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The President

Memorandum of November 6, 2002

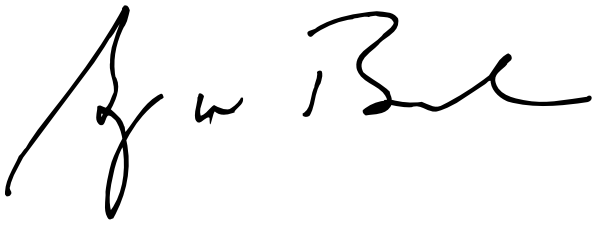
Report to the Congress Regarding Conditions in Burma and U.S. Policy Toward Burma

Memorandum for the Secretary of State

Pursuant to the requirements set forth under the heading ''Policy Toward Burma'' in section 570(d) of the Fiscal Year 1997 Foreign Operations Appropriations Act, as contained in the Omnibus Consolidated Appropriations Act (Public Law 104–208), a report is required every 6 months following enactment concerning:

1) progress toward democratization in Burma;
2) progress on improving the quality of life of the Burmese people, including progress on market reforms, living standards, labor standards, use of forced labor in the tourism industry, and environmental quality; and
3) progress made in developing a comprehensive, multilateral strategy to bring democracy to and improve human rights practices and the quality of life in Burma, including the development of a dialogue between the State Peace and Development Council and democratic opposition groups in Burma.

You are hereby authorized and directed to transmit the attached report fulfilling these requirements to the appropriate committees of the Congress and to arrange for publication in the **Federal Register**.



THE WHITE HOUSE,
Washington, November 6, 2002.

Billing code 4710–10–M

Plan for Implementation of Section 570 of Public Law 104–208 (Omnibus Appropriations Act, Fiscal Year 1997)

Conditions in Burma and U.S. Policy Toward Burma for the Period March 28, 2002–September 27, 2002

Introduction and Summary

Progress towards a real dialogue between Burma's military regime and the NLD's Aung San Suu Kyi took a step forward in May with the government's decision to release her from effective house arrest. Since then, Aung San Suu Kyi has been free to carry out her party duties as General Secretary, and, in a change from conditions in her pre-detention days, to travel freely throughout Burma. Since her release, Aung San Suu Kyi has made trips to Moulmein, Mandalay, and Hpa'an. She has also presided over a slow revival of the NLD as a political party. Virtually crushed by the government during the days leading up to Aung San Suu Kyi's detention in September 2000, the NLD has now re-assembled most of its party leadership and reopened 62 out of over 300 offices throughout Burma. It has also benefited from the release of more than 300 of its party members who had been held as political prisoners. Unfortunately, the steps the government has taken to rebuild confidence with the NLD have not been matched by equally serious steps towards a political dialogue on constitutional issues. As a result, questions still remain regarding the government's overall commitment to political transition.

In regard to human rights, the government's record remains poor. The regime has, however, improved its cooperation with international human rights organizations, finally agreeing to allow the ILO to appoint a liaison officer in Rangoon and to conduct on-site surveys in Burma of areas along the Thai/Burmese border that have been identified by Amnesty International and others as ''hot spots'' for forced labor. It has also continued to work with the International Committee of the Red Cross on improvements in prison conditions and released almost 400 political prisoners over the past two years. Unfortunately, hundreds remain in prison, several students were arrested for expressing political dissent in recent months and substantive improvements in prison conditions have yet to be realized. We are also deeply concerned by ongoing egregious human rights abuses of civilians in ethnic regions, including killing, torture, rape, forced labor, and forced relocations. The regime has responded to accusations leveled by human rights groups in Thailand of widespread army rapes in Shan State with investigations by three separate teams from the Burmese Army, the Ministry of Home Affairs, and the Myanmar National Women's Cooperative Association, but concluded—incredibly—that there was no evidence that Burmese Army personnel had been involved in any rapes in Shan State between 1996 and 2001. That conclusion, together with the lack of any international involvement in the investigation, has left international observers in serious doubt about the government's willingness to deal effectively with Burmese Army abuses in areas of internal conflict.

The areas of Burma under effective control of ethnic groups make Burma one of the world's largest producers of opium, heroin, and amphetamine-type stimulants, despite the fact that its overall output of opium and heroin has declined sharply in recent years, partly as a result of improved Burmese government counternarcotics efforts. Opium production in Burma has now declined for five straight years, and, in 2002, Burma produced less than one-quarter the opium and heroin that it did six years before. Unfortunately, as opium production has declined, the production of methamphetamines has increased, particularly in outlying ethnic majority regions governed by former insurgents, areas that are not under firm government control. According to some estimates, as many as 400 to 800 million methamphetamine tablets may be produced in Burma each year, although these estimates are difficult to verify.

In July, the U.S. Centers for Disease Control and Prevention conducted a countrywide assessment of the HIV/AIDS pandemic in Burma and concluded that it had shifted from an epidemic limited to high-risk groups to a widespread epidemic affecting the general population. The government continued to downplay the extent of the epidemic in the country; however, both the government and the NLD are very interested in international assistance to combat HIV/AIDS. USAID is initiating a new $1 million HIV/AIDS prevention program in the country; assistance will be provided through international NGOs—no assistance will be directed to the government.

There are few signs of any government commitment to economic reform, despite rapidly deteriorating economic conditions. Two problems stand out. In the energy sector, a run of disastrous public investment decisions has left the economy largely without fuel for either its electric generating facilities or many of its basic industries. In the fiscal budget the situation is even more desperate. There, the deficits of Burma's state-owned enterprises are estimated to absorb all of the revenues collected by the government, leaving the government proper (i.e., the army, the navy, the health and education services, and all ministerial operations) to run on monies borrowed from the Central Bank. This in turn has produced a rapid expansion in the money supply, a commensurate surge in inflation, and a sharp depreciation in the value of the domestic currency (the kyat). It has also undermined public confidence in the military government's ability to manage the economy over the long run.

U.S. policy goals in Burma include progress towards democracy and national reconciliation, respect for human rights, a more effective counternarcotics effort, counterterrorism efforts, regional stability, HIV/AIDS mitigation, and accounting for missing servicemen from World War II. We encourage talks between the leader of the National League for Democracy (NLD) Aung San Suu Kyi and the military, recognizing that these are the best hope for meaningful democratic change and protection of human rights. Part of our strategy is to consult regularly, at senior levels, with countries with major interests in Burma and/or major concerns regarding Burma's current human rights practices.

In coordination with the European Union and other states, the United States has maintained sanctions on Burma. These include an arms embargo, an investment ban, and other measures. Our goal in applying these sanctions is to encourage a transition to democratic rule and greater respect for human rights. Should there be significant progress towards those goals as a result of dialogue between Aung San Suu Kyi and the military government, the United States would look seriously at measures to support this process of constructive change.

Measuring Progress toward Democratization

At the time of the dramatic release of NLD General Secretary Aung San Suu Kyi on May 6, 2002, the government promised that she would be free to move about the country—a promise it has generally kept in the months since. Initial difficulty in visiting some UN projects appears to have been resolved. Over the past four months Aung San Suu Kyi has traveled to Moulmein, Mandalay, and Hpa'an. On each trip she coordinated travel and security arrangements with the government, but otherwise set her own itinerary. She also met freely with NLD party workers and the general public; however, in line with general restrictions on all political parties in Burma, she was not allowed to hold outdoor rallies or meetings. In Rangoon, similarly, she has resumed her party duties with minimal government interference and has continued to meet with both Burmese and foreign visitors on a regular basis, although the government still limits her access to high-ranking foreigners. Since March, foreign visitors have included UN Special Envoy Razali Ismail, who has facilitated communication between the government and the NLD, Japanese Foreign Minister Kawaguchi, EU Troika representatives, and ambassadors of European and ASEAN countries.

NLD efforts to rebuild itself as a political party have also accelerated to some degree over the past six months. Badly crippled by government repression during the 1990s, the NLD has now re-assembled most of its national leadership (with the notable exception of senior party adviser U Win Tin, who remains in prison). As of September 27, 2002, 62 of the NLD's party offices have re-opened, including 36 of 40 in Rangoon. All of the party's Central Executive Committee members have been released, as have a majority of the party members who were detained during the government's crackdowns in the 1090s. However, 16 of the party's MPs remain in prison. Altogether, 325 NLD party members have been released from prison or house arrest since 2000, leaving about 200 NLD prisoners still in detention.

The NLD has also resumed some normal party activities, including public meetings on major public holidays. However, outdoor meetings are banned (for both the NLD and all other registered political parties) and party elections remain forbidden under a decree first issued by the Central Election Commission in 1990. The government has refused to grant a publication license to the NLD party's newsletter, despite repeated NLD requests for permission to publish. Two student members of the NLD were also recently arrested for carrying banned political literature. The NLD, for its part, has moderated its public criticism of the regime. While it has called repeatedly for democracy in Burma, it has also stated flatly that it is prepared to work with the government on a process of political transition. Aung San Suu Kyi has indicated recently that humanitarian assistance for Burma's people could be welcome, provided that it is delivered through mechanisms that are transparent, accountable, and beneficial to the Burmese people, as opposed to the government. She told EU representatives that economic sanctions are a matter to be decided by individual foreign states.

Despite the steps the government has taken to rebuild confidence with the NLD, it has not yet responded to the NLD's calls for a serious dialogue on constitutional issues, nor has it sketched out a roadmap for reform or a timetable for elections. As a result, doubts remain regarding the government's commitment to dialogue. While it has repeatedly asserted that its goal is a restored democracy, it has yet to convince its critics, including the U.S., that it is genuinely committed to that course. The U.S. continues to recognize the results of the 1990 elections and will continue to push for the full restoration of the civil and political rights of the people of Burma.

Human Rights

The SPDC's human rights record remains poor with repression of political dissent, forced labor, ethnic persecution, lack of religious freedom and trafficking in persons all figuring prominently. Burma was designated a Country of Particular Concern for particularly severe violations religious freedom in 2001. Burma has been the scene of severe human rights abuses, particularly in ethnic minority areas, where there have been many reports of extrajudicial killings, rapes, and disappearances. Some of these were highlighted during the past six months in publications by Amnesty International and groups based on the Thai border. The Department of State's annual Human Rights Country Report on Burma includes credible reports of rape and other atrocities committed by the Burmese military, especially in ethnic minority areas. In June 2002, the Shan Human Rights Foundation (an organization initially related to the Shan United Army, a narcotics-trafficking organization), together with the Shan Women's Action Network, published a report, based on interviews with displaced persons, which alleged that Burmese Army personnel had been involved in multiple rapes involving hundreds of women between 1996 and 2001. The report also argued that the Burmese Army had used rape systematically as a weapon of war in its counter-insurgency operations. The Burmese investigated these charges with three separate teams from the Burmese Army, the Ministry of Home Affairs and the Myanmar National Women's Cooperative Association, but concluded—incredibly—that

there was no evidence that Burmese Army personnel had been involved in any rapes in Shan State during the five-year period covered by the SHRF/SWAN report. Following subsequent international pressure, the Burmese have approached both the International Committee of the Red Cross and UN Special Rapporteur Pinheiro for possible involvement in an investigation, but there remains doubt about the Burmese government's willingness to deal effectively with Burmese Army abuses in areas of internal conflict. We are urging that the UN independently investigate the reports.

The Burmese government dealt more effectively with other allegations of human rights abuses. It has continued to work with the International Committee of the Red Cross on improvements in prison conditions. It has also allowed ICRC to open up five regional offices throughout the country, staffed by 34 international volunteers, to provide protection to ethnic minorities. Similarly, it has allowed the United Nations High Commission on Refugees to maintain a presence in northern Rakhine State, providing support and protection services to more than 230,000 Rohingya Muslims who have returned from Bangladesh. After nearly a decade, however, some 22,000 Rohingya refugees still remain in two refugee camps in Bangladesh. In spite of ongoing repatriation efforts, for the last few years repatriations to Burma have not kept up with the camp birthrates and restrictions on movement in Burma have made life exceedingly difficult for this population. Furthermore, nearly 130,000 other Burmese ethnic minority displaced persons live in several camps along the border in Thailand because they do not feel it is safe to return. Given continued insurgent activity among some ethnic groups, associated human rights abuses are likely to continue.

The government has also made some progress on forced labor, which remains an issue of serious concern to the international community. In November 2000, the International Labor Organization (ILO) Governing Body concluded that the Government of Burma had not taken effective action to deal with the use of forced labor in the country and, for the first time in its history, called on all ILO members to review their policies to ensure that those policies did not support forced labor. The United States strongly supported this decision.

Over the past year, the Government of Burma has slowly begun to work with the ILO on measures to address the problem. In September 2001, it allowed an ILO High Level Team to visit Burma to assess the situation. That team concluded that the GOB had made an ''obvious, but uneven'' effort to curtail the use of forced labor, but that forced labor persisted, particularly in areas where the government was waging active military campaigns against insurgent forces. It also recommended that the ILO establish a permanent presence in Burma. A second ILO team visited Burma in February 2002 to follow up on this recommendation, and eventually agreement was reached with the ILO in Geneva regarding the appointment of an ILO liaison officer, pending the establishment of a permanent ILO office in Rangoon. That liaison officer has since been appointed. The ILO has also identified a permanent representative to serve in Burma. Perhaps most importantly of all, in August 2002, the ILO began field visits to sites along the Thai/Burmese border which have been identified by Amnesty International and other organizations as ''hot spots'' for forced labor and Burmese Army abuse of ethnic minorities. That said, there were continuing signs that forced labor remains a problem, with reports, even in Rangoon, of laborers being dragooned by the military.

Finally, the government has continued with the slow release of political prisoners. Altogether, approximately 400 political prisoners have been released from detention since October 2000. In response to an appeal from UN Special Rapporteur Pinheiro, the government has also released, on humanitarian grounds, approximately 400 women prisoners who either had small children or were pregnant. To date, releases have included a majority of the NLD members held in prison, all members of the NLDs Central Committee, several major ethnic leaders, several student leaders, and all

but 19 of the MPs elected to the 1990 Parliament. Even with these releases, however, hundreds of political prisoners remain in prison or under detention in Burma as of September 2002, including approximately 200 NLD members.

Burma is a Tier 3 human trafficking country that has not developed prevention, protection or law enforcement programs to address fully the serious trafficking problems that plague the country, but has made some progress in recognizing and publicizing the perils of trafficking in persons. It has signed the 1950 Convention for the Suppression of Traffic in Persons and the Prostitution of Others and is a participant in the UN Inter-Agency Project on the reduction of trafficking in the Mekong sub-region although its other international and regional anti-trafficking cooperation is very limited. In a report delivered to the U.S. Government in August, it also highlighted the recent information activities of Myanmar National Committee for Women's Affairs; the enforcement efforts of a newly formed Working Committee for the Prevention of Trafficking in Persons (which is chaired by the Home Minister); the legislation it has applied to combat trafficking; and the jail sentences that it has handed out to more than 100 traffickers over the past 3 years. However, information on its funding of anti-trafficking activities and its support for the repatriated victims of trafficking remains scant. The government's cooperation with international NGOs concerned about human trafficking has also been minimal. While it appears that the government has finally begun to recognize the significance of its human trafficking problems, it is equally obvious that it has not yet put together programs that can deal with all aspects of those problems. Given its current economic circumstances, we do not anticipate the emergence of effective programs in the near term.

Counternarcotics

The ethnic majority areas of Burma make it one of the world's largest producers of illicit opium, heroin, and amphetamine-type stimulants, despite the fact that its overall output of opium and heroin has declined sharply in recent years, partly as a result of improved Burmese government counternarcotics efforts. Opium production in Burma has now declined for five straight years and, in 2002, Burma produced an estimated 630 metric tons of opium, less than one-quarter of the 2,560 metric tons of opium produced six years earlier. Unfortunately, Burma's success in reducing the production of opium and heroin has been partially undercut by rapidly increasing production of amphetamine-type stimulants, particularly in outlying regions governed by former insurgents. According to some estimates, as many as 400 to 800 million methamphetamine tablets may be produced in Burma each year, although verification of this estimate is difficult due to the mobile, small-scale nature of the methamphetamine production facilities.

The policy of the SPDC central government is to end narcotics trafficking, but the SPDC realizes that this will be a long-term process as it has been elsewhere. There are reliable reports that individual Burmese officials, particularly in outlying areas, may be involved in narcotics production or trafficking, but we do not have evidence that the government is complicit in the drug trade. While the government has consistently urged former ethnic insurgents to curb narcotics production and trafficking in their self-administered areas along the Chinese border, it has only recently, with the support and assistance of China, begun to crack down on these groups. Since September 2001, it has begun to enforce pledges elicited from each former insurgent group to make their self-administered areas opium-free and, in March 2002, pressured each group (including the Wa and the Kokang Chinese) into issuing new decrees outlawing narcotics production and trafficking in areas under their control. However, the Wa have not committed to eliminating narcotics production until 2005.

The government has improved its cooperation with neighboring states, particularly China. In 2001, Burma signed Memoranda of Understanding on narcotics control with both China and Thailand. The MOU with China

established a framework for joint operations, which in turn led to a series of arrests and renditions of major traffickers in 2001 and 2002, many of whom were captured in the former insurgents' self-administered areas. Altogether, over the past 18 months, Burma has returned to China 22 fugitives from Chinese justice, including principals from one group that China described as ''the largest armed drug trafficking gang in the Golden Triangle.'' Burma's MOU with Thailand, similarly, committed both sides to closer police cooperation on narcotics control and to the establishment of three joint ''narcotics suppression coordination stations'' at major crossing points on the border. That cooperation has since been interrupted by tensions on the border, but both governments have made clear that they look forward to resuming cooperation once these tensions have been cleared away.

Finally, Burma has participated in multilateral efforts to control narcotics trafficking in the Golden Triangle. Since November 2001, Burma has participated in ACCORD, the ASEAN and China Cooperative Operations in Response to Dangerous Drugs, which serves as an umbrella for a variety of global programs aimed at strengthening the rule of law, promoting alternative development, and increasing civic awareness of the dangers of drugs. It also signed UNDCP's 1993 Memorandum of Understanding among the six regional states—Burma, China, Thailand, Laos, Vietnam, and Cambodia—to control narcotics production. Finally, as China and Thailand have become more active multilaterally, Burma has joined the trilateral and quadrilateral programs organized by either to coordinate counternarcotics efforts among the four states of the Golden Triangle (Laos, Burma, China, and Thailand).

Under pressure from the Financial Action Task Force (FATF), which designated Burma as a ''non-cooperating'' state in June 2001, the Government of Burma has also begun to take action on money laundering issues. In June 2002, it enacted a new and potentially powerful money laundering law, which, if properly enforced, should address many of the FATF's concerns. That legislation criminalizes money laundering in connection with virtually every kind of serious criminal activity and levies heavy responsibilities on banks with regard to reporting. Penalties are also substantial. The police, in cooperation with the Central Bank and the Attorney General's office, are now training their first financial investigators and should begin prosecutions under the new law within the next few months.

Despite these steps, the United States judged earlier this year that Burma's visibly improving counternarcotics efforts were not yet commensurate with the scale of the problem. To encourage further progress, we have sustained a program of operational cooperation between police authorities in Burma and the U.S. Drug Enforcement Administration. We have also continued to work with the GOB on annual opium yield surveys in Burma, and with UNDCP and other donors on opium reduction and crop substitution programs. In September 2001, the United States pledged an additional $1,000,000 to support UNDCP's Wa Alternative Development Project, which has helped reduce opium production in the territories of the United Wa State Army. Notwithstanding the lack of Burmese financial resources and capacity, we do not, as a matter of law, provide bilateral narcotics assistance.

HIV/AIDS

In July, the U.S. Centers for Disease Control and Prevention (CDC) conducted an in-depth assessment of the HIV/AIDS epidemic in Burma, including among high-risk groups and pregnant women. The CDC assessed capacity at various levels in preventing the spread of HIV and providing care and treatment for those infected. The CDC concluded that the data, while limited, on HIV/AIDS in Burma indicates a widespread epidemic of greater than two-percent prevalence affecting the general population. Previous estimates by the World Health Organization, UNAIDS, and others had indicated an epidemic of less than two-percent prevalence limited to high-risk populations. CDC observed a limited national HIV/AIDS prevention program run by the government, but that some efforts are underway by non-governmental

organizations. Voluntary HIV testing and counseling is extremely limited, and very few people know their HIV status. Programs to prevent mother-to-child transmission of HIV are small and limited and in need of strengthening at all levels. The government has made blood safety a high priority, but quality control is questionable. Availability of care and treatment for those infected with HIV is very limited and trained staffs are few, while some non-governmental organizations provide some care services.

The government generally denies the extent of the HIV/AIDS epidemic in the country, and their programs do not reflect the latest thinking of the scientific community on prevention, treatment, and care. However, like the NLD, the government is very interested in international assistance to combat the growth of the epidemic. CDC made a number of recommendations to strengthen and improve HIV/AIDS surveillance in the country and change policy and program implementation by the government to improve the effectiveness of the response to HIV/AIDS in the country. Policy recommendations included initiating widespread voluntary HIV testing and counseling, including allowing international non-governmental organizations to conduct testing and counseling. The CDC also recommended that national implementation by the government of a mother-to-child transmission prevention program be accelerated, that a national HIV/AIDS care program be developed, and that programs targeting high risk groups be strengthened and enhanced.

The U.S. Agency for International Development (USAID) is in the process of providing $1 million to international non-governmental organizations operating HIV/AIDS prevention project in the country; none of these resources would be directed to the government.

The Quality of Life in Burma

The military government's management of the Burmese economy has been catastrophic. The government's ill-thought efforts to maintain discipline and control, and exclude foreign expertise and participation, have had predictably disastrous results.

Two problems stand out. In the energy sector, a run of disastrous public investment decisions has left the economy without fuel for either its electric generating facilities or many of its basic industries. In January 2002, the nation's peak generating capacity was sufficient to meet only about two thirds of the nation's peak demand and since then the situation has deteriorated further, with no prospect of relief until late 2003 or early 2004 at the very earliest. Until then, at least 30 to 40 percent of the nation's electricity customers will be without power at any given time.

In the fiscal budget, the situation is even more desperate. There, a failed fiscal concept, in which the GOB attempted to run the entire government mostly on the basis of the profits of the state-owned enterprises, has left the GOB without any basis for running the government over the long term, as profits have turned to losses in one state-owned enterprise after another. In fact, in Burma's fiscal year 2001/2002, the reported deficits of the state-owned enterprises actually absorbed all the revenues collected by the government, leaving the government proper (i.e., the army, the navy, the health and education services, and all ministerial operations) to run on monies borrowed from the Central Bank. This has in turn produced a rapid expansion of the money supply, a commensurate increase in inflation and a sharp depreciation in the value of the domestic currency (the kyat). Over the past two years, the kyat's unofficial value has depreciated from a rate of approximately 360/dollar in September 2000 to 1,100/dollar now, while inflation has accelerated to an annualized rate that is now approaching triple digit levels.

The government has attempted to deal with these pressures with a series of ad hoc restrictions on economic activity that reinforce (at least temporarily) its system of control while punishing private sector trade and investment. Thus far, however, the only consequence has been a crippled private sector

and a weakened banking system. Inflation has not ebbed and the kyat, after a brief rally in early June 2002, has resumed its downward slide.

Looking ahead, there is really no prospect for relief for Burma without foreign financing support. The problems within the economy, and particularly within the fiscal budget, are simply too vast and too deeply entrenched to be treated now on the basis of Burma's own resources. However, access to that foreign financing support will likely depend on progress in regard to structural reforms and political transition.

Development of a Multilateral Strategy

U.S. policy goals in Burma are progress towards democracy, improved human rights, more effective counternarcotics efforts, counterterrorism efforts, regional stability, HIV/AIDS mitigation, and accounting for missing servicemen from World War II. We encourage talks between Aung San Suu Kyi and the military government in the hope that it will lead to meaningful democratic change and national reconciliation in Burma. We also consult regularly, at senior levels, with countries with major interests in Burma and/or major concerns regarding Burma's human rights practices.

The United States has co-sponsored annual resolutions at the UN General Assembly and the UN Commission on Human Rights that focus on Burma. We have also supported ILO's unprecedented decision on Burma given its failure to deal effectively with its pervasive forced labor problems. Most importantly, we strongly support the mission of the UN Secretary General's Special Representative for Burma, Razali Ismail, whose efforts have been instrumental in facilitating communication between the government and Aung San Suu Kyi.

In coordination with the European Union and other states, the United States has imposed sanctions on Burma. U.S.-imposed sanctions include an arms embargo, a ban on all new U.S. investment in Burma, the suspension of all bilateral aid, including counternarcotics assistance, the withdrawal of GSP privileges, the denial of OPIC and EXIMBANK programs, visa restrictions on Burma's senior leaders, and a hold on all new lending or grant programs by the World Bank, the IMF, the ADB, and other international financial institutions in which the United States has a major interest. We have maintained our diplomatic representation at the Chargé d'Affaires level since 1990.

Our goal in applying these sanctions is to encourage a transition to democratic rule and greater respect for human rights. Nevertheless, we remain concerned about the growing humanitarian crisis in Burma and will, during the coming year, initiate a new $1 million program to deal with the growing HIV/AIDS epidemic in Burma. This funding will go directly to international NGOs (including Population Services International) to support programs including condom distribution and educational efforts. We will also use a small portion of the funding from the U.S. Burma earmark to develop programs inside Burma in support of democracy. None of these funds will be disbursed to or through the government. We will also continue to examine the potential for law enforcement cooperation with Burma on terrorism and narcotics issues. Should there be significant progress in Burma in coming months on political transition and human rights, then the United States would look seriously at additional measures that could be applied to support this process of constructive change.

[FR Doc. 02–31247

Filed 12–9–02; 8:45 am]

Billing code 4710–10–M

Rules and Regulations

Federal Register
Vol. 67, No. 237
Tuesday, December 10, 2002

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 THE TREASURY

Office of Thrift Supervision

12 CFR Part 562

[No. 2002–54]

RIN 1550–AB54

Regulatory Reporting Standards: Qualifications for Independent Public Accountants Performing Audit Services for Voluntary Audit Filers

AGENCY: Office of Thrift Supervision, Treasury.

ACTION: Interim final rule with request for comments; correction.

SUMMARY: The Office of Thrift Supervision (OTS) published in the **Federal Register** of November 25, 2002, a document concerning amending its annual independent audit requirements for small, non-public, highly rated savings associations that voluntarily obtain independent audits. Inadvertently, the comment period was incorrectly stated. This document corrects that comment period.

DATES: Effective on December 10, 2002.

FOR FURTHER INFORMATION CONTACT: Christine Smith, Project Manager, (202) 906–5740, Examination Policy Division, or Teresa A. Scott, Counsel (Banking & Finance), (202) 906–6478, Regulations and Legislation Division, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552.

SUPPLEMENTARY INFORMATION: OTS published a document in the **Federal Register** of November 25, 2002 (67 FR 70529), FR Doc. 02–29833, that inadvertently stated an incorrect comment period. This correction sets forth the correct comment period.

In rule FR Doc. 02–29833, published on November 25, 2002 (67 FR 70529), make the following correction. On page 70530, in the first column, remove the date ''December 26, 2002'' and add, in its place, ''January 27, 2003''.

Dated: November 27, 2002.

By the Office of Thrift Supervision.

Marilyn K. Burton,

Federal Register Liaison Officer.

[FR Doc. 02–30853 Filed 12–9–02; 8:45 am]

BILLING CODE 6720–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–CE–31–AD; Amendment 39–12973; AD 2002–24–08]

RIN 2120–AA64

Airworthiness Directives; Cirrus Design Corporation Models SR20 and SR22 Airplanes

AGENCY: Federal Aviation Administration, DOT

ACTION: Final rule.

SUMMARY: This amendment supersedes Airworthiness Directive (AD) 2002–05–05, which currently applies to certain Cirrus Design Corporation (Cirrus) Models SR20 and SR22 airplanes. AD 2002–05–05 currently requires you to incorporate temporary operating limitations into the Limitation Section of the airplane flight manual (AFM) for certain affected airplanes and install a cable clamp external to the cone adapter on the Cirrus Airplane Parachute System (CAPS) activation cable for all affected airplanes. AD 2002–05–05 resulted from a report from the manufacturer that certain CAPS may not activate in an emergency situation. This AD is the result of the manufacturer redesigning the CAPS activation system. This AD requires you to modify the CAPS activation system. The actions specified by this AD are intended to prevent failure of the CAPS activation system in an emergency situation. Failure of this system could result in occupant injury and/or loss of life and loss of aircraft.

DATES: This AD becomes effective on January 24, 2003.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of January 24, 2003.

ADDRESSES: You may get the service information referenced in this AD from Cirrus Design Corporation, 4515 Taylor Circle, Duluth, MN 55811; telephone: (218) 727–2737. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–CE–31–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Gregory J. Michalik, Aerospace Engineer, FAA, Chicago ACO, 2300 East Devon Avenue, Des Plaines, IL 60018; telephone: (847) 294–7135; facsimile: (847) 294–7834.

SUPPLEMENTARY INFORMATION:

Discussion

Has FAA taken any action to this point? The FAA received a report from the type certificate holder that a condition exists that could cause the Cirrus Airplane Parachute System (CAPS) installed on certain Cirrus Design Corporation (Cirrus) Model SR20 and SR22 airplanes not to activate in the event of an emergency. Ballistic Recovery Systems (BRS), the supplier of the CAPS, discovered the condition during a supplemental type certificate (STC) certification test of the same unit on another airplane.

Investigation revealed that the rocket cone could allow for variance in the internal diameter at the threaded end of the rocket cone. This variance could result in the retaining nut internal to the cone adapter not being fully secured on the affected parachutes. When the igniter end of the cable housing is unsecured, the cable will not pull the igniter pin free to release the parachute.

Section 23.221 of the Federal Aviation Regulations (14 CFR 23.221) requires that single-engine, normal category airplanes demonstrate compliance with either the one-turn spin recovery or the spin-resistant requirements. The airplane, for spin recovery compliance, must recover from a one-turn spin or a three-second spin, whichever takes longer, in not more than one additional turn after the controls have been applied for recovery. The Cirrus SR20/SR22 are not certificated to meet the spin recovery requirements or spin resistant requirements of 14 CFR 23.221. Instead, Cirrus installed Cirrus Airplane

Parachute System (CAPS) that was FAA-approved as part of the SR20/SR22 type design.

Possible failure of the CAPS activation system in an emergency situation caused us to issue AD 2002–05–05, Amendment 39–12673 (67 FR 11220, March 13, 2002). AD 2002–05–05 requires the following:

—Incorporating temporary operating limitations into the Limitation Section of the airplane flight manual (AFM) for the airplanes with a CAPS that incorporates the process change; and

—Installing a cable clamp external to the cone adapter on the CAPS activation cable (as terminating action for the AFM requirements).

What has happened since AD 2002–05–05 to initiate this action? After further testing, Cirrus has made design changes to the whole CAPS activation system that now eliminate possible failure of the CAP activation system. Incorporation of the design changes eliminates the need for the actions of AD 2002–05–05.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to certain Cirrus Models SR20 and SR22 airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on August 29, 2002 (67 FR 55357). The NPRM proposed to supersede AD 2002–05–05 with a new AD that would require you to replace the CAPS handle access cover, replace the CAPS activation handle bracket, and replace the CAPS activation cable.

Was the public invited to comment? The FAA encouraged interested persons to participate in the making of this amendment. We did not receive any comments on the proposed rule or on our determination of the cost to the public.

FAA's Determination

What is FAA's final determination on this issue? After careful review of all available information related to the subject presented above, we have determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. We have determined that these minor corrections:

—Provide the intent that was proposed in the NPRM for correcting the unsafe condition; and

—Do not add any additional burden upon the public than was already proposed in the NPRM.

Cost Impact

How many airplanes does this AD impact? We estimate that this AD affects 391 airplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected airplanes? We estimate the following costs to accomplish the replacement of the CAPS handle access cover:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
1 workhour × $60 per hour = $60	$19	$79	$79 × 391 = $30,889.

We estimate the following costs to accomplish the replacement of the CAPS activation handle bracket:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
2 workhours × $60 per hour = $120	$7	$127	$127 × 391 = $49,657.

We estimate the following costs to accomplish the replacement of the CAPS activation cable:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
3 workhours × $60 per hour = $180	$320	$500	$500 × 391 = $195,500.

We summarize the following estimated costs to accomplish the modification to the CAPS activation system:

Total labor cost	Total parts cost	Total cost per airplane	Total cost on U.S. operators
6 workhours × $60 per hour = $360	$346	$706	$706 × 391 = $276,046.

The manufacturer will provide warranty credit for labor and parts to the extent noted under WARRANTY INFORMATION in each previously-referenced service bulletin.

Compliance Time of This AD

What is the compliance time of this AD? The compliance time of this AD is ''within 90 days after the effective date of this AD, unless already accomplished.''

Why is the compliance time presented in calendar time instead of hours time-in-service (TIS)? Failure of the CAPS is only unsafe during airplane operation; this unsafe condition is not a result of the number of times the airplane is operated. The chance of this situation occurring is the same for an airplane with 10 hours time-in-service (TIS) as it is for an airplane with 500 hours TIS. For this reason, the FAA has determined that a compliance based on calendar time will be utilized in this AD in order to assure that the unsafe condition is addressed on all airplanes in a reasonable time period.

Regulatory Impact

Does this AD impact various entities? 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.

Does this AD involve a significant rule or regulatory action? 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 copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under 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. FAA amends § 39.13 by removing Airworthiness Directive (AD) 2002–05–05, Amendment 39–12673 (67 FR March 13, 2002), and by adding a new AD to read as follows:

2002–24–08 Cirrus Design Corporation: Amendment 39–12973; Docket No. 2002–CE–31–AD.

(a) *What airplanes are affected by this AD?* This AD affects the following airplane models and serial numbers that are certificated in any category:

Model	Serial numbers
SR20	1005 through 1195.
SR22	0002 through 0209.

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

(c) *What problem does this AD address?* The actions specified by this AD are intended to prevent failure of the Cirrus Airplane Parachute System (CAPS) activation system in an emergency situation. Failure of this system could result in occupant injury and/or loss of life and loss of aircraft.

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

Actions	Compliance	Procedures
Modify the Cirrus Airplane Parachute System (CAPS) by replacing the CAPS handle access cover, the CAPS activation handle bracket, and the CAPS activation cable with parts of improved design.	Within the next 90 days after January 24, 2003 (the effective date of this AD), unless already accomplished.	In accordance with the service information specified in paragraph (e) of this AD.

(e) *What service information should I use to accomplish the actions required in paragraph (d) of this AD:* Use the service bulletins specified below, as applicable:

(1) Cirrus Service Bulletin SB 20–95–03, Issued: June 10, 2002;

(2) Cirrus Service Bulletin SB 20–95–04, Issued: July 10, 2002;

(3) Cirrus Service Bulletin SB 20–95–05, Issued: July 10, 2002; or Cirrus Service Bulletin SB 20–95–05, Rev 1: dated August 14, 2002;

(4) Cirrus Service Bulletin SB 22–95–03, Issued: June 10, 2002;

(5) Cirrus Service Bulletin SB 22–95–04, Issued: July 10, 2002; and

(6) Cirrus Service Bulletin SB 22–95–05, Issued: July 10, 2002; or Cirrus Service Bulletin SB 22–95–05, Rev 1: dated August 14, 2002.

Note 1: Cirrus Service Bulletin SB 20–95–03, Issued: June 10, 2002, on page 2 of 2, includes an incorrect reference to SB 22–95–03 in step 4. The correct reference should be to SB 20–95–03.

Note 2: Cirrus Service Bulletin SB 20–95–05, Issued: July 10, 2002, on page 9 of 16, includes an incorrect reference to SB 22–95–05 in step 15. The correct reference should be to SB 20–95–05.

(f) *Can I comply with this AD in any other way?*

(1) You may use an alternative method of compliance or adjust the compliance time if:

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

(ii) The Manager, Chicago Aircraft Certification Office (ACO), approves your alternative. Submit your request through an FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Chicago ACO.

(2) Alternative methods of compliance approved in accordance with AD 2002–05–05, which is superseded by this AD, are not approved as alternative methods of compliance with this AD.

Note 3: 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 (f) of this AD. The request should include an assessment of the effect of the modification, alteration, or repair on the unsafe condition addressed by this AD; and, if you have not eliminated the unsafe condition, specific actions you propose to address it.

(g) *Where can I get information about any already-approved alternative methods of compliance?* Contact Gregory J. Michalik, Aerospace Engineer, FAA, Chicago ACO, 2300 East Devon Avenue, Des Plaines, IL 60018; telephone: (847) 294–7135; facsimile: (847) 294–7834.

(h) *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.

(i) *Are any service bulletins incorporated into this AD by reference?* Actions required by this AD must be done in accordance with Cirrus Service Bulletin SB 20–95–03, Issued: June 10, 2002; Cirrus Service Bulletin SB 20–95–04, Issued: July 10, 2002; Cirrus Service Bulletin SB 20–95–05, Issued: July 10, 2002; Cirrus Service Bulletin SB 20–95–05, Rev 1: dated August 14, 2002; Cirrus Service Bulletin SB 22–95–03, Issued: June 10, 2002; Cirrus Service Bulletin SB 22–95–04, Issued: July 10, 2002; Cirrus Service Bulletin SB 22–95–05, Issued: July 10, 2002; and Cirrus Service Bulletin SB 22–95–05, Rev 1: dated August 14, 2002. The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. You may get copies from Cirrus Design

Corporation, 4515 Taylor Circle, Duluth, MN 55811; telephone: (218) 727–2737. You may view copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

(j) *Does this AD action affect any existing AD actions?* This amendment supersedes AD 2002–05–05, Amendment 39–12673.

(k) *When does this amendment become effective?* This amendment becomes effective on January 24, 2003.

Issued in Kansas City, Missouri, on November 26, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–30685 Filed 12–9–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–CE–34–AD; Amendment 39–12974; AD 2002–24–09]

RIN 2120–AA64

Airworthiness Directives; Pilatus Britten-Norman Limited BN2T and BN2T–4R Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD) that applies to all Pilatus Britten-Norman Limited (Pilatus Britten-Norman) BN2T and BN2T–4R series airplanes. This AD requires you to repetitively inspect the left and right engine-mounting frame for cracks and replace the frame if cracks are found. This AD is the result of mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the United Kingdom. The actions specified by this AD are intended to detect and correct cracks in the left and right engine-mounting frame, which could lead to engine mount failure. Such failure could result in separation of the engine from the airplane.

DATES: This AD becomes effective on January 27, 2003.

The Director of the Federal Register approved the incorporation by reference of certain publications listed in the regulations as of January 27, 2003.

ADDRESSES: You may get the service information referenced in this AD from Pilatus Britten-Norman Limited, Bembridge, Isle of Wight, United Kingdom PO35 5PR; telephone: +44 (0) 1983 872511; facsimile: +44 (0) 1983 873246. You may view this information at the Federal Aviation Administration (FAA), Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–CE–34–AD, 901 Locust, Room 506, Kansas City, Missouri 64106; or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; facsimile: (816) 329–4090.

SUPPLEMENTARY INFORMATION:

Discussion

What events have caused this AD? The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified FAA that an unsafe condition may exist on all Pilatus Britten-Norman BN2T and BN2T–4R Series airplanes. The CAA reports that the manufacturer has reported six occurrences of cracks in the left and right turbine engine-mounting frame detected during routine inspections by operators of aircraft used on parachute drop or pilot training operations.

What is the potential impact if FAA took no action? These cracks could lead to engine mount failure with consequent separation of the engine from the airplane.

Has FAA taken any action to this point? We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all Pilatus Britten-Norman BN2T and BN2T–4R series airplanes. This proposal was published in the **Federal Register** as a notice of proposed rulemaking (NPRM) on September 17, 2002 (67 FR 58544). The NPRM proposed to require you to repetitively inspect the left and right engine-mounting frame for cracks and replace the frame if cracks are found.

Was the public invited to comment? The FAA encouraged interested persons to participate in the making of this amendment. We did not receive any comments on the proposed rule or on our determination of the cost to the public.

FAA's Determination

What is FAA's final determination on this issue? After careful review of all available information related to the subject presented above, we have determined that air safety and the public interest require the adoption of the rule as proposed except for minor editorial corrections. We have determined that these minor corrections:

—Provide the intent that was proposed in the NPRM for correcting the unsafe condition; and

—Do not add any additional burden upon the public than was already proposed in the NPRM.

Cost Impact

How many airplanes does this AD impact? We estimate that this AD affects 6 airplanes in the U.S. registry.

What is the cost impact of this AD on owners/operators of the affected airplanes? We estimate the following costs to accomplish the inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
4 workhours × $60 per hour = $240	No cost for parts	$240	6 × $240 = $1,440.

We estimate the following costs to accomplish any necessary replacements that will be required based on the results of the inspection. We have no way of determining the number of airplanes that may need such replacement:

Labor cost	Parts cost	Total cost per airplane
30 workhours × $60 per hour = $1,800 per frame	$5,400	$7,200.

Regulatory Impact

Does this AD impact various entities? 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.

Does this AD involve a significant rule or regulatory action? 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 copy of the final evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES**.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

Accordingly, under 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. FAA amends § 39.13 by adding a new AD to read as follows:

2002–24–09 Pilatus Britten-Norman Limited: Amendment 39–12974; Docket No. 2002–CE–34–AD.

(a) *What airplanes are affected by this AD?* This AD affects Models BN2T, and BN2T–4R airplanes, all serial numbers, that are certificated in any category.

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

(c) *What problem does this AD address?* The actions specified by this AD are intended to detect and correct cracks in the left and right engine-mounting frame, which could lead to engine mount failure. Such failure could result in separation of the engine from the airplane.

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

Actions	Compliance	Procedures
(1) Inspect the left and right turbine engine-mounting frame, part number (P/N) NB–20–6853, or FAA-approved equivalent part number, for cracks.	Initially upon accumulating 1,000 hours time-in-service (TIS) on the engine mounting frame or within the next 50 hours TIS after January 27, 2003 (the effective date of this AD), whichever occurs later. If no cracks are found on the initial inspection, repetitively inspect every 100 hours TIS.	In accordance with Britten-Norman Service Bulletin No. SB 282, Issue 2, dated June 1, 2002.
(2) If cracks are found during any inspection required in paragraph (d)(1) of this AD, replace the mounting frame with a new frame, P/N NB–20–6853, or FAA-approved equivalent part number.	Prior to further flight after the inspection in which any crack and/or damage is found. After installing the new frame, inspect as required in paragraph (d)(1) of this AD..	In accordance with Britten-Norman Service Bulletin No. SB 282, Issue 2, dated June 1, 2002

(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 Standards Office 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, Standards Office Manager.

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 Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; 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) *Are any service bulletins incorporated into this AD by reference?* Actions required by this AD must be done in accordance with Britten-Norman Service Bulletin No. SB 282, Issue 2, dated June 1, 2002. The Director of the Federal Register approved this incorporation by reference under 5 U.S.C. 552(a) and 1 CFR part 51. You may get copies from Pilatus Britten-Norman Limited, Bembridge, Isle of Wight, United Kingdom PO35 5PR; telephone: +44 (0) 1983 872511; facsimile: +44 (0) 1983 873246. You may view copies at the FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri, or at the Office of the Federal Register, 800 North Capitol Street, NW., Suite 700, Washington, DC.

Note 2: The subject of this AD is addressed in British AD 002–05–2002, not dated.

(i) *When does this amendment become effective?* This amendment becomes effective on January 27, 2003.

Issued in Kansas City, Missouri, on November 26, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–30686 Filed 12–9–02; 8:45 am]

BILLING CODE 4910–13–P

POSTAL SERVICE

39 CFR Part 255

Access of Persons with Disabilities to Postal Service Programs, Activities, Facilities, and Electronic and Information Technology

AGENCY: Postal Service.

ACTION: Final rule.

SUMMARY: The Postal Service is amending its regulations in order to implement section 508 of the Rehabilitation Act of 1973, as amended. Section 508 requires Federal agencies to ensure that the electronic and information technology (EIT) they procure allows individuals with disabilities access to EIT comparable to the access of those who are not disabled, unless the agency would incur an undue hardship. The statute was amended by the Workforce Investment Act of 1998 to add enforcement provisions and to require agencies to add a complaint process for section 508. The complaint process for members of the public who are disabled is outlined here. The complaint process for employees and applicants who are disabled is set forth in the Postal Service's Handbook EL–603, *Equal Employment Opportunity Complaint Processing.*

DATES: The rule is effective January 9, 2003.

FOR FURTHER INFORMATION CONTACT: Joan C. Goodrich, Esq., (202) 268–3047 or Christine M. Taylor, Esq., (202) 268–3017.

SUPPLEMENTARY INFORMATION:

Background

The Workforce Investment Act of 1998, Public Law 105–220, 112 Stat. 936 (1998), amending section 508 of the Rehabilitation Act of 1973, 29 U.S.C. 794d, was signed into law on August 7, 1998. In addition to the provisions outlined above, the act required the Architectural and Transportation Barriers Compliance Board (Access Board) to publish standards defining EIT and setting forth the technical and functional performance criteria necessary for accessibility to such technology. The act, which was effective August 7, 2000, also required the Access Board to publish its final standards by February 7, 2000.

On July 13, 2000, the Military Construction Appropriations Act for Fiscal Year 2001, Public Law 106–246, which contained an amendment to section 508, was signed into law. Public Law 106–246 delayed the effective date for enforcement of section 508 to 6 months from the publication of the Access Board's final standards. The Access Board's final standards were published on December 21, 2000, in 65 FR 80500–80528. The effective date for enforcement of section 508 became June 21, 2001.

In accordance with the statutory requirements outlined above, the Postal Service published in the **Federal Register** on February 25, 2002 (67 FR 8489–93), a proposed rule adding a complaint process for section 508 to its regulations. March 27, 2002, was set as the deadline for receipt of any comments relating to the proposed rule. The Postal Service received comments from two groups concerned with the rights and interests of individuals with disabilities. These comments are discussed below. After giving thorough consideration to the comments, the Postal Service modified the proposed rule as appropriate and now publishes the final rule.

Discussion of Comments

One group commented on matters outside the scope of this rulemaking. Those comments, which addressed specific accommodations in Post Offices for the blind and visually impaired, have been passed on to the appropriate office within the Postal Service. The second group made the following comments.

1. One comment asked for clarification of how the informal complaint can be initiated, and suggested that ''an informal complaint can be verbal or in writing.'' The comment suggested that an oral or written statement can be the means of lodging the informal complaint. The Postal Service is incorporating this comment into the rule to reflect that an informal complaint can be made orally or in writing.

2. One comment asked that the written acknowledgment of the informal complaint contain certain specific information such as ''the date that the complaint was filed, a description of the complaint issue(s), notice of the complainant's right to file a formal complaint if the informal complaint is not resolved within 60 days, and notice of where to file a formal complaint.'' This information will be incorporated into the rule. The date of the filing of the informal complaint and the description of issues will be added to the acknowledgment letter. Notice of a choice to file a formal complaint or to proceed in any other appropriate forum will be added to the written decision detailing the final disposition of the informal complaint. Where to file a formal complaint will also be given in the notice.

3. Several miscellaneous comments suggested editing changes which have been incorporated as appropriate.

4. One comment requested that the language requiring exhaustion of the formal complaint process be deleted. The rule provides that if the decision on the informal complaint denies relief to the complainant, ''the complainant may seek relief in any other appropriate forum, including the right to file a formal complaint with the Vice President and Consumer Advocate'' of the Postal Service. If the complainant files such a formal complaint, ''the complainant shall exhaust the formal complaint procedure before filing suit in any other forum.'' The exhaustion requirement was added in order to avoid the problem of one case proceeding simultaneously in two forums—administrative and judicial. There is no change to the rule as a result of this comment.

5. One comment asked that the standards of the Architectural Barriers Act for newly constructed, altered, and leased postal facilities be stated in the rule. However, the rule's purpose is to provide a complaint process for section 508. There is no change to the rule as a result of this comment.

6. One comment requested that a nonretaliation provision be added to the rule. This comment is being incorporated into the rule and such a provision is added.

List of Subjects in 39 CFR Part 255

Civil rights, Federal buildings and facilities, Individuals with disabilities.

Accordingly, the Postal Service revises 39 CFR part 255 to read as follows:

PART 255—ACCESS OF PERSONS WITH DISABILITIES TO POSTAL SERVICE PROGRAMS, ACTIVITIES, FACILITIES, AND ELECTRONIC AND INFORMATION TECHNOLOGY

Sec.

255.1 Purpose.
255.2 Definitions.
255.3 Nondiscrimination under any program or activity conducted by the Postal Service.
255.4 Accessibility to electronic and information technology.
255.5 Employment.

255.6 Complaint procedures.
255.7 Special arrangements for postal services.
255.8 Access to postal facilities.
255.9 Other postal regulations; authority of postal managers and employees.

Authority: 39 U.S.C. 101, 401, 403, 1001, 1003, 3403, 3404; 29 U.S.C. 791, 794, 794d.

§ 255.1 Purpose.

