State lands.* Reasonable costs for the mitigation, management, and control of a declared fire burning on co-mingled Federal and State land may be eligible in cases where the State has a responsibility for suppression activities under an agreement to perform such action on a non-reimbursable basis. (This provision is an exception to normal FEMA policy under the Stafford Act and is intended to accommodate only those rare instances that involve State firefighting on a Stafford Act section 420 fire incident involving co-mingled Federal/State and privately-owned forest or grassland.)

§ 204.43 Ineligible costs.

Costs not directly associated with the incident period are ineligible. Ineligible costs include the following:

(a) Costs incurred in the mitigation, management, and control of undeclared fires;

(b) Costs related to planning, pre-suppression (*i.e.,* cutting fire-breaks without the presence of an imminent threat, training, road widening, and other similar activities), and recovery (*i.e.,* land rehabilitation activities, such as seeding, planting operations, and erosion control, or the salvage of timber and other materials, and restoration of facilities damaged by fire);

(c) Costs for the straight or regular time salaries and benefits of a subgrantee's permanently employed or reassigned personnel;

(d) Costs for mitigation, management, and control of a declared fire on co-mingled Federal land when such costs are reimbursable to the State by a Federal agency under another statute (See 44 CFR part 51);

(e) Fires fought on Federal land are generally the responsibility of the Federal Agency that owns or manages the land. Costs incurred while fighting fires on federally owned land are not eligible under the Fire Management Assistance Grant Program except as noted in § 204.42(i).

§§ 204.44–204.50 [Reserved]

Subpart D—Application Procedures

§ 204.51 Application and approval procedures for a fire management assistance grant.

(a) *Preparing and submitting an application.* (1) After the approval of a fire management assistance declaration, the State may submit an application package for a grant to the Regional Director. The application package must include the SF 424 (Request for Federal Assistance) and FEMA Form 20–16a (Summary of Assurances—Non-construction Programs), as well as supporting documentation for the budget.

(2) The State should submit its grant application within 9 months of the declaration. Upon receipt of the written request from the State, the Regional Director may grant an extension for up to 3 months. The State's request must include a justification for the extension.

(b) *Fire cost threshold.* (1) We will approve the initial grant award to the State when we determine that the State's application demonstrates either of the following:

(i) Total eligible costs for the declared fire meet or exceed the individual fire cost threshold; or

(ii) Total costs of all declared and non-declared fires for which a State has assumed responsibility in a given calendar year meet the cumulative fire cost threshold.

(2) The individual fire cost threshold for a State is the greater of the following:

(i) $100,000; or

(ii) Five percent × $1.07 × the State population, adjusted annually for inflation using the Consumer Price

Index for All Urban Consumers published annually by the Department of Labor.

(3) The cumulative fire cost threshold for a State is the greater of the following:

(i) $500,000; or

(ii) Three times the five percent × $1.07 × the State population as described in § 204.51(b)(2)(ii).

(4) States must document the total eligible costs for a declared fire on Project Worksheets, which they must submit with the grant application.

(5) We will not consider the costs of pre-positioning resources for the purposes of determining whether the grant application meets the fire cost threshold.

(6) When the State's total eligible costs associated with the fire management assistance declaration meet or exceed the fire cost threshold eligible costs will be cost shared in accordance with § 204.61.

(c) *Approval of the State's grant application.* The Regional Director has 45 days from receipt the State's grant application or an amendment to the State's grant application, including attached supporting Project Worksheet(s), to review and approve or deny the grant application or amendment; or to notify the Grantee of a delay in processing funding.

(d) *Obligation of the grant.* Before we approve the State's grant application, the State must have an up-to-date State Administrative Plan and a Hazard Mitigation Plan that has been reviewed and approved by the Regional Director. Once these plans are approved by the Regional Director, the State's grant application may be approved and we may begin to obligate the Federal share of funding for subgrants to the Grantee.

(1) State administrative plan.