(a) This part implements section 504 of the Rehabilitation Act of 1973, as amended. Section 504 prohibits discrimination on the basis of disability in programs or activities conducted by executive agencies or by the Postal Service. This part also implements section 508 of the Rehabilitation Act of 1973, as amended. Section 508 requires that executive agencies and the Postal Service ensure, absent an undue burden, that individuals with disabilities have access to electronic and information technology that is comparable to the access of individuals who are not disabled.

(b) The standards relating to electronic and information technology expressed here are intended to be consistent with the standards announced by the Architectural and Transportation Barriers Compliance Board on December 21, 2000. Those standards are codified at 36 CFR part 1194.

§ 255.2 Definitions.

(a) *Agency* as used in this part means the Postal Service.

(b) *Area/functional vice president* also includes his or her designee.

(c) *Electronic and information technology (EIT)* includes ''information technology'' and any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. The term does not include any equipment that contains embedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.

(d) *Formal complaint* means a written statement that contains the complainant's name, address, and telephone number; sets forth the nature of the complainant's disability; and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature of the alleged violation of section 504 or of section 508. It shall be signed by the complainant or by someone authorized to do so on the complainant's behalf.

(e) *Individual with a disability*. For purposes of this part, ''individual with a disability'' means any person who:

(1) Has a physical or mental impairment that substantially limits one or more of such person's major life activities;

(2) Has a record of such an impairment; or

(3) Is regarded as having such an impairment.

(f) *Information technology* means any equipment, or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information.

(g) *Postal manager*. As used in this part, ''postal manager'' means the manager or official responsible for a service, facility, program, or activity.

(h) *Qualified individual with a disability*. For purposes of this part, ''qualified individual with a disability'' means:

(1) With respect to any Postal Service program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with a disability who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity, an individual with a disability who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(i) *Section 501* means section 501 of the Rehabilitation Act of 1973, as amended. Section 501 is codified at 29 U.S.C. 791.

(j) *Section 504* means section 504 of the Rehabilitation Act of 1973, as amended. Section 504 is codified at 29 U.S.C. 794.

(k) *Section 508* means section 508 of the Rehabilitation Act of 1973, as amended. Section 508 is codified at 29 U.S.C. 794d.

(l) *Undue burden* means significant difficulty or expense.

(m) *Vice President and Consumer Advocate* also includes his or her designee.

§ 255.3 Nondiscrimination under any program or activity conducted by the Postal Service.

In accordance with section 504 of the Rehabilitation Act, no qualified individual with a disability shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity conducted by the Postal Service.

§ 255.4 Accessibility to electronic and information technology.

(a) In accordance with section 508 of the Rehabilitation Act, the Postal Service shall ensure, absent an undue burden, that the electronic and information technology the agency procures allows:

(1) Individuals with disabilities who are Postal Service employees or applicants to have access to and use of information and data that is comparable to the access to and use of information and data by Postal Service employees or applicants who are not individuals with disabilities; and

(2) Individuals with disabilities who are members of the public seeking information or services from the Postal Service to have access to and use of information and data that is comparable to the access to and use of information and data by members of the public who are not individuals with disabilities.

(b) When procurement of electronic and information technology that meets the standards published by the Architectural and Transportation Barriers Compliance Board would pose an undue burden, the Postal Service shall provide individuals with disabilities covered by paragraph (a) of this section with the information and data by an alternative means of access that allows the individuals to use the information and data.

§ 255.5 Employment.

No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment with the Postal Service. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973, as established by the Equal Employment Opportunity Commission in 29 CFR part 1614 shall apply to employment within the Postal Service.

§ 255.6 Complaint procedures.

(a) *Applicability*. Except as provided in paragraph (b)(1) of this section, this section applies to all section 504 allegations of discrimination based upon disability in the programs or activities conducted by the Postal Service. Except as provided in paragraph (b)(2) of this section, this section applies to all allegations of section 508 violations.

(b) *Employment complaints*.

(1) The Postal Service shall process complaints of employees and applicants

alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1614 pursuant to section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791. In accordance with 29 CFR part 1614, the Postal Service has established procedures for processing complaints of alleged employment discrimination, based upon disability, in the agency's Handbook EL–603, *Equal Employment Opportunity Complaint Processing*.

(2) The agency shall process complaints of employees and applicants alleging violations of section 508 and involving employment in accordance with the section 508 procedures which have been added to Handbook EL–603. Section 508 complaints shall be processed to provide the remedies required by section 508 of the Rehabilitation Act.

(c) *Complaints by members of the public*. Any individual with a disability who believes that he or she has been subjected to discrimination prohibited by this part or by the alleged failure of the agency to provide access to electronic and information technology may file a complaint by following the procedures described in this section. A complainant shall first exhaust informal administrative procedures before filing a formal complaint.

(1) *Informal complaints relating to Postal Service programs or activities and to EIT*.

(i) A complainant initiates the informal process by informing the responsible postal manager orally or in writing of the alleged discrimination or inaccessibility of Postal Service programs, activities, or EIT. Postal managers or employees who receive informal complaints that they lack the authority to resolve must promptly refer any such informal complaint to the appropriate postal manager, and at the same time must notify the complainant of the name, address, and telephone number of the person handling the complaint.

(ii) *Resolution of the informal complaint and time limits*. Within 15 days of receipt of the informal complaint, the responsible postal manager must send the complainant a written acknowledgement of the informal complaint. The written acknowledgment will include the date the complaint was filed and a description of the issue(s). If the matter cannot be resolved within 30 days of its receipt, the complainant must be sent a written interim report which explains the status of the informal complaint and the proposed resolution of the matter. On or before the 60th day from the agency's receipt of the informal complaint, the appropriate area/functional vice president within the Postal Service shall send a written decision to the complainant detailing the final disposition of the informal complaint and the reasons for that disposition. The decision shall contain the notice that the complainant may challenge an informal decision which denies relief either by proceeding in any other appropriate forum or by filing a formal complaint with the Vice President and Consumer Advocate. The notice will give the address of the Vice President and Consumer Advocate. The notice shall also state that if the complainant chooses to file a formal complaint, the complainant shall exhaust the formal complaint procedures before filing suit in any other forum.

(iii) *Automatic review*. The responsible postal manager's proposed disposition of the informal complaint shall be submitted to the appropriate district/program manager for review. The district/program manager shall forward the proposed disposition to the area/functional vice president for review and issuance of the written decision. This automatic review process shall be completed such that the written decision of the area/functional vice president shall be sent to the complainant no later than the 60th day from the agency's receipt of the informal complaint.

(2) *Formal complaints*. If an informal complaint filed under paragraph (c)(1) of this section denies relief, the complainant may seek relief in any other appropriate forum, including the right to file a formal complaint with the Vice President and Consumer Advocate in accordance with the procedures in paragraph (c)(2)(i) through (iv) of this section. If the complainant files a formal complaint with the Vice President and Consumer Advocate, the complainant shall exhaust the formal complaint procedures before filing suit in any other forum.

(i) *Where to file*. Formal complaints relating to programs or activities conducted by the Postal Service or to access of Postal Service EIT may be filed with the Vice President and Consumer Advocate, United States Postal Service, 475 L'Enfant Plaza, SW., Washington, DC 20260.

(ii) *When to file*. A formal complaint shall be filed within 30 days of the date the complainant receives the decision of the area/functional vice president to deny relief. For purposes of determining when a formal complaint is timely filed under this paragraph (c)(2)(ii), a formal complaint mailed to the agency shall be deemed filed on the date it is postmarked. Any other formal complaint shall be deemed filed on the date it is received by the Vice President and Consumer Advocate.

(iii) *Acceptance of the formal complaint*. The Vice President and Consumer Advocate shall accept a timely filed formal complaint that meets the requirements of § 255.2(d), if filed after fulfilling the informal exhaustion procedures of paragraph (c)(1) of this section, and over which the agency has jurisdiction. The Vice President and Consumer Advocate shall notify the complainant of receipt and acceptance of the formal complaint within 15 days of the date the Vice President and Consumer Advocate received the formal complaint.

(iv) *Resolution of the formal complaint*. Within 180 days of receipt and acceptance of a formal complaint over which the agency has jurisdiction, the Vice President and Consumer Advocate shall notify the complainant of the results of the investigation of the formal complaint. The notice shall be a written decision stating whether or not relief is being granted and the reasons for granting or denying relief. The notice shall state that it is the final decision of the Postal Service on the formal complaint.

(d) *No retaliation*. No person shall be subject to retaliation for opposing any practice made unlawful by the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, or for participating in any stage of administrative or judicial proceedings under the statute.

§ 255.7 Special arrangements for postal services.

Members of the public who are unable to use or who have difficulty using certain postal services may be eligible under postal regulations for special arrangements. Some of the special arrangements that the Postal Service has authorized are listed in this section. No one is required to use any special arrangement offered by the Postal Service, but an individual's refusal to make use of a particular special arrangement does not require the Postal Service to offer other special arrangements to that individual.

(a) The *Postal Operations Manual* offers information on special arrangements for the following postal services:

(1) Carrier delivery services and programs.

(2) Postal retail services and programs.

(i) Stamps by Mail® or stamps by phone.

(ii) Retail service from rural carriers.

(iii) Self-service postal centers. Self-service postal centers contain vending equipment for the sale of stamps and stamp items, and contain deposit boxes for parcels and letter mail. Many centers are accessible to individuals in wheelchairs. Information regarding the location of the nearest center may be obtained from a local Post Office.

(b) The *Domestic Mail Manual*, the *Administrative Support Manual*, and the *International Mail Manual* contain information regarding postage-free mailing for mailings that qualify.

(c) *Inquiries and requests.* Members of the public wishing further information about special arrangements for particular postal services may contact their local postal manager.

(d) *Response to a request or complaint regarding a special arrangement for postal services.* A local postal manager receiving a request or complaint about a special arrangement for postal services must provide any arrangement as required by postal regulations. If no special arrangements are required by postal regulations, the local postal manager, in consultation with the district manager or area manager, as needed, may provide a special arrangement or take any action that will accommodate an individual with a disability as required by section 504 of the Rehabilitation Act of 1973 or by this part.

§ 255.8 Access to postal facilities.

(a) *Legal requirements and policy.* (1) *ABA standards.* Where the design standards of the Architectural Barriers Act (ABA) of 1968, 42 U.S.C. 4151 *et seq.*, do not apply, the Postal Service may perform a discretionary retrofit to a facility in accordance with this part to accommodate individuals with disabilities.

(2) *Discretionary modifications.* The Postal Service may modify facilities not legally required to conform to ABA standards when it determines that doing so would be consistent with efficient postal operations. In determining whether modifications not legally required should be made, due regard is to be given to:

(i) The cost of the discretionary modification;

(ii) The number of individuals to be benefited by the modification;

(iii) The inconvenience, if any, to the general public;

(iv) The anticipated useful life of the modification to the Postal Service;

(v) Any requirement to restore a leased premises to its original condition at the expiration of the lease, and the cost of such restoration;

(vi) The historic or architectural significance of the property in accordance with the National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*;

(vii) The availability of other options to foster service accessibility; and

(viii) Any other factor that is relevant and appropriate to the decision.

(b) *Inquiries and requests.* (1) Inquiries concerning access to postal facilities, and requests for discretionary alterations of postal facilities not covered by the design standards of the ABA, may be made to the local postal manager of the facility involved.

(2) The local postal manager's response to a request or complaint regarding an alteration to a facility will be made after consultation with the district manager or the area manager. If the determination is made that modification to meet ABA design standards is not required, a discretionary alteration may be made on a case-by-case basis in accordance with the criteria listed in paragraph (a)(2) of this section. If a discretionary alteration is not made, the local postal manager should determine if a special arrangement for postal services under § 255.7 can be provided.

§ 255.9 Other postal regulations; authority of postal managers and employees.

This part supplements all other postal regulations. Nothing in this part is intended to authorize any postal manager or employee to violate or exceed any regulatory limit, or to confer any budgetary authority on any postal official or employee outside normal budgetary procedures.

Stanley F. Mires,

Chief Counsel, Legislative.

[FR Doc. 02–30648 Filed 12–9–02; 8:45 am]

BILLING CODE 7710–12–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 001128334–2292–10; I.D. 112702B]

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan

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

ACTION: Rule.

SUMMARY: The Assistant Administrator for Fisheries (AA), NOAA, is withdrawing the temporary restrictions announced in a temporary rule published on December 3, 2002 (67 FR 71900). The purpose of this rule is to withdraw the restrictions and request fishermen to voluntarily remove lobster trap/pot and anchored gillnet gear in an area totaling approximately 1,600 square nautical miles (nm^2) (2,965 km^2), east of Portsmouth, NH, called Jeffreys Ledge, from December 5 through December 20, 2002.

DATES: Effective December 5, 2002.

ADDRESSES: Copies of the proposed and final Dynamic Area Management rules, Environmental Assessment (EA), Atlantic Large Whale Take Reduction Team (ALWTRT) meeting summaries, and progress reports on implementation of the ALWTRP may also be obtained by writing Diane Borggaard, NMFS/Northeast Region, One Blackburn Drive, Gloucester, MA 01930.

Several of the background documents for the ALWTRP and the take reduction planning process can be downloaded from the ALWTRP web site at *http://www.nero.nmfs.gov/whaletrp/.*

FOR FURTHER INFORMATION CONTACT: Diane Borggaard, NMFS/Northeast Region, 978–281–9145; or Patricia Lawson, NMFS, Office of Protected Resources, 301–713–2322.

SUPPLEMENTARY INFORMATION: The ALWTRP was developed pursuant to section 118 of the Marine Mammal Protection Act (MMPA) to reduce the incidental mortality and serious injury of four species of whales (right whales, fin, humpback, and minke) due to incidental interaction with commercial fishing activities. The ALWTRP, implemented through regulations codified at 50 CFR 229.32, relies on a combination of fishing gear modifications and time/area closures to reduce the risk of whales becoming entangled in commercial fishing gear (and potentially suffering serious injury or mortality as a result).

On January 9, 2002, NMFS published the final rule to implement the ALWTRP's Dynamic Area Management (DAM) program (67 FR 1133). The DAM program provides specific authority for NMFS to temporarily restrict the use of lobster trap and anchored gillnet fishing gear in areas north of 40° N. lat. on an expedited basis to protect right whales. Under the DAM program, NMFS may: (1) require the removal of all lobster trap/pot and anchored gillnet fishing gear for a 15–day period; (2) allow lobster trap and anchored gillnet fishing within a DAM zone with gear modifications determined by NMFS to

sufficiently reduce the risk of entanglement; or (3) issue an alert to fishermen requesting the voluntary removal of all lobster trap/pot and anchored gillnet gear for a 15–day period, and asking fishermen not to set any additional gear in the DAM zone during the 15–day period.

A DAM zone is triggered when NMFS receives a reliable report from a qualified individual of three or more right whales sighted within an area (75nm^2 (139 km^2)) such that right whale density is equal to or greater than 0.04 right whales per nm^2 (1.85 km^2). A qualified individual is an individual ascertained by NMFS to be reasonably able, through training or experience, to identify a right whale. Such individuals include, but are not limited to, NMFS staff, U.S. Coast Guard and Navy personnel trained in whale identification, scientific research survey personnel, whale watch operators and naturalists, and mariners trained in whale species identification through disentanglement training or some other training program deemed adequate by NMFS. A reliable report would be a credible right whale sighting.

On November 20, 2002, NMFS Aerial Survey Team reported a sighting of 8 right whales in the proximity of 43° 00' N lat. and 70°08′ W long. This position lies east of Portsmouth, NH, in an area called Jeffreys Ledge.

In a temporary rule published on December 3, 2002 (67 FR 71900), NMFS restricted lobster trap/pot and gillnet gear set in the waters bounded by:

43°19′N, 70°35′W (NW Corner)
43°19′N, 69°40′W
42°39′N, 69°40′W
42°39′N, 70°35′W (SW Corner)

Please note that the western DAM boundary (70°35′W) from 43°11′N due north to 43°19′N will follow the coastline.

Due to rough weather conditions in the Gulf of Maine, effected fishers are unable to remove active gear as required by the temporary rule. Therefore, the AA has determined that the temporary restrictions should be withdrawn. However, the AA requests that fishermen voluntarily remove their lobster trap/pot and anchored gillnet gear in the area described above if weather conditions allow removal of the gear through December 20, 2002. Additionally, fishermen are encouraged not to set gear in the DAM area during this time period.

This rule will be announced to state officials, fishermen, Atlantic Large Whale Take Reduction Team (ALWTRT) members, and other interested parties through e-mail, phone contact, NOAA website, and other appropriate media immediately upon filing with the **Federal Register**.

Classification

This action falls within the scope of alternatives and impacts analyzed in the Final EA prepared for the ALWTRP's DAM program. Further analysis under the National Environmental Policy Act (NEPA) is not required.

Pursuant to 5 U.S.C. 553(b)(B), the AA finds that good cause exists to waive notice and an opportunity to comment on this action to withdraw the temporary restrictions, because providing notice and an opportunity to comment on this action would be contrary to the public interest. If NMFS were to provide notice and an opportunity to comment on this action, the temporary gear restrictions would remain effective, and fishermen would risk bodily harm in trying to remove their gear due to the severe weather conditions in the Northeast region. In addition, it would be unfair to subject fishermen to changes in gear requirements when, due to weather, the affected fishermen have been unable to implement these changes.

The AA is also waiving the 30–day delay in effective date under 5 U.S.C. 553(d)(1), because this action relieves a restriction. Thus, NMFS makes this action effective beginning December 5, 2002. NMFS will also endeavor to provide notice of this action to fishermen through other means as soon as possible. NMFS determined that the regulations establishing the DAM program and actions such as this one taken pursuant to those regulations are consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program of the U.S. Atlantic coastal states. This determination was submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act. Following state review of the regulations creating the DAM program, no state disagreed with NMFS' conclusion that the DAM program is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management program for that state.

The DAM program under which NMFS is taking this action contains policies with federalism implications warranting preparation of a federalism assessment under Executive Order 13132. Accordingly, in October 2001, the Assistant Secretary for Intergovernmental and Legislative Affairs, DOC, provided notice of the DAM program to the appropriate elected officials in states to be affected by actions taken pursuant to the DAM program. Federalism issues raised by state officials were addressed in the final rule implementing the DAM program. A copy of the federalism Summary Impact Statement for that final rule is available upon request (see **ADDRESSES**).

This rule has been determined to be not significant under Executive Order 12866.

Authority: 16 U.S.C. 1361 *et seq.* and 50 CFR 229.32(g)(3)

Dated: December 5, 2002.

William T. Hogarth

Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 02–31160 Filed 12–5–02; 3:09 pm]

BILLING CODE 3510–22–S

Proposed Rules

Federal Register
Vol. 67, No. 237
Tuesday, December 10, 2002

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

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–CE–14–AD]

RIN 2120–AA64

Airworthiness Directives; British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, Jetstream Series 3101, and Jetstream Model 3201 Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Supplemental notice of proposed rulemaking (NPRM); reopening of the comment period.

SUMMARY: This document proposes to revise an earlier proposed airworthiness directive (AD) that would apply to all British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, Jetstream Series 3101, and Jetstream Model 3201 airplanes. The earlier NPRM would have required you to repetitively inspect the horizontal and vertical stabilizer attachment fittings and associated hardware for corrosion and wear (damage) and repair or replace any damaged parts. The earlier NPRM resulted from mandatory continuing airworthiness information (MCAI) issued by the airworthiness authority for the United Kingdom. The manufacturer has issued new service information that supersedes the service information specified in the NPRM and changes the procedures for doing the proposed inspections. These procedures impose an additional burden over that proposed in the NPRM. Therefore, we are reopening the comment period to allow the public the chance to comment on these additional actions.

DATES: The Federal Aviation Administration (FAA) must receive any comments on this proposed rule on or before January 17, 2003.

ADDRESSES: Submit comments to FAA, Central Region, Office of the Regional Counsel, Attention: Rules Docket No. 2002–CE–14–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 also send comments electronically to the following address: *9–ACE–7–Docket@faa.gov.* Comments sent electronically must contain ''Docket No. 2002–CE–14–AD'' in the subject line. If you send comments electronically as attached electronic files, the files must be formatted in Microsoft Word 97 for Windows or ASCII text.

You may get service information that applies to this proposed AD from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 672345; facsimile: (01292) 671625. You may also view this information at the Rules Docket at the address above.

FOR FURTHER INFORMATION CONTACT: Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; 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 proposed 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 contact we 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 mailed comments, you must include a self-addressed, stamped postcard. On the postcard, write ''Comments to Docket No. 2002–CE–14–AD.'' We will date stamp and mail the postcard back to you.

Discussion

What Events Have Caused This Proposed AD?

The Civil Aviation Authority (CAA), which is the airworthiness authority for the United Kingdom, recently notified FAA that an unsafe condition may exist on all British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, Jetstream Series 3101, and Jetstream Model 3201 airplanes. The CAA reports that, during regular scheduled maintenance, an operator discovered fretting corrosion on the horizontal and vertical stabilizer attachment bolts on an in-service Jetstream Series 4100 airplane. The Jetstream Series 4100 airplane has a similar structural layout in the affected area to those affected by this proposed action. The corrosion is occurring on the eye bolt shanks and the horizontal and vertical stabilizer forward and rear attachment fitting lugs on the contact faces. There have been 10 reported cases of corrosion found on Jetstream Series 3101 and Jetstream Model 3201 airplanes.

What Are the Consequences If the Condition Is Not Corrected?

This condition, if not detected and corrected, could result in failure of the horizontal and vertical stabilizer attachment fittings. Such failure could lead to flutter and subsequent structural failure of the empennage.

Has FAA Taken Any Action to This Point?

We issued a proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an AD that would apply to all British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, Jetstream Series 3101, and Jetstream Model 3201 airplanes. This proposal was published in the **Federal**

Register as a notice of proposed rulemaking (NPRM) on July 31, 2002 (67 FR 49627). The NPRM proposed to require you to repetitively inspect the forward and rear horizontal and vertical stabilizer attachment fittings and associated hardware for corrosion and wear (damage), and replace or repair any damaged parts found during any inspection.

You would have to accomplish the proposed actions in accordance with British Aerospace Jetstream Mandatory Service Bulletin 55–JA010941, Original issue: January 25, 2002.

Was the Public Invited To Comment?

The FAA encouraged interested persons to participate in the making of this amendment. The following presents the comments received on the proposal and FAA's response to each comment:

Comment Issue No. 1: Incorporate New Service Information

What Is the Commenter's Concern?

The manufacturer suggests that we incorporate new service information that changes the procedures for doing the proposed inspections of the horizontal and vertical stabilizers for corrosion. The manufacture states that the inspection procedures in British Aerospace Jetstream Mandatory Service Bulletin 55–JA010941, Original Issue: January 25, 2002, do not ensure the detection of all possible fretting corrosion. Removal of the horizontal stabilizer when inspecting for fretting corrosion is now required in accordance with British Aerospace Jetstream Mandatory Service Bulletin 55–JA020543, Original Issue: October 24, 2002, which supersedes British Aerospace Jetstream Mandatory Service Bulletin 55–JA010941, Original Issue: January 25, 2002.

What Is FAA's Response to the Concern?

We concur and will change the proposed AD action accordingly. Any owner/operator of the affected airplanes will have to accomplish the requirements of this proposed AD in accordance with the new manufacturer's service bulletin. Credit will not be given for accomplishing the proposed actions in accordance with British Aerospace Jetstream Mandatory Service Bulletin 55–JA010941, Original Issue: January 25, 2002.

Comment Issue No. 2: Receive Compliance Credit for Using Current BAE Corrosion Preventative and Control Program (PCPC) Maintenance Task Number 55–10–011C1 When Doing the Inspections

What Is the Commenter's Concern?

The commenter states that operators who utilize the current FAA–BAE approved Corrosion Preventative and Control Program (CPCP) Maintenance Task Number 55–10–011C1 and Zonal Task Card 55–10–11 are already accomplishing the inspections required in the proposed AD and should receive credit for compliance using these procedures instead of the manufacturer's service bulletin. The commenter also states that language should be incorporated into the proposed AD giving owners/operators credit for using CPCP Task 55–10–011C1.

What Is FAA's Response to the Concern?

We do not concur. As earlier discussed, we are incorporating new service information into this proposed AD that requires removal of the horizontal stabilizer when doing the proposed inspection. We have confirmed with the manufacturer that CPCP Maintenance Task Number 55–10–011C1 and Zonal Task Card 55–10–11 do not require removal of the horizontal stabilizer when doing the inspection.

Therefore, we cannot give credit for accomplishing the inspection using CPCP Maintenance Task Number 55–10–011C1 and Zonal Task Card 55–10–11 as an alternative method of compliance.

We are not changing the final rule AD action based on this comment.

Comment Issue No. 3: Change the Compliance Time

What Is the Commenter's Concern?

The manufacturer states that because the change to the inspection procedures imposes an additional burden over that proposed in the NPRM, more time should be allowed to accomplish the requirements in the proposed AD (as allowed in the new service information).

What Is FAA's Response to the Concern?

We concur and will change the proposed AD action accordingly.

The FAA's Determination

What Has FAA Decided?

After examining the circumstances and reviewing all available information related to the incidents described above, we have determined that:

—The unsafe condition referenced in this document exists or could develop on other British Aerospace Model HP.137 Jetstream Mk.1, Jetstream Series 200, Jetstream Series 3101, and Jetstream Model 3201 airplanes of the same type design that are on the U.S. registry;

—The NPRM should be changed to incorporate the new service information; and

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

The Supplemental NPRM

How Will the Changes to the NPRM Impact the Public?

Proposing that the NPRM incorporate the new service information that changes the procedures for doing the proposed inspections goes beyond the scope of what was already proposed. Therefore, we are issuing a supplemental NPRM and reopening the comment period to allow the public additional time to comment on the proposed AD.

What Are the Provisions of the Supplemental NPRM?

The proposed AD would require you to:

—Repetitively inspect the forward and rear horizontal and vertical stabilizer attachment fittings and associated hardware for corrosion and wear (damage); and

—Replace or repair any damaged parts found during any inspection.

Cost Impact

How Many Airplanes Would This Proposed AD Impact?

We estimate that this proposed AD affects 250 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 the proposed inspection:

Labor cost	Parts cost	Total cost per airplane	Total cost on U.S. operators
120 workhours × $60 = $7,200	No parts required to perform the inspection.	$7,200	$7,200 × 250 = $1,800,000.

The FAA has no method of determining the number of repetitive inspections each owner/operator would incur over the life of each of the affected airplanes so the cost impact is based on the initial inspection.

The FAA has no method of determining the number of repairs each owner/operator would incur over the life of each of the affected airplanes based on the results of the proposed inspections. We have no way of determining the number of airplanes that may need such repair. The extent of damage would vary on each airplane.

Compliance Time of This Proposed AD

What Would Be the Compliance Time of This Proposed AD?

The compliance time of this proposed AD is ''upon accumulating 8 calendar years on the airframe or within the next 12 months after the effective date of this AD, whichever occurs later.''

Why Is the Compliance Time Presented in Calendar Time Instead of Hours Time-In-Service (TIS)?

The unsafe condition specified by this proposed AD is caused by corrosion. Corrosion can occur regardless of whether the aircraft is in operation or is in storage. Therefore, to assure that the unsafe condition specified in this proposed AD does not go undetected for a long period of time, the compliance is presented in calendar time instead of hours time-in-service (TIS). This will allow the owners/operators to work the proposed inspection into regularly scheduled maintenance.

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:

British Aerospace: Docket No. 2002-CE–14–AD.

(a) *What airplanes are affected by this AD?* This AD affects Model HP.137 Jetstream Mk.1, Jetstream Series 200, Jetstream Series 3101, and Jetstream Model 3201 airplanes, all serial numbers, that are certificated in any category.

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

(c) *What problem does this AD address?* The actions specified by this AD are intended to detect and correct corrosion and/or wear on the horizontal and vertical stabilizer attachment fittings and associated hardware, which could result in failure of the attachment fittings. Such failure could lead to flutter and subsequent structural failure of the empennage.

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

Actions	Compliance	Procedures
(1) Visually inspect the forward and rear horizontal stabilizer attachment bolts and associated hardward for corrosion (i.e., pitting or a change of color in the surface) and wear (damage).	Initially inspect upon accumulating 8 years on the airframe or within the next 12 calendar months after the effective date of this AD, whichever occurs later. Repetitively inspect thereafter at intervals not to exceed 8 years.	In accordance with British Aerospace Jetstream Mandatory Service Bulletin 55–JA020543, Original Issue: October 24, 2002.
(2) If corrosion or wear is found during any inspection required in paragraph (d)(1) of this AD, replace or repair any damaged part in accordance with the procedures specified in the manufacturer's service bulletin.	Prior to further flight after the inspection in which the damage was found.	In accordance with British Aerospace Jetstream Mandatory Service Bulletin 55–JA020543, Original Issue: October 24, 2002.
(3) Visually inspect the forward and rear horizontal and vertical stabilizer attachment fittings and the forward eye bolts of the vertical stabilizer for corrosion or damage at the lug faces.	Initially inspect upon accumulating 8 years on the airframe or within the next 12 calendar months after the effective date of this AD, whichever occurs later. Repetitively inspect thereafter at intervals not to exceed 8 years.	In accordance with British Aerospace Jetstream Mandatory Service Bulletin 55–JA020543, Original Issue: October 24, 2002.

Actions	Compliance	Procedures
(4) If corrosion or damage is found during any inspection required in paragraph (d)(3) of this AD: (i) replace or repair any damaged part in accordance with the procedures specified in the manufacturer's service bulletin; or (ii) if damage exceeds the limits defined in the manufacturer's service bulletin, obtain a repair scheme from the manufacturer through the FAA at the address specified in paragraph (f) of this AD; and (iii) incorporate this repair scheme.	Prior to further flight after the inspection in which the damage was found.	Repair in accordance with the repair scheme obtained from British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA92RW, Scotland. Obtain this repair scheme through the FAA at the address specified in paragraph (f) of this AD.

Note 1: Although not required by this AD, FAA highly recommends you accomplish *Highly Recommended Corrosion Prevention Tasks* in British Aerospace Jetstream Service Bulletin 55–JA020544, Original Issue: October 24, 2002, upon accomplishing the initial inspection of this AD and during repetitive inspections if damage is found.

(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, Standards Office, 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, Standards Office.

Note 2: 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 Doug Rudolph, Aerospace Engineer, FAA, Small Airplane Directorate, 901 Locust, Room 301, Kansas City, Missouri 64106; telephone: (816) 329–4059; 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 British Aerospace Regional Aircraft, Prestwick International Airport, Ayrshire, KA9 2RW, Scotland; telephone: (01292) 672345; facsimile: (01292) 671625. You may view these documents at FAA, Central Region, Office of the Regional Counsel, 901 Locust, Room 506, Kansas City, Missouri 64106.

Note 3: The subject of this AD is addressed in British Aerospace Jetstream Mandatory Service Bulletin 55–JA020543, Original Issue: October 24, 2002. This service bulletin is classified as mandatory by the United Kingdom Civil Aviation Authority (CAA).

Issued in Kansas City, Missouri, on December 2, 2002.

Michael Gallagher,

Manager, Small Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–31129 Filed 12–9–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2002–NM–218–AD]

RIN 2120–AA64

Airworthiness Directives; Dornier Model 328–100 and –300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Dornier Model 328–100 and –300 series airplanes. This proposal would require replacement of certain flight data recorder (FDR) and cockpit voice recorder (CVR) impact switches with certain new impact switches. This action is necessary to prevent the loss of data recorded on the FDR and CVR, which, in the event of an accident, could result in the inability to retrieve data from the FDR and CVR during the accident investigation. This loss of data could hinder the identification of the unsafe condition which caused the accident, and prevent the FAA from developing and mandating actions to prevent additional accidents caused by that same unsafe condition.

DATES: Comments must be received by January 9, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–218–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2002–NM–218–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from FAIRCHILD DORNIER, DORNIER Luftfahrt GmbH, P.O. Box 1103, D–82230 Wessling, Germany. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Dan Rodina, Aerospace Engineer, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2125; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date

for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

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

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2002–NM–218–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2002–NM–218–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The Luftfahrt-Bundesamt (LBA), which is the airworthiness authority for Germany, notified the FAA that an unsafe condition may exist on certain Dornier Model 328–100 and –300 series airplanes. The LBA advises that it received a report indicating that 3g-impact switches were found to be installed in the flight data recorder (FDR) and cockpit voice recorder (CVR). The 3g-impact switches could turn off the FDR and CVR once the loads on the airplane reached 3g, and, thus, there would be no means of recording data when the loads exceeded 3g. An airplane acceleration of 4.25g could trip the switches and turn off the FDR and CVR. In the event of an accident, after experiencing 4.25g, the FDR and CVR could be turned off and data would not be recorded. Replacement of the 3g-impact switches with new, 6g-impact switches is necessary to prevent the loss of data recorded on the FDR and CVR, which could result in the inability to retrieve data from the FDR and CVR in the event of an accident. This loss of data could hinder the identification of the unsafe condition which caused the accident, and prevent the FAA from developing and mandating actions to prevent additional accidents caused by that same unsafe condition.

FAA's Determination of Unsafe Condition

This action is necessary to prevent the loss of data recorded on the FDR and CVR. The loss of data does not directly affect the safety of the airplane. However, should an airplane with a 3g-impact switch have an unsafe condition which results in an accident, the data retrieved from the FDR and CVR would be incomplete. This lack of reliable data could hinder identification of the unsafe condition which caused the accident, and prevent the FAA from developing and mandating actions to prevent additional accidents caused by that same unsafe condition. Therefore, the FAA has determined that the proposed action is necessary.

It should be noted that the purpose of this action is not to enhance the safety of the Dornier Model 328–100 and –300 series airplanes, but rather to restore the level of safety provided by the originally approved FDR and CVR. Therefore, this AD is the appropriate regulatory vehicle to achieve this purpose.

Explanation of Relevant Service Information

Dornier has issued Service Bulletins SB–328–31–390 (for Model 328–100 series airplanes); and SB–328J–31–118 (for Model 328–300 series airplanes); both dated September 6, 2001. These service bulletins describe procedures for replacement of 3g-impact switches with new, 6g-impact switches for the FDR and the CVR. The LBA classified these service bulletins as mandatory and issued German airworthiness directives 2002–238 and 2002–239, both dated August 22, 2002, in order to assure the continued airworthiness of these airplanes in Germany.

FAA's Conclusions

These airplane models are manufactured in Germany and are 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 LBA has kept the FAA informed of the situation described above. The FAA has examined the findings of the LBA, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of Proposed Rule

Since the loss of data recorded on the FDR and CVR may hinder the identification of an unsafe condition that is likely to exist or develop on other airplanes of the same type design registered in the United States, the proposed AD would require accomplishment of the actions specified in the applicable service bulletin described previously.

Cost Impact

The FAA estimates that 53 Model 328–100 series airplanes and 48 Model 328–300 series airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 1 work hour per airplane to accomplish the proposed replacement, and that the average labor rate is $60 per work hour. Required parts would cost approximately $1,346 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be $142,006, or $1,406 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed 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 proposed herein would not have a substantial direct effect on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, it is determined that this proposal would not have federalism implications under Executive Order 13132.

For the reasons discussed above, I certify that this proposed regulation (1) is not a ''significant regulatory action'' under Executive Order 12866; (2) is not

a ''significant rule'' under the DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979); and (3) if promulgated, will not have a significant economic impact, positive or negative, on a substantial number of small entities under the criteria of the Regulatory Flexibility Act. A copy of the draft regulatory evaluation prepared for this action is contained in the Rules Docket. A copy of it may be obtained by contacting the Rules Docket at the location provided under the caption **ADDRESSES.**

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Dornier Luftfahrt GmbH: Docket 2002–NM–218–AD.

Applicability: Airplanes listed in the following table of this AD, certificated in any category:

TABLE—APPLICABILITY

Model	Serial No.
328–100 series airplanes.	3005 through 3119 inclusive
328–300 series airplanes.	3105 through 3223 inclusive

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

Compliance: Required as indicated, unless accomplished previously.

To prevent the loss of data recorded on the flight data recorder (FDR) and cockpit voice recorder (CVR), which, in the event of accident, could result in the inability to retrieve data from the FDR and CVR during the accident investigation, and hinder the identification of the unsafe condition which caused the accident, accomplish the following:

Switch Replacement

(a) For Model 328–100 series airplanes: Within 12 months after the effective date of this AD, replace the FDR and cockpit voice recorder CVR 3g-impact switches, with new, 6g-impact switches, per the Accomplishment Instructions of Dornier Service Bulletin SB–328–31–390, dated September 6, 2001.

(b) For Model 328–300 series airplanes: Within 12 months after the effective date of this AD, replace the FDR and CVR 3g-impact switches, with new, 6g-impact switches, per the Accomplishment Instructions of Dornier Service Bulletin SB–328J–31–118, dated September 6, 2001.

Alternative Methods of Compliance

(c) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, International Branch, ANM–116, Transport Airplane Directorate, FAA. Operators shall submit their requests through an appropriate FAA Principal Operations Inspector, who may add comments and then send it to the Manager, International Branch, ANM–116.

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

Special Flight Permits

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

Note 3: The subject of this AD is addressed in German airworthiness directives 2002–238 and 2002–239, both dated August 22, 2002.

Issued in Renton, Washington, on December 4, 2002.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–31135 Filed 12–9–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 2001–NM–374–AD]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 737–600, 737–700, 737–800, 757–200, and 757–300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: This document proposes the adoption of a new airworthiness directive (AD) that is applicable to certain Boeing Model 737–600, 737–700, 737–800, 757–200, and 757–300 series airplanes. This proposal would require replacing existing video distribution unit (VDU) connectors with new, improved connectors or new wire assemblies (jumpers), and performing related actions, as applicable. This action is necessary to prevent a short circuit in a VDU connector and consequent arcing and damage to wiring within the connector, which could result in damage to adjacent systems or structure and possible smoke or fire in the airplane cabin. This action is intended to address the identified unsafe condition.

DATES: Comments must be received by January 24, 2003.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001-NM–374-AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056. Comments may be inspected at this location between 9 a.m. and 3 p.m., Monday through Friday, except Federal holidays. Comments may be submitted via fax to (425) 227–1232. Comments may also be sent via the Internet using the following address: *9-anm-nprmcomment@faa.gov.* Comments sent via fax or the Internet must contain ''Docket No. 2001–NM–374–AD'' in the subject line and need not be submitted in triplicate. Comments sent via the Internet as attached electronic files must be formatted in Microsoft Word 97 for Windows or ASCII text.

The service information referenced in the proposed rule may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. This information may be examined at the FAA, Transport

Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington.

FOR FURTHER INFORMATION CONTACT: Binh V. Tran, Aerospace Engineer, Systems and Equipment Branch, ANM–130S, FAA, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2890; fax (425) 227–1181.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested persons are invited to participate in the making of the proposed rule by submitting such written data, views, or arguments as they may desire. Communications shall identify the Rules Docket number and be submitted in triplicate to the address specified above. All communications received on or before the closing date for comments, specified above, will be considered before taking action on the proposed rule. The proposals contained in this action may be changed in light of the comments received.

Submit comments using the following format:

• Organize comments issue-by-issue. For example, discuss a request to change the compliance time and a request to change the service bulletin reference as two separate issues.

• For each issue, state what specific change to the proposed AD is being requested.

• Include justification (*e.g.*, reasons or data) for each request.

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

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this action must submit a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket Number 2001–NM–374–AD.'' The postcard will be date stamped and returned to the commenter.

Availability of NPRMs

Any person may obtain a copy of this NPRM by submitting a request to the FAA, Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 2001–NM–374–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

Discussion

The FAA has received reports indicating that burned contacts have been found on certain video distribution unit (VDU) connectors installed on certain Boeing Model 737–700 and 737–800 series airplanes. In several cases, the mating connector on the VDU was damaged and, in one case, an insulation blanket near the connector was damaged. Investigation revealed that the burned contacts were caused by the presence of moisture and wire chafing in the backshell boot of the VDU connector. Moisture or chafed wiring may result in a short circuit that may cause internal arcing and damage to wiring within the connector. This condition, if not corrected, could result in damage to adjacent systems or structure, and possible smoke or fire in the airplane cabin.

The same type of VDU connectors is also installed on Boeing Model 737–600, 757–200, and 757–300 series airplanes. While the FAA has not received any reports of burned contacts on these airplane models, the VDU connectors may be subject to the same unsafe condition as those on Boeing Model 737–700 and –800 series airplanes.

Explanation of Relevant Service Information

We have reviewed and approved Boeing Service Bulletin 737–23A1169, Revision 2, dated June 21, 2001. Part 2 of this service bulletin describes procedures for replacing existing VDU connectors with new, improved connectors having better moisture resistance and longer wires, and adding a drip loop to the wiring at the new VDU connectors.

We also have reviewed and approved Boeing Alert Service Bulletin 757–23A0060, Revision 1, dated January 11, 2001; and Boeing Alert Service Bulletin 757–23A0061, Revision 1, dated January 11, 2001. Part 2 of these service bulletins describes procedures for replacing existing VDU connectors with new, improved connectors having better moisture resistance, or—if a drip loop does not exist—with new wire assemblies (jumpers).

Accomplishment of the actions specified in the service bulletins described previously is intended to adequately address the identified unsafe condition.

Explanation of Requirements of Proposed Rule

Since an unsafe condition has been identified that is likely to exist or develop on other products of this same type design, the proposed AD would require accomplishment of the actions specified in the service bulletins described previously, except as discussed below.

Differences Between Service Bulletins and Proposed AD

Part 1 of the Accomplishment Instructions of the referenced service bulletins describes various interim actions intended to detect or prevent conditions that may lead to a short circuit, until the VDU connectors are replaced with new, improved VDU connectors or wire assemblies, as applicable. However, this proposed AD would not require the interim actions in part 1 of the service bulletins, but only the replacement of the VDU connectors with new, improved connectors or new wire assemblies, as applicable, as described in part 2 of the service bulletins. Mandating the replacement is based on our determination that long-term continued operational safety will be better assured by modifications or design changes to remove the source of the problem, rather than by inspections or other interim actions. Inspections and interim actions may not provide the degree of safety assurance necessary for the transport airplane fleet. This, coupled with a better understanding of the human factors associated with inspections, has led us to consider placing less emphasis on inspections and more emphasis on design improvements. The proposed replacement requirement is consistent with these conditions.

The service bulletins recommend that the part 2 replacement be done as soon as manpower, materials, and facilities are available. We find that such a compliance time would not ensure that the identified unsafe condition is addressed in a timely manner. In developing an appropriate compliance time for this proposed AD, we considered not only the manufacturer's recommendation, but also the degree of urgency associated with addressing the subject unsafe condition. In light of these factors, we find a compliance time of 18 months for completing the proposed actions would be warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

Cost Impact

There are approximately 280 airplanes of the affected design in the worldwide fleet. The FAA estimates that 28 airplanes of U.S. registry would be affected by this proposed AD, that it would take approximately 16 work hours per airplane to accomplish the

proposed connector replacement, and that the average labor rate is $60 per work hour. Required parts would cost between $334 and $13,944 per airplane. Based on these figures, the cost impact of the proposed AD on U.S. operators is estimated to be between $1,294 and $14,904 per airplane.

The cost impact figure discussed above is based on assumptions that no operator has yet accomplished any of the proposed requirements of this AD action, and that no operator would accomplish those actions in the future if this proposed 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. The manufacturer may cover the cost of replacement parts associated with this proposed AD, subject to warranty conditions. Manufacturer warranty remedies may also be available for labor costs associated with this proposed AD. As a result, the costs attributable to the proposed AD may be less than stated above.

Regulatory Impact

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

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

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

The Proposed Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

Boeing: Docket 2001–NM–374–AD.

Applicability: Model 737–600, –700, and ''800 series airplanes, as listed in Boeing Service Bulletin 737–23A1169, Revision 2, dated June 21, 2001; Model 757–200 series airplanes, as listed in Boeing Alert Service Bulletin 757–23A0060, Revision 1, dated January 11, 2001; and Model 757–300 series airplanes as listed in Boeing Alert Service Bulletin 757–23A0061, Revision 1, dated January 11, 2001; 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 a short circuit in a video distribution unit (VDU) connector and consequent arcing and damage to wiring within the connector, which could result in damage to adjacent systems or structure and possible smoke or fire in the airplane cabin, accomplish the following:

Model 737–600, –700, and –800 Series Airplanes: Inspections and Follow-on Actions

(a) For Model 737–600, –700, and –800 series airplanes: Within 18 months after the effective date of this AD, replace existing VDU connectors with new, improved connectors, and install a drip loop in the wiring at the new VDU connectors, per part 2 of the Accomplishment Instructions of Boeing Service Bulletin 737–23A1169, Revision 2, dated June 21, 2001.

Model 757–200 and –300 Series Airplanes: Inspections and Follow-on Actions

(b) For Model 757–200 and -300 series airplanes: Within 18 months after the effective date of this AD, replace existing VDU connectors with new, improved connectors, or with new wire assemblies (jumpers), as applicable, per part 2 of the Accomplishment Instructions of Boeing Alert Service Bulletin 757–23A0060, Revision 1, dated January 11, 2001 (for Model 757–200 series airplanes); or Boeing Alert Service Bulletin 757–23A0061, Revision 1, dated January 11, 2001 (for Model 757–300 series airplanes); as applicable.

Part Installation

(c) As of the effective date of this AD, no person shall install a VDU connector, part number CAMA11W1P, on any airplane.

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 Aircraft Certification Office (ACO), FAA. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

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

Special Flight Permits

(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.

Issued in Renton, Washington, on December 4, 2002.

Vi L. Lipski,

Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 02–31134 Filed 12–9–02; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. FAA–2002–13818; Airspace Docket No. 02–AGL–19]

Proposed Modification of Class E Airspace; Muskegon, MI

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to modify Class E airspace at Muskegon, MI. Standard Instrument Approach Procedures (SIAPS) have been developed for Muskegon County Airport, Muskegon, MI. Controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing these approaches. This action

would increase the area of the existing controlled airspace for Muskegon County Airport.

DATES: Comments must be received on or before January 22, 2003.

ADDRESSES: Send comments on the proposal to the Docket Management System, U.S. Department of Transportation, Room Plaza 401, 400 Seventh Street, SW., Washington, DC 20590–0001. You must identify the docket Number FAA–2002–13818/ Airspace Docket No. 02–AGL–19, at the beginning of your comments. You may also submit comments on the Internet at *http://dms.dot.gov.* You may review the public docket containing the proposal, any comments received, and any final disposition in person in the Dockets Office between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The Docket Office (telephone 1–800–647–5527) is on the plaza level of the Department of Transportation NASSIF Building at the above address.

An informal docket may also be examined during normal business hours at the office of the Regional Air Traffic Division, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018.

FOR FURTHER INFORMATION CONTACT: Denis C. Burke, Air Traffic Division, Airspace Branch, AGL–520, Federal Aviation Administration, 2300 East Devon Avenue, Des Plaines, Illinois 60018, telephone (847) 294–7568.

SUPPLEMENTARY INFORMATION:

Comments Invited

Interested parties are invited to participate in this proposed rulemaking by submitting such written data, views, or arguments as they may desire. Comments that provide the factual basis supporting the views and suggestions presented are particularly helpful in developing reasoned regulatory decisions on the proposal. Comments are specifically invited on the overall regulatory, aeronautical, economic, environmental, and energy-related aspects of the proposal. Communications should identify both docket numbers and be submitted in triplicate to the address listed above. Commenters wishing the FAA to acknowledge receipt of their comments on this document must submit with those comments a self-addressed, stamped postcard on which the following statement is made: ''Comments to Docket No. FAA–2002–13818/Airspace Docket No. AGL–02–19.'' The postcard will be date/time stamped and returned to the commenter. All communications received on or before the specified closing date for comments will be considered before taking action on the proposed rule. The proposal contained in this action may be changed in light of comments received. All comments submitted will be available for examination in the Rules Docket, FAA, Great Lakes Region, office of the Regional Counsel, 2300 East Devon Avenue, Des Plaines, Illinois, both before and after the closing date for comments. A report summarizing each substantive public contact with FAA personnel concerned with this rulemaking will be filed in the docket.

Availability of NPRM's

An electronic copy of this document may be downloaded through the Internet at *http://dms.dot.gov.* Recently published rulemaking documents can also be accessed through the FAA's Web page at *http://www.faa.gov* or the Superintendent of Document's Web page at *http://www.access.gpo.gov/nara.*

Additionally, any person may obtain a copy of this notice by submitting a request to the Federal Aviation Administration, Office of Air Traffic Airspace Management, ATA–400, 800 Independence Avenue, SW., Washington, DC 20591, or by calling (202) 267–8783. Communications must identify both docket numbers for this notice. Persons interested in being placed on a mailing list for future NPRM's should contact the FAA's Office of Rulemaking, (202) 267–9677, to request a copy of Advisory Circular No. 11–2A, Notice of Proposed Rulemaking Distribution System, which describes the application procedure.

The Proposal

The FAA is considering an amendment to 14 CFR part 71 to modify Class E airspace at Muskegon, MI, for Muskegon County Airport. Controlled airspace extending upward from 700 feet or more above the surface of the earth is needed to contain aircraft executing instrument approach procedures. The area would be depicted on appropriate aeronautical charts. Class E airspace areas extending upward from 700 feet or more above the surface of the earth are published in paragraph 6005 of FAA Order 7400.9K dated August 30, 2002, and effective September 16, 2002, which is incorporated by reference in 14 CFR 71.1. The Class E designations listed in this document would be published subsequently in the Order.

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

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

The Proposed Amendment

Accordingly, pursuant to the authority delegated to me, the Federal Aviation Administration proposes to amend 14 CFR part 71 as follows:

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

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

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

§ 71.1 [Amended]

2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9K, Airspace Designations and Reporting Points, dated August 30, 2002, and effective September 16, 2002, is amended as follows:

* * * * *

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

* * * * *

AGL MI E5 Muskegon, MI [Revised]

Muskegon County Airport, MI
(Lat.43°10′10″ N., long.86°14′18″ W.)
Grand Haven Memorial Airpark, MI
(Lat.43°02′02″ N., long.86°11′53″ W.)
Muskegon VORTAC, MI
(Lat.43°10′10″ N., long.86°02′22″ W.)

That airspace extending upward from 700 feet above the surface within a 6.8-mile radius of Muskegon County Airport and within 2.6 miles each side of the ILS localizer southeast course extending from the 6.8-mile radius to 10.8 miles southeast of the airport, and within 2.4 miles each side of the localizer northwest course extending from the 6.8-mile radius to 12.1 miles northwest

of the airport, and within 2.8 miles each side of the Muskegon VORTAC 266° radial extending from the 6.8-mile radius to 12.7 miles west of the airport, and within 1.3 miles each side of the Muskegon VORTAC 271° radial extending from the VORTAC to the 6.8-mile radius of the airport and within a 6.3-mile radius of the Grand Haven Memorial Airpark.

* * * * *

Issued in Des Plaines, Illinois on November 13, 2002.

Richard K. Petersen,

Assistant Manager, Air Traffic Division, Great Lakes Region.

[FR Doc. 02–29898 Filed 12–9–02; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

25 CFR Chapter I, Subchapter E

Negotiated Rulemaking, No Child Left Behind Act of 2001, Public Law 107–110

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of intent to form a negotiated rulemaking committee; request for nominations for tribal representatives for No Child Left Behind Negotiated Rulemaking Committee membership.

SUMMARY: The Secretary of the Interior is announcing the Department's intent to form a Negotiated Rulemaking Committee to develop recommendations for proposed regulations under the No Child Left Behind Act of 2001. The Secretary will select tribal representatives for the committee from among individuals nominated by the representatives of the tribal (contract and grant schools) and tribally operated schools pursuant to this notice. As required by the No Child Left Behind Act, tribal committee representatives selected will, to the maximum extent possible, proportionately reflect students from tribes served by the Bureau of Indian Affairs-funded school system. In addition, the Secretary will consider geographical location, size, and type of school and facility and interests of parents, teachers, administrators, and school board members in selecting tribal committee representatives.

DATES: Nominations for tribal committee membership and comments on the establishment of this Committee, including additional interests other than those identified in this notice, must be postmarked or faxed by January 9, 2003.

ADDRESSES: Send nominations and comments to No Child Left Behind Negotiated Rulemaking Committee Nominations, c/o Starr Penland, Office of Indian Education Programs, Bureau of Indian Affairs, U.S. Department of the Interior, MS 3512–MIB, 1849 C Street, NW., Washington, DC 20240, or FAX to Starr Penland at 202–273–0030.

Nominations and comments received will be available for inspection at the address listed above from 7:45 a.m. to 4 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Catherine Freels, Designated Federal Official, No Child Left Behind Negotiated Rulemaking, U.S. Department of the Interior, Office of the Regional Solicitor, Southwest Region, 505 Marquette Avenue, NW., Albuquerque, New Mexico, 87102, telephone 505–248–5605, FAX 505–248–5623.

SUPPLEMENTARY INFORMATION:

I. Introduction

The purpose of the No Child Left Behind Negotiated Rulemaking Committee is to serve as an advisory committee under the Federal Advisory Committee Act (FACA) and the Negotiated Rulemaking Act (NRA) to provide recommendations to the Secretary of the Interior for proposed regulations under Public Law 107–110 for which Congress has authorized rulemaking. (Sections 1116(g), 1124, 1127, sections 1130, 1136, and 1043.) The objectives of the committee are to represent the interests that will be significantly affected by the final regulations, to negotiate in good faith, and to reach consensus, where possible, on recommendations to the Secretary for the proposed regulations.

In order to proceed with negotiated rulemaking, the NRA requires that the Secretary make certain findings when establishing a negotiated rulemaking committee. In addition to finding that there is a need for negotiated rulemaking under the Act, the Secretary has determined that there are a limited number of identifiable interests that will be significantly affected by the rule; there is a reasonable likelihood that a committee can be convened of persons who will adequately represent those interests which would be significantly affected by the rule and who are willing to negotiate in good faith to reach a consensus on the proposed rule; the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of the final rule; and the Department has adequate resources and is willing to commit such resources, including technical assistance, to the rulemaking committee.

II. Background

Public Law 107–110, section 1138 the No Child Left Behind Act of 2001, requires the Secretary to issue proposed regulations relating to several specific areas of Indian education by June 2003. The Act requires the Secretary to develop these regulations using the negotiated rulemaking process. It also requires the following:

1. The Secretary must form the negotiated rulemaking committee under the Negotiated Rulemaking Act (NRA) and the Federal Advisory Committee Act (FACA) to negotiate and develop recommendations for proposed regulations.

2. Before establishing a negotiated rulemaking committee, the Secretary must conduct regional consultation meetings to obtain guidance on the content of the proposed regulations.

3. In establishing a negotiated rulemaking committee, the Secretary must reflect the unique government-to-government relationship between Indian tribes and the United States.

4. The Secretary must ensure that the committee is comprised only of representatives of the Federal Government and of Indian tribes; select the tribal representatives of the committee from among individuals nominated by the representatives of the tribal and tribally operated schools; and ensure, to the maximum extent possible, that the tribal representative membership on the committee reflects the proportionate share of students from tribes served by the Bureau-funded school system. (The table at the end of this notice shows tribal enrollment in Bureau-funded schools. For each of the 20 tribes with the largest enrollment, the list shows the number of students and the percentage of total enrollment that the tribe represents. For the remaining tribes, the table contains the aggregate enrollment and percentage. We will use these percentages in determining proportional representation.)

The Act specifies six sections that are authorized to be negotiated to produce recommendations for a proposed rule by the June 2003 deadline:

1. Section 1116(g), which covers defining adequate yearly progress which is the essential measurement for determining that schools are providing quality education;

2. Section 1124, which covers establishing separate geographic attendance areas for each Bureau-funded school;

3. Section 1127, which covers establishing a formula for determining the minimum annual amount of funds necessary to fund each Bureau-funded school;

4. Section 1130, which covers establishing a system for the direct funding and support of all Bureau-funded schools under the formula established under section 1127;

5. Section 1136, which covers establishing guidelines to ensure the constitutional and civil rights of Indian students regarding the right to privacy, freedom of religion and expression, and due process in connection with disciplinary actions (suspension and expulsion); and

6. Section 1043, which covers establishing a method for administration of grants under the Tribally Controlled Schools Act of 1988. These sections of the Act are available on the OIEP web site at *http://www.OIEP.bia.edu.*

III. The Concept of Negotiated Rulemaking

The negotiated rulemaking process is fundamentally different from the usual development process for proposed rules. Most proposed regulations are drafted by a Federal agency without public participation and are then published for public comment. Affected parties submit comments supporting their positions during the public comment period without communicating with other affected parties. Under the negotiated rulemaking process, an advisory committee of representatives of the interests that will be significantly affected by the final rule negotiates the provisions of the proposed rule with the agency. Negotiated rulemaking allows the Federal agency and the affected interests represented on the committee to discuss possible approaches to various issues and to negotiate the content of the regulations before a proposed rule is published. It also allows the affected parties to share information, knowledge, expertise, and technical abilities and to resolve their concerns about the rule before publication.

The key principles of negotiated rulemaking are that agreement is by consensus of all the interests and that no one interest or group controls or dominates the process. The NRA defines consensus as the unanimous concurrence among interests represented on a negotiated rulemaking committee, unless the committee itself unanimously agrees to use a different definition. The Secretary, to the maximum extent possible consistent with the Department's legal obligations, will use the consensus of the advisory committee as the basis for the proposed regulations.

A. Facilitation

Experience of various Federal agencies in negotiated rulemaking has demonstrated that using a trained, third-party neutral to facilitate the process will assist all parties during negotiations to identify their real interests, reevaluate their positions, communicate effectively, find common ground, and reach consensus where possible. The Secretary has contracted with Lucy Moore Associates of Santa Fe, New Mexico to assist with the regional consultation meetings prior to the formation of the committee, to provide a report of issues and interests identified at those meetings, and to provide facilitation and training at the first committee meeting. With the approval of the committee, Lucy Moore Associates will facilitate the subsequent committee meetings and provide other services as outlined in the NRA. Lucy Moore has 20 years experience as a mediator and facilitator, working on a wide variety of issues with tribal governments and communities.

B. Establishing the No Child Left Behind Negotiated Rulemaking Committee

The No Child Left Behind Negotiated Rulemaking Committee is an advisory committee under FACA. As required by the Act, the committee will be formed and will operate under the NRA and FACA. The purpose of the negotiated rulemaking committee is to negotiate and recommend to the Secretary the provisions of the proposed regulations. Committee members will not receive pay for their membership, but will be compensated for travel and *per diem* expenses while performing official committee business, consistent with the provisions of 5 U.S.C. 568(c) and Federal travel regulations. Alternates will not be reimbursed for travel and *per diem* unless they are representing a committee member who is unable to attend a meeting. Alternate members will not be permitted to represent those individuals appointed by the Secretary without prior written agreement with the Department.

Because of the tight deadline for publishing proposed rules, committee members must be able to invest considerable time and effort in the negotiated rulemaking process. Committee members must be able to attend committee meetings which will be held at least monthly in the regions which have Bureau-funded schools, work on committee work groups between committee meetings, and negotiate in good faith toward a consensus on issues before the committee. The Secretary is seeking tribal committee representative nominees with demonstrated ability to communicate well with groups or interests they will represent. Because of the complexity of the issues the committee will consider and the need for continuity, the Secretary reserves the right to replace any member who is unable to fully participate in the committee's meetings.

Tribal committee membership must reflect:

- The statutory requirements under the Act for tribal representation of tribes served by Bureau-funded schools; selection from among individuals nominated by representatives of the tribal and tribally operated schools; and tribal committee membership reflecting a proportionate share of students from the tribes served by the Bureau-funded school system; and
- The interests identified through the regional consultation meetings held in August and September 2002, or in comments submitted to the Department by September 15, 2002, pursuant to the **Federal Register** notice at 67 FR 47827 (July 22, 2002) or other interests identified in response to this notice.

The Secretary's decision on the composition of the committee will be based on the requirements of the Act, achieving a balanced committee, whether an interest will be affected significantly by the final rule, whether that interest is already adequately represented by tribal nominees, and whether the potential addition would adequately represent that interest.

C. Administrative and Technical Support

The Office of Indian Education Programs will provide technical support for the committee. A Project Management Office (PMO) will arrange meeting sites and accommodations, ensure adequate logistical support (equipment, personnel, *etc.*) at committee meetings, provide committee members with all relevant information, distribute written materials, ensure timely reimbursement of authorized expenses for committee members, maintain records of the committee's work, and support the committee as otherwise required. OIEP personnel will provide technical support on various Indian Education issues as needed.

D. Training

At the first meeting of the No Child Left Behind Negotiated Rulemaking Committee, a neutral third-party facilitator will provide training on negotiated rulemaking, interest-based

negotiations, consensus-building, and team-building. In addition, at the first meeting committee members will make organizational decisions concerning protocols, scheduling, and facilitation of the committee. All committee members must attend the first meeting.

IV. Interests Identified Through Consultation

Under section 562 of the NRA, ''interest'' is defined as follows: ''interest means, with respect to an issue or matter, multiple parties which have a similar point of view or which are likely to be affected in a similar manner.'' through 14 regional consultation meetings for OIEP personnel, educators at Bureau schools, and tribal officials, parents, teachers, administrators, and school board members of tribes served by Bureau-funded schools and through written comments, the following interests were identified: Teachers; parents; school board members; students; school staff; school administrators; state departments of education; public school representatives; and federal decision-makers. In addition, it was recommended that different types and sizes and geographic representation of schools should be represented in the appointments from the interest groups above, including: Grant/tribally-controlled schools; off-reservation boarding schools; small schools; and alternative schools. In addition, at each regional consultation meeting there were numerous oral comments giving guidance on proposed regulations.

There may be other interests not yet identified that will be significantly affected by the final rule. The Department is accepting comments until January 9, 2003, identifying other interests that may be significantly affected by the final regulations.

V. Request for Nominations

Under the requirements stated in the Background section, the Secretary invites representatives of tribal (contract and grant schools) and tribally operated schools to nominate tribal representatives to serve on the committee and tribal alternates to serve if the representative is unavailable. Because committee membership should reflect the diversity of tribal interests, representatives of tribal (contract and grant schools) and tribally operated schools should nominate representatives who will:

1. Represent the interests of students, parents, teachers, school board members, and school administrators they are nominated to represent;
2. Reflect the spectrum of grant/tribally-controlled schools, off-reservation boarding schools, various size schools, and alternative schools in the geographic regions;
3. Communicate with the constituencies they represent; and
4. Participate fully in the committee's activities.

VI. Submitting Nominations

The Secretary will consider only nominations for tribal committee representatives nominated through the process identified in this **Federal Register** notice. Nominations received in any other manner or for Federal representatives will not be considered. Only the Secretary may nominate Federal employees to the committee.

Nominations must include the following information about each nominee for tribal committee member:

1. the nominee's name, business address, telephone and fax number (and e-mail address, if applicable);
2. The tribal interest(s) to be represented by the nominee (teacher, parent, school administrators, or school board member) and whether the nominee will represent the interest of grant/tribally-controlled schools, off-reservation boarding schools, small or large school or alternative schools in a specific geographic region (*see* section IV of this notice) or other interest related to this rulemaking, as the tribe may designated; and
3. A resume´ reflecting the nominee's qualifications and experience in Indian education (including being a parent of a student attending a Bureau-funded school) to adequately represent the interest(s) identified in (2) above.

To be considered, nominations must be received by the close of business on January 9, 2003, at the location indicated in the **ADDRESSES** section.

Dated: December 3, 2002.

Neal A. McCaleb,

Assistant Secretary—Indian Affairs.

Proportionate share is reflected in the percentages of students from the tribes served by Bureau-funded schools. The percentages of the 20 tribes with the most students is as follows:

Tribe	Student count: student year 01–02	State	Percent
Eastern Navajo	4,665	NM	
Western Navajo	4,362	AZ	
Chinle Navajo	3,579	AZ	
Ft. Defiance Navajo	3,361	AZ	
Shiprock, Navajo	2,379	NM	
.			
Total Navajo	18,346		38.09
Oglala Sioux	3,296	SD	6.84
Turtle Mt. Chippewa	2,146	ND	4.46
MS Choctaw	1,889	MS	3.92
Cheyenne River Sioux	1,377	SD	2.86
Hopi	1,321	AZ	2.74
Eastern Cherokee	1,156	NC	2.40
Rosebud Sioux	1,008	SD	2.09
Standing Rock Sioux	948	SD/ND	1.97
White Mt. Apache	911	AZ	1.89
Gila River	864	AZ	1.79
Tohono O'odham	768	AZ	1.59
Pueblo of Laguna	562	NM	1.17
Sisseton Wahpeton Sioux	541	SD	1.12
Three Affiliated	497	ND	1.03
Spirit Lake Sioux	485	ND	1.01
Mescalero Apache	441	NM	.92
Pueblo of San Felipe	418	NM	.87

Tribe	Student count: student year 01–02	State	Percent
Ramah Navajo	393	NM	.82
Crow Creek Sioux	389	SD	.81
Total for 20 tribes	37,756		78.39
Other tribes	10,410		21.61

[FR Doc. 02–31121 Filed 12–9–02; 8:45 am]

BILLING CODE 4310–6W–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[COTP Houston–Galveston–02–009]

RIN 2115–AA97

Security Zones; Captain of the Port Houston-Galveston Zone

AGENCY: Coast Guard, DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard is issuing a supplemental notice of proposed rulemaking for a notice of proposed rulemaking published June 11, 2002 in which we proposed to establish security zones within the Ports of Houston, Morgan's Point, Bayport, Texas City, and Freeport, Texas. These zones are needed to protect waterfront facilities, persons, and vessels from subversive or terrorist acts. Entry of persons and vessels into these zones would be prohibited except as authorized by this rule or by the Captain of the Port Houston-Galveston.

DATES: Comments and related material must reach the Coast Guard on or before February 10, 2003.

ADDRESSES: You may mail comments and related material to Marine Safety Office Houston-Galveston, 9640 Clinton Drive, Galena Park, TX, 77547. Marine Safety Office Houston-Galveston maintains the public docket for this rulemaking. Comments and material received from the public, as well as documents indicated in this preamble as being available in the docket, will become part of this docket and will be available for inspection or copying at Marine Safety Office Houston-Galveston between 8 a.m. and 3:30 p.m., Monday through Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant Junior Grade (LTJG) George Tobey, Marine Safety Office Houston-Galveston, Texas, Port Waterways Management, at (713) 671–5100.

SUPPLEMENTARY INFORMATION:

Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related material. If you do so, please include your name and address, identify the docket number for this rulemaking [COTP Houston-Galveston—02–009], indicate the specific section of this document to which each comment applies, and give the reason for each comment. Please submit all comments and related material in an unbound format, no larger than 8½ by 11 inches, suitable for copying. If you would like to know that your submission reached us, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period. We may change this proposed rule in view of them.

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for a meeting by writing to Marine Safety Office Houston-Galveston at the address under **ADDRESSES** explaining why one would be beneficial. If we determine that one would aid this rulemaking, we will hold one at a time and place announced by a separate notice in the **Federal Register**.

Background and Purpose

On September 11, 2001, both towers of the World Trade Center and the Pentagon were attacked by terrorists. The President has continued the national emergencies he declared following those attacks (67 FR 58317 (Sep. 13, 2002) (continuing the emergency declared with respect to terrorist attacks); 67 FR 59447 (Sep. 20, 2002) (continuing emergency with respect to persons who commit, threaten to commit or support terrorism)). The President also has found pursuant to law, including the Magnuson Act (50 U.S.C. 191 *et seq.*), that the security of the United States is and continues to be endangered following the terrorist attacks (E.O. 13,273, 67 FR 56215 (Sep. 3, 2002) (security of U.S. endangered by disturbances in international relations of U.S. and such disturbances continue to endanger such relations).

In response to these terrorist acts, heightened awareness for the security and safety of all vessels, ports, and harbors is necessary. The Captain of the Port Houston-Galveston established temporary security zones around highly industrialized areas within the Captain of the Port Houston-Galveston Zone. These zones were published on June 11, 2002 [COTP Houston-Galveston—02–011] (67 FR 39851) and November 5, 2002 [COTP Houston-Galveston—02–018] (67 FR 67301).

On June 11, 2002, we published an NPRM entitled ''Security Zones; Captain of the Port Houston-Galveston Zone'' [COTP Houston-Galveston—02–009] (67 FR 39919). The NPRM proposed to replace the existing temporary security zones with permanent zones. The comment period for the NPRM expired on August 12, 2002. We received only two comments on this rule and both of these comments asked for information on how to comment on the proposed rule. As a result of these comments and to reflect changes in the size of the security zones proposed, the Coast Guard is issuing a supplemental notice of proposed rulemaking.

Discussion of Proposed Rule

Vessels operating within the Captain of the Port Houston-Galveston Zone are potential targets of terrorist attacks, or platforms from which terrorist attacks may be launched upon other vessels, waterfront facilities and adjacent population centers. The Ports of Houston, Morgan's Point, Bayport, Texas City, and Freeport are all heavily industrialized areas with general cargo facilities, container terminals, and bulk liquid transfer facilities.

The proposed rule establishes security zones around areas concentrated with commercial facilities considered critical to national security. These facilities are located in narrow manmade harbors or along narrow depth-restricted ship channels. A terrorist attack within these security zones could have a significant adverse impact on national security and the national economy.

The proposed security zones are as follows:

(1) *Houston, Texas.* The size of this proposed security zone remains unchanged from the NPRM. It includes the Houston Ship Channel and all associated turning basins, bounded by a line drawn between Houston Ship Channel Light 132 and Houston Ship Channel Light 133 west to the T & N Rail Road Swing Bridge at the entrance to Buffalo Bayou, including all waters adjacent to the ship channel from shoreline to shoreline and the first 200 yards of connecting waterways.

(2) *Morgan's Point, Texas.* This proposed security zone is being updated to reflect a more accurate position for Houston Ship Channel Light 91. The Morgan's Point security zone includes the water of Barbours Cut Ship Channel and Turning Basin west of a line drawn between Junction Light ''Barbours Cut'' and Houston Ship Channel Light 91.

(3) *Bayport, Texas.* The proposed security zone for Bayport is being increased to create a zone slightly larger than that published in the NPRM. This will have a minimal impact on vessel traffic because the northern portion of the ship channel remains open. The Bayport security zone includes all waters of the Port of Bayport, Bayport Ship Channel and Bayport Turning Basin south of latitude 29°36′45″ N and west of the Bayport Ship Channel Light 9.

(4) *Texas City, Texas.* The size of this proposed security zone is being increased to provide protection for facilities which were previously just outside of the zone. The Texas City security zone includes all waters of the Port of Texas City Channel, Turning Basin and Industrial Canal south and west of a line drawn from Texas City Channel Light 19 through Cut B Inner Range Front Light and terminating on land in position 29°23′16″ N, 94°53′15″ W.

(5) *Freeport, Texas.* The proposed security zones for Freeport remain the same as in the NPRM. The Dow Barge Canal security zone includes all waters of canal bounded by its junction with the Intracoastal Waterway, by a line drawn between an eastern point at latitude 28°56′48″ N, 95°18′20″ W, and a western point at 28°56′40″ N, 95°18′33″ W. The Brazos Harbor security includes all waters of the harbor west of a line drawn between the northern point at 28°56′27″ N, 95°20′00″ W, and the southern point 28°56′09″ N, 95°20′00″ W at its junction with the Old Brazos River Cut.

This proposed rule will increase the level of security within the ports by reducing the number of vessels transiting the industrialized areas and limiting access to only those vessels that are conducting business with port industries. It restricts entry into the zones to all vessels except vessels engaged or assisting in commerce with waterfront facilities, vessels operated by port authorities, vessels operated by waterfront facilities within the security zones, and vessels operated by federal, state, county or municipal agencies. All other vessels having a need to enter these zones but prohibited from doing so under this rule, must obtain express permission from the Captain of the Port Houston-Galveston or his designated representative prior to entry. Restricting access to these areas reduces potential methods of attack on vessels, waterfront facilities and adjacent population centers located within these zones.

Regulatory Evaluation

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

We expect the economic impact of this proposed rule to be so minimal that a full Regulatory Evaluation under paragraph 10(e) of the regulatory policies and procedures of DOT is unnecessary. The impacts on routine navigation are expected to be minimal. Due to the highly industrialized nature of these zones they are of limited interest to recreational boaters. Vessels engaged in or assisting in, commerce with facilities located within a zone or having the express permission of the Captain of the Port Houston-Galveston, are authorized entry under this rule.

Small Entities

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

The Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule would not have a significant economic impact on a substantial number of small entities. These security zones will not have an impact on a substantial number of small entities because this rule will not obstruct the regular flow of commercial vessel traffic conducting business within the zones. Other vessels may seek permission for entry into the zones from the Captain of the Port Houston-Galveston. If you think that your business, organization, or governmental jurisdiction qualifies as a small entity and that this rule would have a significant economic impact on it, please submit a comment (see **ADDRESSES**) explaining why you think it qualifies and how and to what degree this rule would economically affect it.

Assistance for Small Entities

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), we want to assist small entities in understanding this proposed rule so that they can better evaluate its effects on them and participate in the rulemaking. If the proposed rule would affect your small business, organization, or governmental jurisdiction and you have questions concerning its provisions or options for compliance, please contact LTJG George Tobey, Marine Safety Office Houston-Galveston, Texas, Port Waterways Management, at (713) 671–5100.

Collection of Information

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

Federalism

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on State or local governments and would either preempt State law or impose a substantial direct cost of compliance on them. We have analyzed this proposed rule under that Order and have determined that it does not have implications for federalism.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of $100,000,000 or more in any one year. Though this proposed rule would not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

Taking of Private Property

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

Civil Justice Reform

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

Protection of Children

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

Indian Tribal Governments

This proposed rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would 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. We invite your comments on how this proposed rule might impact tribal governments, even if that impact may not constitute a ''tribal implication'' under the Order.

Energy Effects

We have analyzed this proposed 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.

Environment

We have considered the environmental impact of this proposed rule and concluded that, under figure 2–1, paragraph (34)(g), of Commandant Instruction M16475.lD, this rule is categorically excluded from further environmental documentation because this rule is not expected to result in any significant environmental impact as described in the National Environmental Policy Act of 1969 (NEPA). A ''Categorical Exclusion Determination'' is available in the docket where indicated under **ADDRESSES.**

List of Subjects in 33 CFR Part 165

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

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

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

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

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

2. Add § 165.814 to read as follows:

§ 165.814 Security Zones; Captain of the Port Houston-Galveston Zone.

(a) *Location.* The following areas are designated as security zones:

(1) *Houston, TX.* The Houston Ship Channel and all associated turning basins, bounded by a line drawn between Houston Ship Channel Light 132 (LLNR–24445) and Houston Ship Channel Light 133 (LLNR–24450) west to the T & N Rail Road Swing Bridge at the entrance to Buffalo Bayou, including all waters adjacent to the ship channel from shoreline to shoreline and the first 200 yards of connecting waterways.

(2) *Morgan's Point, TX.* The Barbours Cut Ship Channel and Turning Basin containing all waters west of a line drawn between Junction Light ''Barbours Cut'' 29°41′12″ N, 94°59′12″ W (LLNR–23525), and Houston Ship Channel Light 91, 29°41′00″ N, 94°59′00″ W (LLNR–23375) (NAD 1983).

(3) *Bayport, TX.* The Port of Bayport, Bayport Ship Channel and Bayport Turning Basin containing all waters south of latitude 29°36′45″ N, and west of the Bayport Ship Channel Light 9 (LLNR–23295) (NAD 1983).

(4) *Texas City, TX.* The Port of Texas City Channel, Turning Basin and Industrial Canal containing all waters bounded by the area south and west of a line drawn from Texas City Channel Light 19 (LLNR 24180) through Cut B Inner Range Front Light (LLNR 24765), and terminating on land in position 29°23′16″ N, 94°53′15″ W (NAD 1983).

(5) *Freeport, TX.* (i) The Dow Barge Canal containing all waters bounded by its junction with the Intracoastal Waterway, by a line drawn between the eastern point at latitude 28°56′48″ N, 95°18′20″ W, and the western point at 28°56′40″ N, 95°18′33″ W (NAD 1983).

(ii) The Brazos Harbor containing all waters west of a line drawn between the northern point at 28°56′27″ N, 95°20′00″ W, and the southern point 28°56′09″ N, 95°20′00″ W (NAD 1983) at its junction with the Old Brazos River Cut.

(b) *Regulations.* (1) Entry into these zones is prohibited except for the following:

(i) Commercial vessels operating at waterfront facilities within these zones;

(ii) Commercial vessels transiting directly to or from waterfront facilities within these zones;

(iii) Vessels providing direct operational/logistic support to commercial vessels within these zones;

(iv) Vessels operated by the appropriate port authority or by facilities located within these zones; and

(v) Vessels operated by federal, state, county, or municipal agencies.

(2) Other persons or vessels requiring entry into a zone described in this section must request express permission to enter from the Captain of the Port Houston-Galveston, or designated representative.

(3) To request permission as required by these regulations contact ''Houston Traffic'' via VHF Channels 11½ or via phone at (713) 671–5103.

(4) All persons and vessels shall comply with the instructions of the Captain of the Port Houston-Galveston and designated on-scene U.S. Coast Guard patrol personnel. On-scene U.S. Coast Guard patrol personnel include commissioned, warrant, and petty officers of the U.S. Coast Guard.

Dated: November 26, 2002.

K. S. Cook,

Captain, U.S. Coast Guard, Captain of the Port Houston-Galveston.

[FR Doc. 02–31149 Filed 12–9–02; 8:45 am]

BILLING CODE 4910–15–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 12-Month Finding for a Petition to List the Yosemite Toad

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of 12-month petition finding.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce a 12-month finding for a petition to list the Yosemite toad (*Bufo canorus*) under the Endangered Species Act of 1973, as amended (Act). We find that the petitioned action is warranted, but precluded by higher priority listing actions. We will develop a proposed rule to list this species pursuant to our Listing Priority System (48 FR 43098). Upon publication of this notice of 12-month petition finding, this species will be added to our candidate species list.

DATES: The finding announced in this document was made on November 27, 2002. Comments and information may be submitted until further notice.

ADDRESSES: You may send data, information, comments, or questions concerning this finding to the Field Supervisor, U.S. Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 2800 Cottage Way, Room W–2605, Sacramento, CA 95825. You may inspect the petition, administrative finding, supporting information, and comments received, by appointment, during normal business hours at the above address.

FOR FURTHER INFORMATION CONTACT: Susan Moore at the Sacramento Fish and Wildlife Office (*see* **ADDRESSES** above) (telephone 916/414–6600; facsimile 916/414–6712).

SUPPLEMENTARY INFORMATION:

Background

Section 4(b)(3)(B) of the Endangered Species Act of 1973, as amended (Act) (16 U.S.C. 1531 *et seq.*), requires that, for any petition to revise the List of Threatened and Endangered Species containing substantial scientific and commercial information that listing may be warranted, we conduct a status review and make a finding within 12 months of the date of the receipt of the petition on whether the petitioned action is: (a) Not warranted, (b) warranted, or (c) warranted but precluded from immediate proposal by other higher priority proposals. Section 4(b)(3)(C) of the Act requires that petitions for which a requested action is found to be warranted but precluded should be treated as though resubmitted on the date of such finding, *i.e.*, requiring a subsequent finding to be made within 12 months. Such 12-month findings are to be published promptly in the **Federal Register**.

Section 4(b) of the Act states that we may make warranted but precluded findings only if we can demonstrate that: (1) An immediate proposed rule is precluded by other pending actions, and (2) expeditious progress is being made on other listing actions. Due to the large amount of litigation over critical habitat, we are working on numerous court orders and settlement agreements. Complying with these orders and settlement agreements will consume all of our listing budget for fiscal year 2003. However, we can continue to place species on the candidate species list, as that work activity is funded separately from our listing program.

Taxonomy

The Yosemite toad was originally described by Camp (1916), and given the common name Yosemite Park toad. Subsequent detections of this species indicated that its range extends beyond the boundaries of Yosemite National Park, and Grinnel and Storer (1924) referred to this species as the Yosemite toad.

Similarities in appearance of the Yosemite toad and the western toad (*Bufo boreas*) were noted by Camp (1916). Based on general appearance, structure and distribution, it appears that these two species are closely related (Myers 1942; Stebbins 1951; Mullally 1956; Savage 1958). The close relationship between *B. boreas* and *B. canorus* is also supported by studies of bone structure (Tihen 1962a,b), and by the survivorship of hybrid toads produced by artificially crossing the two species (Blair 1959, 1963, 1964).

Camp (1916), using characteristics of the skull, concluded that *Bufo boreas, B. canorus,* and *B. nestor* (extinct) are more closely related to each other than to other North American toads, and that these species comprise the most primitive group of *Bufo* in North America. Blair (1972) grouped *B. boreas, B. canorus,* black toads (*B. exsul*), and Amargosa toads (*B. nelsoni*), together taxonomically as the ''boreas group.''

Feder (1977) found *Bufo canorus* to be genetically distinctive based on samples from a limited geographic range. However, Yosemite toads are thought to hybridize with western toads in the northern part of their range (Karlstrom 1962; Morton and Sokolski 1978). Shaffer *et al.* (2000) performed genetic analysis of a segment of mitochondrial DNA from 372 Yosemite toads found in Yosemite and Kings Canyon National Parks. Their data showed significant genetic differences in Yosemite toads between the two National Parks. They also found significant genetic variability within Yosemite National Park between drainages, and within both Parks between breeding sites. Their data also indicated that black toads are a subgroup within Yosemite toads rather than a separate species. Stephens (2001) examined mitochondrial DNA from 8 Yosemite toads (selected from the samples examined by Shaffer *et al.* (2000) to represent the range of variability found in that study) and 173 western toads. Stephens' data indicate that *Bufo* in the Sierra Nevada occur in northern and southern evolutionary groups, each of which include both Yosemite and western toads (*i.e.*, toads of both species are more closely related to each other within a group than they are to members of their own species in the other group). Further genetic analysis of Yosemite toads sampled from throughout their range, and from other toad species surrounding their range is needed to fully understand the evolutionary history and appropriate taxonomic status of the Yosemite toad (Stephens 2001).

Description and Natural History

Yosemite toads are moderately sized, with a snout-urostyle length (measured from the tip of the snout to the posterior edge of the urostyle, a bony structure at the posterior end of the spinal column) of 30 to 71 millimeters (mm) (1.2 to 2.8 inches (in)) with rounded to slightly oval paratoid glands (a pair of glands, one on each side of the head, that produce toxins) (Karlstrom 1962). The paratoid glands are less than the width of a gland apart (Stebbins 1985). A thin mid-dorsal (middle of the back) stripe is present in juveniles of both sexes. The stripe disappears or is reduced with age, and more quickly in males (Jennings and Hayes 1994). The iris of the eye is dark brown with gold iridophores (reflective pigment cells) (Jennings and Hayes 1994). Males are smaller than females, with less conspicuous warts (Stebbins 1951). Differences in coloration between males and females are more pronounced in the Yosemite toad than in any other North American frog or toad (Stebbins 1951). Females have black spots or blotches edged with white or cream that are set against a grey, tan or brown background color (Jennings and Hayes 1994). Males have a nearly uniform dorsal coloration of yellow-green to olive drab to darker greenish brown (Jennings and Hayes

1994). Karlstrom (1962) suggested that differences in coloration between the sexes evolved because they provide the Yosemite toad with protective coloration. The uniform coloration of the adult male matches and blends with the silt and grasses that they frequent during the breeding season, whereas the young and females with disruptive coloration tend to use a wider range of habitats with broken backgrounds; thus coloration may help conceal individual toads from predators.

Yosemite toads overwinter in rodent burrows (Jennings and Hayes 1994). They emerge from hibernation as soon as snowmelt pools form near their overwintering sites (Karlstrom 1962; Kagarise Sherman 1980; Jennings and Hayes 1994). Observed emergence times range from early May to the middle of June (Kagarise Sherman 1980).

Males form breeding choruses, and breeding begins soon after emergence (Jennings and Hayes 1994). Males call during the day and early evening (Stebbins 1951). The breeding call is a mellow long sustained trill with 10 to more than 20 notes (Stebbins 1951). Males have been observed to attack other males to prevent them from calling, to amplex (amplexus is a characteristic clasping of the female by the male during mating) other toads in trial and error search for females, and to attack amplexed pairs and attempt to take over the female (Kagarise Sherman 1980). In studies by Kagarise Sherman (1980), males that mated successfully were more likely to be larger, have arrived at breeding sites earlier, and have stayed at breeding sites longer.

Eggs are typically deposited in shallow water with silty bottoms (Karlstrom 1962). Ideal habitat for egg development is between 2–4 centimeters (cm) (0.8–1.6 in) deep, and eggs do not survive in water deeper than 6 cm (2.4 in) (David Martin, University of California, Santa Barbara, pers. comm. 2002). Eggs are deposited in gelatinous strings (Stebbins 1951; Karlstrom and Livezey 1955) which are intertwined with vegetation and buried in silt (Karlstrom 1962). Eggs are relatively large (2.1 mm (0.08 in) average diameter) and brownish black to jet black over the upper three quarters, and gray to tannish gray over the lower one quarter (Jennings and Hayes 1994). Females are estimated to deposit between 1,000 to 1,500 eggs (Kagarise Sherman 1980).

When not breeding, adults feed in meadow or moist upland habitat until they hibernate (Kagarise Sherman 1980; D. Martin, pers. comm. 2002). Although they are largely diurnal (active during the day) (Jennings and Hayes 1994), especially while breeding, recent evidence shows that they primarily feed and move at night (D. Martin, pers. comm. 2002).

Eggs generally hatch within 3 to 6 days depending on water temperature (Jennings and Hayes 1994), although they may take over 15 days (Kagarise Sherman 1980). Tadpoles typically transform within 40 to 50 days after fertilization. Tadpoles are not known to overwinter (Jennings and Hayes 1994), although immature tadpoles have been observed well into September (Mullally 1956). Tadpoles tend to congregate (Brattstrom 1962) and use warm shallow water during the day (Cunningham 1963), then retreat to deeper water at night (Mullally 1953). The tadpoles are uniformly black, the snout is blunt, the intestines are scarcely or not at all visible, and the dorsal fin is transparent and marked with few relatively large melanophores (dark-colored pigment cells) (Stebbins 1951). Tadpoles measure 10 to 37 mm (0.39 to 1.45 in) in length (Stebbins 1951, 1985).

Newly metamorphosed juveniles are around 10 mm (0.39 in) in snout-urostyle length (Jennings and Hayes 1994). Some individuals may reproduce at 2 years of age, but growth is slow in both sexes and most individuals require more time to reach maturity (Jennings and Hayes 1994). Males have been observed to first breed at 3 to 5 years and females at 4 to 6 years (Kagarise Sherman 1980; Kagarise Sherman and Morton 1984). Females probably do not breed every year (Morton 1981). Yosemite toads are long lived, with females documented as reaching 15 years old and males 12 years old (Kagarise Sherman and Morton 1984).

Kagarise Sherman (1980) observed one female Yosemite toad move 270 meters (m) (885 feet (ft)) in 65 days and one male move 150 m (492 ft) in 9 days. Toads in her study generally moved 150 to 230 m (492 to 755 ft) each spring from their hibernation sites to their breeding sites. In studies in which toads were repeatedly located using radiotelemetry equipment (D. Martin, pers. comm. 2002), adult toads were observed to moving up to approximately 610 m (2,000 ft) in a single night. During the active season (spring-summer), females generally spend less time at, and travel further away from, breeding ponds than males (Kagarise Sherman 1980). Young of year metamorphs (young toads that have just transformed from tadpoles) probably hibernate closer to the ponds in which they were born than adult toads (Kagarise Sherman 1980). Stebbins (1951) suggested that isolation or semi-isolation of subpopulations of Yosemite toads is likely because they are unlikely to cross large, dry, forested areas between meadows.

Adult and juvenile Yosemite toads are lie-and-wait predators. They remain motionless until a prey item approaches, then strike and capture the prey with their sticky tongues (Kagarise Sherman and Morton 1984). The examined stomach contents of Yosemite toads have included beetles, ants, centipedes, spiders, dragonfly larvae, mosquitos, and moth and butterfly larvae (Grinnel and Storer 1924; Mullally 1953). They will also prey on flies, bees, wasps, millipedes (Kagarise Sherman and Morton 1984), spider mites, crane flies, springtails, owl flies, and damsel flies (Martin 1991).

Yosemite toad tadpoles graze on detritus and plant material such as algae and will also eat other items such as lodgepole pine pollen. Yosemite toad tadpoles can also be carnivorous and will eat other Yosemite toad tadpoles (see Natural Mortality, below), Pacific chorus frog (previously Pacific treefrog) (*Pseudacris regilla*, previously *Hyla regilla*) tadpoles, diving beetle larvae, and dead mammals (Martin 1991).

Habitat Requirements

Yosemite toads use meadow habitats surrounded by lodgepole pine (*Pinus contorta*) or whitebark pine (*P. albicaula*) (Camp 1916). They are most likely to be found in areas with thick meadow vegetation or patches of low willows (*Salix* spp.) (Mullally 1953). They are most often seen near water, but only occasionally in water (Mullally and Cunningham 1956), and use rodent burrows for overwintering and probably for temporary refuge during the summer (Jennings and Hayes 1994). They also use spaces under surface objects, including logs and rocks, for temporary refuge (Stebbins 1951; Karlstrom 1962). Breeding habitat includes the edges of wet meadows and slow-flowing streams (Jennings and Hayes 1994). Tadpoles have also been observed in shallow ponds and shallow areas of lakes (Mullally 1953). Moist upland areas such as seeps and springheads are important summer non-breeding habitats for adult toads (D. Martin, pers. comm. 2002).

Natural Mortality

Mountain yellow-legged frogs (*Rana muscosa*) (Mullally 1953), aquatic dragonfly larvae (Jennings and Hayes 1994), diving beetles (*Dytiscus* spp.) (Kagarise Sherman and Morton 1984), and possibly larval long-toed salamanders (*Ambystoma macrodactylum*) (Jennings and Hayes 1994) prey on the young life stages of Yosemite toads. American robins

(*Turdus migratorius*) prey on Yosemite toad tadpoles (Jennings and Hayes 1994). Garter snakes (*Thamnophis spp.*) have been observed to eat yearling Yosemite toads (D. Martin, pers. comm. 2002), and are probably the most significant predator on tadpoles and metamorphs (Karlstrom 1962; Jennings and Hayes 1994). California gulls (*Larus californicus*) and Clark's nutcrackers (*Nucifraga columbiana*) have been observed killing adult toads (Mulder *et al.* 1978; Kagarise Sherman 1980; Kagarise Sherman and Morton 1993). Cannibalism has been recorded in Yosemite toad tadpoles (Martin 1991; Chan 2001). The tadpoles have not been observed to kill each other, but they do wound each other in feeding frenzies, and have been observed eating dead tadpoles of their own species (Martin 1991; Chan 2001; D. Martin, pers. comm. 2002).

Dessication of breeding habitat before tadpoles metamorphose is a major cause of mortality (Zeiner *et al.* 1988; Kagarise Sherman and Morton 1993; Jennings and Hayes 1994). Eggs are sometimes killed by freezing (Kagarise Sherman and Morton 1984). Fungal growth has also been observed on eggs (Kagarise Sherman 1980), but it is unclear whether the fungus causes mortality or grows after the eggs die from other causes.

Toads may die of exposure when crossing snow or ice (Kagarise Sherman 1980). Toads that emerge from hibernation early may suffer from exposure and inability to feed if there are late-season storms (Kagarise Sherman 1980).

Adult toads of either sex may drown or asphyxiate when multiple males attempt to amplex a single female. Kagarise Sherman (1980) documented the death of a single female in this manner, and found three additional females and two males that may also have died during multiple amplexus.

Historic and Current Range and Status

The historic range of Yosemite toads in the Sierra Nevada occurs from the Blue Lakes region north of Ebbetts Pass (Alpine County) to 5 kilometers (km) (3.1 miles (mi)) south of Kaiser Pass in the Evolution Lake/Darwin Canyon area (Fresno County) (Jennings and Hayes 1994). The historic elevational range of Yosemite toads is 1,460 to 3,630 m (4,790 to 11,910 ft) (Stebbins 1985).

Pre-1990 historic records of Yosemite toad localities are primarily from museum records and incidental sightings. Systematic habitat surveys looking specifically for Yosemite toad populations have only been conducted since the early 1990s. Therefore, it is impossible to know how many populations have declined or become extinct, because we do not know how many populations originally existed. Sites first documented after 1990 are useful to illustrate the current range of the species, but are not useful in discussing its decline, due to lack of baseline data. Based on the number of historic sites that are no longer occupied (*see* below), it is possible that many populations have disappeared without ever having been documented.

Since 1990, 292 sites throughout Yosemite toads' historic range have been surveyed, and 229 sites have been confirmed to be occupied. Known Yosemite toad locations by area is based on the most comprehensive dataset on Yosemite toad localities available, which was collected by the U.S. Forest Service (USFS) for use in their conservation assessment of the species (as required by the Sierra Nevada Forest Plan Amendment (U.S. Department of Agriculture (USDA) 2001f)). This data set was compiled by the USFS and came from various sources, including University of California and California State University researchers, the California Academy of Science, the National Park Service (NPS), the U.S. Geological Survey, the California Department of Fish and Game (CDFG), and the California Natural Diversity Data Base. The following discussion on the number of Yosemite toad sites should be considered an approximation, based on best available information, because surveys are ongoing and some sites may have not yet been reported and added to the database. Also, multiple sightings in close proximity to each other have been considered as a single site for the purposes of this discussion.

The historic and current acreage of Yosemite toad habitat (wet meadows, shallow breeding waters, and moist uplands) within the historic range of Yosemite toads is unknown, although these habitats have been degraded and may be decreasing in area as a result of conifer encroachment and livestock grazing (*see* Factor A below). The vast majority of land within the range of the Yosemite toad is federally managed, with 919,011 hectares (ha) (2,270,918 acre (ac)) (99 percent of the range) on USFS, NPS, and Bureau of Land Management lands. Much of this land is within designated wilderness. The remaining land within the species' range is a mix of State, local government, and private lands.

The following known site discussion is based on the California Wildlife Habitat Relations range map, obtained as a geographic information system data from CDFG for the species, although this map includes large areas of unsuitable habitat. However, this map is the best available range map for the species, although the species has been detected in a few locations outside its boundaries, primarily at the southern end of the range. The site specific information is based on localized studies that do not represent a comprehensive range-wide assessments of the species status.

(1) Yosemite toads are known from three sites in the southeast corner of the El Dorado National Forest where it borders with the Toiyabe and Stanislaus National Forests. Two of these three sites have been confirmed as occupied since 1990.

(2) Yosemite toads are known from 25 locations along the west side of the Toiyabe National Forest, 15 of which have been confirmed as occupied since 1990.

(3) Yosemite toads are known from 28 sites on the Stanislaus National Forest, 22 of which have been confirmed as occupied since 1990. These sites occur primarily in two groups, one on the northern edge of the forest, where it borders with the El Dorado and Toiyabe National Forests, and the other in a band extending west across the Stanislaus National Forest, from its southeast border with Yosemite National Park and the Toiyabe National Forest.

(4) Yosemite toads are known from 49 sites along the west side of Inyo National Forest, 35 of which have been confirmed as occupied since 1990.

(5) Yosemite toads are known from 91 locations throughout Sierra National Forest, of which 84 have been confirmed as occupied since 1990.

(6) Yosemite toads are known from 78 sites scattered throughout Yosemite National Park, 57 of which have been confirmed occupied since 1990.

(7) Yosemite toads are known from 18 sites throughout the northern half of Kings Canyon National Park, 14 of which have been confirmed as occupied since 1990.

It is impossible to fully determine the extent to which Yosemite toads have declined, because baseline data on the number and size of historic populations are few. The following studies, which reassess the current status of historically documented populations, give the most insight into the species' decline.

Jennings and Hayes (1994) reviewed the current status of Yosemite toads using museum records of historic and recent sightings, published data, and unpublished data and field notes from biologists working with the species. They mapped 55 historically

documented general localities throughout the range of the species where the toad had been present (based on 144 specific sites), and found that Yosemite toads are now absent from 29 of those localities, a decline of over 50 percent.

In 1990, David Martin surveyed 75 sites throughout the range of the Yosemite toad for which there are historic records of the species' presence, and found that 47 percent of those sites showed no evidence of any life stage of the species (Stebbins and Cohen 1997), a decline of about 63 percent.

Grinnell and Storer (1924) surveyed for vertebrates at 40 sites along a 143-km (89-mi) west-to-east transect across the Sierra Nevada, through Yosemite National Park, in 1915 and 1919. Drost and Fellers (1996) conducted more thorough surveys, specifically for amphibians, at 38 of those sites in 1992. They found that Yosemite toads were absent from 6 of 13 sites in which they had been found in the original survey. At sites where Drost and Fellers (1996) found Yosemite toads, the toads occurred in low numbers (only 15 total adult and juvenile toads at all sites), with documented declines in relative abundance in three of the Grinnel and Storer (1924) sites, as based on their generalized abundance categories such as rare, common, and abundant. Therefore, the species has declined or disappeared completely from at least 9 of 13 (69 percent) of the Grinnel and Storer (1924) sites.

The only long-term study on the size of a population of Yosemite toads indicates that the population has declined dramatically. Kagarise Sherman and Morton (1993) studied Yosemite toads at Tioga Pass Meadow (Mono County, California) intensively from 1971 to 1982, and made less systematic observations from 1983 to 1991. To estimate the adult population size, they captured and marked toads entering breeding pools. From 1974 to 1978, an average of 258 males entered the breeding pools. In 1979, the number of male toads began to decline, and by 1982, the number of males had dropped to 28. During the same time period, the number of females varied between 45 and 100, but there was no obvious trend in number observed. In periodic surveys between 1983 and 1991, it appeared that both males and females continued to decline, and breeding activity became sporadic. In 1990, the researchers were only able to locate one female, two males, and four to six egg masses. In 1991, they found only one male and two egg masses. The researchers also surveyed non-breeding habitat in the same area and found similar population declines. To date, the population at Tioga Pass Meadow has not recovered (Roland Knapp, Sierra Nevada Aquatic Research Laboratory, pers. comm. 2002).