(i) The State must develop an Administrative Plan (or have a current Administrative Plan on file with FEMA) that describes the procedures for the administration of the Fire Management Assistance Grant Program. The Plan will include, at a minimum, the items listed below:

(A) The designation of the State agency or agencies which will have responsibility for program administration.

(B) The identification of staffing functions for the Fire Management Assistance Program, the sources of staff to fill these functions, and the management and oversight responsibilities of each.

(C) The procedures for:

(*1*) Notifying potential applicants of the availability of the program;

(*2*) Assisting FEMA in determining applicant eligibility;

(*3*) Submitting and reviewing subgrant applications;

(*4*) Processing payment for subgrants;

(*5*) Submitting, reviewing, and accepting subgrant performance and financial reports;

(*6*) Monitoring, close-out, and audit and reconciliation of subgrants;

(*7*) Recovering funds for disallowed costs;

(*8*) Processing appeal requests and requests for time extensions; and

(*9*) Providing technical assistance to applicants and subgrant recipients, including briefings for potential applicants and materials on the application procedures, program eligibility guidance and program deadlines.

(ii) The Grantee may request the Regional Director to provide technical assistance in the preparation of the State Administrative Plan.

(2) Hazard Mitigation Plan. As a requirement of receiving funding under a fire management assistance grant a State or tribal organization, acting as Grantee, must:

(i) Develop a Hazard Mitigation Plan in accordance with 44 CFR part 206, subpart M, that addresses wildfire risks and mitigation measures; or

(ii) Incorporate wildfire mitigation into the existing Hazard Mitigation Plan developed and approved under 44 CFR part 206, subpart M that also addresses wildfire risk and contains a wildfire mitigation strategy and related mitigation initiatives.

§ 204.52 Application and approval procedures for a subgrant under a fire management assistance grant.

(a) *Request for Fire Management Assistance.* (1) State, local, and tribal governments interested in applying for subgrants under an approved fire management assistance grant must submit a Request for Fire Management Assistance to the Grantee in accordance with State procedures and within timelines set by the Grantee, but no longer than 30 days after the close of the incident period.

(2) The Grantee will review and forward the Request to the Regional Director for final review and determination. The Grantee may also forward a recommendation for approval of the Request to the Regional Director when appropriate.

(3) The Regional Director will approve or deny the request based on the eligibility requirements outlined in § 204.41.

(4) The Regional Director will notify the Grantee of his/her determination; the Grantee will inform the applicant.

(b) Preparing a Project Worksheet. (1) Once the Regional Director approves an applicant's Request for Fire Management Assistance, the Regional Director's staff may begin to work with the Grantee and local staff to prepare Project Worksheets (FEMA Form 90–91).

(2) The Regional Director may request the Principal Advisor to assist in the preparation of Project Worksheets.

(3) The State will be the primary contact for transactions with and on behalf of the applicant.

(c) *Submitting a Project Worksheet.* (1) Applicants should submit all Project Worksheets through the Grantee for approval and transmittal to the Regional Director as amendments to the State's application.

(2) The Grantee will determine the deadline for an applicant to submit completed Project Worksheets, but the deadline must be no later than six months from close of the incident period.

(3) At the request of the Grantee, the Regional Director may grant an extension of up to three months. The Grantee must include a justification in its request for an extension.

(4) Project Worksheets will not be accepted after the deadline and extension specified in paragraphs (c)(2) and (c)(3) of this section has expired.

(5) *$1,000 Project Worksheet minimum.* When the costs reported are less than $1,000, that work is not eligible and we will not approve that Project Worksheet.

§ 204.53 Certifying costs and payments.

(a) By submitting applicants' Project Worksheets to us, the Grantee is certifying that all costs reported on applicant Project Worksheets were incurred for work that was performed in compliance with FEMA laws, regulations, policy and guidance applicable to the Fire Management Assistance Grant Program, as well as with the terms and conditions outlined for the administration of the grant in the FEMA-State Agreement for the Fire Management Assistance Grant Program.