Kagarise Sherman and Morton (1993) also conducted occasional surveys of six other populations in the eastern Sierra Nevada. Five of these populations showed serious, apparently long-term, declines between 1978 and 1981, while the sixth population held relatively steady until the final survey in 1990, at which time it dropped precipitously. In 1991, E.L. Karlstrom revisited the site at which he had studied a breeding population of Yosemite toads from 1954 to 1958, just south of Tioga Pass Meadow within Yosemite National Park (Tuolumne County, California), and found no evidence of toads or signs of breeding (Kagarise Sherman and Morton 1993).

Previous Federal Action

On April 3, 2000, we received a petition to list the Yosemite toad as endangered from the Center for Biological Diversity and Pacific Rivers Council. On October 12, 2000, we announced a 90-day petition finding in the **Federal Register** (65 FR 60607) concluding that the petition presented substantial scientific or commercial information to indicate that the listing of the Yosemite toad may be warranted.

This 12-month finding is made in accordance with a settlement agreement which requires us to complete a finding by November 30, 2002 (*Center for Biological Diversity and Pacific Rivers Council* v. *Norton and Jones,* No. C–01–2106 (N.D. Calif.)).

Summary of Factors Affecting the Species

Section 4 of the Act and regulations (50 CFR part 424) promulgated to implement the listing provisions of the Act describe the procedures for adding species to the Federal lists. A species may be determined to be an endangered or threatened species due to one or more of the five factors described in section 4(a)(1). In the case of the Yosemite toad, the specific relationship between the potential threats under each factor and the continued decline of the species remains unclear. These factors, and their application to the Yosemite toad, are as follows:

A. The present or threatened destruction, modification, or curtailment of its habitat or range. The following discussion presents several threats to the species' habitat or range.

Grazing

Livestock grazing began in Sierra Nevada meadow and riparian areas with the settlement of California by the Spanish in the mid-1700s, and rose to a level that caused significant impacts in the mid-1800s following the gold rush (Menke *et al.* 1996). In general, livestock grazing within the range of the Yosemite toad was at a high, but undocumented, level until the establishment of National Parks (beginning in 1890) and National Forests (beginning in 1905) (Menke *et al.* 1996) in the Sierra Nevada area. Within established National Parks, livestock grazing was gradually eliminated, but packstock grazing was permitted and has increased over time (Menke *et al.* 1996).

Over time within established National Forests, the amount of grazing was gradually reduced, better documented, and the type of animals grazed shifted from predominantly sheep to cattle and packstock (Menke *et al.* 1996). In general, livestock grazing within the National Forests in the Sierra Nevada has continued with gradual reductions since the 1920s, except for an increase during World War II (Menke *et al.* 1996). Currently, there are numerous active and inactive livestock grazing allotments on the five National Forests that occur within the range of the Yosemite toad. Approximately 71 active and 36 inactive allotments occur across the Eldorado, Toiyabe, Inyo, Stanislaus, and Sierra National Forests (Laura Conway, Stanislaus National Forest, pers. comm. 2002; Holly Eddinger, Sierra National Forest, *in litt.,* 2002; Aimee Smith, Sierra National Forest, *in litt.,* 2002).

Since 1970, the continuing decrease in grazing permitted on the National Forests has been motivated by concern for resource protection (Menke *et al.* 1996). National Forests have conducted projects to minimize or rehabilitate areas impacted by grazing, including exclosures around some sensitive areas, erosion control structures, and replanting of riparian species.

Packstock grazing is the only grazing currently allowed in National Parks, and it is also allowed in National Forests. There has been very little monitoring of the impacts of packstock use in the Sierra Nevada, which increased after World War II due to increased road access, and increases in leisure time and disposable income (Menke *et al.* 1996). The recreational use of packstock and horsebackriding in the Sierra Nevada can be expected to increase further as human populations increase (State of California 2001; USDA 2001g).

Mule deer (*Odocoileus hemionus*) and bighorn sheep (*Ovis canadensis*) have always occurred within the habitats used by the Yosemite toad (Ingles 1965).

However, grazing by dense groups of large herbivores such as cattle and horses is not a natural situation in those habitats, and these habitats are vulnerable to degradation. Because Yosemite toad breeding habitat is shallow, that habitat is very vulnerable to changes in hydrology caused by grazing (D. Martin, pers. comm. 2002; R. Knapp, pers. comm. 2002).

Direct and indirect mortality of Yosemite toads have occurred as a result of livestock grazing. Cattle have been observed to trample Yosemite toad eggs and disturb eggs such that they fall into hoofprints or other deeper water and die. Metamorph Yosemite toads have been observed to fall into cattle hoofprints or to be defecated on by cattle, become trapped, and die, and adult Yosemite toads have been observed trampled to death in cattle hoofprints (D. Martin, pers. comm. 2002). Preliminary research data indicate that Yosemite toad tadpoles in grazed areas take longer to metamorphose and produce smaller metamorphs than those in areas being rested from grazing, presumably due to high bacteria and nutrient levels, causing low water quality in the grazed areas (D. Martin, pers. comm. 2002).

Grazing removes vegetative cover, and before/after surveys have shown reductions in the number of Yosemite toads using an area after the herbaceous cover was grazed (D. Martin, pers. comm. 2002). Grazing can also cause erosion by disturbing the ground, removing vegetation, and destroying peat layers in meadows, which lowers the groundwater table and summer flows (Armour *et al.* 1994; D. Martin, pers. comm. 2002). Consequently, this may increase the stranding and mortality of tadpoles, or make these areas completely unsuitable for Yosemite toads (D. Martin, pers. comm. 2002). Grazing can also degrade or destroy moist upland areas used as non-breeding habitat by Yosemite toads (D. Martin, pers. comm. 2002), especially when nearby meadow and riparian areas have been fenced to exclude livestock. Livestock may also collapse rodent burrows used by Yosemite toads as cover and hibernation sites, or disturb toads and disrupt their behavior.

The impacts of grazing on habitat can be inferred by observing the recovery of vegetation, ground stability, and water flow that occurs when riparian areas are fenced to exclude livestock (Kattelmann and Embury 1996). An example of this, from a drainage occupied by Yosemite toads, is provided by a study of fish habitat on Silver King and Coyote Valley Creeks (tributaries of the Carson River, Alpine County, California). In this study, stream reaches were fenced to exclude cattle and, over time, bank stability increased and stream channels became deeper and narrower than the unfenced reaches. This indicated that streambank sloughing had been reduced and vegetation was stabilizing soils and reducing erosion (Overton *et al.* 1994; Kattelmann and Embury 1996).

Livestock grazing in the Sierra Nevada has been so widespread for so long that, in most places, no ungrazed areas are available to illustrate the natural condition of the habitat (Kattelmann and Embury 1996). Due to the long, and historically unregulated history (Menke *et al.* 1996) of livestock and packstock grazing in the Sierra Nevada, and the lack of historic Yosemite toad population size estimates, it is difficult to make a quantitative link between grazing and reductions in Yosemite toad populations. However, because of the documented negative effects of livestock on Yosemite toad habitat, and documented direct mortality of the species caused by livestock, the decline of some populations of Yosemite toad has been attributed to the effects of livestock grazing (Jennings and Hayes 1994; Jennings 1996).

Roads and Timber Harvest

Any activity that severely alters the terrestrial environment, such as road construction and timber harvest, is likely to result in the reduction and occasional extirpation of amphibian populations in the Sierra Nevada (Jennings 1996). By creating gaps in the natural vegetation, roads and harvested areas may act as dispersal barriers and contribute to the fragmentation of Yosemite toad habitat and populations. Habitat fragmentation has been shown to have a negative effect on amphibian species richness (Lehtinen *et al.* 1999). Timber harvest removes vegetation and causes ground disturbance and soil compaction, which makes that ground more susceptible to erosion (Helms and Tappeiner 1996). Much of the erosion caused by timber harvests is from logging roads (Helms and Tappeiner 1996). This erosion could damage Yosemite toad breeding habitat by lowering the water table, and drying out riparian habitats used by the species.

Prior to the formation of National Parks and National Forests, timber harvest was widespread and unregulated, but primarily took place at low elevations on the west slope of the Sierra Nevada, below the elevational range of the Yosemite toad (University of California (UC) 1996). Between 1900 and 1950, the majority of timber harvest took place on old growth forests on private land (UC 1996). The majority of roads in National Forests of the Sierra Nevada were built between 1950 and 1990 to allow access to the forests for timber harvest (USDA 2001h). Between 1950 and the early 1990s, the USFS allowed major increases in timber harvest on National Forests and at higher elevations, and the majority of impacts on Yosemite toads probably took place during this period.

Roads may cause the potential for direct mortality of amphibians through roadkill (deMaynadier and Hunter 2000), and the possible introduction of contaminants such as petroleum products, herbicides, and pesticides. The levels of timber harvest and road construction have declined substantially since implementation of the California Spotted Owl Sierran Province Interim Guidelines in 1993, and some existing roads have been, or are scheduled for, decomissioning (USDA 2001h). Therefore, the risks posed by new roads and timber harvests have declined, but those already existing still pose risks to the species and its habitat through erosion, roadkill, and contaminant introduction.

Vegetation and Fire Management Activities

Vegetation management includes the removal of small trees and brush to reduce fuels, and to reduce competition which allows faster growth of desired tree species (Helms and Tappeiner 1996). These activities may disturb the ground and increase erosion, which could cause damage to Yosemite toad habitat through siltation and lowering of groundwater levels. Brush removal sometimes includes the use of herbicides, which may run off into Yosemite toad habitat, causing lethal or sublethal effects on individuals (*see* Factor D and E below).

Long-term fire suppression has influenced changes in forest structure and dynamics in the Sierra Nevada. In general, the fire return interval is now much longer than it was historically, and live and dead fuels are more abundant and continuous (USDA 2001c). Fire is thought to be important in maintaining open aquatic and riparian habitats for amphibians in some systems (Russel *et al.* 1999).

Fire suppression, and changes in fire frequency and hydrology, has probably contributed to the decline of Yosemite toads through habitat loss caused by conifer encroachment on meadows (Chang 1996; NPS 2002). Under natural conditions, conifers are excluded from meadows by fire and soils too saturated for their survival. But as conifers begin to encroach on a meadow, if they are not occasionally set back by fire, they

transpire water out of the meadow, reducing the saturation of the soils, and facilitating further conifer encroachment. Therefore, some vegetation treatment may be needed to maintain or restore Yosemite toad habitat.

Increases in fuel abundance have created the potential for catastrophic fires which could cause direct mortality of Yosemite toads; however, data on the direct effects of fire on Yosemite toads are lacking. Fires and mechanical fire suppression activities (such as cutting fire lines) could cause erosion and siltation that could negatively impact Yosemite toad habitat. However, amphibians in general are thought to retreat to moist or subterranean refuges and thereby suffer low mortality during natural fires (Russel *et al.* 1999).

Fire retardant chemicals contain nitrogen compounds or surfactants (soaps). Laboratory tests of these chemicals have shown that after surfactants and ammonia are released when they are added to water, they cause mortality in fish and aquatic invertebrates (Hamilton *et al.* 1996), and likely have similar effects on amphibians. Therefore, if fire retardant chemicals were dropped in or near Yosemite toad habitat, they could have negative effects on individual toads. The majority of vegetation and fire management activities take place at lower elevations, but they do pose a threat to the species when they take place within the species' elevational range.

Recreation

Recreational activities take place throughout the Sierra Nevada and can have significant negative impacts on wildlife and their habitats (USDA 2001a). Recreation is the fastest growing use of National Forests (USDA 2001f). Heavy foot traffic in riparian areas tramples vegetation, compacts soils, and can physically damage streambanks. Trails (foot, horse, bicycle, or off-highway motor vehicle) compact soil in riparian habitat, which increases erosion, replaces vegetation, and can lower the water table (Kondolph *et al.* 1996). Trampling or the collapsing of rodent burrows by recreationists, pets, and vehicles could lead to direct mortality of all life stages of the Yosemite toad. Recreational activity may also disturb toads and disrupt their behavior (Karlstrom 1962).

Dams and Water Diversion

Several artificial lakes are located in or above Yosemite toad habitat, most notably Edison, Florence, Huntington, Courtright, and Wishon Reservoirs. By altering the timing and magnitude of water flows, these reservoirs have caused changes in hydrology which may have negatively altered Yosemite toad habitat. Changes in water flows have caused increased water levels upstream of the reservoirs, which may have reduced the suitability of shallow water habitats necessary for egg laying, or allowed the invasion of predatory fish into those habitats. Water flow changes may have contributed to the mortality of eggs and tadpoles either by stranding during low water or innundation during high water. The reservoirs themselves probably cover what was once Yosemite toad habitat. Most native Sierra Nevada amphibians cannot live in or move through reservoirs (Jennings 1996). Therefore, reservoirs represent both a loss of habitat and a barrier to dispersal and gene flow. These factors have probably contributed to the decline of Yosemite toads and continue to pose a risk to the species.

B. Overutilization for commercial, recreational, scientific, or educational purposes. There is no known commercial market for Yosemite toads. There is also no documented recreational or educational use for Yosemite toads, although it is likely that they have been handled by curious members of the public and collected as pets.

Scientific research may cause some stress to Yosemite toads through disturbance and disruption of behavior, handling, and injuries associated with marking individuals. Scientific research has resulted in the death of a few individuals through accidental trampling (Green and Kagarise Sherman 2001), irradiation where Karlstrom (1957) collected data on Yosemite toad movements by implanting them with radioactive tags, and collection for museum specimens (Jennings and Hayes 1994). Given the current reduced size and number of populations (Jennings and Hayes 1994), further collection could pose a serious threat to Yosemite toad populations.

C. Disease or predation. Prior to the stocking of high Sierra Nevada lakes with salmonid fishes, which began over a century ago, fish were entirely absent from most of this region (Bradford 1989). Introduced fish, such as rainbow and golden trout (*Oncorhynchus mykiss* ssp.), brown trout (*Salmo trutta*), and brook trout (*Salvelinus fontinalis*), have been shown to have a negative impact, primarily through predation, on native populations of Sierra Nevada amphibians, including the mountain yellow-legged frog (Bradford 1989; Knapp and Matthews 2000) and Pacific chorus frog (Matthews *et al.* 2001).

Data on the effects of introduced fish on Yosemite toads are less clear, although re-surveys of historic Yosemite toad sites have shown that the species had disappeared from several lakes where they formally bred and which are now occupied by fish (Stebbins and Cohen 1997; D. Martin, pers. comm. 2002). Drost and Fellers (1994) state that Yosemite toads are less vulnerable to fish predation than frogs because they breed primarily in ephemeral waters that do not support fish. The palatability of Yosemite toad tadpoles to fish predators is unknown (Jennings and Hayes 1994), but is often assumed to be low based on the unpalatability of western toads (Drost and Fellers 1994; Kiesecker *et al.* 1996), to which Yosemite toads are closely related. Brook trout have been observed to prey on Yosemite toad tadpoles and to ''pick at'' Yosemite toad eggs, which later became infected with fungus (D. Martin, pers. comm. 2002). Brook trout have been observed to swim near, but ignore, Yosemite toad tadpoles, which gives evidence towards tadpoles being unpalatable, at least in some situations. If Yosemite toad tadpoles are unpalatable to trout, some tadpoles may still be taken by trout that have not learned to avoid them yet (R. Knapp, pers. comm. 2002). The palatability of metamorph Yosemite toads to trout is also unknown, but metamorph western toads have been observed in golden trout stomach contents (R. Knapp, pers. comm. 2002).

At a site where Yosemite toads normally breed in small meadow ponds, they have been observed to successfully switch breeding activities to stream habitat containing fish during years of low water (Phil Strand, Sierra National Forest, pers. comm. 2002). Thus, drought conditions can increase the toads' exposure to predatory fish. Also, although the number of lake breeding sites used by Yosemite toads is small relative to the number of ephemeral sites, lake sites may be especially important because they are more likely to be useable during years with low water (R. Knapp, pers. comm. 2002).

The effects of introduced fish on Yosemite toads needs further study, especially palatability experiments to determine the level of predation. Because Yosemite toads primarily breed in ephemeral waters, fish are probably less of an impact on them than on amphibians that breed primarily in perennial lakes and streams. However, the observed predation of Yosemite toad tadpoles by trout (Martin 1992; D. Martin, pers. comm. 2002) indicate that introduced fish do pose a risk to the species in some situations, which may

be accentuated during drought years. Therefore, introduced fish have probably contributed to the decline of the species. As Yosemite toad populations become smaller and more fragmented, the impacts of predation may be significant.

Various diseases have been confirmed in dead Yosemite toads (Green and Kagarise Sherman 2001). Those diseases, in concert with other factors, are likely to have contributed to the decline of Yosemite toads and continue to be a risk to the species. Mass die-offs of amphibians have been attributed to: chytrid fungal infections of metamorphs and adults (Carey *et al.* 1999); *Saprolegnia* fungal infections of eggs (Blaustein *et al.* 1994); iridovirus infection of larvae, metamorphs, or adults; and bacterial infections (Carey *et al.* 1999). Humans, pets, livestock, packstock, vehicles, and wild animals may all act as disease vectors. Although it has not been observed in the Sierra Nevada, introduced fish may also serve as disease vectors to amphibians. Infection of both fish and amphibians by the same pathogen has been documented with viral (Mao *et al.* 1999) and fungal (Blaustein *et al.* 1994) pathogens.

Tissue samples from dead or dying adults and from healthy tadpoles were collected during a die-off of adult Yosemite toads at Tioga Pass Meadow and Saddlebag Lake and analyzed for disease (Green and Kagarise Sherman 2001). Several infections were found in the adults, including: chytridiomycosis (chytrid fungal infection), bacillary bacterial septicemia (red-leg disease), *Dermosporidium* (a fungal infection), myxozoan infection (parasitic cnidarians (relatives of jellyfish)), *Rhabdias* spp. (a parasitic roundworm) infection, and several species of trematode (parasitic flatworm) infection. However, no single infectious disease was found in more than 25 percent of individuals, and some dead toads showed no infection that would explain their death. No evidence of infection was found in tadpoles. The authors concluded that the die-off was caused by suppression of the immune system caused by an undiagnosed viral infection or chemical contamination that made the toads susceptible to the diagnosed infections. This seems likely considering the evidence suggesting environmental contaminants as a factor contributing to the decline of Yosemite toads (see Factor E).

Carey (1993) developed a model to explain the disappearance of boreal toads (*Bufo boreas boreas*) in the Rocky Mountains. In that model, she hypothesized that the toads were stressed by some unknown environmental factor. This stress caused a physiological response that suppressed the immune system, which was further hindered by cold temperatures typical of the toads' high-elevation environment. The toads then died of infection by pathogens normally found in their environment. This model may fit Yosemite toad die-offs, given the close relationship between the two toads and their occupation of similar habitats.

Saprolegnia ferax is a species of water mold that commonly infects fish. This mold has been documented to cause massive lethal infection of eggs of western toads in Oregon (Blaustein *et al.* 1994). However, it is unclear whether the infection was caused by the introduction of the fungal pathogen via fish stocking, or if the fungus was already present and the eggs' ability to resist infection was inhibited by some unknown environmental factor. Subsequent laboratory experiments (Kiesecker *et al.* 2001), showed that the fungus could be passed from hatchery fish to western toads. Fungal growth on Yosemite toad eggs was observed by Kagarise Sherman (1980), but the fungal species was not determined, and it was unclear whether the fungus killed the eggs or grew on them after they died of some other cause.

D. The inadequacy of existing regulatory mechanisms. The Yosemite toad occurs on Federal, State, and private lands. Existing regulatory mechanisms do not fully protect this species or its habitat on these lands. Federal, State, and local laws have been insufficient to prevent past and ongoing losses of the limited habitat of the Yosemite toad.

Under section 404 of the Clean Water Act (CWA), the U.S. Army Corps of Engineers (Corps) regulates the discharge of fill material into waters of the United States, including wetlands. However, 99 percent of the Yosemite toad's range is on Federal land, so few projects that include fill of wetlands are likely in these areas. Therefore, section 404 of the CWA is not likely to be relevant to the Yosemite toad in most cases.

Yosemite toads may not be taken or possessed within a National Park without a special permit from the NPS. In addition, cattle grazing, stocking of invasive fish, and most timber harvest are prohibited within National Park boundaries (NPS 2001). However, Yosemite toads have continued to decline within the National Parks in which the species occurs. This may be, in part, due to the Parks allowing such activities as packstock grazing and recreation in Yosemite toad habitat, as well as chemical contamination of the species and its habitat from sources outside the Parks.

The Wilderness Act of 1964 calls for designated wilderness land ''to be protected and managed so as to preserve its natural conditions.'' Timber harvest and the use of motor vehicles are generally prohibited within wilderness areas, but cattle grazing and invasive fish stocking are permitted within National Forest wilderness lands and pose a threat to the species and its habitat. The species has declined sharply (Jennings and Hayes 1994) regardless of wilderness designation in large portions of its range.

The Yosemite toad is considered a sensitive species by the USFS. Each National Forest was required to complete a Land and Resource Management Plan (LRMP) by the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 (NFMA). Those acts require that the LRMPs provide for multiple use and sustained yield of the products and services obtained from the National Forests, including wildlife. The Sierra Nevada Forest Plan Amendment (Amendment) (USDA 2001d) amends the LRMPs of National Forests within the Sierra Nevada to address issues pertaining to: old forest ecosystems and associated species; aquatic, riparian, and meadow ecosystems and associated species; fire and fuels; noxious weeds; and lower westside hardwood ecosystems. The Amendment calls for the preparation of a conservation assessment, activity-related standards and guidelines, and conservation measures by the USFS to protect Yosemite toads and their habitat occurring in National Forests within the Sierra Nevada.

Under the Amendment to the LRMPs of National Forests within the Sierra Nevada, (USDA 2001f), the USFS is to provide the following conservation measures for Yosemite toads under: (A) Exclude livestock (including pack and saddle stock) from standing water and saturated soils in wet meadows and associated streams and springs occupied by Yosemite toads, or identified as ''essential habitat'' in the conservation assessment for the Yosemite toad during the breeding and rearing season (as determined locally). If physical exclusion of livestock, such as fencing, is impractical, then exclude grazing from the entire meadow until the meadow has been dry for 2 weeks. Wet meadows are defined as relatively open meadows with low to moderate amounts of woody vegetation that have standing

water and saturated soils after the first of June; if these conditions do not persist in the meadow for more than 2 weeks, allow grazing only in those portions of the meadow where dry conditions exist; (B) Monitor a sample of occupied Yosemite toad sites to assess: (1) Habitat conditions, and (2) Yosemite toad occupancy and population dynamics. Based on the monitoring data, modify or suspend grazing if Yosemite toad conservation is not being accomplished. These grazing restrictions may be modified through formal adaptive management studies, developed in cooperation with the USFS's Pacific Southwest Research Station, designed to assess the effects of grazing intensity and frequency on Yosemite toad habitat conditions and site occupancy; and (C) Conduct surveys of unoccupied suitable habitat for the Yosemite toad within this species' historic range to determine presence of Yosemite toads. Complete surveys of these areas within 3 years of January 2001. If surveys are not completed within the 3-year period, consider unsurveyed meadows as occupied habitat and apply restrictions for excluding livestock described in (A).

Conservation measures also include direction to avoid application of pesticides within 152 m (500 ft) of known Yosemite toad sites, and the removal of invasive fish from some areas of mountain yellow-legged frog habitat, which could benefit Yosemite toads if they are also using those areas (USDA 2001d). The conservation measures also set limits for grazing utilization of grasses and shrubs, livestock use and road construction in willow flycatcher (*Empidonax trailii*) habitat (which includes areas that may also be inhabited by Yosemite toads), packstock use of Yosemite toad habitat during the breeding and rearing season, and disturbance of streambanks and lakeshores. The conservation measures also recommend removing livestock gathering and handling facilities from riparian and meadow areas and providing off-stream watering devices for livestock. The Amendment also includes requirements for monitoring to review how well the objectives established by the Amendment have been met, and how closely management standards and guidelines have been applied (USDA 2001e).

The USFS has been implementing these conservation measures since 2001, but they have not yet been fully implemented. The Amendment is currently being reviewed, and it remains unknown if these measures will be changed, or if any additional protection of the Yosemite toad will be included. Therefore, the Amendment has not yet provided sufficient protection for the Yosemite toad and its habitat, and it is not known if it will in the future. Also, the effect of the LRMPs in place on National Forests within the Sierra Nevada is unknown. Yosemite toads have continued to decline (Jennings and Hayes 1994).

The State of California considers the Yosemite toad a species of special concern, but it is not State listed as a threatened or endangered species under the California Endangered Species Act. California Sport Fishing Regulations include the Yosemite toad as a protected species that may not be taken or possessed at any time except under special permit from the CDFG. This gives the Yosemite toad some legal protection from collecting, but does not protect it from other causes of mortality or alterations to its habitat.

The California Environmental Quality Act (CEQA) requires review of any project that is undertaken, funded, or permitted by a State or local governmental agency. If a project with potential impacts on Yosemite toad were reviewed, CDFG personnel could determine that, although not listed, the toad is a *de facto* endangered, threatened, or rare species under section 15380 of CEQA. Once significant effects are identified, the lead agency has the option of requiring mitigation for effects through changes in the project or to decide that overriding considerations make mitigation infeasible (CEQA Sec. 21002). In the latter case, projects may be approved that cause significant environmental damage, such as destruction of listed endangered species or their habitat. Protection of listed species through CEQA is, therefore, dependent upon the discretion of the agency involved.

The California Forest Practice rules set guidelines for the design of timber harvests on private land to reduce impacts on non-listed species. However, these rules have little application to the protection of Yosemite toad because approximately 99 percent of the species' range is on Federal land.

The California Department of Pesticide Regulation has authority to restrict the use of pesticides. Their Toxic Air Contaminant (TAC) Program includes assessment of the risks posed by airborne pesticides by collecting air samples near sites of pesticide application and in communities near those sites. If air samples indicate that reductions in exposure are needed, mitigation measures are developed to bring about those reductions (California Department of Pesticide Regulation 2001). However, the TAC program is intended primarily to protect human health, and air samples are not taken at far distant locations from application sites, like those inhabited by Yosemite toads.

E. Other natural or manmade factors affecting its continued existence.

Yosemite toads probably are exposed to a variety of pesticides and other chemicals throughout their range. Environmental contaminants could negatively affect the species by causing direct mortality; suppressing the immune system; disrupting breeding behavior, fertilization, growth or development of young; and disrupting the ability to avoid predation (Carey and Bryant 1995). Hydrocarbon and other contamination from oil production and road runoff; the application of numerous chemicals for agricultural production; roadside maintenance; and rodent and vector control programs may all have negative effects on Yosemite toad populations. Also, the airborne transport of pesticides as a result of drift from agricultural applications, including chlorothalonil, malathion, diazinon, and chlorpyrifos, from the Central Valley of California to the Sierra Nevadas, has been documented (Aston and Seiber 1997; McConnell *et al.* 1998) in samples of air, rain, snow, lake water, and pine needles.

Cholinesterase is an enzyme that functions in the nervous system and is disrupted by organophosphorus pesticides, including malathion, chlorpyrifos, and diazinon (Sparling *et al.* 2001). Reduced cholinesterase activity and pesticide residues have been found in Pacific chorus frog larvae collected in the Sierra Nevada downwind of the Central Valley (Sparling *et al.* 2001). Cholinesterase activity was significantly lower in samples from the Sierra Nevada than from samples taken from coastal California, upwind of the Central Valley. No samples were taken above approximately 1,500 m (4,900 ft) elevation (Sparling *et al.* 2001), which barely overlaps the 1,460 to 3,630 m (4,790 to 11,910 ft) elevational range (Stebbins 1985) of Yosemite toads. However, significant amounts of pesticide residues have been documented as high as 1,920 m (6,300 ft) in Sequoia National Park, south of Yosemite and Kings Canyon National Parks (Aston and Seiber 1997; McConnell *et al.* 1998). In addition to interfering with nerve function, contaminants may act as estrogen mimics (Jennings 1996), or may otherwise disrupt endocrine function (Carey and Bryant 1995), and may have a negative effect on amphibian populations.

Dichlorodiphenyltrichloroethane (DDT) and its residues were found in frogs throughout the Sierra Nevada during the late 1960s (Corey *et al.* 1970), and those residues still appear in Pacific chorus frog larvae collected in the late 1990s (Sparling *et al.* 2001), over 25 years after DDT was banned for use in the United States.

Spatial analysis of populations of Yosemite toads shows a trend towards greater decline in populations downwind of areas of the Central Valley with more agriculture, where there is presumably more pesticide use; however this trend is not statistically significant (Carlos Davidson, California State University, Sacramento, *in litt.*, 2002).

Snow core samples from the Sierra Nevada contain a variety of contaminants from industrial and automotive sources including: hydrogen ions (indicative of acidic precipitation), nitrogen and sulfur compounds (NH_4, NO_3, SO_2, and SO_4), and heavy metals (Pb, Fe, Mn, Cu, and Cd) (Laird *et al.* 1986). The pattern of recent frog extinctions in the southern Sierra Nevada corresponds with the pattern of highest concentration of air pollutants from automotive exhaust, possibly due to increases in nitrification (or other changes), caused by those pollutants (Jennings 1996).

The effects of contaminants on amphibians needs further research (Hall and Henry 1992), and there are few, if any, studies on the direct effect of contaminants on Yosemite toads. However, we know of one study which shows that there are significant levels of contaminants that have been deposited in the Sierra Nevada, and the correlative evidence between areas of contamination in the Sierra Nevadas and areas of amphibian decline (Jennings 1996; Sparling *et al.* 2001; C. Davidson, *in litt.,* 2002), and the significant evidence of an adverse physiologic effect of pesticides on Sierra Nevada amphibians in the field (Sparling *et al.* 2001), indicate that contaminants may be a severe risk to the Yosemite toad and may have contributed to the species' decline.

Rodent control programs probably have an adverse indirect effect on Yosemite toad populations. Control of rodents that create burrows, such as ground squirrels, could significantly reduce the number of burrows available for use by Yosemite toads that require them for hibernation. Because the burrow density required to support Yosemite toads in an area is not known, the loss of burrows as a result of control programs cannot be quantified at this time. Active rodent colonies probably are needed to sustain Yosemite toads because inactive burrow systems become progressively unsuitable over time. Loredo *et al.* (1996) found that burrow systems collapsed within 18 months following abandonment by, or loss of, the ground squirrels. Rodent control programs must be analyzed and implemented carefully in Yosemite toad habitat so the persistence of the species is not threatened. Much of the species' range is occupied by livestock, primarily cattle, and most livestock owners seek to eliminate rodent burrows because of the threat of cows breaking their legs if they accidentally step into a burrow.

The last century has included some of the most variable climate reversals, at both the annual (extremes and high frequency of El Nino and La Nina events) and near decadal scales (periods of 5- to 8-year drought and wet periods) that has been documented (USDA 2001b). These events may have negative effects on Yosemite toads. Severe winters (El Nino) would force longer hibernation times, and could stress the toads by reducing the time available for them to feed and breed. Severe winters may also depress reproductive effort. Morton (1981) theorized that fluctuations in energy storage from year to year may explain why many female Yosemite toads do not breed on a yearly basis. Alternately, during mild winters (La Nina), precipitation is reduced. This reduction in precipitation could lead to stranding and death of Yosemite toad eggs and tadpoles, a major documented source of mortality (Zeiner *et al.* 1988; Kagarise Sherman and Morton 1993; Jennings and Hayes 1994), or to increased exposure to predatory fish.

Changes in climate that occur faster than the ability of endangered species to adapt could cause local extinctions (U.S. Environmental Protection Agency (EPA) 1989). Analysis of the Antarctic Vostok ice core has shown that over the past 160,000 years, temperatures have varied with the concentrations of greenhouse gasses such as carbon dioxide and methane (Harte 1996). Since the pre-industrial era, atmospheric concentrations of carbon dioxide have increased nearly 30 percent, methane concentrations have more than doubled, and nitrous oxide (another greenhouse gas) levels have risen approximately 15 percent (EPA 1997). The burning of fossil fuels is the primary source of these increases (EPA 1997). Global mean surface temperatures have increased 0.3 to 0.7 Celsius (0.6–1.2 Fahrenheit) since the late 19th century (EPA 1997). Climate modeling indicates that the overall effects of global warming on California will include higher average temperatures in all seasons, higher total annual precipitation, and decreased spring and summer runoff due to decreases in snowpacks (EPA 1989, 1997). Decreases in spring and summer runoff could lead to the loss of breeding habitat for Yosemite toads and an increase in stranding mortality of eggs and tadpoles.

Changes in temperature may also affect virulence of pathogens to a different degree than the immune systems of amphibians (Carey *et al.* 1999), and may make Yosemite toads more susceptible to disease. An experimental increase in stream water temperature was shown to decrease density and biomass in invertebrates (Hogg and Williams 1996), thus global warming might have a negative impact on the Yosemite toad prey base.

Drought has contributed to the decline of Yosemite toads (Jennings and Hayes 1994), and the effects of climate change may also have contributed to that decline. These effects pose an ongoing, range-wide risk to the species.

Acid precipitation has been hypothesized as a cause of amphibian declines in the Sierra Nevada, because waters there are extremely low in acid neutralizing capacity, and therefore susceptible to changes in water chemistry due to acidic deposition (Bradford *et al.* 1994). Precipitation acidity in the Sierra Nevada has been documented to have significantly increased at a collection station at approximately 2,100 m (6,900 ft) elevation near Lake Tahoe (Byron *et al.* 1991). In addition to raising the acidity of water, acidic deposition may also cause increases in dissolved aluminum, because aluminum is more soluble at higher acidity. These increases in dissolved aluminum may be toxic to amphibians (Bradford *et al.* 1992). In laboratory experiments (Bradford *et al.* 1992; Bradford and Gordon 1992), high acidity and high aluminum concentrations did not have significant effects on survival of Yosemite toad embryos or newly hatched tadpoles. However, at pH 5.0 (pH represents acidity on a negative scale, with 7 being neutral and lower numbers being more acidic) and at high aluminum concentrations, Yosemite toad embryos hatched earlier and the tadpoles showed a reduction in body size. In a complementary field study of 235 randomly selected potential amphibian breeding sites (Bradford *et al.* 1994), no significant difference was found in pH between sites occupied and unoccupied by Yosemite toads. These data indicate that acid precipitation is an unlikely cause of decline in Yosemite toad

populations (Bradford *et al.* 1994). Therefore, acid deposition is considered a low risk to the species at this time, but should still be considered in conservation efforts because of the possibility of sublethal effects (Bradford *et al.* 1992), of its interaction with other factors, and the potential for more severe acidic deposition in the future.

Ambient ultraviolet-b (UV–B) radiation (280 to 320 nanometers (11.0 to 12.6 microinches)) has increased at north temperate latitudes in the past two decades (Adams *et al.* 2001). Ambient levels of UV–b were demonstrated to cause significant decreases in survival of western toad eggs in field experiments (Blaustein 1994). In a laboratory experiment (Kats *et al.* 2000), metamorph western toads exposed to levels of uv–b below those found in ambient sunlight showed a lower alarm response to chemical cues of injured toads than metamorphs that were completely shielded from UV–B. This indicates that ambient levels of UV–B may cause sublethal effects on toad behavior that may increase their vulnerability to predation. In a field experiment (Kiesecker and Blaustein 1995), the synergistic effects of exposure to ambient levels of UV–B radiation, and exposure to a pathogenic fungus (*Saprolegnia*), were shown to cause significantly higher mortality of western toad embryos than either factor alone.

Sadinsky *et al.* (1997) observed a high percentage of embryo mortality in Yosemite toads at six breeding sites in Yosemite National Park, but in a preliminary field experiment this mortality did not appear to be related to UV–B. In spatial statistical analysis of extant and extinct populations, higher elevation was shown to have a positive effect on the likelihood that populations of Yosemite toads were extant. This is counter to what would be expected if UV–B were the primary cause of decline (C. Davidson, *in litt.*, 2002), as sites at higher elevations would be expected to receive more solar radiation due to the thinner atmosphere. The increase in UV–B at high elevations in the Sierra Nevada has not been more than 5 percent in the past several decades (Jennings 1996). These data indicate that UV–B has probably not contributed significantly to the decline of Yosemite toads and is probably currently a low risk to the species. However, as with acid precipitation, UV–B should still be considered as a risk to the species because of the potential for sublethal effects, synergistic effects with other factors, and the potential for further increases in UV–B radiation in the future.

Finding

We have carefully assessed the best scientific and commercial information available regarding the past, present, and future threats faced by this species. We reviewed the petition, information available in our files, and other published and unpublished information submitted to us during the public comment period following our 90-day petition finding. We also consulted with recognized Yosemite toad experts and other Federal and State resource agencies. On the basis of the best scientific and commercial information available, we find that proposing to list the Yosemite toad is warranted, but is precluded by higher priority listing actions.

In making this finding, we recognize that there have been declines in the distribution and abundance of Yosemite toads, primarily attributed to habitat degradation, airborne contaminants, and drought.

We conclude that the overall magnitude of threats to the Yosemite toad is moderate, and that the overall immediacy of these threats is non-imminent. Pursuant to our Listing Priority System (48 FR 43098), a species for which threats are moderate and non-imminent is assigned a Listing Priority Number of 11. While we conclude that proposing to list the Yosemite toad is warranted, an immediate proposal to list is precluded by other higher priority listing actions. During fiscal year 2003, we must spend all of our Listing Program funding to comply with court orders and judicially approved settlement agreements, which are now our highest priority actions. The Yosemite toad will be added to the list of candidate species upon publication of this notice of 12-month finding. We will continue to monitor the status of this species and other candidate species. Should an emergency situation develop concerning this species, we will act to provide immediate protection, if warranted.

We intend that any proposed listing action for the Yosemite toad will be as accurate as possible. Therefore, we will continue to accept additional information and comments from all concerned governmental agencies, the scientific community, industry, or any other interested party concerning this finding. We are especially interested in further genetic information on the proper taxonomic status of the Yosemite toad and further information on the current range and status of the species, factors contributing to its decline, and conservation efforts.

References Cited

A complete list of all references cited is available on request from the Sacramento Fish and Wildlife Office (*see* **ADDRESSES** section, above).

Authority

The authority for this action is the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*).

Dated: November 27, 2002.

Steve Williams,

Director, Fish and Wildlife Service.

[FR Doc. 02–30800 Filed 12–9–02; 8:45 am]

BILLING CODE 4310–55–P

Notices

Federal Register
Vol. 67, No. 237
Tuesday, December 10, 2002

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

DEPARTMENT OF AGRICULTURE

Farm Service Agency

Biologically Engineered Low-Nicotine Tobaccos

AGENCIES: Farm Service Agency.

ACTION: Notice.

SUMMARY: In a notice published in the **Federal Register** on May 15, 2002, the Farm Service Agency (FSA) invited comments from the public about whether the biologically-engineered, low-nicotine Burley Tobacco type 31–V and related tobaccos should be considered quota or non-quota tobacco. The preponderance of public comments supported these tobaccos being considered non-quota for the 2003 and subsequent crop years. This notice announces that there will be no change to the FSA regulations to include these tobaccos among those which are subject to marketing quota regulations.

FOR FURTHER INFORMATION CONTACT: Director, Tobacco Division, FSA, USDA, 1400 Independence Avenue, SW., Room 5750, STOP 0514, Washington, DC 20250–0514, by phone at (202)720–2715, or email at *tob_comments@wdc.fsa.gov.*

SUPPLEMENTARY INFORMATION: Recently, tobacco that was biologically-engineered to have a low nicotine content became available to producers. The regulations of the Agricultural Marketing Service (AMS), which classifies tobacco for inspection purposes but does not determine types for FSA's tobacco marketing quota program, provide that certain tobacco which in its cured state has a nicotine content of not more than eight-tenths of one percent (8/10 of 1%), oven dry weight, be classified as type 31–V, if burley, or type 73, if flue-cured. AMS thus classified, for inspection purposes, the biologically engineered tobacco, which fell at or below that nicotine level, as being either type 31–V (burley) or, if cured in the same manner as flue-cured tobacco, as type 73 (flue-cured).

FSA invited the views of interested persons before making any determination on considering biologically-engineered, low-nicotine tobacco as quota or non-quota tobacco. The majority of comments received, which were considered in formulating FSA's decision, support biologically-engineered, low-nicotine tobaccos being considered non-quota. Therefore, because current FSA marketing quota regulations include type 31 (burley) and types 11–14 (flue-cured) as tobacco subject to quotas, but do not include the biologically-engineered low-nicotine tobaccos type 31–V or type 73, FSA has determined that there will be no change to the marketing quota regulations. All comments are a matter of public record and may be viewed at the address shown above.

Signed in Washington, DC, on November 27, 2002.

Diane Sharp,

Acting Administrator, Farm Service Agency.

[FR Doc. 02–31118 Filed 12–9–02; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Forest Service

Kootenai (KNF) and Idaho Panhandle National Forests (IPNF); Montana, Idaho and Washington; Extension of Scoping For Revised Land and Resource Management Plans

AGENCY: Forest Service, USDA.

ACTION: Extension of the scoping period in conjunction with revision of the Land and Resource Management Plans (hereafter referred to as Forest Plan or Plans) for the Kootenai and Idaho Panhandle Forests (Kootenai Idaho Panhandle Zone, hereafter referred to as KIPZ) located in Lincoln, Sanders, and Flathead counties in Montana; Bonner, Boundary, Kootenai, Shoshone, Benewah, Latah, and Clearwater counties in Idaho; and Pend Oreille county in Washington.

SUMMARY: The scoping period has been extended for the proposed revised Forest Plans and the Draft Environmental Impact Statement. The original notice of intent was published in the **Federal Register**, Vol. 67, No. 83 on April 30, 2002 as FR Doc. 02–10548.

DATES: Comments concerning the scope of the analysis must be received in writing by March 21, 2003.

ADDRESSES: Send written comments and suggestions to Forest Supervisor, c/o Forest Plan Revision, Kootenai National Forest, 1101 W Hwy 2, Libby, MT 59923.

FOR FURTHER INFORMATION CONTACT: Joe Krueger at (406) 293–6211 or Gary Ford at (208) 765–7478.

SUPPLEMENTARY INFORMATION: The scoping period has been extended to March 21, 2003, to provide additional time for public access to the Analysis of the Management Situation report. Comments received during the scoping period will be used to develop alternatives in the DEIS.

Dated: December 3, 2002.

Bob Casteneda,

Kootenai Forest Supervisor.

Dated: December 3, 2002.

Ranotta K. McNair,

Idaho Panhandle Forest Supervisor, Forest Service-Northern Region.

[FR Doc. 02–31136 Filed 12–9–02; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–853]

Bulk Aspirin From the People's Republic of China; Extension of Time Limit for the Final Results of Antidumping Duty Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit.

SUMMARY: The Department of Commerce is extending the time limit for the final results of the administrative review of the antidumping duty order on bulk aspirin from the People's Republic of China. The period of review is July 6, 2000, through June 30, 2001. This extension is made pursuant to section 751(a)(3)(A) of the Tariff Act of 1930, as amended (''the Act'').

EFFECTIVE DATE: December 3, 2002.

FOR FURTHER INFORMATION CONTACT: Julie Santoboni or Cole Kyle, Office 1, Import Administration, International Trade

Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington DC 20230; at telephone (202) 482–4194 and 482–1503, respectively.

Statutory Time Limits

Section 751(a)(3)(A) of the Act requires the Department of Commerce (''the Department'') to issue the preliminary results of an administrative review within 245 days after the last day of the anniversary month of an order for which a review is requested and a final determination within 120 days after the date on which the preliminary results are published. However, if it is not practicable to complete the review within the time period, section 751(a)(3)(A) of the Act allows the Department to extend these deadlines to a maximum of 365 days and 180 days, respectively.

Background

On August 20, 2001, we published a notice of initiation of the administrative review of bulk acetylsalicylic acid, commonly referred to as bulk aspirin, from the People's Republic of China. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocations in Part,* 66 FR 43570 (August 20, 2001). The period of this review is July 6, 2000, through June 30, 2001. On August 7, 2002, we published the preliminary results of our review. In our notice of preliminary results, we stated our intention to issue the final results of this review no later than 120 days after the date of publication of the preliminary results, December 5, 2002.

Extension of Time Limits for Final Results

Due to the complexity of the surrogate value issues raised in the petitioner's case brief, we determine that it is not practicable to complete the final results of this review within the original time limit. Therefore, the Department is extending the time limit for completion of the final results until no later than February 3, 2003. This extension is in accordance with section 751(a)(3)(A) of the Act.

Dated: December 4, 2002.

Susan Kuhbach,

Acting Deputy Assistant Secretary for AD/CVD Enforcement I.

[FR Doc. 02–31152 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–503]

Iron Construction Castings from Canada: Rescission of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of rescission of antidumping duty administrative review.

EFFECTIVE DATE: December 10, 2002.

FOR FURTHER INFORMATION CONTACT: Karine Gziryan or Howard Smith, AD/CVD Enforcement, Office 4, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–4081 and (202) 482–5193, respectively.

SUPPLEMENTARY INFORMATION:

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations at 19 CFR part 351 (2002).

Background

On March 1, 2002, the Department of Commerce (the Department) published a notice of opportunity to request an administrative review of the antidumping duty order on iron construction castings from Canada covering the period March 1, 2001 through February 28, 2002 (67 FR 9438).

On April 17, 2002, pursuant to a request by Canada Pipe Company, Ltd. (Canada Pipe), the Department initiated an administrative review of the antidumping duty order on iron construction castings from Canada for the period March 1, 2001, through February 28, 2002, (67 FR 20089) (April 24, 2002). On November 25, 2002, Canada Pipe withdrew its request for an administrative review.

Rescission of Review

Section 351.213(d)(1) of the Department's regulations provides that a party that requests an administrative review may withdraw the request within 90 days after the date of publication of the notice of initiation of the requested administrative review. Although Canada Pipe withdrew its request for the review after the 90-day period had expired, the Department is rescinding the administrative review of the order on iron construction castings from Canada for the period March 1, 2001, through February 28, 2002 because no other party requested a review of Canada Pipe and it is otherwise reasonable to rescind the review. This action is consistent with the Department's practice. *See e.g., Frozen Concentrated Orange Juice From Brazil; Final Results and Partial Rescission of Antidumping Duty Administrative Review*, 67 FR 40913 (June 14, 2002) where, pursuant to a request filed after the 90 day deadline, the Department rescinded the review with respect to one respondent because the review of that respondent had not progressed beyond a point where it would have been unreasonable to grant the request for rescission.

This notice is in accordance with section 777(i)(1) of the Act and 19 CFR 351.213(d)(4).

Dated: November 29, 2002.

Holly A. Kuga,

Acting Deputy Assistant Secretary for Import Administration.

[FR Doc. 02–31151 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–570–502]

Notice of Extension of Time Limit for Preliminary Results of the Antidumping Duty Administrative Review: Certain Iron Construction Castings From the People's Republic of China

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: December 10, 2002.

SUMMARY: The Department of Commerce (the Department) is extending the time limit for the preliminary results of the antidumping duty administrative review on certain iron construction castings from the People's Republic of China. This review covers the period May 1, 2001, through April 30, 2002. The extension is made pursuant to section 751(a)(2)(B)(iv) of the Tariff Act of 1930, as amended (''the Act'').

FOR FURTHER INFORMATION CONTACT: Javier Barrientos or Julio A. Fernandez, AD/CVD Enforcement Office 7, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution

Avenue, NW., Washington, DC 20230, at (202) 482–2243 or (202) 482–0961, respectively.

Background

The Department of Commerce (the Department) received a request on May 30, 2002, from Powin Corporation, an importer of the subject merchandise, for an administrative review of the antidumping duty order on certain iron construction castings from the People's Republic of China (PRC) produced by Mucun Foundry of Fangzi District (Mucun Foundry). On June 25, 2002, the Department published a notice of initiation of this administrative review for the period of May 1, 2001, through April 30, 2002 (67 FR 42753).

Extension of Time Limits for Preliminary Results

Pursuant to section 751(a)(3)(A) of the Act, the Department shall issue preliminary results in an administrative review of an antidumping duty order within 245 days after the last day of the anniversary month of the date of publication of the order. The Act further provides, however, that the Department may extend that 245-day period to 365 days if it determines it is not practicable to complete the review within the foregoing time period.

In light of the complexity of analyzing the factors of production data, including indirect labor and electricity expenses incurred, and the sales data of the associated exporter, it is not practicable to complete this review by the current deadline of January 30, 2003.

Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time limit for the preliminary results by 120 days, until no later than May 30, 2003. The final results continue to be due 120 days after the publication of the preliminary results.

This notice is issued and published in accordance to sections 751(a)(1) and 777(I)(1) of the Act.

Dated: December 3, 2002.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 02–31153 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–816]

Certain Stainless Steel Butt-Weld Pipe Fittings from Taiwan: Extension of Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit for final results of antidumping duty administrative review.

SUMMARY: The Department of Commerce (''the Department'') is extending the time limit for the final results of the review of stainless steel butt-weld pipe fittings from Taiwan. This review covers the period June 1, 2000 through May 31, 2001.

EFFECTIVE DATE: December 10, 2002.

FOR FURTHER INFORMATION CONTACT: James Doyle, Enforcement Group III—Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482–0159.

Applicable Statute

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''the Act''), are to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations to the Department's regulations are to 19 CFR part 351 (2001).

Background

On July 23, 2001, the Department published a notice of initiation of this antidumping duty administrative review for the period of June 1, 2000 through May 31, 2001 (66 FR 38252). We published the preliminary results of review on July 9, 2002 (67 FR 45467). On November 7, 2002, (67 FR 67823) we extended the time limit for this review 30 days.

Extension of Time Limit for Final Results

Section 751(a)(3)(A) of the Act states that if it is not practicable to complete the review within the time specified, the administering authority may extend the 120-day period, following the date of publication of the preliminary results, to issue its final results by an additional 60 days. Completion of the final results within the 120-day period is not practicable for the following reasons:

- This review involves certain complex Constructed Export Price (''CEP'') adjustments including but not limited to CEP Profit and CEP Offset which were raised by respondent and petitioners after the verification and after the preliminary results of review.
- The review involves a large number of transactions and complex adjustments other than those mentioned above.

Therefore, in accordance with section 751(a)(3)(A) of the Act, the Department is extending the time period for issuing the final results of review by 11 days until December 17, 2002.

Dated: December 4, 2002.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 02–31156 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–824]

Stainless Steel Sheet and Strip in Coils from Italy: Extension of Time Limit of Final Results of Antidumping Duty Administrative Review

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of extension of time limit of the final results of antidumping duty administrative review.

SUMMARY: The Department of Commerce (''the Department'') is extending the time limits of the final results of the antidumping duty administrative review of stainless steel sheet and strip in coils (''SSSS'') from Italy. This review covers the period July 1, 2000 through June 30, 2001.

EFFECTIVE DATE: December 10, 2002.

FOR FURTHER INFORMATION CONTACT: Stephen Bailey, AD/CVD Enforcement Group III, Office 9, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–1102.

SUPPLEMENTARY INFORMATION:

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''Act''), are references to the provisions effective January 1, 1995, the effective date of the amendments made

to the Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 C.F.R. Part 351 (2001).

Background

On July 2, 2001, the Department published in the **Federal Register** a notice of opportunity to request an administrative review of the antidumping duty order on SSSS from Italy. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 66 FR 34910 (July 2, 2001). On July 31, 2001, domestic industry parties from the original investigation (''petitioners''), ThyssenKrupp Acciai Speciali Terni S.p.A. (''TKAST'') [1], a producer and exporter of subject merchandise, and ThyssenKrupp AST USA, Inc. (''TKAST USA''), requested that the Department conduct an administrative review of the antidumping duty order. On August 20, 2001, the Department initiated an administrative review of the antidumping duty order on SSSS from Italy with regard to TKAST. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Requests for Revocation in Part*, 66 FR 43570 (August 20, 2001). On March 5, 2002, the Department extended the time limit for the preliminary results of this administrative review by 90 days. *See Notice of Extension of Time Limit of the Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy*, 67 FR 9960 (March 5, 2002). On May 13, 2002, we again extended the preliminary results of administrative review, this time by 25 days. *See Notice of Extension of Time Limit of the Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy*, 67 FR 32015 (May 13, 2002). On July 26, 2002, the Department extended the time limit for the preliminary results in this administrative review another five days. *See Notice of Extension of Time Limit of the Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy*, 67 FR 50421 (August 2, 2002).

[1] On January 18, 2002 Acciai Speciali Terni S.p.A.'s shareholders voted to change the company's name to ThyssenKrupp Acciai Speciali Terni S.p.A. On February 27, 2002, Acciai Speciali Terni USA, Inc. became ThyssenKrupp AST USA, Inc. Throughout most of the responses, the companies refer to themselves as TKAST and TKAST USA, respectively.

On August 7, 2002 we issued our preliminary results of administrative review. *See Preliminary Results of Antidumping Duty Administrative Review: Stainless Steel Sheet and Strip in Coils from Italy,* 67 FR 51224 (August 7, 2002). The final results of administrative review are currently due December 5, 2002.

Extension of Time Limit of Final Results

Section 751(a)(3)(A) of the Act states that if it is not practicable to complete the review within the time specified, the administering authority may extend the 120-day period, following the date of publication of the preliminary results, to issue its final results by 60 days. Completion of the final results of this review within the 120-day period is not practicable for the following reasons:

- The review involves a large number of transactions and complex adjustments.
- The review includes complex sales and cost issues which require the Department to analyze a significant amount of information pertaining to sales practices, manufacturing costs and corporate relationships.

Therefore, in accordance with section 751(a)(3)(A) of the Act, we are extending the time period for issuing the final results of review by 40 days until January 14, 2003.

Dated: December 3, 2002.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration, Group III.

[FR Doc. 02–31157 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Department of Agriculture—Albany, CA; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 02–039.

Applicant: U.S. Department of Agriculture, Albany, CA 94710.

Instrument: Automated Robotic Colony Picking and Replicating System, Model QPixII.

Manufacturer: Genetix Limited, United Kingdom.

Intended Use: See notice at 67 FR 58355, September 16, 2002.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States.

Reasons: The foreign instrument provides a high performance robotic system for automated microbial colony picking and replicating on the basis of various features with additional capabilities of halo recognition and rearraying selected clones from one microplate to another. The National Institutes of Health advised in its memorandum of September 11, 2002, that (1) this capability is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use.

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 02–31154 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

Pennsylvania State University; Notice of Decision on Application for Duty-Free Entry of Scientific Instrument

This decision is made pursuant to section 6(c) of the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Pub. L. 89–651, 80 Stat. 897; 15 CFR part 301). Related records can be viewed between 8:30 a.m. and 5 p.m. in Suite 4100W, U.S. Department of Commerce, Franklin Court Building, 1099 14th Street, NW., Washington, DC.

Docket Number: 02–040.

Applicant: Pennsylvania State University, University Park, PA 16802.

Instrument: Optical Image Furnace and Accessories, Model SC1–MDH–20020.

Manufacturer: NEC Machinery Corporation, Japan.

Intended Use: See notice at 67 FR 58355, September 16, 2002.

Comments: None received.

Decision: Approved. No instrument of equivalent scientific value to the foreign instrument, for such purposes as it is intended to be used, is being manufactured in the United States.

Reasons: The foreign instrument provides a dual mirror image furnace with a homogeneous temperature gradient around the horizontal plane with a simultaneous steeper temperature gradient along the vertical portion for growth of various crystals. The National Aeronautics and Space Administration advised May 8, 2002, that (1) This capability is pertinent to the applicant's intended purpose and (2) it knows of no domestic instrument or apparatus of equivalent scientific value to the foreign instrument for the applicant's intended use (comparable case).

We know of no other instrument or apparatus of equivalent scientific value to the foreign instrument which is being manufactured in the United States.

Gerald A. Zerdy,

Program Manager, Statutory Import Programs Staff.

[FR Doc. 02–31155 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 120402A]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Receipt of application for scientific research permit (1408) and request for comment.

SUMMARY: Notice is hereby given that NMFS has received an application for scientific research from California Department of Water Resources (CDWR) in Sacramento, CA (1408). This permit would affect three Evolutionarily Significant Units (ESUs) of salmonids identified in the **SUPPLEMENTARY INFORMATION** section below. This document serves to notify the public of the availability of the permit application for review and comment.

DATES: Written comments on the permit application must be received at the appropriate address or fax number (see **ADDRESSES**) no later than 5 p.m. Pacific Standard Time on January 9, 2003.

ADDRESSES: Written comments on this request should be sent to the appropriate office as indicated below. Comments may also be sent via fax to the number indicated for the request. Comments will not be accepted if submitted via e-mail or the Internet. The applications and related documents are available for review, by appointment, for permit 1408: Protected Resources Division, NMFS, 650 Capitol Mall, Suite 8–300, Sacramento, CA 95814 (ph: 916–930–3600; fax: 916–930–3629). Documents may also be reviewed by appointment in the Office of Protected Resources, F/PR3, NMFS, 1315 East-West Highway, Silver Spring, MD 20910 3226 (301–713–1401).

FOR FURTHER INFORMATION CONTACT: Rosalie del Rosario at phone number 916–930–3600, or e-mail: *Rosalie.delRosario@noaa.gov.*

SUPPLEMENTARY INFORMATION:

Authority

Issuance of permits and permit modifications, as required by the Endangered Species Act of 1973 (16 U.S.C. 1531 1543) (ESA), is based on a finding that such permits/modifications: (1) are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Authority to take listed species is subject to conditions set forth in the permits. Permits and modifications are issued in accordance with and are subject to the ESA and NMFS regulations governing listed fish and wildlife permits (50 CFR parts 222 226).

Those individuals requesting a hearing on an application listed in this notice should set out the specific reasons why a hearing on that application would be appropriate (see **ADDRESSES**). The holding of such a hearing is at the discretion of the Assistant Administrator for Fisheries, NOAA. All statements and opinions contained in the permit action summaries are those of the applicant and do not necessarily reflect the views of NMFS.

Species Covered in This Notice

This notice is relevant to 3 federally listed salmonid ESUs: endangered Sacramento River Winter-run Chinook salmon (*Oncorhynchus tshawytscha*), threatened Central Valley Spring-run Chinook salmon (*O. tshawytscha*), and threatened Central Valley steelhead (*O. mykiss*).

New Applications Received

CDWR requests a 2–year permit for incidental take of adult endangered Sacramento River Winter-run Chinook salmon, threatened Central Valley Spring-run Chinook salmon and threatened Central Valley steelhead in the mainstem of the Sacramento River. The purpose of the study is to provide information on swimming performance and behavior of white sturgeon to assist the construction and operation of sturgeon passage structures that will be applicable to proposed North Delta Through Delta Facilities.

Dated: December 4, 2002.

Margaret Lorenz,

Acting Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 02–31158 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 120402B]

Endangered and Threatened Species; Take of Anadromous Fish

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

ACTION: Issuance of modification to permit 1044 to the Southwest Fisheries Science Center (SWFSC) in Santa Cruz, CA.

SUMMARY: Notice is given that NMFS has issued a modification to permit 1044 to SWFSC that authorizes takes of threatened Endangered Species Act (ESA) listed anadromous fish species for research purposes subject to certain conditions set forth therein.

ADDRESSES: The applications and related documents are available for review in the following offices, by appointment:

Protected Resources Division, NMFS, 777 Sonoma Avenue, Room 325, Santa Rosa, CA 95404–6528.

FOR FURTHER INFORMATION CONTACT: For permit 1044: Diana Hines, Protected Resources Division, NMFS, Santa Rosa, CA (707) 575–6057, or e-mail: *diana.hines@noaa.gov*.

SUPPLEMENTARY INFORMATION:

Species Covered in This Notice

The following species and evolutionarily significant units are covered in this notice: Central California Coast steelhead (*Oncorhynchus mykiss*).

Issuance of this permit, as required by the ESA, was based on a finding that such modification was: (1) applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permit; and (3) is consistent with the purposes and policies set forth in section 2 of the

ESA. This permit was issued in accordance with, and is subject to, part 222 of Title 50 CFR, the NMFS regulations governing listed species permits.

Modification to Permit Issued

Notice was published on August 23, 2002, that SWFSC applied for a modification to permit 1044 to take threatened Central California Coast steelhead associated with a life history diversity study and density study in Soquel Creek, CA. Modification 2 to Permit 1044 was issued on November 12, 2002, authorizing takes of juvenile, threatened, Central California Coast steelhead. Modification 2 is valid for the duration of the permit.

Permit 1044M2 expires June 30, 2007.

Dated: December 4, 2002.

Margaret Lorenz,

Acting Chief, Endangered Species Division,Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 02–31159 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–22–S

DEPARTMENT OF COMMERCE

National Telecommunications and Information Administration

Docket No. 010222048–2293–06

The Health and Life Insurance Cancellation Notices Exception of the Electronic Signatures in Global and National Commerce Act

AGENCY: National Telecommunications and Information Administration (NTIA), U.S. Department of Commerce

ACTION: Notice, Request for Comments

SUMMARY: Section 101 of the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106–229, *codified at* 15 U.S.C. 7001 *et seq.* (''ESIGN'' or ''the Act''), preserves the legal effect, validity, and enforceability of signatures and contracts relating to electronic transactions and electronic signatures used in the formation of electronic contracts. 15 U.S.C. 7001(a). Section 103 (a) and (b) of the Act, however, provides that the provisions of section 101 do not apply to contracts and records governed by statutes and regulations regarding court documents; probate and domestic law matters; state commercial law; consumer law covering utility services, residential property foreclosures and defaults, and insurance benefits; product recall notices; and hazardous materials documents. Section 103 of the Act also requires the Secretary of Commerce, through the Assistant Secretary for Communications, to review the operation of these exceptions to evaluate whether they continue to be necessary for consumer protection, and to make recommendations to Congress based on this evaluation. 15 U.S.C. 7003(c)(1). This Notice is intended to solicit comments from interested parties for purposes of this evaluation, specifically on the health and life insurance cancellation notices exception to the ESIGN Act. *See* 15 U.S.C. 7003(b)(2)(C). NTIA will publish separate notices requesting comment on the other exceptions listed in section 103 of the ESIGN Act.[1]

DATES: Written comments and papers are requested to be submitted on or before February 10, 2003.

ADDRESSES: Written comments should be submitted to Josephine Scarlett, National Telecommunications and Information Administration, 14th Street and Constitution Ave., NW., Washington, DC 20230. Paper submissions should include a three and one-half inch computer diskette in HTML, ASCII, Word, or WordPerfect format (please specify version). Diskettes should be labeled with the name and organizational affiliation of the filer, and the name of the word processing program used to create the document. In the alternative, comments may be submitted electronically to the following electronic mail address: *esignstudy__insnot@ntia.doc.gov*. Comments submitted via electronic mail also should be submitted in one or more of the formats specified above.

FOR FURTHER INFORMATION CONTACT: For questions about this request for comment, contact: Josephine Scarlett, Attorney, Office of the Chief Counsel, NTIA, 14th Street and Constitution Ave., NW., Washington, DC 20230, telephone (202) 482–1816 or electronic mail: *jscarlett@ntia.doc.gov*. Media inquiries should be directed to the Office of Public Affairs, National Telecommunications and Information Administration, at (202) 482–7002.

SUPPLEMENTARY INFORMATION:

Background: Electronic Signatures in Global and National Commerce Act

Congress enacted the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106–229, 114 Stat. 464 (2000), to facilitate the use of electronic records and signatures in interstate and foreign commerce and to remove uncertainty about the validity of contracts entered into electronically. Section 101 requires, among other things, that electronic signatures, contracts, and records be given legal effect, validity, and enforceability. Sections 103(a) and (b) of the Act provides that the requirements of section 101 will not apply to contracts and records governed by statutes and regulations regarding: probate and domestic law matters; state commercial law; consumer law covering utility services, residential default and foreclosure notices; insurance benefits cancellation notices; product recall notices; and hazardous materials documents.

The statutory language providing for an exception to section 101 of ESIGN for health and life insurance cancellation notices is found in section 103(b)(2)(C) of the Act:

Sec. 103. [15 U.S.C. 7003] Specific Exceptions.

(b) Additional Exceptions.— The provisions of section 101 shall not apply to—

* * * *

(2) any notice of—

* * * *

(C) the cancellation or termination of health insurance or benefits or life insurance benefits (excluding annuities)—

* * * *

The statutory language requiring the Assistant Secretary for Communications and Information to submit a report to Congress on the results of the evaluation of the section 103 exceptions to the ESIGN Act is found in section 103(c)(1) of the Act as set forth below.

(c) Review of Exceptions.—

(1) Evaluation required.— The Secretary of Commerce, acting through the Assistant Secretary for Communications and Information, shall review the operation of the exceptions in subsections (a) and (b) to evaluate, over a period of 3 years, whether such exceptions continue to be necessary for the protection of consumers. Within 3 years after the date of enactment of this Act, the Assistant Secretary shall submit a report to Congress on the results of such evaluation.

Health and Life Insurance Cancellation Notices

Information regarding life and health insurance rates and benefits is widely distributed through electronic means, including Internet websites and facsimiles. The ESIGN Act exception for life and health insurance cancellation notices excludes insurance cancellation notices sent to consumers by an

[1] Comments submmitted in response to *Federal Register* notices requesting comment on the other exceptions to ESIGN will be considered as part of the same section 103 evaluation and not as part of a separate review of the Act.

electronic method from the operation of the statute. The rules and regulations governing termination and cancellation notices for life and health insurance benefits are governed, in part by Federal law, but primarily by state law.

The Department of Labor, Pension Welfare Benefits Administration (PWBA), and the Department of Health and Human Services, Centers for Medicaid and Medicare Services (CMS), have Federal regulatory authority for the distribution of information regarding life and health insurance to Federal employees and to Medicare and Medicaid recipients. As early as 1997, before the passage of ESIGN, these agencies proposed rules to allow the release of information regarding health and life insurance benefits in electronic format. *See, e.g.,* 62 FR 16979 (April 8, 1997). Since that time, both agencies have conducted rulemaking proceedings to incorporate standards for the electronic transmission of certain health insurance information. The CMS adopted standards for electronic transactions regarding health plans, health care clearinghouses, and certain health care providers in August 2000. *See* 65 FR 50312 (August 17, 2000). CMS recently proposed an amendment to its rules to improve Medicare and Medicaid programs, and the efficiency and effectiveness of the health care system in general by encouraging the development of a health information system through the establishment of standards and requirements for the electronic transmission of certain health insurance information. *See* 67 FR 38050 (May 31, 2002). The CMS's regulations require health providers and organizations to provide: written notice to Medicare enrollees of the termination of a risk contract; notice by mail to Medicare enrollees of a health maintenance organization (HMO) or covered medical provider's (CMP) intention not to renew a contract; and 60 days' notice of a contract termination initiated by the HMO or CMP. *See* 42 CFR 417.488(a), 417.492(a)(ii), and 417.494(b)(iv)(4).

The Labor Department's PWBA also recently issued regulations governing the disclosure of pension and health plan information through electronic media. *See* 67 FR 17264 (April 9, 2002). Under new rules that became effective on October 9, 2002, the administrator of a group health plan may furnish certain documents to plan enrollees, beneficiaries, and other persons entitled to the information using electronic media. *See* 29 CFR 2520.104b–1(c).

With respect to state laws, some states' regulations require health and life insurance companies to provide written notice to policyholders before the effective date of a policy cancellation or nonrenewal. For example, the Florida statute provides that a health insurance provider must provide the insured written notice at least 45 days prior to cancellation or nonrenewal. Fla.Stat. § 408.909(7) (2002). The South Carolina Code provides that an insurer must give an insured at least 31 days' written notice of nonrenewal of a health insurance policy. S.C. Code Ann. § 38–71–335.

The use of electronic means to transmit health and life insurance cancellation notices, therefore, would represent a departure from Federal and state rules that require companies to transmit information in writing through postal delivery. Approximately forty-three states have used section 102(a)(1) of ESIGN to adopt electronic transactions laws that incorporate or exclude state-exclusive areas from the application of the state's electronic transactions law. *See* National Conference of Commissioners on Uniform State Laws at *http://www.nccusl.org/nccusl/LegislativeByState.pdf.* Of the states that have passed these laws, several have expressly excluded health and life insurance cancellation notices from the operation of the state electronic transactions laws.[2] For example, North Carolina's electronic transaction law provides that the law does not apply to ''any notice of the cancellation or termination of health insurance or benefits, or life insurance or benefits, excluding annuities.'' *See* N.C. Gen. Stat. § 66–313(e)(3) (2000). A large number of the remaining states have passed state uniform electronic transactions laws that do not contain language that expressly excludes health and life insurance cancellation notices. These states' statutes may contain general provisions, however, that makes the substantive insurance law controlling, which requires an examination of the insurance codes in these states to determine whether electronic health and life insurance cancellation notices are legally valid. Information regarding changes in state or Federal law to allow electronic transmission of cancellation notices for life and health insurance would assist in the evaluation of whether consumers would be adequately protected if the life and health insurance cancellation notices exception is eliminated from the ESIGN Act.

[2] The following states have enacted electronic transactions laws that include an exception for health and life insurance cancellation notices: Alabama, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Minnesota, Mississippi, New Jersey, New Mexico, and North Carolina. *See e.g.,* Md Code Ann., Com. Law § 21-201(B)(4)(III); N.C. Gen. Stat. § 66-313(E)(3) (2001); and National Conference of Commissioners on Uniform State Laws, *available at http://www.nccusl/legislativebystate.pdf.*

The ESIGN Section 103 Evaluation

The ESIGN Act directs the Assistant Secretary of Communications and Information to conduct an evaluation of whether the exceptions set out in section 103 of the Act continue to be necessary for the protection of consumers, and to submit a report to Congress on the results of the evaluation no later than June 30, 2003. The Assistant Secretary for Communications and Information is the chief administrator of NTIA. As the President's principal advisor on telecommunications policies pertaining to the Nation's economic and technological advancement, NTIA is the executive branch agency responsible for developing and articulating domestic and international telecommunications policy.

The ESIGN section 103 evaluation is intended to examine the current status of Federal and state regulations that govern, and practices of companies that issue life and health insurance cancellation notices, in preparation for a report to Congress on whether this exception remains necessary to protect consumers. This evaluation is not a review or analysis of Federal and state regulations and rules relating to life and health insurance cancellation notices for the purpose of recommending changes to those regulations, but to advise Congress of the current state of law, practice, and procedure regarding this issue. Comments filed in response to this Notice should not be considered to have a connection with or impact on ongoing specific Federal and state procedures or rulemaking proceedings concerning life and health insurance cancellation notices.

Invitation to Comment

NTIA requests that interested parties, including members of the bar, courts and consumer representatives, submit written comment on any issue of fact, law, or policy that may assist in the evaluation required by section 103(c). We invite comment from all parties that may be affected by the removal of the life and health insurance cancellation notices exception from the ESIGN Act including, but not limited to, state agencies and organizations, national and state bar associations, consumer advocates, and insurance or benefits law practitioners. The comments will assist NTIA in evaluating the potential impact of the removal of this exception from

ESIGN on consumers, insurers, practitioners, and state electronic transactions laws. The following questions are intended to provide guidance as to the specific subject areas to be examined as a part of the evaluation. Commenters are invited to discuss any relevant issue, regardless of whether it is identified below.

1. What methods, if any, are available to protect health and life insurance consumers if the exception for life and health insurance cancellation notices is eliminated from the ESIGN Act? Discuss.

2. Discuss state and municipal health and life insurance regulations, laws, and ordinances that require written notice to consumers for cancellation or termination of insurance benefits.

3. Discuss any state regulations that allow companies to transmit health and life insurance cancellation notices by electronic methods.

4. How would the removal of the insurance cancellation notices exception to ESIGN affect health and life insurance consumers? How would the removal of the exception affect the provision of notice by health and life insurance companies to their customers? Please discuss.

5. What effect would the removal of the exception have on current state and Federal policies concerning cancellations of life and health insurance? Discuss.

6. If the ESIGN Act is amended to eliminate the health and life insurance cancellation notice exception, what other changes, if any, should be made to the Act to maintain consumer protection laws? What changes would be necessary, if any, to maintain current state and Federal policies concerning the content and timing of health and life insurance termination and cancellation notices?

7. What are the benefits for health and life insurance customers, and insurance companies that may result from electronic notice of cancellation of insurance benefits?

8. List any issues regarding delivery, timing, authentication, and privacy for health and life insurance benefits cancellation notices that can and should be resolved prior to removal of the exception from the Act?

9. Discuss current electronic methods that are used to provide life and health insurance information to customers(e.g., executed contracts, quotes provided, benefits statements).

10. Describe any consumer protection mechanisms employed by companies that use electronic methods to transmit health and life insurance information to consumers.

11. Have states and companies developed electronic notification procedures for the transmission of health and life insurance information? If so, discuss:

a. the receipt verification procedures that have been implemented;

b. regulations that have been updated to reflect electronic signature technologies; and

c. current state regulations that require the retention of a separate paper copy.

12. Discuss any other issues (such as privacy and state consumer protection laws) that may be affected if insurance cancellation notices are included under the requirements of section 101 of the ESIGN Act.

Please provide copies of studies, reports, opinions, research or other empirical data referenced in the responses.

Dated: December 4, 2002.

Kathy D. Smith,

Chief Counsel, National Telecommunications and Information Administration.

[FR Doc. 02–31069 Filed 12–9–02; 8:45 am]

BILLING CODE 3510–60–S

DEPARTMENT OF DEFENSE

Department of the Army

Notice of Availability of the Draft Mission Environmental Impact Statement (EIS) for Aberdeen Proving Ground (APG), Maryland

AGENCY: Department of the Army, DoD.

ACTION: Notice of availability.

SUMMARY: The Department of the Army announces the availability of the APG Draft Mission EIS for public review and comment. The EIS provides APG and its stakeholders an analysis of the environmental impacts resulting from all reasonably foreseeable future mission activities at APG, located in northeastern Maryland.

DATES: The public comment period will end 45 days after the publication of the notice of availability in the **Federal Register** by the Environmental Protection Agency.

ADDRESSES: Anyone wishing to receive a copy of the Draft EIS or the EIS Executive Summary may send a postcard or letter with their name and address to: U.S. Army Garrison Aberdeen Proving Ground, Directorate of Safety, Health and Environment, ATTN: AMSSB–GSH–ER (Buddy Keesee), Aberdeen Proving Ground, MD 21005.

FOR FURTHER INFORMATION CONTACT: Buddy Keesee at (410)–278–6755, or via email at *buddy.keesee@usag.apg.army.mil.*

SUPPLEMENTARY INFORMATION: The Army proposes to provide for the future operation of APG, located in Maryland at the northern end of the Chesapeake Bay. APG is composed of two principal areas separated by the Bush River: the Aberdeen Area situated north of the river and the Edgewood Area to the south. Three alternatives have been identified and assessed for the future operation of APG: (1) Alternative A: future planned activities plus mitigation alternative (proposed action), (2) Alternative B: future planned activities alternative, and (3) Alternative C: no action alternative. The future planned activities plus mitigation alternative (Alternative A) would provide for the Army's future operation of APG through the adoption of a comprehensive environmental baseline assessment of APG mission activities for use in environmental manage-ment decision-making, to include the analysis of cumulative effects, as well as the implementation of a mitigation program to nullify any potential adverse impacts of all reasonable foreseeable future mission activities. Alternative A is distinct from the other alternatives as it represents a comprehensive approach to the management of the APG environment. The future planned activities alternative (Alternative B) would encompass all reasonable foreseeable future mission activities. However, individual actions requiring National Environmental Policy Act documentation would be implemented piecemeal and a means for comprehensive environmental management, including a current environmental baseline, would not be established. The no action alternative (Alternative C) is defined as the continuation of current ongoing mission activities at approximately the same levels, intensities, rates, and conditions as they currently exist (*i.e.,* status quo). Under no action, the baseline established by the 1978 installation-wide EIS would be the only comprehensive point of reference for the analysis of environmental effects, including cumulative effects. Mitigation measures would be implemented on a project-by-project basis.

The analysis in the Draft Mission EIS indicates that no significant adverse impacts that cannot be avoided, minimized, or mitigated are anticipated to occur under the proposed action (Alternative A) or the no action alternative (Alternative C). Although there is an opportunity to mitigate future adverse impacts under the

proposed action and current adverse impacts under the no action alternative, there is a fundamental difference in the approach. Under the proposed action, a means for comprehensive environmental management, including a current environmental baseline, would be established. Mitigation may be applied comprehensively within this context. In the case of the no action alternative, environmental consideration and documentation will be performed on a prpoject-by-project basis with the baseline established by the 1978 installation-wide EIS. A comprehensive mitigation program would not be implemented.

When requesting copies of the EIS, please specify whether you wish to receive only the Executive Summary or the full document including the appendices.

Comments received after the 45-day comment period will be considered to the extent practicable. The Army will use the comments received to help prepare the the APG Final Mission EIS. Public information meetings on the Draft EIS will be held in Harford, Baltimore and Kent Counties in Maryland. The meetings will provide opportunities for information exchange and discussion among members of the Army, APG, and the public. Exact dates and locations will be advertised in the local media at least 15 days prior to the meetings. Additional information on the public meetings can also be obtained from the DPG Public Affairs Office at (410) 278–1147.

Persons and organizations wishing to comment on the Draft EIS may attend the public meetings or may send written comments to: Commander, U.S. Army Garrison Aberdeen Proving Ground, ATTN: AMSSB–GSH–ER (Draft APG EIS), Aberdeen Proving Ground, MD 21005.

The full Draft EIS and EIS Executive Summary will be available at the following public reading rooms: Harford County Library (Aberdeen Branch), 21 Franklin Street, Aberdeen; Harford County Library (Edgewood Branch), 2205 Hanson Road, Edgewood; Kent County Public Library, 408 High Street, Chestertown. Copies at the public reading rooms are for review purposes only and extra copies of the documents will not be available at these locations.

Dated: December 2, 2002.

Raymond J. Fatz,

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health), OASA (I&E).

[FR Doc. 02–31137 Filed 12–9–02; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 8, 2003.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Karen Lee, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address *Karen_F._Lee@omb.eop.gov.*

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 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.

Dated: December 4, 2002.

John Tressler,

Leader, Regulatory Management Group, Office of the Chief Information Officer.

Office of Educational Research and Improvement

Type of Review: Reinstatement.

Title: National Postsecondary Student Aid Study: 2004.

Frequency: One time.

Affected Public: Individuals or household; business or other for-profit; not-for-profit institutions.

Reporting and Recordkeeping Hour Burden: Responses: 1,204. Burden Hours: 4,125.

Abstract: The 2004 National Postsecondary Student Aid Study is being conducted to meet the continuing need for national-level data about significant financial aid issues for students enrolling in postsecondary education. Information about financial aid policies and postsecondary affordability is critical to policymakers who determine the need analysis formulas for Pell Grants, maximum amounts for student loans and other need-based federal programs, and estimate the continuing and future burden that ensuring federal aid places on the Federal government. For the first time this study will also collect representative data on state aid and tuition policies which have been previously unavailable at the student level. This clearance request covers field test and full-scale activities. This interview will collect information on background, program of study, enrollment status, federal aid amounts, state aid amounts, other types of aid, tuition, school-related expenses, student and parent finances, student employment, credit card usage, and educational expectations.

Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or directed to her e-mail address *Vivian.Reese@ed.gov.* Requests may also be 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 Kathy Axt at her e-mail address *Kathy.Axt@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. 02–31120 Filed 12–9–02; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF EDUCATION

Submission for OMB Review; Comment Request

AGENCY: Department of Education.

SUMMARY: The Leader, Regulatory Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before January 8, 2003.

ADDRESSES: Written comments should be addressed to the Office of Information and Regulatory Affairs, Attention: Karen Lee, Desk Officer, Department of Education, Office of Management and Budget, 725 17th Street, NW., Room 10235, New Executive Office Building, Washington, DC 20503 or should be electronically mailed to the internet address *Karen_F._Lee@omb.eop.gov*.

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 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.

Dated: December 4, 2002.

John Tressler,

Leader, Regulatory Management Group, Office of the Chief Information Officer.

Office of Educational Research and Improvement

Type of Review: Reinstatement.

Title: Trends in International Mathematics and Science Study (TIMSS): 2003.

Frequency: One time.

Affected Public: Individuals or household; not-for-profit institutions; State, local, or tribal gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden: Responses: 25,710. Burden Hours: 20,730.

Abstract: The TIMSS 2003 will assess the mathematical and science knowledge of students in over 50 participating countries. This is the third cycle of TIMSS studies. Previous TIMSS were conducted in 1994–1995 and in 1999. TIMSS 2003 will go to fourth and eighth graders in the United States. In addition to the assessments, in each participating country, the selected students and their fourth grade teachers and eighth grade science and math teachers, and administrators of the selected schools will also fill out background questionnaires to learn about curricula, instruction, home context, and school characteristics and policies.

Written requests for information should be addressed to Vivian Reese, Department of Education, 400 Maryland Avenue, SW., Room 4050, Regional Office Building 3, Washington, DC 20202–4651 or directed to her e-mail address *Vivian.Reese@ed.gov*. Requests may also be 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 Kathy Axt at her e-mail address *Kathy.Axt@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. 02–31119 Filed 12–9–02; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC03–27–000]

California Independent System Operator Corporation; Notice of Filing

December 4, 2002.

Take notice that on December 2, 2002, California Independent System Operator Corporation (ISO) filed with the Federal Energy Regulatory Commission (Commission) an application pursuant to section 203 of the Federal Power Act for authorization for the transfer of Operational Control of certain transmission assets from the cities of Anaheim, California (Anaheim), Azusa, California (Azusa), Banning, California (Banning), and Riverside, California (Riverside) (collectively Southern Cities) to the ISO, to be effective on January 1, 2003.

The ISO states that this filing has been served on the Public Utilities Commission of the State of California, the California Energy Commission, the California Electricity Oversight Board, and all parties with effective Scheduling Coordinator Agreements under the ISO Tariff, including the Southern Cities.

The ISO is requesting expeditious action by the Commission on this Application so that the transfer of Operational Control discussed herein can be effectuated on January 1, 2003.

Any person desiring to intervene or to protest this filing should file 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). 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. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: December 20, 2002.

Linwood A. Watson, Jr.,

Deputy Secretary.

[FR Doc. 02–31139 Filed 12–9–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Project No. 4914]

International Paper Company; Errata Notice

December 4, 2002.

The comment date was omitted from the Notice of Application Tendered for Filing with the Commission, Soliciting Additional Study Requests, and Establishing Procedural Schedule for Relicensing and a Deadline for Submission of Final Amendments issued on November 27, 2002 (67 FR

72161, December 4, 2002). The comment date should be January 21, 2003.

Linwood A. Watson, Jr.,

Deputy Secretary.

[FR Doc. 02–31141 Filed 12–9–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. EC03–25–000]

WPS Resources Corporation, Energy Services, Inc.; Notice of Filing

December 4, 2002.

Take notice that on November 27, 2002, WPS Resources Corporation (WPSR) and WPS Energy Services, Inc. (ESI) tendered for filing with the Federal Energy Regulatory Commission (Commission) pursuant to Section 203 of the Federal Power Act and part 33 of the Commission's regulations, a request for authorization to convert certain debt owed to WPSR by Quest Energy, L.L.C. into common equity pursuant to which Quest will become a subsidiary of WPSR.

Copies of the filing were served on the Public Service Commissions of Wisconsin and Michigan.

Any person desiring to intervene or to protest this filing should file 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). 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. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number field to access the document. For assistance, please contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: December 18, 2002.

Linwood A. Watson, Jr.,

Deputy Secretary.

[FR Doc. 02–31138 Filed 12–9–02; 8:45 am]

BILLING CODE 6717–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. ER03–235–000]

Xcel Energy Services, Inc.; Northern States Power Company; Notice of Filing

December 4, 2002.

Take notice that on November 26, 2002, Xcel Energy Services, Inc. (XES), on behalf of Northern States Power Company (NSP) submitted for filing with the Federal Energy Regulatory Commission (Commission) Amendment # 2 to the Interconnection & Interchange Agreement between NSP and Minnesota Municipal Power Agency.

NSP requests the letter agreements be accepted for filing effective October 17, 2002, and requests waiver of the Commission's notice requirements in order for the Agreements to be accepted for filing on the date requested.

Any person desiring to intervene or to protest this filing should file 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). 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. All such motions or protests should be filed on or before the comment date, and, to the extent applicable, must be served on the applicant and on any other person designated on the official service list. This filing is available for review at the Commission or may be viewed on the Commission's Web site at *http://www.ferc.gov*, using the ''FERRIS'' link. Enter the docket number excluding the last three digits in the docket number filed to access the document. For assistance, contact FERC Online Support at *FERCOnlineSupport@ferc.gov* or toll-free at (866) 208–3676, or for TTY, contact (202) 502–8659. Protests and interventions may be filed electronically via the Internet in lieu of paper; *see* 18 CFR 385.2001(a)(1)(iii) and the instructions on the Commission's Web site under the ''e-Filing'' link. The Commission strongly encourages electronic filings.

Comment Date: December 20, 2002.

Linwood A. Watson, Jr.,

Deputy Secretary.

[FR Doc. 02–31140 Filed 12–9–02; 8:45 am]

BILLING CODE 6717–01–P

FEDERAL FINANCIAL INSTITUTIONS EXAMINATION COUNCIL

Appraisal Subcommittee

Information Collection Activities Under OMB Review

AGENCY: Appraisal Subcommittee, Federal Financial Institutions Examination Council.

ACTION: Notice of information collection extension submitted to OMB for review under the Paperwork Reduction Act of 1980.

SUMMARY: In accordance with the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35), the Appraisal Subcommittee of the Federal Financial Institutions Examination Council (''ASC'') has sent to the Office of Management and Budget (''OMB'') for review the following information collection.

DATES: Comments on this information collection must be received on or before January 9, 2003.

ADDRESSES: Send comments to Ben Henson, Executive Director, Appraisal Subcommittee, 2000 K Street, NW., Suite 310, Washington, DC 20006; and Joseph F. Lackey, Jr., Clearance Officer, Office of Management and Budget, New Executive Office Building, Room 10235, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Marc L. Weinberg, General Counsel, Appraisal Subcommittee, 2000 K Street, NW., Suite 310, Washington, DC 20006, from whom copies of the information collection and supporting documents are available.

SUPPLEMENTARY INFORMATION:

Title: 12 CFR Part 1102, Subpart B; Rules of Practice for Proceedings.

Type of Review: Regular submission.

Summary and Need: Procedures for ASC non-recognition and ''further action'' proceedings against State appraiser regulatory agencies and other persons under § 1118 of Title XI of the Financial Institutions Reform, Recovery,

and Enforcement Act of 1989 (12 U.S.C. 3347).

Form Number: None.

OMB Number: 3139–0005.

Affect Public: State, local or tribal government.

Number of Responses: 2 responses.

Average Hours Per Responses: 60 hours.

Total Annual Burden Hours: 120 hours.

By the Appraisal Subcommittee of the Federal Financial institutions Examination Council.

Dated: December 4, 2002.

Ben Henson,

Executive Director.

[FR Doc. 02–31079 Filed 12–9–02; 8:45 am]

BILLING CODE 6700–01–M

FEDERAL RESERVE SYSTEM

Change in Bank Control Notices; Acquisition of Shares of Bank or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the office of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices of the Board of Governors. Comments must be received not later than December 26, 2002.

A. Federal Reserve Bank of Chicago (Phillip Jackson, Applications Officer) 230 South LaSalle Street, Chicago, Illinois 60690-1414:

1. Wayne W. Whalen and Paula Wolff, River Forest, Illinois; to retain ownership of the outstanding shares of Unionbancorp, Inc., Ottawa, Illinois, and thereby indirectly retain voting shares of Unionbank, Streator, Illinois; Unionbank/Central, Princeton, Illinois; Unionbank/West, Macomb, Illinois, and Unionbank/Northwest, Hanover, Illinois.

2. Dennis J. McDonnell and Kathleen A. McDonnell, Chicago, Illinois; to retain ownership of the outstanding shares of Unionbancorp, Inc., Ottawa, Illinois, and thereby indirectly retain voting shares of Unionbank, Streator, Illinois; Unionbank/Central, Princeton, Illinois; Unionbank/West, Macomb, Illinois, and Unionbank/Northwest, Hanover, Illinois.

B. Federal Reserve Bank of Minneapolis (Julie Stackhouse, Sr. Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. Brian and Patricia Wellmon, Crandon, Wisconsin; to acquire voting shares of Northern Wisconsin Bank Holding Company, Laona, Wisconsin, and thereby indirectly acquire voting shares of Laona State Bank, Laona, Wisconsin.

Board of Governors of the Federal Reserve System, December 4, 2002.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 02–31125 Filed 12–9–02; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL RESERVE SYSTEM

Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act (12 U.S.C. 1843). Unless otherwise noted, nonbanking activities will be conducted throughout the United States. Additional information on all bank holding companies may be obtained from the National Information Center website at *http://www.ffiec.gov/nic/*.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than January 3, 2003.

A. Federal Reserve Bank of Minneapolis (Julie Stackhouse, Sr. Vice President) 90 Hennepin Avenue, Minneapolis, Minnesota 55480-0291:

1. Olmsted Holding Corporation, Byron, Minnesota; to become a bank holding company by acquiring 100 percent of the voting shares of Olmsted National Bank, Rochester, Minnesota.

B. Federal Reserve Bank of Kansas City (Susan Zubradt, Assistant Vice President) 925 Grand Avenue, Kansas City, Missouri 64198-0001:

1. First Olathe Bancshares, Inc., Overland Park, Kansas; to acquire an additional 29.26 percent, for a total of 59.56 percent of the voting shares of Bannister Bancshares, Inc., Kansas City, Missouri, and thereby indirectly acquire additional voting shares of Union Bank, Kansas City, Missouri.

Board of Governors of the Federal Reserve System, December 4, 2002.

Jennifer J. Johnson,

Secretary of the Board.

[FR Doc. 02–31124 Filed 12–9–02; 8:45 am]

BILLING CODE 6210–01–S

FEDERAL TRADE COMMISSION

[File No. 011 0242]

National Academy of Arbitrators; 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 draft 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 January 2, 2003.

ADDRESSES: Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. Comments filed in electronic form should be directed to: *consentagreement@ftc.gov,* as prescribed below.

FOR FURTHER INFORMATION CONTACT: L. Barry Costilo, FTC, Bureau of Competition, 600 Pennsylvania Avenue, NW., Washington, DC 20580, (202) 326–2024.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade

Commission Act, 38 Stat. 721, 15 U.S.C. 46(f), 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, subject to final approval, 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 Home Page (for December 3, 2002), on the World Wide Web, at *http://www.ftc.gov/os/2002/12/index.htm.* A paper copy can be obtained from the FTC Public Reference Room, Room 130–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580, either in person or by calling (202) 326–2222.

Public comments are invited, and may be filed with the Commission in either paper or electronic form. Comments filed in paper form should be directed to: FTC/Office of the Secretary, Room 159–H, 600 Pennsylvania Avenue, NW., Washington, DC 20580. If a comment contains nonpublic information, it must be filed in paper form, and the first page of the documents must be clearly labeled ''confidential.'' Comments that do not contain any nonpublic information may instead be filed in electronic form (in ASCII format, WordPerfect, or Microsoft Word) as part of or as an attachment to email messages directed to the following email box: *consentagreement@ftc.gov.* Such comments 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 to a proposed consent order from the National Academy of Arbitrators (''NAA''). NAA has its principal place of business in Pittsburgh, Pennsylvania.

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 decide whether it should withdraw from the agreement or make final the agreement's proposed order.

NAA is an honorary association for labor-management arbitrators. Labor-management arbitrators hear and decide disputes between labor unions and employers. The complaint alleges that NAA engages in substantial activities for the economic benefit of its members. The complaint further alleges that NAA has approximately 600 members, many of whom arbitrate labor-management disputes for a fee.

The complaint charges that NAA has violated Section 5 of the Federal Trade Commission Act by acting as a combination of its members and in agreement with some of its members to retrain competition by restricting advertising and solicitation by its members. The complaint alleges that in furtherance of the combination and agreement NAA has adopted and maintained a Code of Professional Responsibility for Arbitrators of Labor-Management Disputes and Formal Advisory Opinions that restrain arbitrators from engaging in truthful, non-deceptive advertising and solicitation, regardless of whether such advertising or solicitation compromises or appears to compromise the impartiality of Arbitrators. The Code of Professional Responsibility states:

An arbitrator must not solicit arbitration assignments. * * * Solicitation, as prohibited by this section, includes the making of requests for arbitration work through personal contacts with individual parties, orally or in writing.

In addition to prohibiting solicitation, the previous version of the Code prohibited virtually all advertising. The advertising restriction was recently amended to restrict only false and misleading advertising. However, NAA's Formal Advisory Opinions, which serve as official interpretations of the Code, often do not draw a distinction between advertising and solicitation and continue to restrict members from distributing truthful information. For example, Opinion 14 deems an arbitrator's unsolicited mailing to both labor and management representatives that contains truthful biographical information to be a violation of NAA's ethics provisions on advertising and solicitation. Opinion 16 concludes that it is unethical solicitation and advertising for an arbitrator to send out announcements of the change of address of his office, which include his resume (including the fact that he is a lawyer) and state his fee schedule. Opinion 18 declares it unethical for an arbitrator to ''distribute his business cards, except on request, to potential clients.'' And Opinion 19 holds that an arbitrator who gives potential clients ball point pens to inform them of his change of address runs afoul of the proscriptions on advertising and solicitation. Given these Formal Advisory Opinions, the narrowing of the advertising restrictions in the Code to false and misleading advertising does not eliminate competitive concerns.

The complaint alleges that the above acts and practices constitute unfair methods of competition which have restrained competition unreasonably. It further alleges that the effects of the acts and practices are to injure consumers by depriving consumers of the services of labor-management arbitrators of the benefits of truthful, non-deceptive information and of free and open competition among arbitrators.

NAA has signed a consent agreement containing the proposed consent order. The proposed consent order would prohibit NAA from maintaining or enforcing any policy, ethics rule, interpretation or guideline that impedes or restricts arbitrators from engaging in advertising truthful information about their services, including the prices, terms and conditions of sale of their services. The proposed consent order would also prohibit NAA from maintaining or enforcing any policy, ethics rule, interpretation or guideline against solicitation of arbitration work. The order permits NAA to adopt and promulgate reasonable ethics guidelines governing the conduct of its members with respect to representations that NAA reasonably believes would be false or deceptive or governing conduct that NAA reasonably believes would compromise or appear to compromise the impartiality of arbitrators.

To ensure and monitor compliance, the consent order provides, among other things, that within certain time frames NAA shall remove the provisions that are inconsistent with the order from NAA's Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, NAA's Advisory Opinions, any NAA policy statement or guideline and NAA's website. The order requires NAA to publish a copy of the order and complaint in its newsletter. It further provides that the order and complaint shall be published on the NAA web site, with a link placed in a prominent position on the web site's home page. The proposed consent order also contains other provisions to monitor compliance.

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of

the agreement and proposed order or to modify in any way their terms.

By director of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 02–31143 Filed 12–9–02; 8:45 am]

BILLING CODE 6750–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Information Collection Activities: Submission for OMB review; Comment Request

The Department of Health and Human Services, Office of the Secretary publishes a list of information collections it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) and 5 CFR 1320.5. The following are those information collections recently submitted to OMB.

1. Study of Fathers' Involvement in Permanency Planning and Child Welfare Casework—New—The Office of the Assistant Secretary for Planning and Evaluation proposes a study to assess how four states identify, locate, and involve non-custodial fathers in decision making and permanency planning for children in the child welfare system. *Respondents:* State or local governments—State and Local Administrator Burden Information—*Number of Respondents:* 44; *Average Burden per Response:* 35 minutes; *Total Administrator Burden:* 26 hours—Caseworker Burden Information—*Number of Respondents:* 1,200; *Average Burden per Response:* 55 minutes; *Total Caseworker Burden:* 1,100 hours—Administrative Burden—*Number of Respondents:* 8 *Average Burden per Response:* 90 minutes; *Total Administrative Burden:* 12 hours—*Total Burden:* 1,138 hours.

OMB Desk Officer: Allison Herron Eydt.

Copies of the information collection packages listed above can be obtained by calling the OS Reports Clearance Officer on (202) 690–6207. Written comments and recommendations for the proposed information collection should be sent directly to the OMB desk officer designated above at the following address: Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503.

Comments may also be sent to Cynthia Agens Bauer, OS Reports Clearance Officer, Room 503H, Humphrey Building, 200 Independence Avenue SW., Washington DC, 20201. Written comments should be received with 30 days of this notice.

Dated: November 22, 2002.

Kerry Weems,

Deputy Assistant Secretary, Budget.

[FR Doc. 02–31083 Filed 12–9–02; 8:45 am]

BILLING CODE 4154–05–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of the Secretary

Agency Information Collection Activities: Submission for OMB Review; Comment Request

The Department of Health and Human Services, Office of the Secretary publishes a list of information collections it has submitted to the Office of Management and Budget (OMB) for clearance in compliance with the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35) and 5 CFR 1320.5. The following are those information collections recently submitted to OMB.