(b) Advancement/Reimbursement for State grant costs will be processed as follows:

(1) Through the U.S. Department of Health and Human Services SMARTLINK system; and

(2) In compliance with 44 CFR 13.21 and U. S. Treasury 31 CFR part 205, Cash Management Improvement Act.

§ 204.54 Appeals.

An eligible applicant, subgrantee, or grantee may appeal any determination we make related to an application for the provision of Federal assistance according to the procedures below.

(a) *Format and content.* The applicant or subgrantee will make the appeal in writing through the grantee to the Regional Director. The grantee will review and evaluate all subgrantee appeals before submission to the Regional Director. The grantee may make grantee-related appeals to the Regional Director. The appeal will contain documented justification supporting the appellant's position, specifying the monetary figure in dispute and the provisions in Federal law, regulation, or policy with which the appellant believes the initial action was inconsistent.

(b) *Levels of appeal.* (1) The Regional Director will consider first appeals for fire management assistance grant-related decisions under subparts A through E of this part.

(2) The Associate Director will consider appeals of the Regional Director's decision on any first appeal under paragraph (b)(1) of this section.

(c) *Time limits.* (1) Appellants must file appeals within 60 days after receipt of a notice of the action that is being appealed.

(2) The grantee will review and forward appeals from an applicant or subgrantee, with a written recommendation, to the Regional Director within 60 days of receipt.

(3) Within 90 days following receipt of an appeal, the Regional Director (for first appeals) or Associate Director (for second appeals) will notify the grantee in writing of the disposition of the appeal or of the need for additional information. A request by the Regional Director or Associate Director for additional information will include a date by which the information must be provided. Within 90 days following the receipt of the requested additional information or following expiration of the period for providing the information, the Regional Director or Associate Director will notify the grantee in writing of the disposition of the appeal. If the decision is to grant the appeal, the Regional Director will take appropriate implementing action.

(d) *Technical advice.* In appeals involving highly technical issues, the Regional Director or Associate Director may, at his or her discretion, submit the appeal to an independent scientific or technical person or group having expertise in the subject matter of the appeal for advice or recommendation. The period for this technical review may be in addition to other allotted time periods. Within 90 days of receipt of the report, the Regional Director or Associate Director will notify the grantee in writing of the disposition of the appeal.

(e) The decision of the Associate Director at the second appeal level will be the final administrative decision of FEMA.

§§ 204.55–204.60 [Reserved]

Subpart E—Grant Administration

§ 204.61 Cost share.

(a) All fire management assistance grants are subject to a cost share. The Federal cost share for fire management assistance grants is seventy-five percent (75%).

(b) As stated in § 204.25, the cost share provision will be outlined in the terms and conditions of the FEMA-State Agreement for the Fire Management Assistance Grant Program.

§ 204.62 Duplication and recovery of assistance.

(a) *Duplication of benefits.* We provide supplementary assistance under the Stafford Act, which generally may not duplicate benefits received by or available to the applicant from insurance, other assistance programs, legal awards, or any other source to address the same purpose. An applicant must notify us of all benefits that it receives or anticipates from other sources for the same purpose, and must seek all such benefits available to them. We will reduce the grant by the amounts available for the same purpose from another source. We may provide assistance under this Part when other benefits are available to an applicant, but the applicant will be liable to us for any duplicative amounts that it receives or has available to it from other sources, and must repay us for such amounts.

(b) *Duplication of programs.* We will not provide assistance under this part for activities for which another Federal agency has more specific or primary authority to provide assistance for the same purpose. We may disallow or recoup amounts that fall within another Federal agency's authority. We may provide assistance under this part, but the applicant must agree to seek assistance from the appropriate Federal agency and to repay us for amounts that are within another Agency's authority.