1. Financial Summary of Obligations and Expenditures of Block Grant Funds (45 CFR 96.30)—0990–0236—Extension—Public Law 101–510 amended 31 U.S.C. Chapter 15 to provide that, by the end of the fifth fiscal year after the fiscal year in which the Federal government obligated the funds, the account will be cancelled. If valid charges to a cancelled account are presented after cancellation, they may be honored only by charging them to a current appropriation account, not to exceed an amount equal to one percent of the total appropriations of that account. Because of the need to determine the status of grant accounts to comply with this statutory provision, it is necessary to require an annual report on obligations and/or expenditures from all grantees under the block grant programs. *Respondents:* State, local or Tribal governments; *Number of Respondents:* 620; *Average Burden per Response:* one hour; *Total Annual Burden:* 620 hours.

OMB Desk Officer: Allison Herron Eydt.

Copies of the information collection packages listed above can be obtained by calling the OS Reports Clearance Officer on (202) 690–6207. Written comments and recommendations for the proposed information collection should be sent directly to the OMB desk officer designated above at the following address: Human Resources and Housing Branch, Office of Management and Budget, New Executive Office Building, Room 10235, 725 17th Street NW., Washington, DC 20503.

Comments may also be sent to Cynthia Agens Bauer, OS Reports Clearance Officer, Room 503H, Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201. Written comments should be received within 30 days of this notice.

Dated: November 22, 2002.

Kerry Weems,

Deputy Assistant Secretary, Budget.

[FR Doc. 02–31084 Filed 12–9–02; 8:45 am]

BILLING CODE 4151–17–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–03–20]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404)498–1210.

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 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. Send comments to Anne O'Connor , CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

Proposed Project: Resources and Services Database on CDC National Prevention Information Network (OMB No. 0920–0255)—Reinstatement—National Center for HIV, STD, and TB

Prevention (NCHSTP), Centers for Disease Control and Prevention (CDC).

Background

CDC, National Center for HIV, STD, and TB Prevention proposes to continue data collection for the Resources and Services Database on CDC National Prevention Information Network (formerly known as the National AIDS Clearinghouse), previously approved under OMB No. 0920–0255. This request is for a 3-year reinstatement of clearance.

NCHSTP has the primary responsibility within the CDC and the U.S. Public Health Service for the prevention and control of HIV infection, sexually transmitted diseases (STDs), and tuberculosis (TB), including community-based HIV prevention activities and syphilis and TB elimination programs. To support NCHSTP's mission and to link Americans to prevention, education, and care services, the CDC National Prevention Information Network (NPIN) serves as the U.S. reference, referral, and distribution service for information on HIV/AIDS, STDs, and TB. NPIN is a critical member of the network of government agencies, community organizations, businesses, health professionals, educators, and human services providers that educate the American public about the grave threat to public health posed by HIV/AIDS, STDs, and TB, and provides services for persons infected with human immunodeficiency virus (HIV).

Established in 1988, the NPIN Resources and Services Database contains entries on approximately 19,000 organizations and is the most comprehensive listing of HIV/AIDS, STD and TB resources and services available throughout the country. This database describes national, state and local organizations that provide services related to HIV/AIDS, STDs, and TB such as counseling and testing, prevention, education and support services. The NPIN reference staff rely on the Resources and Services Database to respond to nearly 63,000 requests each year for information or referral from community based organizations, state and local health departments, and health professionals working in HIV/AIDS, STD and TB prevention. The CDC National AIDS and STD Hotline staff also use the NPIN Resources and Services Database to refer approximately one million callers yearly to local programs for information, services, and treatment. The American public can also access the NPIN Resources and Services database through the NPIN Web site. More than 12 million visits by the public to the Web site are recorded annually.

To accomplish CDC's goal of continuing efforts to maintain an up-to-date, comprehensive database, NPIN plans each year to add 100 newly identified organizations and to verify those organizations currently described in the NPIN Resources and Services Database each year. NPIN staff learn about new organizations through exhibiting at health and professional meetings, searching the Internet, and perusing newsletter announcements and press releases. Once a new organization is identified as providing HIV/AIDS, STD or TB-related services, NPIN staff will mail the Resource Organization Questionnaire along with a cover letter. The purpose of the questionnaire is to gather information about the HIV/AIDS, STD or TB-related services available from the organization, what geographic area the organization serves, and the target audiences for these services. Each organization will also receive a stamped, self-addressed envelope for the return of the questionnaire. Organizations with access to the Internet, will be given the option to complete and submit an electronic version of the questionnaire by visiting the CDC NPIN Web site. If NPIN receives no response to the initial mailing of the questionnaire, a follow-up telephone call will be made to the organization requesting the organization to complete and return the questionnaire.

As part of the verification process for the Resources and Services Database, 40 percent of the organizations will receive a copy of their current database entry by electronic mail, including a cover letter and a list of instructions. The remaining 60 percent will receive a telephone call to review their database record. There is no cost to respondents.

Survey	Number of respondents	Number of responses/respondent	Avg. burden/response (in hours)	Total burden (in hours)
Questionnaire Resource Organization	100	1	30/60	50
Questionnaire Telephone Follow-up	33	1	15/60	8.25
Email Verification	7,600	1	15/60	1900
Telephone verification	11,400	1	10/60	1900
Total				3858

Dated: December 4, 2002.

John Moore,

Acting Deputy Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention.

[FR Doc. 02–31131 Filed 12–9–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[60Day–03–21]

Proposed Data Collections Submitted for Public Comment and Recommendations

In compliance with the requirement of section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 for opportunity for public comment on proposed data collection projects, the Centers for Disease Control and Prevention (CDC) will publish periodic summaries of proposed projects. To request more information on the proposed projects or to obtain a copy of the data collection plans and instruments, call the CDC Reports Clearance Officer on (404) 498–1210.

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 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. Send comments to Anne O'Connor , CDC Assistant Reports Clearance Officer, 1600 Clifton Road, MS–D24, Atlanta, GA 30333. Written comments should be received within 60 days of this notice.

Proposed Project: Automated Management Information System (MIS) for Diabetes Control Programs—Extension—National Center for Chronic Disease Prevention and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC).

Background

The National Center for Chronic Disease Prevention and Health Promotion, Centers for Disease Control and Prevention (CDC) has implemented a Management Information System (MIS) and federally sponsored data collection requirement from all CDC funded diabetes control programs. Diabetes is the sixth leading cause of death in the United States contributing to more than 200,000 deaths each year. An estimated 11.1 million people in the United States have been diagnosed with diabetes and an estimated 5.9 million people have undiagnosed diabetes. The Centers for Disease Control and Prevention's Division of Diabetes Translation (DDT) provides funding to health departments of States and territories to develop, implement, and evaluate systems-based Diabetes Control Programs (DCPs). DCPs are population-based, public health programs that design, implement and evaluate public health prevention and control strategies that improve access to and quality of care for all, and reach communities most impacted by the burden of diabetes (*e.g.*, racial/ethnic populations, the elderly, rural dwellers and the economically disadvantaged). Support for these programs is a cornerstone of the DDT's strategy for reducing the burden of diabetes throughout the nation. The Diabetes Control Program is authorized under sections 301 and 317(k) of the Public Health Service Act (42 U.S.C. sections 241 and 247b(k)).

In accordance with the original OMB approval (July 20, 2002), this extension will continue to expand and enhance the technical reporting capacity of the MIS. The MIS is a web-based, password access protected repository/technical reporting system that replaced an archaic paper reporting system. The MIS allows the accurate, uniform, and complete collection of diabetes program progress information using the Internet. The MIS has improved upon the old data collection system by:

- Improving accountability;
- Shortening the information cycle;
- Eliminating non-standard reporting;
- Minimizing unnecessary duplication of data collection and entry;
- Reducing the reporting burden on small state organizations;
- Using plain, coherent, and unambiguous terminology that is understandable to respondents;
- Implementing a consistent system for progress reporting and record-keeping processes;
- Identifying the retention periods for recordkeeping requirements;
- Utilizing modern information technology for data collection and transfer;
- Significantly reducing the amount of paper reports that diabetes control programs are required to submit.

The MIS has allowed CDC to more rapidly respond to outside inquiries concerning a specific diabetes control activity occurring in the state diabetes control programs. The data collection requirement has formalized the format and contents of diabetes data reported from the DCPs and provides an electronic means for efficient collection and transmission to the CDC headquarters.

The MIS has facilitated the staff's ability at CDC to fulfill its obligations under the cooperative agreements; to monitor, evaluate, and compare individual programs; and to assess and report aggregate information regarding the overall effectiveness of the DCP program. It has also supported DDT's broader mission of reducing the burden of diabetes by enabling DDT staff to more effectively identify the strengths and weaknesses of individual DCPs and to disseminate information related to successful public health interventions implemented by these organizations to prevent and control diabetes. Implementation of the MIS has provided for efficient collection of state-level diabetes program data. The cost to respondents is $7,080.

Respondents	Number. of respondents	Number of responses/ respondent	Average burden/ response (in hours)	Total burden (in hours)
State Program Control Officers	59*	1	4	236
Total				236

*Respondents reside in each of the 50 States, 8 Territories, and the District of Columbia and provide progress reporting on an annual frequency.

Dated: December 4, 2002.

John Moore,

Acting Associate Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention.

[FR Doc. 02–31132 Filed 12–9–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY–06–03]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503. Written comments should be received within 30 days of this notice.

Proposed Project: Assisted Reproductive Technology (ART) Program Reporting System, (OMB No. 0920–0556)—Extension—National Center for Chronic Disease Prevention

and Health Promotion (NCCDPHP), Centers for Disease Control and Prevention (CDC). Section 2(a) of Pub. L. 102–493 (known as the Fertility Clinic Success Rate and Certification Act of 1992 (FCSRCA), 42 U.S.C. 263a–1(a)) requires that each assisted reproductive technology (ART) program shall annually report to the Secretary through the Centers for Disease Control and Prevention: (1) pregnancy success rates achieved by such ART program, and (2) the identity of each embryo laboratory used by such ART program and whether the laboratory is certified or has applied for such certification under this act.

The Centers for Disease Control and Prevention (CDC) is seeking to extend approval of a reporting system for Assisted Reproductive Technology (ART) Program from the Office of Management and Budget (OMB). This reporting system has been designed in collaboration with the Society for Assisted Reproductive Technology (SART) to comply with the requirements of the FCSRCA. The reporting system includes all ART cycles initiated by any of the approximately 400 ART programs in the United States, and covers the pregnancy outcome of each cycle, as well as a number of data items deemed important to explain variability in success rates across clinics and across individuals. Data is to be collected through computer software developed by SART in consultation with CDC.

In developing the definition of pregnancy success rates and the list of data items to be reported, CDC has consulted with representatives of SART, the American Society for Reproductive Medicine, and RESOLVE, the National Infertility Association (a national, nonprofit consumer organization), as well as a variety of individuals with expertise and interest in this field. The annual burden for this data collection is 63,400 hours.

Respondents	Number of respondents	Number of responses/ respondent	Average burden/ response (in hours)
ART Clinics	400	220	37/60
Data Validation	40	113	23/60

Dated: December 4, 2002.

John Moore,

Acting Deputy Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention.

[FR Doc. 02–31130 Filed 12–9–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Disease Control and Prevention

[30DAY–08–03]

Agency Forms Undergoing Paperwork Reduction Act Review

The Centers for Disease Control and Prevention (CDC) publishes a list of information collection requests under review by the Office of Management and Budget (OMB) in compliance with the Paperwork Reduction Act (44 U.S.C. chapter 35). To request a copy of these requests, call the CDC Reports Clearance Officer at (404) 498–1210. Send written comments to CDC, Desk Officer, Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503. Written comments should be received within 30 days of this notice.

Proposed Project: Human Exposure to Cyanobacterial (blue-green algal) Toxins in Drinking Water: Risk of Exposure to Microcystin from Public Water Systems (OMB. No. 0920–0527)—Revision—National Center for Environmental Health (NCEH), Centers for Disease Control and Prevention (CDC).

Background

Cyanobacteria (blue-green algae) can be found in terrestrial, fresh, brackish, or marine water environments. Some species of cyanobacteria produce toxins that may cause acute or chronic illnesses (including neurotoxicity, hepatotoxicity, and skin irritation) in humans and animals (including other mammals, fish, and birds). A number of human health effects, including gastroenteritis, respiratory effects, skin irritations, allergic responses, and liver damage, are associated with the ingestion of or contact with water containing cyanobacterial blooms. Although the balance of evidence, in conjunction with data from laboratory animal research, suggests that cyanobacterial toxins are responsible for a range of human health effects, however, there have been few epidemiologic studies of this association. We plan to recruit 100 people whose tap water comes from a source with a current cyanobaterial bloom (*i.e., M. aeruginosa*) and who report drinking unfiltered tap water. We also plan to recruit 100 people who report drinking unfiltered tap water but whose tap water source is groundwater that has not been contaminated with cyanobacteria. This population will serve as our referent population for the analysis of microcystins in blood and for the clinical assays. We will administer a questionnaire and collect blood samples from all study participants. Blood samples will be analyzed using a newly developed molecular assay for levels of microcystins—the hepatotoxin produced by Micocystis aeruginosa. We also will analyze blood samples for levels of liver enzymes (a biological marker of hepatotoxicity) and for a number of clinical parameters including hepatitis infection (a potential confounder in our study). We will evaluate whether we can (1) detect low levels of microcystins (<10 ng/ml of blood) in the blood of people who are exposed to very low levels of this toxin in their drinking water, (2) utilize clinical endpoints such as blood liver enzyme levels as biomarkers of exposure and biological effect, and (3) compare the analytical results for the exposed population with the results from the referent population. The total annual burden hours is estimated to be 350.

Respondents	Number of respondents	Number of responses/ respondent	Avg. burden/ response (in hrs.)
Telephone contact	300	1	10/60
Survey	200	1	1

Respondents	Number of respondents	Number of responses/ respondent	Avg. burden/ response (in hrs.)
Tap water sample collection	200	1	30/60

Dated: December 4, 2002.

John Moore,

Acting Deputy Director for Policy, Planning and Evaluation, Centers for Disease Control and Prevention.

[FR Doc. 02–31133 Filed 12–9–02; 8:45 am]

BILLING CODE 4163–18–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability of the Final Addendum to the Recovery Plan for the Multi-Island Plants

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of document availability.

SUMMARY: The U.S. Fish and Wildlife Service (Service), announces the availability of the final Addendum to the Recovery Plan for the Multi-Island Plants. There are 10 plant taxa included in this plan, all of which are listed as endangered. All 10 taxa are endemic to the Maui Nui group of islands in the Hawaiian Islands.

ADDRESSES: Copies of this recovery plan are available by request from the U.S. Fish and Wildlife Service, Pacific Islands Fish and Wildlife Office, 300 Ala Moana Boulevard, Room 3–122, Box 50088, Honolulu, Hawaii 96850 (phone 808/541–3441). Recovery Plans may also be obtained from: Fish and Wildlife Reference Service, 5430 Grosvenor Lane, Suite 110, Bethesda, Maryland 20814, 301/429–6403 or 1–800–582–3421. The fee for the plan varies depending on the number of pages of the plan. This recovery plan will be made available on the World Wide Web at *http://www.r1.fws.gov/ecoservices/endangered/recovery/default.htm* or *http://endangered.fws.gov/recovery/recplans/index.htm*.

FOR FURTHER INFORMATION CONTACT: Christa Russell, Plant Conservation Program Coordinator, at the above U.S. Fish and Wildlife Service Honolulu address.

SUPPLEMENTARY INFORMATION:

Background

Recovery of endangered or threatened animals and plants is a primary goal of our endangered species program. A species is considered recovered when the species' ecosystem is restored and/or threats to the species are removed so that self-sustaining and self-regulating populations of the species can be supported as persistent members of native biotic communities. Recovery plans describe actions considered necessary for the conservation of the species, establish criteria for downlisting or delisting listed species, and estimate the time and cost associated with implementing the measures needed for recovery.

The Endangered Species Act (Act) (16 U.S.C. 1531 *et seq.*), requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act requires that during recovery plan development, we provide public notice and an opportunity for public review and comment. Information presented during the public comment period has been considered in the preparation of this final addendum, and is summarized in an appendix to the recovery plan. We will forward substantive comments regarding recovery plan implementation to appropriate Federal or other entities so that they can take these comments into account during the course of implementing recovery actions.

This Addendum to the Recovery Plan for the Multi-Island Plants covers 10 plant taxa, all of which are listed as endangered. These 10 Hawaiian plant taxa are endemic to the Maui Nui group of islands in the Hawaiian Islands. This group includes Maui, Molokai, Lanai, and Kahoolawe. Five taxa are endemic to the island of Maui, three taxa are endemic to the island of Lanai, one taxon is endemic to Molokai, and one taxon is endemic to the island of Kahoolawe. The listed plants are: *Clermontia samuellii* (oha wai), *Cyanea copelandii* ssp. *haleakalaensis* (haha), *Cyanea glabra* (haha), *Cyanea hamatiflora* ssp. *hamatiflora* (haha), *Dubautia plantaginea* ssp. *humilis* (naenae), *Hedyotis schlechtendahliana* var. *remyi* (kopa), *Kanaloa kahoolawensis* (kohe malama malama o Kanaloa), *Labordia tinifolia* var. *lanaiensis* (kamakahala), *Labordia triflora* (kamakahala), and *Melicope munroi* (alani).

The 10 taxa included in this addendum grow in a variety of vegetation communities (shrublands and forests), elevational zones (coastal to montane), and moisture regimes (dry to wet). These taxa and their habitats have been variously affected or are currently threatened by one or more of the following: competition for space, light, water, and nutrients by introduced vegetation; habitat degradation by wild, feral or domestic animals (pigs, goats, and deer); predation by animals (deer, pigs, goats, rats, slugs, and insects); substrate loss; and collecting for scientific or horticultural purposes. In addition, due to the small number of existing individuals and their very narrow distributions, these taxa and most of their populations are subject to an increased likelihood of extinction and/or reduced reproductive vigor from naturally occurring events such as hurricanes.

The objective of the addendum to the recovery plan is to provide a framework for the recovery of these 10 taxa so that their protection by the Act is no longer necessary. The interim objective is to stabilize all existing populations of these 10 plants. To be considered stable, each taxon would have to be managed to control threats (*e.g.*, fenced) and be represented in an ex situ (such as a nursery or arboretum) collection. In addition, a minimum total of three populations of each taxon should be documented on the islands where they now occur or occurred historically. Each of these populations would have to be naturally reproducing and increasing in number, with a minimum of 25 mature individuals per population for long-lived perennials (*Kanaloa kahoolawensis* and *Melicope munroi*), and a minimum of 50 mature individuals per population for short-lived perennials (*Clermontia samuelii*, *Cyanea copelandii* ssp. *haleakalaensis*, *Cyanea glabra*, *Cyanea hamatiflora* ssp. *hamatiflora*, *Dubautia plantaginea*, *Hedyotis schlechtendahlia* var. *remyi, Labordia tinifolia* var. *lanaiensis*, and *Labordia triflora*).

For reclassification to threatened status, a total of five to seven populations of each taxon should be documented on islands where they now occur, or occurred historically. In certain cases, however, a particular taxon could be eligible for reclassification even if all five to seven of the populations are on only one island, provided all of the other recovery criteria have been met, and the populations in question are widely distributed and secure enough that one

might reasonably conclude that the taxon is not in danger of extinction throughout all or a significant part of its range.

Each of these populations would have to be naturally reproducing, stable or increasing in number, and secure from threats, with a minimum of 100 mature individuals per population for long-lived perennials and a minimum of 300 mature individuals per population for short-lived perennials. Each population should persist at this level for a minimum of 5 consecutive years before reclassification is considered. A total of 8 to 10 populations of each taxon should be documented on islands where they now occur or occurred historically. As with reclassification to threatened status, there could be certain cases in which a particular taxon may be eligible for removal from the list even if all 8 to 10 of the populations are on only 1 island, provided all of the other recovery criteria have been met, and the populations in question are widely distributed and secure enough that one might reasonably conclude that the taxon is not in danger of extinction throughout all or a significant part of its range. Each of these populations would have to be naturally reproducing, stable or increasing in number, and secure from threats, with a minimum of 100 mature individuals per population for long-lived perennials and a minimum of 300 mature individuals per population for short-lived perennials. Each population should persist at this level for a minimum of 5 consecutive years.

Authority

The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: September 19, 2002.

Carolyn A. Bohan,

Acting Regional Director, Region 1, Fish and Wildlife Service.

[FR Doc. 02–31076 Filed 12–9–02; 8:45 am]

BILLING CODE 4310–55–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances Notice of Registration

By Notice dated March 27, 2002, and published in the **Federal Register** on April 10, 2002, (67 FR 17467), Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by letter to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of fentanyl (9801), a basic class of controlled substance listed in Schedule II.

The firm plans to bulk manufacture the listed controlled substance for sale to its customers.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, Section 823(a) and determined that the registration of Boehringer Ingelheim Chemicals, Inc., to manufacture is consistent with the public interest at this time. DEA has investigated Boehringer Ingelheim Chemicals, Inc. to ensure that the company's registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic class of controlled substance listed above is granted.

Dated: November 5, 2002,

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–31070 Filed 12–9–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated October 5, 2001, and published in the **Federal Register** on October 17, 2001 (66 FR 52781), B.I. Chemicals, Inc., which has changed its name to Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of phenylacetone (8501), a basic class of controlled substance listed in Schedule II.

The firm plans to import the phenylacetone for the bulk manufacture of amphetamine.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, Section 8923(a) and determined that the registration of Boehringer Ingelheim Chemicals, Inc. to import phenylacetone is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Boehringer Ingelheim Chemicals, Inc. on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to section 1008(a) of the Controlled Substance Import and Export Act and in accordance with title 21, Code of Federal Regulations, section 1301.34, the above firm is granted registration as an importer of the basic class of controlled substance listed above.

Dated: November 5, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–31071 Filed 12–9–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated October 5, 2001, and published in the **Federal Register** on October 17, 2001, (66 FR 52780), B.I. Chemicals, Inc. which changed its name to Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as a bulk manufacturer of the basic classes of controlled substances listed below:

Drug	Schedule
Amphetamine (1100)	II
Methadone (9250)	II
Methadone-intermediate (9254)	II
Levo-alphacetylmethadol (9648)	II

The firms plans to bulk manufacture the listed controlled substances for formulation into finished pharmaceuticals.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, Section 823(a) and determined that the registration of Boehringer Ingelheim Inc.

to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated the firm on a regular basis to ensure that the company's continued registration is consistent with the public interest. These investigations have included inspection and testing of the company's physical security systems, audits of the company's records, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to 21 U.S.C. 823 and 28 CFR 0.100 and 0.104, the Deputy Assistant Administrator, Office of Diversion Control, hereby orders that the application submitted by the above firm for registration as a bulk manufacturer of the basic classes of controlled substances listed above is granted.

Dated: November 5, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–31072 Filed 12–9–02; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Notice of Application

Pursuant to Section 1301.33(a) of title 21 of the Code of Federal Regulations (CFR), this is notice that on June 21, 2002, Noramco, Inc., 1440 Olympic Drive, Athens, Georgia 30601, made Application by letter to the Drug Enforcement Administration (DEA) for registration as a bulk manufacturer of Sufentanil (9740), a basic class of controlled substance listed in Schedule II.

The firm plans to manufacture the listed controlled substance in bulk for distribution to its customers.

Any other such applicant and any person who is presently registered with DEA to manufacture such substance may file comments or objections to the issuance of the proposed registration.

Any such comments or objections may be addressed, in quintuplicate, to the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration, United States Department of Justice, Washington, DC 20537, Attention: DEA Federal Register Representative (CCR), and must be filed no later than 60 days from publication.

Dated: November 26, 2002.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 02–31073 Filed 12–9–02; 8:45 am]

BILLING CODE 4410–09–M

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

[Notice (02–147)]

National Environmental Policy Act; Mars Exploration Rover-2003 Project

AGENCY: National Aeronautics and Space Administration (NASA).

ACTION: Notice of availability of final environmental impact statement (FEIS) for implementation of the Mars Exploration Rover (MER)–2003 Project.

SUMMARY: Under the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and NASA policy and procedures (14 CFR part 1216 subpart 1216.3), NASA has prepared a FEIS for the MER–2003 project. In the FEIS, NASA addresses the potential environmental impacts associated with continuing the preparations for and implementing the MER–2003 project. The purpose of the MER–2003 project is to explore the surface of Mars.

The proposed action and preferred alternative for implementing the MER–2003 project includes two missions, each involving identical rover spacecraft. NASA proposes to launch the first mission from Cape Canaveral Air Force Station (CCAFS), Florida, in May or June 2003, on a Delta II 7925, and the second mission from CCAFS in June or July 2003, on a Delta II 7925 Heavy. Each rover would include two small radioactive sources for instrument calibration and would use up to 11 radioisotope heater units (RHU) for thermal control.

NASA published a notice of availability (NOA) of the draft EIS (DEIS) for the MER–2003 Project (67 FR 48490, July 24, 2002) and mailed copies to 79 Federal, State and local agencies, organizations, and individuals. In addition, NASA made the DEIS available in electronic format on its website. The U.S. Environmental Protection Agency (EPA) subsequently published its NOA (67 FR 48894, July 26, 2002). Comments received during the 45-day comment period ending September 9, 2002, have been addressed in the FEIS.

DATES: NASA will take no final action on the proposed MER–2003 missions on or before January 9, 2003, or 30 days from the date of publication in the **Federal Register** of the EPA notice of availability of the MER–2003 project FEIS, whichever is later.

ADDRESSES: *See* **SUPPLEMENTARY INFORMATION** section for addresses for reviewing the FEIS and obtaining copies of the record of decision.

FOR FURTHER INFORMATION CONTACT: David Lavery, Office of Space Science, Mail Code SM, NASA Headquarters, Washington, DC 20546–0001, telephone 202–358–4800, or electronic mail *marsnepa@hq.nasa.gov.*

SUPPLEMENTARY INFORMATION: The proposed MER–2003 project is part of NASA's continuing efforts to: (1) Understand the atmosphere, surface, and interior of Mars; (2) determine if life exists or has ever existed on Mars; (3) and develop an understanding of Mars in support of possible future human exploration. The aim of the MER–2003 project is to determine the aqueous, climactic, and geologic history of two high priority sites on Mars. In the FEIS, NASA considered and analyzed the environmental impacts of the proposed action and the no action alternative. The proposed action, which is the preferred alternative, consists of continuing preparations for and implementing the MER–2003 project. The proposed action would include two missions that would continue intensive studies of two Martian sites via identical rover spacecraft. Operation of the rovers and their science instruments would also benefit planning and design of future missions by: (1) Demonstrating the capabilities and technologies for long-range reconnaissance by mobile science platforms; (2) demonstrating complex science operations through the simultaneous use of multiple mobile laboratories; and (3) validating the standards, protocols, and capabilities of the international Mars communications infrastructure.

The first mission (MER–A) would be launched on a Delta II 7925 from CCAFS in May or June 2003. The second mission (MER–B) would be launched on a Delta II 7925 Heavy from CCAFS in June or July 2003. Opportunities to visit Mars occur every 26 months, but not all opportunities are the same from the point of view of launch vehicle capability. The 2003 launch opportunity represents the most favorable opportunity for a surface mission to Mars in decades. Programmatic issues (*e.g.*, changes in NASA priorities or

unforeseen circumstances), however, could necessitate modification to the mission objectives and timing. Such modifications could result in the need to launch one mission in 2003 and a second mission at a later date, or not at all. Depending upon the significance of any new information and whether any changes in the project are substantial, NASA will consider preparing additional environmental documentation in accordance with CEQ and NASA procedures.

For the MER–2003 missions, the potentially affected environment for normal launches includes the area at and in the vicinity of the launch site, CCAFS in Florida. The environmental impacts of normal launches of the two missions for the proposed action would be associated principally with the exhaust emissions from each of the Delta II launch vehicles. These effects would include: (1) Short-term impacts on air quality within the exhaust cloud and near the launch pads and (2) the potential for acidic deposition on the vegetation and surface water bodies at and near the launch complex, particularly if rain occurs shortly after launch.

Potential launch accidents could result in the release of some of the radioactive material on board the rover. Each rover would employ two instruments that use small quantities of cobalt-57 (not exceeding 350 millicuries) and curium-244 (not exceeding 50 millicuries) as instrument sources. Each rover would have up to 11 RHUs that use plutonium dioxide to provide heat to the electronics and batteries on board the rover. The radioisotope inventory of 11 RHUs would total approximately 365 curies of plutonium.

The U.S. Department of Energy (DOE), in cooperation with NASA, has performed a risk assessment of potential accidents for the MER–2003 project. This assessment used a methodology refined through applications to the Galileo, Mars Pathfinder, and Cassini missions and incorporates results of safety tests on the RHUs and an evaluation of the January 17, 1997, Delta II accident at CCAFS. DOE's risk assessment for this project indicates that in the event of a launch accident the expected impacts of released radioactive material at and in the vicinity of the launch area, and on a global basis, would be small.

FEIS Review Copies

The FEIS may be reviewed during normal business hours at the following locations:

(a) NASA Headquarters, Library, Room 1J20, 300 E Street, SW., Washington, DC 20546.

(b) Spaceport U.S.A., Room 2001, John F. Kennedy Space Center, FL 32899. Please call Lisa Fowler at 321–867–2201 so that arrangements can be made.

(c) Jet Propulsion Laboratory, Visitors Lobby, Building 249, 4800 Oak Grove Drive, Pasadena, CA 91109 (818–354–5179).

In addition, the FEIS may be examined at the following NASA Centers by contacting the Freedom of Information Act Office at the respective Center:

(d) NASA, Ames Research Center, Moffett Field, CA 94035 (650–604–1181).

(e) NASA, Dryden Flight Research Center, P.O. Box 273, Edwards, CA 93523 (661–276–2704).

(f) NASA, Glenn Research Center at Lewis Field, 21000 Brookpark Road, Cleveland, OH 44135 (216–433–2755).

(g) NASA, Goddard Space Flight Center, Greenbelt Road, Greenbelt, MD 20771 (301–286–0730).

(h) NASA, Johnson Space Center, Houston, TX 77058 (281–483–8612).

(i) NASA, Langley Research Center, Hampton, VA 23681 (757–864–2497).

(j) NASA, Marshall Space Flight Center, Huntsville, AL 35812 (256–544–2030).

(k) NASA, Stennis Space Center, MS 39529 (228–688–2164).

Limited hard copies of the FEIS are available, on a first request basis, by contacting David Lavery, Office of Space Science, Mail Code SM, NASA Headquarters, Washington, DC 20546–0001, telephone 202–358–4800, or electronic mail *marsnepa@hq.nasa.gov.*

Electronic Access

The FEIS is also available in Acrobat® format at *http://spacescience.nasa.gov/admin/pubs/mereis/index.htm.*

Copies of the Record of Decision

Copies of the record of decision, when issued, may be obtained upon written request to David Lavery, Office of Space Science, Mail Code SM, NASA Headquarters, Washington, DC 20546–0001.

Dated: December 5, 2002.

Jeffrey E. Sutton,

Assistant Administrator for Management Systems.

[FR Doc. 02–31127 Filed 12–9–02; 8:45 am]

BILLING CODE 7510–01–P

NATIONAL TRANSPORTATION SAFETY BOARD

Sunshine Act Meeting

TIME AND PLACE: 9:30 a.m., Tuesday, December 17, 2002.

PLACE: NTSB Conference Center, 429 L'Enfant Plaza SW., Washington, DC 20594.

STATUS: The two items are Open to the Public.

MATTERS TO BE CONSIDERED:

7454A—Marine Accident Report—Collision Between the U.S. Coast Guard Patrol Boat *CG242513* and the U.S. Small Passenger Vessel *Bayside Blaster,* Biscayne Bay, Miami, Florida, January 12, 2002.

7513—Highway Accident Brief—Motorcoach run-off-the-road, near Canon City, Colorado, on December 21, 1999.

New Media Contact: Telephone: (202) 314–6100.

Individuals requesting specific accommodations should contact Ms. Carolyn Dargan at (202) 314–6305 by Friday, December 13, 2002.

FOR MORE INFORMATION CONTACT: Vicky D'Onofrio, (202) 314–6410.

Dated: December 6, 2002.

Vicky D'Onofrio,

Federal Register Liaison Officer.

[FR Doc. 02–31230 Filed 12–6–02; 2:07 pm]

BILLING CODE 7533–01–M

NUCLEAR REGULATORY COMMISSION

[Docket No. 50–318]

Calvert Cliffs Nuclear Power Plant, Inc., Calvert Cliffs Nuclear Power Plant, Unit No. 2, Environmental Assessment and Finding of No Significant Impact

The U.S. Nuclear Regulatory Commission (NRC) is considering issuance of an exemption from Title 10 of the Code of Federal Regulations (10 CFR) part 50.44, 46 and Appendix K for Facility Operating License No. DPR–69, issued to Calvert Cliffs Nuclear Power Plant, Inc. (the licensee), for operation of the Calvert Cliffs Nuclear Power Plant, Unit No. 2 (Calvert Cliffs), located in Calvert County, Maryland. Therefore, as required by 10 CFR 51.21, the NRC is issuing this environmental assessment and finding of no significant impact.

Environmental Assessment

Identification of the Proposed Action

The proposed action, as described in the licensee's application for exemption

dated July 12, 2002, would allow the licensee to use up to four lead fuel assemblies (LFAs) with an advanced cladding material, a zirconium-based alloy, that does not meet the definition of Zircaloy or ZIRLO, which are referred to in Title 10 of the Code of Federal Regulations Section 50.46(a)(1)(i). The LFAs are scheduled to be loaded into the Calvert Cliffs Unit 2 reactor core during the upcoming refueling outage and would remain in the core for two (2) cycles.

The Need for the Proposed Action

The proposed exemption from 10 CFR 50.44, 10 CFR 50.46, and Appendix K to 10 CFR part 50 is needed because these regulations specifically refer to light-water reactors containing fuel consisting of uranium oxide pellets enclosed in zircaloy or ZIRLO tubes. A new zirconium-based alloy cladding has been developed, which is not the same chemical composition as zircaloy or ZIRLO. Therefore, the licensee needs an exemption to insert up to four assemblies containing the new fuel cladding material into the Calvert Cliffs reactor core for test during operation.

Environmental Impacts of the Proposed Action

The NRC has completed its evaluation of the proposed action and concludes that the proposed exemption will not present an undue risk to the public health and safety. The safety evaluation performed by Westinghouse demonstrates that the predicted chemical, mechanical and material performance of the Advance zirconium-based cladding is within that approved for Zircaloy-4 or ZIRLO under all anticipated operational occurrences and postulated accidents. Furthermore, the LFAs will be placed in non-limiting core locations. In the unlikely event that cladding failures occur in the LFAs, environmental impact would be minimal and is bounded by previous environmental impact statements.

The proposed action will not significantly increase the probability or consequences of accidents, no changes are being made in the types of effluents that may be released off site, and there is no significant increase in occupational or public radiation exposure. Therefore, there are no significant radiological environmental impacts associated with the proposed action.

In regard to potential nonradiological impacts, the proposed action does not have a potential to affect any historic sites. It does not affect nonradiological plant effluents and has no other environmental impact. Therefore, there are no significant nonradiological environmental impacts associated with the proposed action.

Accordingly, the NRC concludes that there are no significant environmental impacts associated with the proposed action.

Environmental Impacts of the Alternatives to the Proposed Action

As an alternative to the proposed action, the staff considered denial of the proposed action (*i.e.*, the ''no-action'' alternative). Denial of the application would result in no change in current environmental impacts. The environmental impacts of the proposed action and the alternative action are similar.

Alternative Use of Resources

The action does not involve the use of any different resource than those previously considered in the Final Environmental Statement for the Calvert Cliffs Nuclear Power Plant (CCNPP) dated April 1973 or the Final Environmental Impact Statement for licence renewal for the CCNPP dated October 1999.

Agencies and Persons Consulted

On September 5, 2002, the staff consulted with the Maryland State official, Richard McLean of the Maryland Department of the Environment, regarding the environmental impact of the proposed action. The State official had no comments.

Finding of No Significant Impact

On the basis of the environmental assessment, the NRC concludes that the proposed action will not have a significant effect on the quality of the human environment. Accordingly, the NRC has determined not to prepare an environmental impact statement for the proposed action.

For further details with respect to the proposed action, see the licensee's letter dated July 17, 2002. Documents may be examined, and/or copied for a fee, at the NRC's Public Document Room (PDR), 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 System (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* Persons who do not have access to ADAMS or who encounter problems in accessing the documents located in ADAMS, should contact the NRC PDR Reference staff by telephone at 1–800–397–4209 or 301–415–4737, or by e-mail to *pdr@nrc.gov.*

Dated at Rockville, Maryland, this 3rd day of December 2002.

For the Nuclear Regulatory Commission:

Guy S. Vissing,

Acting Chief, Section 1, Project Directorate I, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 02–31167 Filed 12–9–02; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

[Docket 72–17]

Portland General Electric Company Issuance of Environmental Assessment and Finding of No Significant Impact Regarding the Proposed Amendment to Materials License No. SNM–2509

The U.S. Nuclear Regulatory Commission (NRC or Commission) is considering issuance of an amendment, pursuant to 10 CFR 72.56, to Special Nuclear Material License No. 2509 (SNM–2509) held by Portland General Electric Company (PGE) for the Trojan Independent Spent Fuel Storage Installation (ISFSI). The requested amendment would revise the ISFSI license (SNM–2509) and the Technical Specifications (TS) of SNM–2509 to increase the Multi-Purpose Canister (MPC) helium backfill upper pressure limit at the Trojan ISFSI.

Environmental Assessment (EA)

Identification of Proposed Action: By letter dated October 18, 2002, PGE requested an amendment to revise the license (SNM–2509) and the TS of SNM–2509 for the Trojan ISFSI. The changes would increase the MPC helium backfill upper pressure limit, make an editorial clarification, and make similar changes to the helium backfill upper pressure limit in the description of the cask loading operations. The current license specifies the MPC is to be backfilled with helium with a pressure between 29.3 psig and 33.3 psig. The amendment requests the upper limit be changed from 33.3 psig to 39.3 psig.

Need for the Proposed Action: The proposed action is necessary to minimize worker exposure during spent fuel loading activities and to maintain spent fuel parameters within required limits. Current helium backfill equipment, to be used during loading operations at the Trojan facility, cannot demonstrate backfill of the MPC free volume with helium accurately enough to satisfy TS requirements. Alternative

equipment that could provide the necessary accuracy would result in protracted helium backfilling operations and increased worker dose. In either case MPC helium backfilling operations using the current equipment and/or alternative equipment would pose undue exposure risk to plant personnel and result in extended fuel loading schedules and subsequent delays in decommissioning of the Trojan site.

Environmental Impacts of the Proposed Action: In 1999 the NRC issued a license to PGE to construct and operate the Trojan ISFSI. Prior to this action the NRC examined the environmental impacts of constructing and operating the Trojan ISFSI and issued an environmental assessment and finding of no significant impact (See 61 FR 64378, December 4, 1996). The NRC has completed its evaluation of the proposed action and concludes that granting the request for amendment to increase the TS MPC helium backfill upper pressure limit from 33.3 psig to 39.3 psig will not increase the probability or consequence of accidents beyond that bounded by previous analysis. No changes are being made in the types of any effluents that may be released offsite. With regard to radiological impacts, the increase in the TS MPC helium backfill upper pressure limit will not yield an increase in neutron and gamma dose rates at the cask surface. Dose rates remain below regulatory limits for occupational exposures and public radiation exposures and continue to comply with the applicable regulatory criteria specified in 10 CFR part 20, and 10 CFR 72.104 and 72.106. As a result, there are no significant radiological environmental impacts associated with the proposed action.

The amendment only affects the requirements associated with MPC helium backfilling operations and does not affect non-radiological plant effluents or any other aspects of the environment. Therefore, there are no significant non-radiological environmental impacts associated with the proposed action.

Accordingly, the Commission concludes that there are no significant environmental impacts associated with the proposed action.

Alternatives to the Proposed Action: The alternative to the proposed action would be to deny the request for amendment (*i.e.*, the ''no-action'' alternative). Denial of the proposed action would result in PGE continuing to use current MPC helium backfill limits established in the TS. Without an increase in the MPC helium backfill upper pressure TS limit, decommissioning of the Trojan site could be delayed. The Trojan Nuclear Power Plant has been permanently shut down. Delaying decommissioning of the Trojan site could potentially lead to greater occupational exposure due to the extended time workers would be in the proximity of the spent fuel. The environmental impacts of the alternative action could be greater than the proposed action.

Given that the alternative action of denying the approval for amendment has no lesser environmental impacts associated with it, and considering that the proposed action would result in storage of fuel at the Trojan ISFSI, which has already been approved under a site specific license, the Commission concludes that the preferred alternative is to grant this amendment.

Agencies and Persons Consulted: On November 14, 2002, Mr. Adam Bless of the Oregon Office of Energy, Energy Resource Division, was contacted regarding the proposed action and had no comments.

Finding of No Significant Impact

The environmental impacts of the proposed action have been reviewed in accordance with the requirements set forth in 10 CFR part 51. Based upon the foregoing Environmental Assessment, the Commission finds that the proposed action of granting an amendment to change the MPC helium backfill upper pressure limit will not significantly impact the quality of the human environment. Accordingly, the Commission has determined not to prepare an environmental impact statement for the proposed amendment.

For further details with respect to this amendment, see the PGE letter dated October 18, 2002. The amendment request was docketed per 10 CFR part 2 under Docket 72–17. 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/reading-rm-adams.html.* If you do not have access to ADAMS or if there are problems in accessing the documents listed in ADAMS, 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.*

Dated at Rockville, Maryland this 3rd day of December, 2002.

For the Nuclear Regulatory Commission:

Christopher M. Regan,

Project Manager, Spent Fuel Project Office, Office of Nuclear Material Safety and Safeguards.

[FR Doc. 02–31166 Filed 12–9–02; 8:45 am]

BILLING CODE 7590–01–P

NUCLEAR REGULATORY COMMISSION

Sunshine Act Meeting

AGENCY: Nuclear Regulatory Commission.

DATES: Weeks of December 9, 16, 23, 30, 2002, January 6, 13, 2003.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Public and Closed.

MATTERS TO BE CONSIDERED:

Week of December 9, 2002

There are no meetings scheduled for the Week of December 9, 2002.

Week of December 16, 2002—Tentative

Tuesday, December 17, 2002

9:30 a.m.—Briefing on Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues (Public Meeting) (Contact: Ho Nieh, 301–415–1721). This meeting will be webcast live at the Web address *http://www.nrc.gov.*

Wednesday, December 18, 2002

9:30 a.m.—Meeting with Advisory Committee on Nuclear Waste (ACNW) (Public Meeting) (Contact: John Larkins, 301–415–7360). This meeting will be webcast live at the Web address *http://www.nrc.gov.*

3 p.m.—Discussion of Security Issues (Closed–Ex. 1).

Week of December 23, 2002—Tentative

There are no meetings scheduled for the Week of December 23, 2002.

Week of December 30, 2002—Tentative

There are no meetings scheduled for the Week of December 30, 2002.

Week of January 6, 2003—Tentative

There are no meetings scheduled for the Week of January 6, 2003.

Week of January 13, 2003—Tentative

Tuesday, January 14, 2002

10 a.m.—Briefing on Status of NRR Programs, Performance, and Plans (Public Meeting).

*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: R. Michelle Schroll (301) 415–1662.

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SUPPLEMENTARY INFORMATION: By a vote of 5–0 on November 27 and December 2, the Commission determined pursuant to U.S.C. 552b(e) and § 9.107(a) of the Commission's rules that ''Discussion of Security Issues (Closed—Ex. 1)'' be held on December 4, and on less than one week's notice to the public.

* * * * *

The NRC Commission Meeting Schedule can be found on the Internet at: *www.nrc.gov/what-we-do/policy-making/schedule.html.*

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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: December 5, 2002.

R. Michelle Schroll,

Acting Technical Coordinator, Office of the Secretary.

[FR Doc. 02–31214 Filed 12–6–02; 1:35 pm]

BILLING CODE 7990–01–M

NUCLEAR REGULATORY COMMISSION

Biweekly Notice; Applications and Amendments to Facility Operating Licenses Involving No Significant Hazards Considerations

I. Background

Pursuant to Pub. L. 97–415, the U.S. Nuclear Regulatory Commission (the Commission or NRC staff) is publishing this regular biweekly notice. Pub. L. 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, November 15, 2002, through November 29, 2002. The last biweekly notice was published on November 26, 2002 (67 FR 70762).

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 Commission's Public Document Room (PDR), 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 January 9, 2003, 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,[1] which is available at the Commission's PDR, 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 System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/doc-collections/cfr/.* 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

[1] The most recent version of Title 10 of the Code of Federal Regulations, published January 1, 2002, inadvertently omitted the last sentence of 10 CFR 2.714(d) and paragraphs (d)(1) and (d)(2) regarding petitions to intervene and contentions. For the complete, corrected text of 10 CFR 2.714(d), please see 67 FR 20884; April 29, 2002.

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 Staff, or may be delivered to the Commission's PDR, located at One White Flint North, 11555 Rockville Pike (first floor), Rockville, Maryland, by the above date. Because of continuing disruptions in delivery of mail to United States Government offices, it is requested that petitions for leave to intervene and requests for hearing be transmitted to the Secretary of the Commission either by means of facsimile transmission to (301) 415–1101 or by e-mail to *hearingdocket@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, and because of continuing disruptions in delivery of mail to United States Government offices, it is requested that copies be transmitted either by means of facsimile transmission to (301) 415–3725 or by e-mail to *OGCMailCenter@nrc.gov.* A copy of the request for hearing and petition for leave to intervene should also be sent 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 PDR, 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 System's (ADAMS) Public Electronic Reading Room on the Internet at the NRC Web site, *http://www.nrc.gov/reading-rm/adams.html.* 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, 304–415–4737 or by e-mail to *pdr@nrc.gov.*

Arizona Public Service Company, *et al.*, Docket Nos. STN 50–528, STN 50–529, and STN 50–530, Palo Verde Nuclear Generating Station, Units 1, 2, and 3, Maricopa County, Arizona

Date of amendment requests: November 7, 2002.

Description of amendment requests: The amendments would revise Technical Specification (TS) 3.2.4, ''Departure From Nucleate Boiling Ratio (DNBR),'' TS 3.3.1, ''Reactor Protective System (RPS) Instrumentation—Operating,'' and TS 3.3.3, ''Control Element Assembly Calculators (CEACs).'' The proposed changes are to Limiting Conditions for Operation (LCOs), LCO Actions, and LCO Surveillance Requirements. The amendments support the replacement of the Core Protection Calculator System (CPCS). The replacement CPCS will perform functionally identical safety-related algorithms as the existing CPCS, although on a newer platform, and the CPCS design function will remain unchanged. Because the replacement CPCS for each unit will be installed in refueling outages for the three units over at least a year, starting with the Unit 2 fall 2003 outage, the licensee has proposed to have the TSs contain both the current requirements and the new requirements with the phrases ''(Before CPC Upgrade)'' and ''(After CPC Upgrade)'' on the TSs to show which requirements apply to which case.

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?

Response: No.

The Core Protection Calculator System (CPCS) is being replaced due primarily to parts obsolescence. The replacement CPCS will perform functionally identical safety-related algorithms as the existing CPCS, but on a newer platform. The CPCS design function will remain unchanged.

The physical location of the replacement CPCS will be the same as the existing CPCS in the auxiliary protective cabinets. Installation will occur during refueling outages when the system is not required for service. [The] majority of the testing will be performed prior to installation.

The CPCS is not an initiator of any analyzed accident, but is used for mitigation of a large number of anticipated operational occurrences and a small number of accidents. Since the CPCS is not an accident initiator, and the replacement CPCS is functionally unchanged, the CPC replacement will not increase the probability of an accident.

The functionality of the existing CPCS safety related algorithms are replicated in the System Requirements Specification for the Common Q [Common Qualified] Core Protection Calculator System. The basic Common Q CPCS design concept was approved by NRC Safety Evaluation (SE), Acceptance For Referencing Of Topical Report CENPD–396–P, Rev. 01, ''Common Qualified Platform'' and Appendices 1, 2, 3 and 4, Rev. 01, dated August 11, 2000 (Ref. 2 [listed in the enclosure to the amendment request]), and there have been no significant functional changes to the design as presented. The requirements for response time and accuracy that are assumed in the Palo Verde Nuclear Generating Station (PVNGS) Updated Final Safety Analysis Report (UFSAR) accident analysis will continue to be met. Therefore, since the new [replacement] CPCS will be capable of performing the same safety-related functions within the same response time and accuracy as the existing CPCS, the proposed change does not involve a significant 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?

Response: No.

The CPCS provides a monitoring and detection function and is not an initiator for any accident. The CPCS provides Reactor Protection System (RPS) trips on Low Departure from Nucleate Boiling Ratio (DNBR) and High Local Power Density (LPD) in response to calculations involving several input variables. It also provides a Control Element Assembly Withdrawal Prohibit (CWP) signal to the Plant Protection System (PPS), and provides indication and annunciation. The CPCS performs no other plant functions, and is not used to initiate any ESF [(Engineered Safety Feature)] functions. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The [new] CPCS is a replacement for the existing CPCS. It will retain the same safety-related functionality as the existing CPCS. The equipment will be qualified in accordance with requirements described in the Palo Verde UFSAR.

The replacement CPCS will perform functionally identical safety-related algorithms as the existing CPCS, will trip in response to the same inputs with equivalent accuracy, and will meet the same four channel separation requirements. The only significant area of difference involves the platform. The Common Q platform uses a consistent set of qualified building blocks (Advant Controllers, Flat Panel Displays, Power Supplies, and Communication Systems) that can be used for any safety system application. For Palo Verde purposes, the only application of this platform at this time will be for use as a CPCS. The new platform will include improved human factors and fault tolerance within each CPCS channel.

In summary, the replacement CPCS performs the same function as the existing CPCS, meets the qualification requirements of the existing CPCS, and meets the accuracy standards of the existing CPCS. Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Based on the above, APS [(the licensee)] concludes that the proposed amendment(s) present no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of ''no significant hazards consideration'' is justified.

The NRC staff has reviewed the licensee's analysis and, based on that review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the request for amendments involves no significant hazards consideration.

Attorney for licensee: Nancy C. Loftin, Esq., Corporate Secretary and Counsel, Arizona Public Service Company, PO Box 53999, Mail Station 9068, Phoenix, Arizona 85072–3999.

NRC Section Chief: Stephen Dembek.

Carolina Power & Light Company, Docket No. 50–324, Brunswick Steam Electric Plant, Unit 2, Brunswick County, North Carolina

Date of amendment request: November 7, 2002.

Description of amendment request: The proposed amendment would revise the Minimum Critical Power Ratio (MCPR) Safety Limit contained in Technical Specification 2.1.1.2 from 1.09 to 1.11 for two recirculation loop operation and from 1.10 to 1.13 for single recirculation loop operation.

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:

CP&L [Carolina Power and Light Company] has evaluated whether or not a significant hazards consideration is involved with the proposed amendment by focusing on the three standards set forth in 10 CFR 50.92, ''Issuance of amendment,'' as discussed below:

1. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The MCPR Safety Limit values are calculated to ensure that greater than 99.9 percent of the fuel rods in the core avoid transition boiling during any plant operation if the safety limit is not violated. The derivation of the MCPR Safety Limit values specified in the Technical Specifications, and their use to determine cycle-specific thermal limits, has been performed using the methodology discussed in ''General Electric Standard Application for Reactor Fuel,'' NEDE–24011–P–A–14 (*i.e.*, GESTAR–II), and U.S. Supplement, NEDE–24011–P–A–14–US, June 2000, which incorporates Amendment 25. Amendment 25 was approved by the NRC in a March 11, 1999, safety evaluation report. Operational MCPR limits are applied that ensure the MCPR Safety Limit is not exceeded during all modes of operation and anticipated operational occurrences.

The revised MCPR Safety Limit values do not affect the operability of any plant systems nor do these revised values compromise any fuel performance limits; therefore, the probability of fuel damage will not be increased as a result of this change.

The MCPR Safety Limit values do not impact the source term or pathways assumed in accidents previously evaluated, and there are no adverse effects on the factors contributing to offsite or onsite radiological doses. In addition, the revised MCPR Safety Limit values do not affect the performance of any equipment used to mitigate the consequences of a previously evaluated accident and do not affect setpoints that initiate protective or mitigative actions.

Therefore, the proposed Technical Specification change does not involve a significant increase in the probability or consequences of a previously evaluated accident.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

Creation of the possibility of a new or different kind of accident would require the creation of one or more new precursors of that accident. New accident precursors may be created by modifications of the plant configuration, including changes in allowable modes of operation. The proposed revision of the MCPR Safety Limit values does not involve any facility modifications, and plant equipment will not be operated in a different manner. No new initiating events or transients will result from the revised MCPR Safety Limit values. As a result, no new failure modes are being introduced. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margin of safety is established through the design of the plant structures, systems, and components; through the parameters within which the plant is operated; through the establishment of setpoints for actuation of equipment relied upon to respond to an event; and through margins contained within the safety analyses. The revised MCPR Safety

Limit values will not adversely impact the performance of plant structures, systems, components, and setpoints relied upon to respond to mitigate an accident or transient. The MCPR Safety Limit values are calculated to ensure that greater than 99.9 percent of the fuel rods in the core avoid transition boiling during any plant operation if the safety limit is not violated, thereby ensuring that fuel cladding integrity is maintained. The revised MCPR Safety Limit values have been calculated using NRC approved methods and procedures and preserve the existing margin to transition boiling. Based on the assurance that the fuel design criteria are being met, the revised MCPR Safety Limit values do not involve a reduction in a margin of safety.

Based on the above, CP&L has concluded that the proposed amendment presents no significant hazards consideration under the standards set forth in 10 CFR 50.92(c), and, accordingly, a finding of ''no significant hazards consideration'' is justified.

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: William D. Johnson, Vice President and Corporate Secretary, Carolina Power & Light Company, Post Office Box 1551, Raleigh, North Carolina 27602.

NRC Section Chief: Allen G. Howe.

Duke Energy Corporation, Docket Nos. 50–269, 50–270, and 50–287, Oconee Nuclear Station, Units 1, 2, and 3, Oconee County, South Carolina

Date of amendment request: November 14, 2002.

Description of amendment request: The proposed amendments would revise the Technical Specification Surveillance Requirement (SR) 3.3.1.3 to add a correlation slope to the formula for imbalance error. The SR is also being changed to require an adjustment of the power range channel output if the absolute value of the imbalance error is ≥2 percent rated thermal power.

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:

Pursuant to 10 CFR 50.91, Duke Power Company (Duke) has made the determination that this amendment request involves a No Significant Hazards Consideration by applying the standards established by the NRC regulations in 10 CFR 50.92. This ensures 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.

No. This change will add a correlation slope (CS) to Imbalance Error that is derived from the Power Imbalance Detector Correlation (PIDC) test performed during the cycle startup testing. The formula currently exists in the technical specification. The CS will add nuclear conservatism to the error calculation.

Since the calculation already exists and the CS adds more conservatism, this proposed change does not involve an 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 kind of accident previously evaluated.

No. As stated above, the proposed revision adds a conservative CS to the existing error calculation. This change is bounded by all of the existing accidents and does not create the possibility of a new or different kind of accident from any kind of accident previously evaluated.

(3) Involve a significant reduction in a margin of safety.

No. The proposed change does not adversely affect any plant safety limits, set points, or design parameters. The change also does not adversely affect the fuel, fuel cladding, Reactor Coolant System, or containment integrity. Therefore, the proposed change does not involve a significant in a margin of safety.

Duke has concluded, based on the above, that there are no significant hazards considerations involved in this amendment request.

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: Anne W. Cottington, Winston and Strawn, 1200 17th Street, NW., Washington, DC 20005.

NRC Section Chief: John A. Nakoski.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington.

Date of amendment request: October 22, 2002.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TS) to change TS Section 5.0, ''Administrative Controls,'' to adopt Technical Specification Task Force (TSTF) –258, Revision 4. The proposed changes would: (1) Revise TS Section 5.2.2, ''Unit Staff,'' to delete the details of the staffing requirements and delete the requirements for the Shift Technical Advisor (STA) as a separate position while retaining the function, (2) revise TS Section 5.5.4, ''Radioactive Effluent Controls Program,'' to be consistent with the intent of 10 CFR Part 20, (3) revise TS Section 5.6.4, ''Monthly Operating Reports,'' to delete periodic reporting requirements for main steam safety/relief valve challenges to be consistent with Generic Letter 97–02, ''Revised Contents of the Monthly Operating Report,'' and (4) revise TS Section 5.7, ''High Radiation Area,'' in accordance with 10 CFR 20.1601(c). A new TS Section 5.3.2 would be added to incorporate regulatory definitions for the senior reactor operator (SRO) and reactor operator (RO) positions.

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 change does not involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed change is an administrative clarification of existing TS requirements which clarifies and modifies administrative controls in the areas of operator staffing requirements, working hour limits, STA position, Radioactive Effluent Controls Program, periodic reporting requirements for relief valve openings, and radiological control requirements. These changes do not impact the operation, physical configuration, or function of plant equipment or systems. These TS revisions do not affect analysis inputs or mitigation for analyzed accidents and transients. Therefore, the proposed amendment does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed change does not involve a physical alteration of the plant, add any new equipment, or require any existing equipment to be operated in a manner different from the present design. The proposed change does not introduce any new modes of plant operation or make any changes to system setpoints. Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed change is administrative in nature and does not involve physical changes to plant structures, systems, or components (SSCs), or the manner in which these SSCs are operated, maintained, modified, tested, or inspected. The proposed change does not involve a change to any safety limit, limiting safety system setting, limiting condition for operation, or design parameters for any SSC. The proposed change does not impact any safety analysis assumptions and does not

involve a change in initial conditions, system response times, or other parameters affecting any accident analysis.

For these reasons, 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: Thomas C. Poindexter, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Stephen Dembek.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of amendment request: October 22, 2002.

Description of amendment request: The proposed amendment deletes a reference to Section 2.E in Section 2.F of Facility Operating License No. NPF–21. Section 2.E requires the licensee to fully implement and maintain in effect all provisions of the Commission-approved physical security, guard training and qualification, and safeguards contingency plans. Section 2.E is redundant because the reporting requirements and criteria for the Physical Security Programs are specified in 10 CFR 73.71 and Appendix G of 10 CFR part 73.

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 change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed Operating License amendment request is administrative in nature and merely deletes a duplicative and unnecessary reporting requirement. The proposed amendment deletes a reference to Operating License Section 2.E in Operating License Section 2.F. Operating License Section 2.F presently requires the Columbia Generating Station to report any violations of the requirements contained in Section 2.C (with the exception of 2.C(2)) and 2.E of the License. Operating License Section 2.E requires Columbia Generating Station to fully implement and maintain in effect all provisions of the Commission-approved physical security, guard training and qualification, and safeguards contingency plans. The requirement to report a violation of Section 2.E is redundant and unnecessary because the reporting requirements and criteria for the physical security program are specified in [10 CFR 73.71 and 10 CFR 73] Appendix G. This change to the Operating License has no impact on the manner in which the Columbia Generating Station is operated. No actual plant equipment or accident analyses will be affected by the proposed change. There will be no increase in radiological dose to plant workers or the public. Therefore, the proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed Operating License amendment request is administrative in nature and merely deletes a duplicative and unnecessary reporting requirement. The proposed amendment deletes a reference to Operating License Section 2.E in Operating License Section 2.F. Operating License Section 2.F presently requires the Columbia Generating Station to report any violations of the requirements contained in Section 2.C (with the exception of 2.C(2)) and 2.E of the License. Operating License Section 2.E requires Columbia Generating Station to fully implement and maintain in effect all provisions of the Commission-approved physical security, guard training and qualification, and safeguards contingency plans. The requirement to report a violation of Section 2.E is redundant and unnecessary because the reporting requirements and criteria for the Physical Security Program are specified in 10 CFR 73.71 and 10 CFR 73 Appendix G. This request is administrative in nature. This change to the Operating License has no impact on the manner in which the Columbia Generating Station is operated. No actual plant equipment or accident analyses will be affected by the proposed change. No failure modes not bounded by previously evaluated accidents will be created. Therefore, the proposed amendment does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change does not involve a significant reduction in a margin of safety.

The proposed change will not reduce a margin of safety because it has no direct effect on any safety analyses assumptions, and no adverse effect on the performance of any system, structure, or component relied upon for accident mitigation. The proposed amendment deletes a reference to Operating License Section 2.E in Operating License Section 2.F. Deletion of the reference to Section 2.E eliminates a redundant and unnecessary reporting requirement, because the reporting requirements and criteria for the physical security program are specified in 10 CFR 73.71 and 10 CFR 73 Appendix G. Additionally, there would be no effect on baseline core damage probability. Therefore, the proposed change does not involve a significant 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 C. Poindexter, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Stephen Dembek.

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 amendment request: September 18, 2002.

Description of amendment request: The proposed change will revise the Technical Specifications (TS) Limiting Conditions for Operation and Administrative sections to correct or clarify certain requirements and information.

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?

Response: No.

The proposed changes are primarily to correct word omissions, typographical errors, reflect current terminology, and make the TS consistent with other NRC [U.S. Nuclear Regulatory Commission] approved documents. These changes are all of an administrative nature and have no effect on any plant equipment or structures. Therefore, these changes do not increase the probability or consequences of an accident previously evaluated.

The proposed amendment also revises the allowed drywell-to-primary containment differential pressure limit. This limit is intended to ensure that containment conditions are consistent with safety analyses. The proposed smaller negative pressure ensures that the design assumptions for the containment will be met if and when a postulated loss of coolant [accident] (LOCA) should occur. Moving the limit in a conservative direction will not increase the probability or consequences of previously evaluated accidents.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed changes do not involve a physical alteration of the plant. No new or different equipment or modes of operation are being introduced by this proposed change. Thus, the changes do not create the

possibility of a new or different kind of accident from any accident previously evaluated.

The change to the allowed drywell-to-primary containment differential pressure limit does not adversely impact the ability of the containment to perform its intended function. The establishment of a more conservative limit for this parameter ensures that the plant stays within current safety analysis and therefore, can not create the possibility of a new or different kind of accident.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

Margin of safety is related to the confidence in the ability of the fission product barriers to perform their design functions during and following an accident situation. These barriers include the fuel cladding, the reactor coolant system, and the containment system. The proposed changes are primarily administrative in nature and can not affect any safety barriers. The proposed change to the allowed drywell-to-primary containment differential pressure limit establishes a more conservative limit for a key parameter for the containment than is currently specified in the TS. The revised differential pressure limit is consistent with current assumptions of the accident analysis. Therefore, the proposed change does not involve a significant 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: Nicholas S. Reynolds, Esquire, Winston and Strawn, 1400 L Street, NW., 12th Floor, Washington, DC 20005–3502.

NRC Section Chief: Robert A. Gramm.

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; Entergy Gulf States, Inc., and Entergy Operations, Inc., Docket No. 50–458, River Bend Station, Unit 1, West Feliciana Parish, Louisiana; and Entergy Operations, Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: November 6, 2002.

Description of amendment request: The proposed change will delete the content of the Appendix B, Environmental Protection Plan (Non-Radiological) (EPP), and the appropriate sections of the Facility Operating License (FOL) referring to the EPP will be modified to delete reference to the EPP.

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?

Response: No.

The EPPs are concerned with monitoring the effect that plant operations have on the environment for the purpose of protecting the environment and has no affect on any accident postulated in the Updated Final Safety Analysis Report (UFSAR). Accident probabilities or consequences are not affected in any way by the environmental monitoring and reporting required by the EPPs. The deletion of Appendix B of the FOL will not impact the design or operation of any plant system or component. The NRC [Nuclear Regulatory Commission] relies on other Federal, State, and local agencies for environmental protection regulation. No environmental protection requirements established by these other agencies are being reduced by this license amendment. The programs and reporting requirements of the EPPs do not affect the initiation or mitigation of any accidents previously analyzed.

Therefore, the proposed change does not involve a significant increase in the probability 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 accident previously evaluated?

Response: No.

This license amendment is administrative in nature. Environmental monitoring and reporting has no affect on accident initiation. The deletion of the EPPs will not produce any changes to the design or operation of the plant. There will be no effect on the types and amounts of any effluent that will be released.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

This change is administrative in nature. The change in annual reporting requirements has no impact on margin of safety. Environmental Evaluations will still be performed, where necessary, on changes to plant design or operations to assess the effect on environmental protection.

Therefore, the proposed change does not involve a significant 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.

Attorneys for licensee: (Grand Gulf Nuclear Station, Unit 1, and Waterford Steam Electric Station, Unit 3) Nicholas S. Reynolds, Esq., Winston & Strawn, 1400 L Street, NW., 12th Floor, Washington, DC 20005–3502; and (River Bend Station, Unit 1) Mark Wetterhahn, Esq., Winston & Strawn, 1400 L Street, NW., Washington, DC 20005.

NRC Section Chief: Robert A. Gramm.

Entergy Nuclear Operations, Inc., Docket No. 50–293, Pilgrim Nuclear Power Station, Plymouth County, Massachusetts

Date of amendment request: August 16, 2002.

Description of amendment request: The proposed amendment would modify Technical Specification (TS) 3/4.10.A, ''Refueling Interlocks'' to provide an alternative required action if the refueling interlocks became inoperable during fuel movements in the reactor vessel. The proposed amendment would also modify TS 3/4.10.D, ''Multiple Control Rod Removal.'' The proposed changes would allow fuel movements in the reactor vessel should the refueling equipment interlocks become 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. Does the proposed change involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The refueling interlocks function to prevent prompt reactivity excursions during refueling. Criticality and, therefore, subsequent prompt reactivity excursions are prevented during the insertion and during control rod movement provided the other control rods in core cells containing one or more fuel assemblies are fully inserted. The refueling interlocks accomplish this by preventing loading of fuel into the core with any control rod withdrawn, by preventing withdrawal of a rod from the core during fuel loading, or preventing multiple control rod withdrawal. The proposed requirements ensure that these functions can be performed when required. Therefore, the probability of an accident previously evaluated is not significantly increased.

The refueling interlocks addressed by these specifications do not mitigate the consequences of any accident. Therefore, consequences of an accident previously evaluated are not significantly increased.

2. Does the proposed change create the possibility of a new or different kind of

accident [from] any accident previously evaluated?

Response: No.

The proposed change does not involve a change to the plant design. The refueling interlocks function to prevent prompt reactivity excursions during refueling. The proposed requirements ensure that these functions can be performed when required. As a result, the proposed changes do not affect any of the parameters or conditions that could contribute to the initiation of any new or different kind of accident. Therefore, this proposed [change] does not create the possibility of a new or different kind of accident [from] any accident previously evaluated.

3. Does the change involve a significant reduction in [the] margin of safety?

Response: No.

The refueling interlocks function to prevent prompt reactivity excursions during refueling. Criticality and, therefore, subsequent prompt reactivity excursions are prevented during the insertion of fuel, provided all control rods are fully inserted during the fuel insertion and during control rod movement provided the other control rods in core cells containing one or more fuel assemblies are fully inserted. The refueling interlocks accomplish this by preventing loading of fuel into the core with any control rod withdrawn, by preventing withdrawal of a rod from the core during fuel loading, or preventing multiple control rod withdrawal. The proposed requirements ensure that these functions can be performed when required. 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 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. Andersen, Acting.

Entergy Nuclear Operations, Inc., Docket No. 50–293, Pilgrim Nuclear Power Station, Plymouth County, Massachusetts

Date of amendment request: August 16, 2002.

Description of amendment request: The proposed amendment would delete Technical Specification (TS) 3.10.D.1.d from TS 3/4.10.D, ''Multiple Control Rod Removal,'' and the associated Surveillance Requirement 4.10.D.1.d. The proposed changes involving the deletion of this requirement would reduce the number of fuel movements or valve manipulations, thereby, increasing safety and reducing worker dose. In addition, the proposed amendment would also make an editorial change to correct a reference to TS 3.3.B.3 instead of TS 3.3.B.4 in TS 3/4.10.D.1.

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?

Response: No.

Following the deletion of the requirement that all control rods in a 3×3 array centered on each of the control rods being removed be fully inserted and electronically or hydraulically disarmed, or have the surrounding four fuel assemblies removed from the core cell, sufficient barriers will be in place to prevent the possibility of an unacceptable reactivity excursion.

As a backup to licensee procedures and controls to prevent an unacceptable reactivity excursion, the Technical Specifications (TS) will continue to have two layers of controls to ensure that an unacceptable reactivity excursion cannot occur. The first layer of control is on the local reactivity effects of withdrawing the control rod while the second is on any potential core wide effects.

The local reactivity effects of removing the control rod are addressed by the requirement that the four fuel assemblies be removed from the core cell surrounding each control rod or control rod drive mechanism to be removed from the core and/or the reactor vessel. The requirement that the fuel assemblies in the cell controlled by the control rod be removed from the reactor core ensures withdrawal of another control rod cannot result in an unacceptable reactivity excursion.

Any potential core wide effects of removing the control rod will also continue to be controlled by the TS. The TS will continue to require control rods that are not withdrawn in accordance with 3/4.10.D remain fully inserted, the core remain sub-critical with a margin with the highest worth control rod withdrawn, and no more than one control rod can be inadvertently withdrawn. These requirements together ensure an operator error that resulted in the withdrawing of a control rod from a fueled cell would not result in an unacceptable reactivity excursion and the operator cannot withdraw a second control rod in error. Therefore, these requirements ensure that adequate [Shutdown Margin] SDM will be maintained, thereby, preventing unacceptable reactivity excursions during refueling.

In addition to these two barriers preventing an unacceptable reactivity excursion, the TS will continue to require that the source range monitors be operable. This requirement ensures that neutron monitoring information is available to the operators providing them with the information necessary to identify an unacceptable reactivity excursion is occurring and take action to terminate the event.

The control remaining provide sufficient assurance an unacceptable reactivity excursion will not occur during these activities. Therefore, the probability of an accident previously evaluated is not significantly increased.

The control being deleted did not mitigate the consequences of any accident. Therefore, consequences of an accident previously evaluated are not significantly increased.

2. Does the proposed change create the possibility of a new or different kind of accident [from] any accident previously evaluated?

Response: No.

The proposed change does not involve a change to the plant design or a new mode of equipment operation. As a result, the proposed change does not affect parameters or conditions that could contribute to the initiation of any new or different kind of accident. Therefore, this proposed [change] does not create the possibility of a new or different kind of accident [from] any accident previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

Response: No.

Following the deletion of the requirement that all control rods in a 3×3 array centered on each of the control rods being removed be fully inserted and electrically or hydraulically disarmed, or have the surrounding four fuel assemblies removed from the core cell, sufficient barriers will be in place to prevent the possibility of an unacceptable reactivity excursion.

The TS will continue to have controls as a backup to licensee procedures and controls to prevent an unacceptable reactivity excursion. The requirement that the fuel assemblies in the cell controlled by the control rod be removed from the reactor core ensures withdrawal of another control rod cannot result in an unacceptable reactivity excursion. Also the TS will ensure that an operator error which results in the withdrawing of a control rod from a fueled cell will not result in an unacceptable reactivity excursion and that the operator cannot withdraw a second control rod in error.

In addition to these two barriers preventing an unacceptable reactivity excursion, the TS will continue to require that the source range monitors be operable. This requirement ensures that neutron monitoring information is available to the operators providing them with the information necessary to identify that an unacceptable reactivity excursion is occurring and take action to terminate the event.

The controls remaining provide sufficient assurance an unacceptable reactivity excursion will not occur during these activities. Therefore, the proposed changes do not involve a significant 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 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. Andersen, Acting.

Entergy Operations Inc., Docket No. 50–382, Waterford Steam Electric Station, Unit 3, St. Charles Parish, Louisiana

Date of amendment request: October 24, 2002.

Description of amendment request: The amendment would revise Technical Specifications (TSs) relating to positive reactivity additions while in shutdown modes by clarifying TSs involving the positive reactivity additions. The proposed changes are based on Technical Specification Task Force (TSTF)–286, Revision 2, and allow for small, controlled, safe insertions of positive reactivity while in shutdown modes. In addition, two administrative-type changes are proposed.

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?

Response: No.

The proposed Technical Specification (TS) changes revise actions that either require suspension of operations involving positive reactivity additions or preclude reduction in boron concentration less than the reactor coolant system (RCS). Reactivity excursions are analyzed events. The proposed changes limit positive reactivity additions into the RCS such that the required shutdown margin (SDM) or refueling boron concentration continue to be met. Reactivity changes performed during shutdown modes are currently governed by strict administrative controls. Although the proposed changes will allow procedural flexibility with regards to RCS temperature and boron concentration, these operations will still be under administrative control. The changes proposed by these amendments are within the scope and assumptions of the existing analyses.

Therefore, the proposed changes do not involve a significant increase in the probability 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 accident previously evaluated?

Response: No.

The proposed TS revisions relate to positive reactivity additions while in shutdown modes of operation. Reactivity excursions are analyzed events. The operational flexibility allowed in these proposed license amendments will be performed under strict administrative controls in order to limit the potential for excessive positive reactivity addition. Although the existing procedural controls will need modification, no new or different operational failure modes will be introduced by these changes.

Additionally, implementation of these proposed changes does not require any physical plant modifications, so no new or different hardware-related failure modes are introduced. The changes proposed by these amendments are within the scope and assumptions of the existing analyses.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previosly evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The proposed changes conform closely to the industry and NRC approved TSTF–286, Rev[ision] 2, and relate to small, controlled, safe insertions of positive reactivity additions while in shutdown modes. These changes revise actions that either require suspension of operations involving positive reactivity additions, or prohibit RCS boron concentration reduction. The proposed changes provide operational flexibility while controlling positive reactivity additions. The proposed changes provide for continued safe reactor operations and preserve the required SDM or refueling boron concentration.

Therefore, the proposed changes do not involve a significant 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: N. S. Reynolds, Esquire, Winston & Strawn 1400 L Street NW., Washington, DC 20005–3502.

NRC Section Chief: Robert A. Gramm.

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 amendment request: October 16, 2002.

Description of amendment request: The proposed amendment would revise the Completion Time for Required Action A.1 of TS 3.8.7, ''Inverters—Operating,'' from the current 24 hours for one instrument bus inverter inoperable to 14 days. The change is being proposed to support on-line maintenance of the instrument bus inverters and will have a negligible impact on plant safety. The current Completion Time for restoration of an inoperable instrument bus inverter is insufficient to support the required maintenance and post-maintenance testing windows.

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 action allows continued unit operation, for up to 14 days, with an inoperable instrument bus inverter. An inoperable instrument bus inverter is not considered as an initiator of any analyzed event. Extending the Completion Time for an inoperable instrument bus inverter would not have a significant impact on the frequency of occurrence for any accident previously evaluated. The proposed change will not result in changes to the plant activities associated with instrument bus inverter maintenance, but rather will allow increased flexibility in the scheduling and performance of preventive maintenance. Therefore, this change will not significantly increase the probability of occurrence of any event previously analyzed in the current Byron/Braidwood Stations' Updated Final Safety Analysis Report (UFSAR) safety analyses.

The consequences of a previously analyzed event are dependent on the initial conditions assumed in the analysis, the availability and successful functioning of equipment assumed to operate in response to the analyzed event, and the setpoints at which these actions are initiated. With an instrument bus inverter inoperable, the affected instrument bus is capable of being fed from its dedicated safety-related constant voltage transformer (CVT), which is powered from a 480 VAC Engineered Safety Feature (ESF) bus. In the event of a Loss of Offsite Power (LOOP), the affected instrument bus will experience a momentary loss of power until the associated diesel generator (DG) re-energizes the 480 VAC ESF bus. A LOOP with an inoperable instrument bus inverter (*i.e.,* instrument bus being powered by its CVT) will result in a loss of power to the associated instrument bus until the associated DG re-energizes the 480 VAC ESF bus. All instruments supplied by the instrument bus would be restored with no adverse impact to the units because no other instrument channels in the opposite train would be expected to be inoperable or in a tripped condition during this time, with the exception of routine surveillances. In the event the DG failed (*i.e.,* failed to re-energize the 480 VAC ESF bus), power could still be established to the 4 kV ESF bus by powering the 480 VAC ESF bus from the opposite unit 4 kV ESF bus cross-tie breaker. In the event of a failure to re-energize the 480 VAC ESF bus or of a CVT failure, the most significant impact on the unit is the failure of one train

of ESF equipment to actuate. In this condition, the redundant train of ESF equipment will automatically actuate to mitigate the accident, and the affected unit would remain within the bounds of the accident analyses. Therefore, the request for extending the Completion Time will not significantly increase the consequences of an accident previously evaluated in the Byron/Braidwood Stations' UFSAR.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously evaluated?

The proposed action does not involve physical alteration of the station. No new equipment is being introduced, and installed equipment is not being operated in a new or different manner. There is no change being made to the parameters within which the units are operated. There are no setpoints at which protective or mitigative actions are initiated that are affected by this proposed action. The use of the CVT as an alternate power source for the instrument bus is consistent with the Byron and Braidwood Stations' plant designs. This proposed action will not alter the manner in which equipment operation is initiated, nor will the function demands on credited equipment be changed. No alteration in the procedures, which ensure the unit remains within analyzed limits, is proposed, and no change is being made to procedures relied upon to respond to an off-normal event. As such, no new failure modes are being introduced. The proposed action does not alter assumptions made in the safety analysis.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Margins of safety are established in the design of components, the configuration of components to meet certain performance parameters, and in the establishment of setpoints to initiate alarms or actions. There is no change in the design of the affected systems, no alteration of the setpoints at which alarms or actions are initiated, and no change in plant configuration from original design. With one of the required instrument buses being powered from the CVT, there is no significant reduction in the margin of safety. Testing of the DGs and associated electrical distribution equipment provides confidence that the DGs will start and provide power to the associated equipment in the unlikely event of a LOOP during the extended 14-day Completion Time.

Therefore, the proposed change does not involve a significant reduction in a margin of safety.

Based on the above evaluation, we have concluded that the proposed change does not involve a significant hazards consideration.

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 requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Edward J. Cullen, Deputy General Counsel, Exelon BSC—Legal, 2301 Market Street, Philadelphia, PA 19101.

NRC Section Chief: Anthony J. Mendiola.

Exelon Generation Company, LLC, Docket Nos. 50–237 and 50–249, Dresden Nuclear Power Station, Units 2 and 3, Grundy County, Illinois

Date of amendment request: October 10, 2002.

Description of amendment request: The proposed amendments would change technical specifications to increase the number of safety valves required to be operable from eight to nine and add surveillance requirements for the ninth safety valve.

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 TS changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed Technical Specifications (TS) changes require an additional safety valve to be operable. The proposed change also adds the requirement to verify the lift setpoint of this additional safety valve. TS requirements that govern operability or routine testing of plant components are not assumed to be initiators of any analyzed event because these components are intended to prevent, detect, or mitigate accidents. Therefore, these changes will not involve an increase in the probability of an accident previously evaluated.

The proposed changes ensure that the reactor pressure vessel (RPV) steam dome pressure response is maintained within established limits in order to maintain the analyzed response of the RPV steam dome pressure below the safety limit for this parameter during the most severe pressurization transient. This ensures that the reactor coolant system integrity will be maintained during this transient. Thus, the proposed change does not involve an increase in the consequences of an accident previously evaluated.

In summary, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed TS changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not affect the manner in which plant systems will be operated under normal and abnormal operating conditions. Therefore, these changes will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed TS changes do not involve a significant reduction in a margin of safety.

The proposed changes ensure that the RPV steam dome pressure response is maintained within established limits in order to maintain the analyzed response of the RPV steam dome pressure below the safety limit for this parameter during the most severe pressurization transient. Ensuring the safety limit is met for this transient ensures that RCS integrity will be maintained. Therefore, the proposed changes do not result in a 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 requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Edward J. Cullen, Deputy General Counsel, Exelon BSC—Legal, 2301 Market Street, Philadelphia, PA 19101.

NRC Section Chief: Anthony J. Mendiola.

Exelon Generation Company, LLC, Docket Nos. 50–237 and 50–249, Dresden Nuclear Power Station, Units 2 and 3, Grundy County, Illinois

Date of amendment request: October 28, 2002.

Description of amendment request: The proposed amendments would authorize changes to the Updated Final Safety Analysis Report (UFSAR) to address the use of cast iron components in the containment cooling service water and emergency diesel generator cooling water systems. These changes were submitted to the Nuclear Regulatory Commission (NRC) for review and approval in accordance with 10 CFR 50.59(c)(2).

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 changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes allow for the use of cast iron materials in the Containment Cooling Service Water (CCSW) and Diesel Generator Cooling Water (DGCW) Systems at Dresden Nuclear Power Station (DNPS). The use of cast iron materials in these systems would be subject to acceptance criteria proposed for incorporation into the DNPS Updated Final Safety Analysis Report (UFSAR).

A failure in the CCSW or DGCW systems is not an initiator of any analyzed accident described in the UFSAR. Therefore, these proposed changes would not involve an increase in the probability of an accident previously evaluated. Additionally, these

proposed changes would not increase the consequences of an accident previously evaluated because the proposed changes would not adversely impact structures, systems, or components. The proposed UFSAR acceptance criteria establish requirements for cast iron use that ensure the CCSW and DGCW systems would be capable of performing their intended safety-related functions of supplying cooling water to essential plant equipment, even during a design basis earthquake.

In summary, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes allow for the use of cast iron materials in the CCSW and DGCW systems at DNPS by adding acceptance criteria to the UFSAR for such material. No other changes in requirements are being proposed. The added acceptance criteria establish requirements for cast iron that ensure the CCSW and DGCW systems would be capable of performing their safety-related functions of supplying cooling water to essential plant equipment, even during a design basis earthquake. No new failure modes are introduced by the proposed change. No new sources of energy are added. There is no change being made to the parameters within which DNPS is operated, nor do the proposed changes physically alter the plant. The proposed changes do not adversely impact the manner in which the CCSW or DGCW systems will operate under normal and abnormal operating conditions. The plant response to any single failure is not changed. The proposed changes will not alter the function demands on credited equipment. No alteration in the procedures, which ensure DNPS remains within analyzed limits, is proposed, and no change is being made to procedures relied upon to respond to an off-normal event. Therefore, these proposed changes provide an equivalent level of safety and will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The CCSW and DGCW systems are addressed in Technical Specifications (TS) Sections 3.7.1 and 3.7.2. However, the Bases of these TS sections do not discuss the codes to which the systems are designed. Margins of safety are established in the design of components, the configuration of components to meet certain performance parameters, and in the establishment of setpoints to initiate alarms and actions. The proposed cast iron acceptance criteria will ensure that any implied margin of safety is maintained regarding the ability of the CCSW and DGCW systems to perform their safety functions during all design basis conditions. Therefore, it is concluded that 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 requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Edward J. Cullen, Deputy General Counsel, Exelon BSC—Legal, 2301 Market Street, Philadelphia, PA 19101.

NRC Section Chief: Anthony J. Mendiola.

Exelon Generation Company, LLC, Docket Nos. 50–373 and 50–374, LaSalle County Station, Units 1 and 2, LaSalle County, Illinois

Date of amendment request: October 24, 2002.

Description of amendment request: The proposed amendments would revise Technical Specification 5.5.13, ''Primary Containment Leakage Rate Testing Program,'' to reflect a one-time deferral of the primary containment Type A test to no later than June 13, 2009, for Unit 1 and no later than December 7, 2008, for Unit 2.

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 an accident previously evaluated?

No. The proposed changes will revise LaSalle County Station, Units 1 and 2, Technical Specification (TS) 5.5.13, ''Primary Containment Leakage Rate Testing Program'' to reflect a one-time deferral of the primary containment Type A test to no later than June 13, 2009, for Unit 1 and no later than December 7, 2008, for Unit 2. The current Type A test interval of ten years, based on past performance, would be extended on a one-time basis to 15 years from the last Type A test.

The function of the primary containment is to isolate and contain fission products released from the reactor Primary Coolant System (PCS) following a design basis Loss-of-Coolant Accident (LOCA) and to confine the postulated release of radioactive material to within limits. The test interval associated Type A testing is not a precursor of any accident previously evaluated. Type A testing does provide assurance that the LaSalle County Station primary containments will not exceed allowable leakage rate values specified in the Technical Specifications and will continue to perform their design function following an accident. The risk assessment of the proposed changes has concluded that there is an insignificant increase in total population dose rate and an insignificant increase in the conditional containment failure probability.

Therefore, the proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

No. The proposed changes for a one-time extension of the Type A tests for LaSalle County Station, Units 1 and 2 will not affect the control parameters governing unit operation or the response of plant equipment to transient and accident conditions. The proposed changes do not introduce any new equipment, modes of system operation or failure mechanisms.

Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the change involve a significant reduction in a margin of safety?

No. LaSalle County Station, Units 1 and 2, are General Electric BWR/5 plants with Mark II primary containments. The Mark II primary containment consists of two compartments, the drywell and the suppression chamber. The drywell has the shape of a truncated cone, and is located above the cylindrically shaped suppression chamber. The drywell floor separates the drywell and the suppression chamber. The primary containment is penetrated by access, piping and electrical penetrations.

The integrity of the primary containment penetrations and isolation valves is verified through Type B and Type C local leak rate tests (LLRT) and the overall leak tight integrity of the primary containment is verified by a Type A integrated leak rate test (ILRT) as required by 10 CFR 50, Appendix J, ''Primary Reactor Containment Leakage Testing for Water-Cooled Power Reactors.'' These tests are performed to verify the essentially leak tight characteristics of the primary containment at the design basis accident pressure. The proposed changes for a one-time extension of the Type A tests do not effect the method for Type A, B or C testing or the test acceptance criteria.

Therefore, the proposed changes do not involve a significant 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 requested amendments involve no significant hazards consideration.

Attorney for licensee: Mr. Edward J. Cullen, Deputy General Counsel, Exelon BSC—Legal, 2301 Market Street, Philadelphia, PA 19101.

NRC Section Chief : Anthony J. Mendiola.

FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2, Beaver County, Pennsylvania

Date of amendment request: June 5, 2002, as supplemented August 19, 2002.

Description of amendment request: The requested amendments would change the plant technical specifications (TSs) to allow plant operation with the associated containment at atmospheric pressure. The plant TSs currently require the containment to be maintained at sub-atmospheric pressures when its associated unit is in operation. Minor editorial, formatting, and pagination changes will also be made as necessary to incorporate the revisions into the TSs.

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?

Response: No.

The Beaver Valley Power Station (BVPS) containments are designed to withstand the internal pressure and temperature resulting from a loss of coolant accident (LOCA), main steamline break (MSLB), feedwater line break, and a control rod ejection accident (CREA). All of these accidents have been previously analyzed in the Updated Final Safety Analysis Report (UFSAR) except the feedwater line break. This is not analyzed because the MSLB is most limiting. The effect on containment pressure and temperature due to a CREA is bounded by a LOCA, since a CREA is modeled as a small break LOCA. The probability of occurrence for these accidents is independent of the type of containment. Therefore a change from a subatmospheric to an atmospheric containment will not increase the probability of these accidents.

The revised containment integrity analysis demonstrates that the pressures and temperatures associated with the applicable design basis accidents identified above are within the existing containment design limits. From a containment integrity viewpoint, the limiting design basis accidents (DBA) presently are the MSLB for Unit 1 and the LOCA for Unit 2. Following the conversion to an atmospheric containment, the limiting DBA will be the MSLB for both units. The effects of the proposed changes on plant structures, systems and components (SSC) have been evaluated and verify that the capability of the SSCs to perform their design functions will be retained following approval of the proposed changes. The revised radiological analysis reflects a selective application of the Alternative Source Term (AST) of Regulatory Guide 1.183, ''Alternative Radiological Source Terms for Evaluating Design Basis Accidents at Nuclear Power Reactors,'' and incorporation of the ARCON96 methodology for on-site atmospheric dispersion factors. The revised radiological analysis concludes that normal operation of the BVPS units with atmospheric containments will not impact either unit's compliance with the operator exposure limits set forth in 10CFR20, or with the public exposure limits set forth by 10CFR50, Appendix I.

For accident conditions, the proposed changes will potentially impact the reported dose consequences of the LOCA, CREA and MSLB for both BVPS units, and the locked rotor accident (LRA) for BVPS Unit 1. The radiological consequences of the remaining design bases accidents are not adversely impacted by the proposed changes.

The revised radiological analysis concludes that site boundary and control room dose consequences of the LOCA and the CREA remain within the regulatory requirements of 10CFR50.67, as supplemented by Regulatory Guide 1.183. It also concludes that the control room doses for the MSLB for both BVPS units, and LRA for BVPS Unit 1 will continue to remain within the regulatory limits provided in SRP 6.4 [NUREG–0800, ''Standard Review Plan for the Review of Safety Analysis Reports for Nuclear Power Plants,'' section 6.4].

Therefore, the proposed change does not involve a significant increase in the probability 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 accident previously evaluated?

Response: No.

The design basis accidents, which could be adversely affected by the proposed changes, have been reanalyzed. These analyses demonstrate that all acceptance criteria have been satisfied. The revised containment integrity analysis demonstrates that the containment will not be subjected to temperatures or pressures that are beyond its design limits. Converting to an atmospheric containment will not result in any new or different kind of accidents because no new accident initiators will be introduced.

Changes to instrumentation setpoints, system flow rates, surveillance requirements, and the elimination of certain operability requirements will not have any [effect] that could create the possibility of a new or different type of accident since none of these changes would result in any changes to the manner in which the affected equipment is operated. Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety?

Response: No.

The margin of safety attributed to the containment involves both the pressures and temperatures the containment is subjected to following a DBA, and the on-site and offsite dose consequences associated with normal and post DBA operations.

The revised containment integrity analysis conducted to support the proposed changes demonstrate that the containment peak pressure and temperature following a DBA will not exceed the containments' design limits. Since the containment design limits are not exceeded, the existing margin of safety between these limits and the containment failure limits is not reduced.

The revised radiological analysis concludes that the existing dose consequence margin of safety is not significantly reduced. Therefore, the proposed change does not involve a significant 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: Mary O'Reilly, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Richard J. Laufer.

FirstEnergy Nuclear Operating Company, et al., Docket Nos. 50–334 and 50–412, Beaver Valley Power Station, Unit Nos. 1 and 2, Beaver County, Pennsylvania

Date of amendment request: October 31, 2002.

Description of amendment request: The proposed amendments would revise the Beaver Valley Technical Specifications (TS) to allow extending the Type A Containment Integrated Leak Rate Test (ILRT) interval from 10 years to 15 years on a one-time basis.

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.

Response: No.

The proposed change does not involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed change allows a one-time extension to the current surveillance interval for the Type A Containment Integrated Leak Rate Test (ILRT). The current test interval of ten years, based on performance history, would be extended on a one-time basis to 15 years from the last Type A test. The proposed change will not result in a significant increase in the risk of plant operation. The risk analysis was performed in accordance with Regulatory Guide 1.174 and shows that the increase in total plant risk due to the extended ILRT interval is 0.005 percent (Unit 1) and 0.02 percent (Unit 2). The delta-large early release frequency (LERF) is 1.91E–9 /yr (Unit 1) and 1.35E–9 /yr (Unit 2) when the test interval is increased from 10 to 15 years. These delta-LERF values meet the Regulatory Guide 1.174 acceptance criterion of less than 1.0E–07 per year for LERF. The proposed extension to Type A testing does not increase the probability of an accident previously

evaluated, since the containment Type A test does not involve any modifications, nor a change in the way that any plant structures, systems or components (SSC) function, and does not involve an activity that could lead to equipment failure or accident initiation. The proposed extension of the test interval does not involve a significant increase in the consequences of an accident, since the study documented in NUREG–1493, has found that generically, very few potential leak paths are not identified with Type B and C tests. NUREG–1493 concluded that an increase in the Type A test interval to twenty years resulted in an imperceptible increase in risk. Containment testing and inspection provide a high degree of assurance that the containment will not degrade in a manner only detectable by Type A testing. Inspections required by the ASME Code and the Maintenance Rule are performed in order to identify indications of containment degradation that could affect leak tightness. Type B and C testing requirements and intervals required by 10 CFR 50 Appendix J are not affected by this proposed extension to the Type A test interval, and will identify any potential openings in containment penetrations that would otherwise require a Type A test. The increase in risk of the proposed change, as measured by the change in LERF is within the acceptance criterion of Regulatory Guide 1.174, therefore there will not be a significant increase in the consequences of any accidents.

Therefore, the proposed change does not involve a significant increase in the probability 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 accident previously evaluated?

Response: No.

The proposed change does not result in operation of the units in a way that would create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed extension to Type A testing does not create a new or different type of accident because no physical modifications are being made, and no compensatory measures are being imposed that could potentially lead to a failure. There are no changes to unit operation that could introduce a new failure mode or create a new or different kind of accident. The proposed change only allows a one-time extension to the current interval for Type A testing and does not change the implementation aspects of the subsequent test.

Therefore, the proposed change does not create the possibility of a new or different kind of accident from any previously evaluated.

3. Does the proposed change involve a significant reduction in a margin of safety.

Response: No.

The proposed change will not result in a significant reduction in a margin of safety. The proposed change is for a one-time extension to the current interval for Type A testing. The current test interval of ten years, based on historical performance, will be extended on a one-time basis to 15 years from the last Type A test. The NUREG–1493 study of the effects of extending the Type A test interval out to 20 years concluded that there is an imperceptible increase in plant risk. Additionally, the extended test interval will have a minimal effect on plant risk, since Type B and C testing detect over 95% of potential leakage paths. The plant specific risk analysis determined results that are consistent with the conclusions of NUREG–1493. The overall increase in the risk contribution due to the proposed change was determined to be 0.005 percent (Unit 1) and 0.02 percent (Unit 2). The delta-LERF is 1.91E–9/yr (Unit 1) and 1.35E–9/yr (Unit 2) when the test interval is increased from 10 to 15 years. The calculated impact on risk is insignificant, and meets the acceptance criterion of Regulatory Guide 1.174.

Therefore, the proposed change does not involve a significant 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: Mary O'Reilly, FirstEnergy Nuclear Operating Company, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Richard J. Laufer.

FirstEnergy Nuclear Operating Company, Docket No. 50–440, Perry Nuclear Power Plant, Unit 1, Lake County, Ohio

Date of amendment request: June 4, 2002.

Description of amendment request: The proposed amendment proposes a revision of pressure/temperature (P/T) limit curves for non-nuclear heatup/cooldown, core critical operation, and pressure testing for reactor coolant systems (RCSs); including an exemption request pursuant to 10 CFR 50.60(b).

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 change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed P/T limit curves are based upon the use of an alternate material fracture toughness curve and the use of an NRC-approved methodology for calculation of neutron fluence. The proposed RCS P/T limit curves are valid through 22 Effective Full-Power Years (EFPY) and 32 EFPY.

The American Society of Mechanical Engineers (ASME) Boiler & Pressure Vessel (B&PV) Code Case N–640 permits the use of K_{Ic} as defined in ASME B&PV Code, Section XI, Appendix A, Figure A–4200–1 instead of K_{Ia} as defined in ASME B&PV Code, Section XI, Appendix G, Figure G–2210–1. The use of the K_{Ic} curve in determining the lower bound fracture toughness in the development of P/T limit curves is more technically correct than the K_{Ia} curve. The K_{Ic} curve models the slow heatup and cooldown processes that a Reactor Pressure Vessel (RPV) normally undergoes. These slow heatup and cooldown limits are enforced through the use of the PNPP [Perry Nuclear Power Plant] Technical Specification 3.4.11, ''RCS Pressure and Temperature (P/T) Limits.'' Surveillance Requirement 3.4.11.1 states that heatup and cooldown rates will be ≤100 °F in any one hour period. The use of the K_{Ic} curve is applicable to PNPP and is inconsistent with the ASME B&PV. Therefore, the use of K_{Ic} will provide an adequate margin of safety to protect against potential RPV failure.

NRC [Nuclear Regulatory Commission] regulations require the vessel material transition temperature be adjusted to account for the effects of neutron radiation. Regulatory Guide 1.190, ''Calculational and Dosimetry Methods for Determining Pressure Vessel Neutron Fluence,'' provides a methodology for calculating the neutron fluence, while Regulatory Guide 1.99, ''Radiation Embrittlement of Reactor Vessel Materials,'' provides the guidance for calculating the adjusted transition temperature using the fluence factor. The methodologies satisfy the requirements of 10 CFR [part] 50, Appendices G and H, and General Design Criteria 31, ''Fracture Prevention of Reactor Coolant Pressure Boundary.'' The methodologies used to develop the proposed P/T limit curves satisfy the requirements of the regulations.

The predicted lowest upper shelf energy at 32 EFPY was greater than the minimum of 50 ft-lbs required by 10 CFR [part] 50, Appendix G. The adjusted reference temperature for the limiting material was less than the 200 °F limit required by Regulatory Guide 1.99, Revision 2. Therefore, the integrity of the RCS has been maintained. As such, the proposed curves ensure that adequate reactor vessel safety margins against nonductile failure exist during normal operation, anticipated operational occurrences, and hydrostatic testing. There are no plant modifications associated with these changes. Thus, the proposed changes do not involve a significant increase in the probability of occurrence of an accident previously evaluated.

The proposed changes do not adversely affect the integrity of the reactor vessel. Hence, the function of the reactor vessel to act as a radiological barrier during an accident is not affected. Therefore, the proposed changes do not involve a significant increase in the consequences of an accident previously evaluated.

2. The proposed change would not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed P/T limit curves are based upon the use of an alternate material fracture toughness curve and the use of an NRC-approved methodology for calculation of neutron fluence.

The ASME B&PV Code Case N–640 permits the use of the K_{Ic} curve in determining the lower bound fracture toughness in the development of P/T limit curves. The K_{Ic} curve models the slow heatup and cooldown processes that a RPV normally undergoes. These slow heatup and cooldown limits are enforced through the use of the PNPP Technical Specifications. Therefore, the use of K_{Ic} will provide an adequate margin of safety to protect against potential RPV failure.