(c) *Negligence.* We will provide no assistance to an applicant for costs attributable to applicant's own negligence. If the applicant suspects negligence by a third party for causing a condition for which we made assistance available under this Part, the applicant is responsible for taking all reasonable steps to recover all costs attributable to the negligence of the third party. We generally consider such amounts to be duplicated benefits available to the Grantee or subgrantee, and will treat them consistent with (a) of this section.

(d) *Intentional acts.* Any person who intentionally causes a condition for which assistance is provided under this part shall be liable to the United States to the extent that we incur costs attributable to the intentional act or omission that caused the condition. We may provide assistance under this part, but it will be conditioned on an agreement by the applicant to cooperate with us in efforts to recover the cost of the assistance from the liable party. A person shall not be liable under this section as a result of actions the person takes or omits in the course of rendering care or assistance in response to the fire.

§ 204.63 Allowable costs.

44 CFR 13.22 establishes general policies for determining allowable costs.

(a) We will reimburse direct costs for the administration of a fire management assistance grant under 44 CFR part 13.

(b) We will reimburse indirect costs for the administration of a fire management assistance grant in compliance with the Grantee's approved indirect cost rate under OMB Circular A–87.

§ 204.64 Reporting and audit requirements

(a) *Reporting.* Within 90-days of the Performance Period expiration date, the State will submit a final Financial Status Report (FEMA Form 20–10), which reports all costs incurred within the incident period and all administrative costs incurred within the performance period; and

(b) *Audit.* (1) Audits will be performed, for both the Grantee and the subgrantees, under 44 CFR 13.26.

(2) FEMA may elect to conduct a program-specific Federal audit on the Fire Management Assistance Grant or a subgrant.

PART 206—FEDERAL DISASTER ASSISTANCE FOR DISASTERS DECLARED ON OR AFTER NOVEMBER 23, 1988

7. The authority citation for part 206 continues to read as follows:

Authority: The Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.*; Reorganization Plan No. 3 of 1978, 43 FR 41943, 3 CFR, 1978 Comp., p.329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376; E.O. 12148, 44 FR 43239, 3 CFR, 1979 Comp., p. 412; and E.O. 12673, 54 12571, 3 CFR, 1989 Comp., p. 214.

8. Amend § 206.2 as follows:

a. Revise paragraph (a)(3)(i) to read ''Unless otherwise specified in subparts A through K of this part, the Associate Director or Assistant Director of the

Readiness, Response and Recovery Directorate, or his/her designated representative.''

b. Revise paragraph (a)(20) to read as follows:

§ 206.2 Definitions.

(a) * * *

(20) *Public Assistance:* Supplementary Federal assistance provided under the Stafford Act to State and local governments or certain private, nonprofit organizations other than assistance for the direct benefit of individuals and families. For further information, see subparts G and H of this part. Fire Management Assistance Grants under section 420 of the Stafford Act are also considered Public Assistance. See subpart K of this part and part 204 of this chapter.

* * * * *

Dated: November 8, 2001.

Michael D. Brown,

Acting Deputy Director.

[FR Doc. 01–28577 Filed 11–13–01; 8:45 am]

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Federal Aviation Administration

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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 ''P L U S'' (Public Laws Update Service) on 202–523–6641. This list is also available online at *http://www.nara.gov/fedreg/plawcurr.html*.

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/nara005.html*. Some laws may not yet be available.

H.R. 2311/P.L. 107–66

Energy and Water Development Appropriations Act, 2002 (Nov. 12, 2001; 115 Stat. 486)

H.R. 2590/P.L. 107–67

Treasury and General Government Appropriations Act, 2002 (Nov. 12, 2001; 115 Stat. 514)

H.R. 2647/P.L. 107–68

Making appropriations for the Legislative Branch for the fiscal year ending September 30, 2002, and for other purposes. (Nov. 12, 2001; 115 Stat. 560)

H.R. 2925/P.L. 107–69

To amend the Reclamation Recreation Management Act of 1992 in order to provide for the security of dams, facilities, and resources under the jurisdiction of the Bureau of Reclamation. (Nov. 12, 2001; 115 Stat. 593)

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