NRC regulations require the vessel material transition temperature be adjusted to account for the effects of neutron radiation. The methodologies used to develop the proposed P/T limit curves satisfy the requirements of the regulations. The predicted lowest upper shelf energy at 32 EFPY was greater than the minimum of 50 ft-lbs required by 10 CFR [part] 50, Appendix G. The adjusted reference temperature for the limiting material was less than the 200 °F limit required by Regulatory Guide 1.99, Revision 2. Therefore, the integrity of the RCS has been maintained. As such, the proposed curves ensure that adequate reactor vessel safety margins against nonductile failure exist during normal operation, anticipated operational occurrences, and hydrostatic testing.

There are no plant modifications associated with these changes.

The proposed changes to the P/T limit curves do not affect the assumed accident performance of any structure, system, or component previously evaluated. The proposed changes do not introduce any new modes of system operation or failure mechanisms. Therefore, the proposed changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed change will not involve a significant reduction in the margin of safety.

NRC regulations require that P/T limits provide an adequate margin of safety to the conditions at which brittle fracture may occur. These regulations are set forth in 10 CFR [Part] 50, Appendix A, General Design Criteria (GDC) 31, and 10 CFR [Part] 50, Appendices G and H. Regulatory Guides 1.99 and 1.190 provide guidance for the compliance of GDC 31 and Appendices G and H. The appendices reference the requirements and guidance of ASME B&PV Code, Section XI, Appendix G for the development of P/T limit curves. The methodologies described within the regulatory guides and the ASME Code will provide P/T limit curves with the requisite margin against brittle fracture. The proposed P/T limit curves are based on these methodologies as modified by application of ASME Code Case N–640.

Although the code case proposes a change to a requirement contained in ASME, Section XI, Appendix G, the alternative allowed by Code Case N–640 is based upon industry experience gained since the inception of 10 CFR [Part] 50, Appendix G. The more appropriate assumptions and provisions allowed by the code case maintain a margin of safety that is consistent with the intent of 10 CFR [Part] 50, Appendices G and H. 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: Mary E. O'Reilly, Attorney, FirstEnergy Corporation, 76 South Main Street, Akron, OH 44308.

NRC Section Chief: Anthony J. Mendiola.

FPL Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: October 11, 2002.

Description of amendment request: The proposed amendment would change Technical Specification (TS) 3.4.9.1, ''Reactor Coolant System [RCS]—Pressure/Temperature Limits'' and TS 3.4.9.3, ''Reactor Coolant System—Overpressure Protection Systems'' and their associated Bases sections. Specifically, the proposed changes will replace TS Figure 3.4–2, ''Reactor Coolant System Heatup Limitations,'' Figure 3.4–3, ''Reactor Coolant System Cooldown Limitations,'' and Figure 3.4–4, ''RCS Cold Overpressure Protection Setpoints,'' to allow operation to 20 Effective Full Power Years (EFPY). The proposed change to TS 3.4.9.3 will also revise the Cold Overpressure Protection System arming temperature from 329°F to 290°F to reflect the higher allowable low temperature overpressure protection pressure limit afforded by the use of ASME Code Case N–641.

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 changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes to TS 3.4.9.1 and TS 3.4.9.3 do not result in a condition where the design, material, and construction standards that were applicable prior to the proposed changes are altered. The probability of occurrence of an accident previously evaluated for Seabrook Station is not altered by the proposed amendment to the TSs. The accidents remain the same as currently analyzed in the UFSAR [Updated Final Safety Analysis Report] as a result of changes to the P/T limits as well as those for Cold Overpressure Mitigation System (COMS). The new P/T limits are based on NRC [Nuclear Regulatory Commission] accepted methodology along with [the] American Society of Mechanical Engineers (ASME) Code alternative methodology. An exemption request to allow use of the alternative ASME methodology is included as part of this LAR [License Amendment Request]. The proposed COMS setpoint limit based on the revised P/T limits satisfies the criteria specified in the alternative ASME methodology and 10 CFR part 50 Appendix G closure head/vessel flange region pressure limit criteria. The proposed changes do not impact the integrity of the reactor coolant pressure boundary (RCPB) *i.e.* there is no change to the operating pressure, materials, system loadings, etc., as a result of this change. In addition, there is no increase in the potential for the occurrence of a loss of coolant accident. The probability of any design basis accident is not affected by this change, nor are the consequences of any design basis accident (DBA) affected by this proposed change. The proposed P/T limit curves and the COMS limits are not considered to be an initiator or contributor to any accident currently, evaluated in the Seabrook Station UFSAR. These new limits ensure the long term structural integrity of the RCPB.

Fracture toughness test data are obtained from beltline material specimens contained in surveillance capsules that are periodically withdrawn from the reactor vessel. This data allows determination of time conditions under which the vessel can be operated with adequate safety margins against non-ductile fracture throughout its service life. The second Seabrook Station surveillance capsule was removed from the reactor vessel after completion of Operating Cycle No. 5 in May 1997 and was analyzed to predict the fracture toughness requirements using projected neutron fluence calculations. For each analyzed transient and steady state condition, the allowable pressure is determined as a function of reactor coolant temperature considering postulated flaws in the reactor vessel beltline region material. The predicted radiation induced ΔRT_{NDT} was calculated using the respective reactor vessel beltline materials copper and nickel contents and the neutron fluence predicted for 20 EFPY. The RT_{NDT} and, accordingly, the operating limits for Seabrook Station were adjusted to account for the effects of irradiation on the fracture toughness of the reactor vessel beltline materials. Therefore, new operating limits are established which are represented in the revised operating curves for heatup/cooldown, criticality and inservice hydrostatic testing contained in the technical specifications. The proposed P/T limit curves and COMS setpoint limits are not considered to be an initiator or contributor to any accident currently evaluated in the Seabrook Station UFSAR.

Therefore based on the above discussion, it is concluded that the proposed revisions to TS 3.4.9.1 and TS 3.4.9.3 do not involve a significant increase in the probability or consequences of any accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed changes to the P/T and COMS limits will not create a new accident scenario. The requirements to have P/T and COMS protection are part of the licensing basis for Seabrook Station. The proposed technical specification amendment reflects the change in reactor vessel material properties as determined by evaluation of the most recently withdrawn surveillance capsule. Based on the surveillance capsule data, the adjusted RT_{NDT} values for the plate and weld material were within the two standard deviations of Regulatory Guide 1.99, Revision 2 predictions. As all the requisite criteria of Regulatory Guide 1.99, Revision 2 was satisfied, it was concluded that the surveillance data was credible and the beltline material was responding as empirically predicted. The new P/T limits are based on NRC accepted methodology along with American Society of Mechanical Engineers (ASME) Code alternative methodology. An exemption request to allow use of the alternative ASME methodology is included as part of this LAR. The proposed COMS setpoint limit based on the revised P/T limits satisfies the criteria specified in the alternative ASME methodology and 10 CFR part 50 Appendix G closure head/vessel flange region pressure limit criteria. The proposed changes will not alter the way any structure, system or component functions, and will not significantly alter the manner in which the plant is operated. There will be no adverse effect on plant operation or accident mitigation equipment.

Since no new failure modes are created by the proposed revisions to TS 3.4.9.1 and TS 3.4.9.3, this change does not create the possibility of a new or different kind of accident from any that was previously evaluated.

3. The proposed changes do not involve a significant reduction in a margin of safety.

The existing P/T and COMS limit curves in the technical specifications are reaching their expiration for the number of years at effective full power operation. The revision of the P/T limits and COMS will ensure that Seabrook Station continues to operate within the operating limits allowed by 10 CFR 50.60 and the ASME Code. The material properties used in the development of the revised limit curves are based on the evaluation of the most recently withdrawn surveillance capsule. The application of ASME Code Case N–641 presents alternative methods for calculating P/T and COMS temperature and pressure limits in lieu of those established in ASME Section XI, Appendix G–2215. This ASME Code alternative allows analysis features that are less restrictive than those associated with previous methodologies, however these features remain conservative with respect to the requirements delineated ASME Section XI. Therefore it is concluded that the revised P/T and COMS limit curves proposed by this technical specification amendment still provide sufficient margin to preclude non-ductile fracture of the reactor vessel.

Thus, it is concluded that these proposed revisions to TS 3.4.9.1 and TS 3.4.9.3 do not involve a significant 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 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, Florida Power & Light Company, PO Box 14000, Juno Beach, FL 33408–0420.

NRC Section Chief (Acting): James W. Andersen.

FPL Energy Seabrook, LLC, Docket No. 50–443, Seabrook Station, Unit No. 1, Rockingham County, New Hampshire

Date of amendment request: October 11, 2002.

Description of amendment request: The proposed amendment would relocate Technical Specifications (TSs) 3.1.2.1, ''Reactivity Control Systems-Borations Systems-Flow Paths-Shutdown;'' 3.1.2.2, ''Reactivity Control Systems-Boration Systems-Flow Paths-Operating;'' 3.1.2.3, ''Reactivity Control Systems-Boration Systems-Charging Pumps-Shutdown;'' 3.1.2.4, ''Reactivity Control Systems-Boration Systems-Charging Pumps-Operating;'' 3.1.2.5, ''Reactivity Control Systems-Boration Systems-Borated Water Sources-Shutdown;'' 3.1.2.6, ''Reactivity Control Systems-Boration Systems-Borated Water Sources-Operating;'' and 3.4.7, ''Reactor Coolant System-Chemistry,'' to the Seabrook Station Technical Requirements Manual (SSTR) and would revise TS 3.1.2.7, ''Reactivity Control Systems-Boration Systems-Isolation of Unborated Water Sources-Shutdown.'' The proposed amendment would also revise TSs 3.4.1.2, ''Reactor Coolant System-Reactor Coolant Loops and Coolant Recirculation-Hot Standby,'' 3.4.3 ''Reactor Coolant System-Pressurizer,'' 3.4.7, ''Reactor Coolant System-Chemistry,'' and 3.9.2, ''Refueling Operations-Instrumentation,'' to adopt a portion of NUREG–1431, Revision 2, ''Standard Technical Specifications, Westinghouse Plants,'' involving a wording revision to more closely match Standard Technical Specifications. The revision to TS 3/4.9.2 would also involve surveillance changes. The associated Bases would also be modified as a result of 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, which is presented below:

1. The proposed changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

The TS changes propose the relocation of the boration subsystem and chemistry requirements to a licensee-controlled document. The relocation of these requirements will not cause an accident to occur and will not result in any change in the operation of the associated accident mitigation equipment. Therefore, the proposed changes will not increase the probability or consequences of an accident previously evaluated.

The TS changes propose the modification of the TS for ''Isolation of Unborated Water Sources—Shutdown.'' Only the demineralizers that are intended to deborate the Reactor Coolant System will need to be isolated in MODE 4, 5, or 6. Administrative controls, currently in use for the operation of the Boron Thermal Regeneration System and replenishment of demineralizer resin in the Chemical Volume and Control System, will be used to minimize the affects of an inadvertent dilution due to operation of the demineralizers. The Seabrook Station Updated Final Safety Analysis currently includes a boron dilution event analysis for each MODE of operation. Use of these administrative controls will ensure that the operation of the BTRS [Boron Thermal Regeneration System] is bounded by the boron dilution analysis. Therefore, the modification of the TS requirement will not increase the probability or consequences of an accident previously evaluated.

The TS changes propose to change the source range flux monitor requirements in MODE 6. The proposed change does not significantly affect the operability of the associated equipment. The source range neutron flux monitors are components not assumed to be initiators of analyzed events. Therefore, the change in the TS requirement for the source range instrumentation in MODE 6 will not increase the probability or consequences of an accident previously evaluated.

The additional proposed changes to the TS that will standardize terminology, relocate information to the Bases, remove extraneous information, modify the requirements to prevent rod withdrawal for operational flexibility, and make minor format changes will not result in any technical changes to the current requirements. Therefore, these additional proposed changes will not increase the probability or consequences of an accident previously evaluated.

2. The proposed changes do not create the possibility of a new or different kind of accident from any previously evaluated.

The proposed changes to the TSs do not impact any system or component that could cause an accident, nor will it alter the plant configuration or require any unusual operator actions, nor will it alter the way any structure, system, or component functions. Therefore, the proposed changes will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. The proposed changes do not involve a significant reduction in [a] margin of safety.

The proposed TS changes associated with the relocation of the boration subsystem and

chemistry requirements to a licensee-controlled document will not result in a significant reduction in a margin of safety.

The proposed TS changes associated with the modification of the TS for ''Isolation of Unborated Water Sources—Shutdown,'' are consistent with the requirements contained in the Seabrook Station Updated Final Safety Analysis which currently includes a boron dilution event analysis for each MODE of operation. The changes result in operation within the parameters specified by the analysis. Therefore, the modification of the TS requirement will not result in a significant reduction in a margin of safety.

The proposed TS changes associated with the source range flux monitor do not significantly affect the operability of the associated equipment. Therefore, the change in the TS requirement for the source range instrumentation will not result in a significant reduction in a margin of safety.

The additional proposed changes to the TSs that will standardize terminology, relocate information to the Bases, remove extraneous information, modify requirements to prevent rod withdrawal for operational flexibility, and make minor format changes will not result in any technical changes to the current requirements. Therefore, these additional changes will not result in a significant 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 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

Attorney for licensee: Mr. M. S. Ross, Florida Power & Light Company, PO Box 14000, Juno Beach, FL 33408–0420.

NRC Section Chief (Acting): James W. Andersen.

Florida Power and Light Company (FPL), *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 23, 2002.

Description of amendment request: The proposed amendment would revise the Technical Specifications (TS) Section 5.6, ''Design Features—Fuel Storage,'' to include the design of a new cask pit spent fuel storage rack for each unit to increase the allowable spent fuel wet storage capacity at both units and include the description of Boral™ as the neutron absorbing material used in the new cask pit storage racks. The proposal also revises the spent fuel pool (SFP) thermal-hydraulic analyses for core offload times of 120 hours after reactor shutdown and for a partial core offload as the normal offload condition. In addition the proposal includes a change in FPL's commitments regarding the Unit 2 spent fuel cooling system design basis described in the Updated Final Safety Analysis Report (UFSAR). A current UFSAR commitment regarding the Unit 2 peak SFP temperature limit during full core offloads with minimum SFP cooling will be replaced with a new design basis.

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?

No. The proposed changes to increase the spent fuel storage capacity with cask pit racks were evaluated for impact on the following previously evaluated events:

a. A fuel handling accident (FHA),
b. A heavy load drop into the cask pit,
c. A loss of SFP cooling,
d. A stored fuel criticality event,
e. A seismic event.

The probability of a fuel handling accident is not significantly increased by the proposed changes, because the same equipment (*e.g.*, the spent fuel handling crane) and procedures will be used to handle fuel assemblies and the frequency of fuel movement will be essentially the same, with or without cask pit racks. The FHA radiological consequences are not significantly increased because the source term of a single fuel assembly will remain unchanged, and the cask pit racks will be installed at the same water depth as the existing SFP racks, with the same iodine decontamination factors assumed in the FHA analysis. The structural consequences of dropping a fuel assembly on a cask pit rack were also found to be no more severe than those in the current FHA analysis.

The probability and consequences of a heavy load drop of the cask pit rack or its platform are bounded by the existing cask drop analyses, because a fuel transfer cask is much heavier than either the empty rack or platform, and cask handling will be a more frequent operation in the future than cask pit rack installation and removal. The cask pit rack will be removed prior to any cask handling operations, such that a cask drop scenario onto a cask pit rack loaded with fuel is not credible. Therefore, the probability and the consequences of a heavy load drop in the cask pit are not significantly increased.

The probability of a loss of SFP cooling is unaffected and its consequences are not significantly increased with cask pit racks installed. With the cask pit rack installed, loss of forced cooling results in a sufficient time-to-boil for the operator to recognize the condition and establish SFP makeup to compensate for water lost due to pool bulk boiling, and thereby maintain a sufficient water blanket over the stored spent fuel.

The probability and consequences of a stored fuel criticality event are not increased by the addition of a cask pit rack. The reactivity analysis for the new racks demonstrates that reactivity remains subcritical (below 0.95) for the worst-case fuel mispositioning event, without credit for soluble boron. The probability of a seismic event is unaffected and its consequences are not significantly increased with cask pit racks installed, because the structural analysis of the new racks demonstrates that the fuel storage function of the rack is unimpaired by loading combinations including seismic motion, and there is no adverse seismic-induced interaction between the rack and adjacent structures.

Based on the above, it is concluded that the proposed amendments do not involve a significant increase in the probability or consequences of an accident previously evaluated.

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. The proposed changes to add a cask pit rack to each unit do not alter the operating requirements of the plant or of the equipment credited in the mitigation of design basis accidents, nor do the proposed changes affect any of the important parameters required to ensure the safe storage of spent fuel. A new rack material (Boral™) is introduced into the pool under these changes, but based on its operating history in SFPs, there are no mechanisms that create a new or different kind of accident. The potential for dropping the new rack or its platform during installation or removal is bounded by the existing analysis for dropping a spent fuel transfer cask into the cask pit. The same equipment (*e.g.*, the spent fuel handling crane) and procedures will be used to handle fuel assemblies for the new cask pit racks as are used for existing spent fuel storage. The fuel storage configuration in the new racks will be similar to the configuration in the existing SFP storage racks, and a fuel drop or mispositioning event in the new racks does not represent a new or different kind of accident from fuel handling and mispositioning events previously evaluated. Therefore, the proposed amendments will not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Would operation of the facility in accordance with the proposed amendments involve a significant reduction in a margin of safety?

No. The effect of the proposed changes on current margins of safety were evaluated for spent fuel storage functionality and criticality, spent fuel and SFP cooling, and SFP/cask pit structural integrity. The design of the new racks uses proven technology which preserves the proper safety margins for spent fuel storage to provide a coolable and subcritical geometry under both normal and abnormal/accident conditions. The design complies with current regulatory guidelines and the ANSI [American National Standards Institute] standards, including 10 CFR 50 Appendix A GDC [General Design Criterion] 62, NUREG–0800 Section 9.1.2, the OT Position for Review and Acceptance of Spent Fuel Storage and Handling Applications,

Regulatory Guide 1.13, and ANSI/ANS [American Nuclear Society] 8.17. Handling the racks and platforms in accordance with the defense-in-depth approach of NUREG–0612 with temporary lift items designed to ANSI N14.6 preserves the proper margin of safety to preclude a heavy load drop in the cask pit.

The proposed SFP cooling system design basis is consistent with the regulatory guidance in NRC Standard Review Plan Section 9.1.3 for SFP temperature limits during normal and abnormal core offload conditions. The rack and SFP thermal hydraulic analyses demonstrate that the proposed SFP cooling system design basis is met, and that no bulk boiling will occur in the new rack or SFP with minimum cooling available. A loss of SFP cooling will allow sufficient time for operators to identify the condition and initiate makeup flow or restore cooling to preserve fuel cooling capability.

The new rack criticality analyses demonstrate that the subcriticality safety margin is maintained below 0.95 under all conditions, without credit for soluble boron. The structural analyses for the new racks and adjacent structures show that the rack and surrounding structures are unimpaired by loading combinations during seismic motion, and there is no adverse seismic-induced interaction between the rack and adjacent structures. Based on these evaluations, operating the facility with the proposed amendments does not involve a significant reduction in any margin of safety.

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: Allen G. Howe.

Nebraska Public Power District, Docket No. 50–298, Cooper Nuclear Station, Nemaha County, Nebraska

Date of amendment request: September 26, 2002.

Description of amendment request: The proposed amendment would revise Surveillance Requirement (SR) 3.0.3 to extend the delay period, before entering a Limiting Condition for Operation, following a missed surveillance. The delay period would be extended from the current limit of ''* * * up to 24 hours or up to the limit of the specified Frequency, whichever is less'' to ''* * * up to 24 hours or up to the limit of the specified Frequency, whichever is greater.'' In addition, the following requirement would be added to SR 3.0.3: ''A risk evaluation shall be performed for any Surveillance delayed greater than 24 hours and the risk impact shall be managed.''

The NRC staff issued a notice of opportunity for comment in the **Federal Register** on June 14, 2001 (66 FR 32400), on possible amendments concerning missed surveillances, including a model safety evaluation and model no significant hazards consideration (NSHC) determination, using the consolidated line item improvement process. The NRC staff subsequently issued a notice of availability of the models for referencing in license amendment applications in the **Federal Register** on September 28, 2001 (66 FR 49714).

The licensee affirmed the applicability of the following NSHC determination in its application dated September 26, 2002.

Basis for proposed no significant hazards consideration determination: As required by 10 CFR 50.91(a), an analysis of the issue of no significant hazards consideration is presented below:

Criterion 1—The Proposed Change Does Not Involve a Significant Increase in the Probability or Consequences of an Accident Previously Evaluated

The proposed change relaxes the time allowed to perform a missed surveillance. The time between surveillances is not an initiator of any accident previously evaluated. Consequently, the probability of an accident previously evaluated is not significantly increased. The equipment being tested is still required to be operable and capable of performing the accident mitigation functions assumed in the accident analysis. As a result, the consequences of any accident previously evaluated are not significantly affected. Any reduction in confidence that a standby system might fail to perform its safety function due to a missed surveillance is small and would not, in the absence of other unrelated failures, lead to an increase in consequences beyond those estimated by existing analyses. The addition of a requirement to assess and manage the risk introduced by the missed surveillance will further minimize possible concerns. Therefore, this change does not involve a significant increase in the probability or consequences of an accident previously evaluated.

Criterion 2—The Proposed Change Does Not Create the Possibility of a New or Different Kind of Accident From Any Previously Evaluated

The proposed change does not involve a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. A missed surveillance will not, in and of itself, introduce new failure modes or effects and any increased chance that a standby system might fail to perform its safety function due to a missed surveillance would not, in the absence of other unrelated failures, lead to an accident beyond those previously evaluated. The addition of a requirement to assess and manage the risk introduced by the missed surveillance will further minimize possible concerns. Thus, this change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

Criterion 3—The Proposed Change Does Not Involve a Significant Reduction in the Margin of Safety

The extended time allowed to perform a missed surveillance does not result in a significant reduction in the margin of safety. As supported by the historical data, the likely outcome of any surveillance is verification that the LCO [Limiting Condition for Operation] is met. Failure to perform a surveillance within the prescribed frequency does not cause equipment to become inoperable. The only effect of the additional time allowed to perform a missed surveillance on the margin of safety is the extension of the time until inoperable equipment is discovered to be inoperable by the missed surveillance. However, given the rare occurrence of inoperable equipment, and the rare occurrence of a missed surveillance, a missed surveillance on inoperable equipment would be very unlikely. This must be balanced against the real risk of manipulating the plant equipment or condition to perform the missed surveillance. In addition, parallel trains and alternate equipment are typically available to perform the safety function of the equipment not tested. Thus, there is confidence that the equipment can perform its assumed safety function.

Therefore, this change does not involve a significant reduction in a margin of safety.

Based upon the reasoning presented above and the previous discussion of the amendment request, the requested change does not involve a significant hazards consideration.

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: Mr. John R. McPhail, Nebraska Public Power District, Post Office Box 499, Columbus, NE 68602–0499.

NRC Section Chief: Robert A. Gramm.

Nine Mile Point Nuclear Station, LLC, Docket No. 50–220, Nine Mile Point Nuclear Station Unit No. 1, Oswego County, New York

Date of amendment request: November 15, 2002.

Description of amendment request: The licensee proposes to revise the reactor coolant system pressure-temperature (P–T) limit curves and associated limit tables specified in Section 3/4.2.2, ''Minimum Reactor

Vessel Temperature for Pressurization,'' of the Technical Specifications (TSs). The P–T limit curves and tabular listing of P–T limit values contained in the revised figures and tables are based, in part, on an alternative methodology and will be valid for 28 effective full-power years. The alternative methodology has been endorsed by the American Society of Mechanical Engineers.

The associated licensee-controlled TSs Bases pages would also be changed to reflect the above TS 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 has reviewed the licensee's analysis against the three standards of 10 CFR 50.92(c). The NRC staff's analysis is presented below:

The first standard requires that operation of the unit in accordance with the proposed amendment will not involve a significant increase in the probability or consequences of an accident previously evaluated. The proposed changes, if approved by the Nuclear Regulatory Commission (NRC), will be made in a manner such that conservatism is maintained through compliance with applicable NRC regulations and guidance. No hardware design change is involved with the proposed amendment, thus there will be no adverse effect on the functional performance of any plant structure, system, or component (SSC). All SSCs will continue to perform their design functions with no decrease in their capabilities to mitigate the consequences of postulated accidents. P–T limit curves were not previously factored into the probability of accidents, nor were they factored into scenarios of previously analyzed accidents. Accordingly, the revised P–T limit curves and tabular listing of P–T limit values will lead to no increase in the consequences of an accident previously evaluated, and no increase of the probability of an accident previously evaluated.

The second standard requires that operation of the unit in accordance with the proposed amendment will not create the possibility of a new or different kind of accident from any accident previously evaluated. The proposed amendment is not the result of a hardware design change, nor does it lead to the need for a hardware design change. There is no change in the methods the unit is operated. As a result, all SSCs will continue to perform as previously analyzed by the licensee, and previously evaluated and accepted by the NRC staff. Therefore, the proposed amendment will not create the possibility of a new or different kind of accident from any previously evaluated.

The third standard requires that operation of the unit in accordance with the proposed amendment will not involve a significant reduction in a margin of safety. Since the licensee did not propose to exceed or alter a design basis or safety limit, the proposed amendment will not affect in any way the performance characteristics and intended functions of any SSC. Therefore, the proposed amendment does 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: Mark J. Wetterhahn, Esquire, Winston & Strawn, 1400 L Street, NW., Washington, DC 20005–3502.

NRC Section Chief: Richard J. Laufer.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: July 25, 2002, as supplemented October 21, 2002.

Description of amendment request: The amendment would modify Technical Specification (TS) requirements for missed surveillance tests in TS 4.0.3 using the Consolidated Line Item Improvement Program, modify TS 4.0.1 to be consistent with the Standard Technical Specifications (STS), and incorporate a TS Bases Control Program in Section 6.0 in accordance with the STS.

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 an accident previously evaluated?

Specification 4.0.3

The proposed change relaxes the time allowed to perform a missed Surveillance. The time between Surveillances is not an initiator to any accident previously evaluated. Consequently, the probability of an accident previously evaluated is not significantly increased. The equipment being tested is still required to be OPERABLE and capable of performing the accident mitigation functions assumed in the accident analysis. As a result, the consequences of any accident previously evaluated are not significantly affected.

Specification 4.0.1

The proposed additional requirement equating failure to meet a surveillance with failure to meet the LCO [limiting condition for operation] is consistent with current interpretation of the technical specifications. This change, along with relocation and rewording of existing requirements from Specification 4.0.3, are administrative in nature and do not adversely affect accident initiators, design functions, facility configuration or the manner of operation or control. The ability of structures, systems and components to perform their intended function remains unaffected.

Bases Control Program

The proposed change to adopt a Technical Specification Bases Control Program is also administrative in nature and does not adversely affect accident initiators, design functions, facility configuration or the manner of operation or control. The ability of structures, systems or components to perform their intended function remains unaffected. Future changes to the TS Bases will continue to be administratively controlled in accordance with the requirements of 10 CFR 50.59.

Therefore, these three changes do not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. Does the change create the possibility of a new or different kind of accident from any accident previously evaluated?

None of the three proposed changes involves a physical alteration of the plant (no new or different type of equipment will be installed) or a change in the methods governing normal plant operation. Thus, these changes do not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does this change involve a significant reduction in a margin of safety?

Specification 4.0.3

The relaxed time allowed to perform a missed Surveillance does not result in a significant reduction in the margin of safety. As supported by the historical data, the likely outcome of any Surveillance is verification that the LCO is met. Failure to perform a Surveillance within the prescribed Frequency does not cause equipment to become inoperable. The only effect of the additional time allowed to perform a missed Surveillance on the margin of safety is the extension of the time until inoperable equipment is discovered to be inoperable by the missed Surveillance. However, given the rare occurrence of inoperable equipment, and the rare occurrence of a missed Surveillance, a missed Surveillance on inoperable equipment would be very unlikely. This must be balanced against the real risk of manipulating the plant equipment or condition to perform the missed Surveillance. In addition, parallel trains and alternate equipment are typically available to perform the safety function of the equipment not tested.

Specification 4.0.1

The proposed changes to TS 4.0.1, including relocation and rewording of

existing requirements from Specification 4.0.3, are administrative in nature and do not reduce the level of programmatic or procedural controls associated with the Surveillance Requirements. There are no substantive differences in meaning or intent between the existing specifications and the corresponding STS requirements. Further, these changes have no impact on equipment design, configuration, analytical basis, setpoints or operation.

Bases Control Program

The proposed change to adopt a Technical Specification Bases Control Program is also administrative in nature and does not reduce the level of programmatic or procedural controls associated with the Bases. There is no impact on equipment design, configuration, analytical basis, setpoints or operation.

Thus, there is confidence that the equipment can perform its assumed safety function. Therefore, this change does not involve a significant 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: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, PO Box 236, Hancocks Bridge, NJ 08038.

NRC Section Chief: James Andersen, Acting.

PSEG Nuclear LLC, Docket No. 50–354, Hope Creek Generating Station, Salem County, New Jersey

Date of amendment request: October 23, 2002.

Description of amendment request: The proposed change updates the reference to 10 CFR 20.203 with the corresponding reference to 10 CFR 20.1601.

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 would not involve a significant increase in the probability or consequences of an accident previously evaluated.

The proposed changes do not affect accident initiators or precursors and do not alter the design assumptions, conditions, configuration of the facility, or manner in which the plant is operated. The proposed changes do not alter or prevent the ability of structures, systems, or components to perform their intended safety function to mitigate the consequences of an initiating event within the acceptance limits assumed in the UFSAR [Updated Final Safety Analysis Report]. The proposed changes are administrative in nature. Technical Specification (TS) 6.12 will be updated to include the new 10 CFR 20 (effective 06/20/91) requirements. The proposed changes do not alter the conditions or assumptions in any of the previous accident analyses, and as a result, the radiological consequences associated with these analyses remain unchanged.

Therefore, the proposed changes will not involve a significant increase in the probability or consequences of an accident previously evaluated.

2. The proposed amendment would not create the possibility of a new or different kind of accident from any accident previously evaluated.

The proposed changes do not alter the design assumptions, conditions, configuration of the facility, or the manner in which the plant is operated.

The proposed changes are administrative in nature and the relocated procedural details do not change the level of programmatic controls and procedural details. Accordingly, the proposed changes do not create any new failure modes or limiting single failures associated with a plant structure, system, or component important to safety. Also, there will be no change in the types or increase in the amounts of any effluents released offsite.

Therefore, 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 would not involve a significant reduction in the margin of safety.

The proposed changes do not impact equipment design or operation, nor do the changes affect any TS safety limits or safety system settings that could adversely affect plant safety. The proposed changes are administrative in nature. Technical Specification (TS) 6.12 will be updated to include the new 10 CFR 20 requirements (effective 06/20/91) and are in conformance with NUREG–1433 [Standard Technical Specifications General Electric Plants, BWR 4]. Furthermore, the proposed changes do not result in a change in the types or an increase in the amounts of any effluents released offsite.

Therefore, it is concluded that the proposed changes do not involve a significant 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: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, PO Box 236, Hancocks Bridge, NJ 08038.

NRC Section Chief: James Andersen, Acting.

PSEG Nuclear LLC, Docket No. 50–354, Salem Nuclear Generating Station, Unit Nos. 1 and 2, Salem County, New Jersey

Date of amendment request: September 20, 2002.

Description of amendment request: The proposed amendment will add new limiting conditions for operation for fuel storage pool boron concentration, fuel assembly storage in the spent fuel pool, relocate requirements for spent fuel storage, revise existing Technical Specification (TS) 3/4.9.1 for boron concentration during refueling operations, and revise existing administrative controls associated with the Core Operating Limits Report described in TS 6.9.1.9.

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?

Response: No.

The postulated accidents are basically of three types. The first type of postulated accident is an abnormal location of a fuel assembly, the second type of postulated accident is associated with lateral rack movement, and the third type of postulated accident is a dropped fuel assembly on the top of the rack. The dropped fuel assembly and the lateral rack movement have been previously shown to have negligible reactivity effects (<0.0001 [delta k]). The misplacement of a fuel assembly could have a small positive reactivity effect, however, the negative reactivity effect of a minimum soluble boron concentration of 600 ppm [parts per million] compensates for the increased reactivity caused by any of the postulated accident scenarios.

There is no increase in the probability of the accidental misloading of irradiated fuel assemblies into the spent fuel pool racks when considering the presence of soluble boron in the pool water for criticality control. Fuel assembly placement will continue to be controlled pursuant to approved fuel handling procedures and will be in accordance with the Technical Specification (TS) spent fuel rack storage configuration limitations.

There is no increase in the consequences of the accidental misloading of irradiated fuel assemblies into the spent fuel pool racks because criticality analyses demonstrate that the pool will remain subcritical following an accidental misloading if the pool contains an adequate boron concentration. This has been previously evaluated in the Safety Evaluation by the Office of Nuclear Reactor Regulation related to Amendment Nos[.] 151 and 131 to Facility Operating Licenses DPR–70 and DPR–75 for the Salem Nuclear Generating Station Units 1 and 2, dated May 4, 1994 (Spent Fuel Reracking, TAC [technical

assignment control] NOS. M85797 and M85798). The proposed TS limitations will ensure that an adequate spent fuel pool boron concentration will be maintained.

The proposed change will revise the Salem Generating Station (SGS) TS to be consistent with the improved Standard Technical Specifications for Westinghouse plants, NUREG–1431 Revision 2, 4/30/01. The new TS are not an accident initiator. Specifying a minimum boron concentration in a new TS and relocating fuel assembly storage requirements in a new TS are conservative approaches to operational control.

Therefore, this proposed amendment does not involve a significant increase in the probability of occurrence or consequences of an accident previously analyzed.

2. Does the proposed change create the possibility of a new or different kind of accident from any accident previously analyzed?

Response: No.

Criticality accidents in the spent fuel pool have been analyzed in the previous criticality safety analyses documented in PSEG letter NLR–N93058 dated April 28, 1993 transmitting License Change Request (LCR) 93–02 and Attachment D, The Licensing Report for Spent Fuel Storage Capacity Expansion, Public Service Electric and Gas Company, Salem Generating Stations 1 & 2, USNRC [U.S. Nuclear Regulatory Commission] Docket Nos[.] 50–272 & 50–311, prepared by Holtec International. This is the basis for the present TS. The addition of a Limiting Condition for Operation (LCO) for boron concentration does not alter the assumptions or the results of the existing spent fuel criticality analyses or accident analyses described in the Salem Updated Final Safety Analysis Report. The addition of TS which provide for TS control where previous administrative controls had been in place and relocation of material within existing TS does not alter the results of criticality safety analyses.

Therefore, this proposed amendment does not create the 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?

Response: No.

The TS changes proposed and the resulting spent fuel storage operation limits will continue to provide adequate safety margin to ensure that the stored fuel assembly array will remain subcritical. Those limits are based on a plant specific criticality analysis and are unchanged by this application. The addition of TS which provides for TS control where previous administrative controls had been in place and relocation of material within existing TS continue to establish conservative operational control.

Therefore, the proposed change does not involve a significant 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: Jeffrie J. Keenan, Esquire, Nuclear Business Unit—N21, PO Box 236, Hancocks Bridge, NJ 08038.

NRC Section Chief: James Andersen, Acting.

Tennessee Valley Authority, Docket No. 50–260, Browns Ferry Nuclear Plant, Unit 2, Limestone County, Alabama

Date of amendment request: October 25, 2002.

Description of amendment request: The proposed amendment would revise the numerical value of the Safety Limit Minimum Critical Power Ratio (SLMCPR) in Technical Specification (TS) 2.1.1.2 to incorporate the results of the cycle-specific core reload analysis for Browns Ferry Unit 2 Cycle 13 operation.

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 amendment involve a significant increase in the probability or consequences of an accident previously evaluated?

Response: No.

The proposed amendment establishes a revised SLMCPR value for two recirculation loop operation. The probability of an evaluated accident is derived from the probabilities of the individual precursors to that accident. The proposed SLMCPR preserves the existing margin to transition boiling and the probability of fuel damage is not increased. Since the change does not require any physical plant modifications or physically affect any plant components, no individual precursors of an accident are affected and the probability of an evaluated accident is not increased by revising the SLMCPR value.

The consequences of an evaluated accident are determined by the operability of plant systems designed to mitigate those consequences. The revised SLMCPR has been determined using NRC-approved methods and procedures. The basis of the MCPR Safety Limit is to ensure no mechanistic fuel damage is calculated to occur if the limit is not violated. These calculations do not change the method of operating the plant and have no effect on the consequences of an evaluated accident. Therefore, the proposed TS change does not involve an increase in the probability or consequences of an accident previously evaluated.

2. Does the proposed amendment create the possibility of a new or different kind of accident from any accident previously evaluated?

Response: No.

The proposed license amendment involves a revision of the SLMCPR for two recirculation loop operation based on the results of an analysis of the Cycle 13 core. Creation of the possibility of a new or different kind of accident would require the creation of one or more new precursors of that accident. New accident precursors may be created by modifications of the plant configuration, including changes in the allowable methods of operating the facility. This proposed license amendment does not involve any modifications of the plant configuration or changes in the allowable methods of operation. Therefore, the proposed TS change does not create the possibility of a new or different kind of accident from any accident previously evaluated.

3. Does the proposed amendment involve a significant reduction in a margin of safety.

Response: No.

The margin of safety as defined in the TS bases will remain the same. The new SLMCPR was calculated using NRC-approved methods and procedures, which are in accordance with the current fuel design and licensing criteria. The SLMCPR remains high enough to ensure that greater than 99.9 percent of all fuel rods in the core are expected to avoid transition boiling if the limit is not violated, thereby preserving the fuel cladding integrity. Therefore, the proposed TS change does not involve a 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 11A, Knoxville, Tennessee 37902.

NRC Section Chief: Allen G. Howe.

Tennessee Valley Authority, Docket No. 50–327, Sequoyah Nuclear Plant (SQN), Unit 2, Hamilton County, Tennessee

Date of amendment request: November 15, 2002.

Description of amendment request: The proposed one-time condition would establish special provisions and requirements for safe operation of Unit 2 while heavy load lifts are performed on Unit 1. The provisions for heavy load lifts are described in Topical Report 24370–TR–C–002 that was previously submitted on April 15, 2002, for NRC review and approval. The topical report contains prerequisite actions for heavy load movement, active monitoring during heavy load movement, and compensatory measures in response to the unlikely event of a heavy load drop. This submittal withdraws an amendment request dated July 10, 2002.

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.

No changes in event classification as discussed in SQN Updated Final Safety Analysis Chapter 15 will occur due to the proposed license amendment. The one-time provision ensures that the SQN ERCW [essential raw cooling water] system remains functional for continued safe operation of Unit 2 during heavy load lifts performed on Unit 1 during SGR (steam generator replacement) replacement [sic] activities.

Accordingly, the proposed modification to SQN Unit 2 operating license and the implementation of compensatory measures for a postulated load drop will 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 possibility of a new or different accident scenario occurring as a result of activities conducted during the SQN Unit 1 SGR project are [sic] not created. Three postulated scenarios related to heavy load handling during the SGR project were examined for their potential to represent a new or different kind of accident from those previously evaluated: (1) A breach of the old steam generator (OSG), resulting in the release of contained radioactive material, (2) flooding in the Auxiliary Building caused by the failure of piping in the ERCW tunnel, and (3) loss of ERCW to support safe shutdown of the operating unit.

Failure of an OSG that results in a breach of the primary side of the steam generator (SG) could potentially result in a release of a contained source outside containment. The consequences of this event, both offsite and in the control room, were examined and found to be within the consequences of the failure of other contained sources outside containment at the SQN site (*i.e.*, within the SQN design basis).

With regard to flooding of the Auxiliary Building from a heavy load drop, the protective measure taken prior to the lifting of heavy loads include installation of a wall in the ERCW tunnel near the Auxiliary Building interface. The wall provides protection against a postulated flood of the ERCW tunnel and protects against flooding of the Auxiliary Building beyond those events previously evaluated.

With regard to the potential for a heavy load drop causing the loss of ERCW cooling water to the operating unit (*i.e.*, Unit 2), TVA is implementing provisions to preclude a load drop. A heavy load drop is considered an unlikely accident for the following reasons:

The lifting equipment was specifically designed and chosen for the subject heavy lifts,

—Crane operators will be specially trained in the operation of the lift equipment and in the SQN site conditions,

—Qualifying analyses and administrative controls will be used to protect the lifts from the effects of external events,

The areas over which a load drop could cause loss of ERCW are a small part of the total travel path of the loads.

In addition, protection against the potential for a loss of ERCW is established prior to any heavy load lifts. Compensatory measures ensure the ERCW system is isolated should a pipe break occur, and that ERCW flow is redirected to equipment essential for safe shutdown capability of Unit 2.

Accordingly, the possibility of a new or different kind of accident from any accident previously evaluated is not created.

C. The proposed amendment does not involve a significant reduction in a margin of safety.

The proposed change to the Unit 2 operating license supports safe operation and safe shutdown capabilities of Unit 2 during replacement of the Unit 1 SGs. These measures do not result in changes in the design basis for plant structures, systems, and components (SSCs). Consequently, the proposed change will not affect any margins of safety for plant SSCs.

Accordingly, a significant reduction in the margin of safety is not created by the proposed change.

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 11A Knoxville, Tennessee 37902.

NRC Section Chief: Allen G. Howe.

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/reading-rm/adams.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*.

Carolina Power & Light Company, Docket Nos. 50–324, Brunswick Steam Electric Plant, Unit 2, Brunswick County, North Carolina

Date of amendment request: November 26, 2001, as supplemented January 31, February 5, February 11, and October 8, 2002.

Description of amendment request: The amendment revises the Improved Technical Specification 5.5.12 to allow a one-time interval increase for the Type A Integrated Leakage Rate Test for no more than 2 years, 2 months.

Date of issuance: November 21, 2002.

Effective date: November 21, 2002.

Amendment No.: 250.

Facility Operating License No. DPR–62: The amendment changes the Technical Specifications.

Date of initial notice in ***Federal Register:*** January 8, 2002 (67 FR 926). The January 31 and February 5, 2002, supplements contained clarifying information only, and did not change the initial no significant hazards consideration determination or expand the scope of the initial **Federal Register** notice. The February 11 and October 8, 2002, supplements revised the original requests but the initial no significant

hazards determination bounded the revised request.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 21, 2002.

No significant hazards consideration comments received: No.

Dominion Nuclear Connecticut, Inc., Docket No. 50–423, Millstone Power Station, Unit No. 3, New London County, Connecticut

Date of application for amendment: July 19, 2002, as supplemented September 6, 2002.

Brief description of amendment: The amendment revised Technical Specification (TS) Surveillance Requirement (SR) 4.0.3 to extend the delay period, before entering a Limiting Condition for Operation, following a missed surveillance. The delay period is extended from the current limit of ''* * * up to 24 hours'' to '' * * * up to 24 hours or up to the limit of the specified surveillance interval, whichever is greater.'' In addition, the following requirement is added to SR 4.0.3: ''A risk evaluation shall be performed for any surveillance delayed greater than 24 hours and the risk impact shall be managed.'' The amendment also made administrative changes to SRs 4.0.1 and 4.0.3 to be consistent with NUREG–1431, Revision 2, ''Standard Technical Specifications—Westinghouse Plants.''

Date of issuance: November 15, 2002.

Effective date: As of the date of issuance and shall be implemented within 90 days from the date of issuance.

Amendment No.: 213.

Facility Operating License No. DPR–65: This amendment revised the TSs.

Date of initial notice in ***Federal Register:*** September 4, 2002 (67 FR 56604).

The September 6, 2002, letter provided clarifying information that did not change the initial proposed no significant hazards consideration determination or expand the amendment beyond the scope of the initial notice.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 15, 2002.

No significant hazards consideration comments received: No.

Energy Northwest, Docket No. 50–397, Columbia Generating Station, Benton County, Washington

Date of application for amendment: July 16, 2002, as supplemented by letter dated September 4, 2002.

Brief description of amendment: The amendment changes the technical specifications (TS) to revise the specified minimum emergency diesel generator (DG) steady state output voltage from 3740 volts to 3910 volts.

Date of issuance: November 14, 2002.

Effective date: November 14, 2002, to be implemented within 30 days from the date of issuance.

Amendment No.: 181.

Facility Operating License No. NPF–21: The amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** August 20, 2002 (67 FR 53985).

The September 4, 2002, supplemental letter provided additional information that clarified the application, did not expand the scope of the application as originally noticed, and did not change the NRC staff's original proposed no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 14, 2002.

No significant hazards consideration comments received: No.

Entergy Nuclear Operations, Inc., Docket No. 50–286, Indian Point Nuclear Generating Unit No. 3, Westchester County, New York

Date of application for amendment: May 30, 2002, as supplemented on September 13 and November 6 and 20, 2002.

Brief description of amendment: The amendment revises the Facility Operating License and the Technical Specifications to increase the licensed core thermal power level to 3067.4 megawatts (MWt), which is a 1.4% increase above the currently authorized power level of 3025 MWt. The power uprate is based on the improvement in the core power uncertainty allowance originally required for the emergency core cooling system (ECCS) evaluations performed in accordance with Appendix K, ''ECCS Evaluation Models,'' to part 50 of Title 10 of the CFR. Specifically, the reduced uncertainty is obtained by using a more accurate measurement of feedwater flow.

Date of issuance: November 26, 2002.

Effective date: November 26, 2002.

Amendment No.: 213.

Facility Operating License No. DPR–64: Amendment revised the Technical Specifications and License.

Date of initial notice in ***Federal Register:*** July 9, 2002 (67 FR 45565).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 26, 2002.

The September 13, November 6, and November 20, 2002, letters provided clarifying information that did not enlarge the scope of the amendment request or change the initial proposed no significant hazards consideration determination.

No significant hazards consideration comments received: No.

Exelon Generation Company, LLC, and PSEG Nuclear LLC, Docket Nos. 50–277 and 50–278, Peach Bottom Atomic Power Station, Units 2 and 3, York County, Pennsylvania

Date of application for amendment: May 24, 2002, as supplemented by letters dated June 27, September 11, September 24, and October 16, 2002.

Brief description of amendments: The amendments increase the licensed power level by approximately 1.62% from 3458 megawatts thermal (MWt) to 3514 MWt. These changes are based on increased feedwater flow measurement accuracy achieved by utilizing high accuracy ultrasonic flow measurement instrumentation.

Date of issuance: November 22, 2002.

Effective date: For Peach Bottom Atomic Power Station, Unit 2, as of the date of issuance and shall be implemented within 60 days of issuance. For Peach Bottom Atomic Power Station, Unit 3, as of its date of issuance, and shall be implemented upon startup following the Unit 3 14th Refueling Outage, currently scheduled for fall 2003.

Amendment No: 247 and 250.

Facility Operating License Nos. DPR–44 and DPR–56: The amendment revises the Technical Specifications and License.

Date of initial notice in ***Federal Register:*** July 9, 2002 (67 FR 45568).

The June 27, September 11, September 24, and October 16, 2002, supplemental letters provided clarifying information that did not change the scope of the original **Federal Register** notice or the original no significant hazards consideration determination.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 22, 2002.

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, January 15, June 5, and September 20, 2002.

Brief description of amendments: The amendments replace the current accident source term used in design-basis radiological analyses for control room habitability with an alternative source term (AST) pursuant to Title 10 of the CFR part 50.67, ''Accident Source Term.'' The licensee for D.C. Cook, Units 1 and 2, Indiana Michigan Power Company has requested a selective implementation of the AST limited to control room habitability assessments. The licensee has elected to use the AST and its associated acceptance criteria in preparing a revised control room dose analysis to show compliance with 10 CFR Part 50, Appendix A Criterion 19 ''Control Room.''

In addition, the proposed amendments revise the technical specifications (TSs) to change the standard by which charcoal used in engineered safeguard features systems is tested. The proposed changes to the TSs are made in accordance with Generic Letter 99–02, ''Laboratory Testing of Nuclear-grade Activated Charcoal.'' The amendments also revise the format of the TS pages to adopt the format of Technical Specification Task Force (TSTF) Document TSTF–287 ''Ventilation System Envelope Outage Time.''

Date of issuance: November 14, 2002.

Effective date: As of the date of issuance and shall be implemented within 60 days.

Amendment Nos.: 271 and 252.

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 provided by the licensee contained clarifying information and did not change the initial no significant hazards consideration 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 November 14, 2002.

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: January 14, 2002.

Brief description of amendments: The amendments would revise Unit 2 technical specification (TS) 3.4.2, ''Safety Valves—Shutdown,'' and TS 3.4.3, ''Safety Valves—Operating,'' to increase the allowable as-found setpoint tolerance for the Unit 2 pressurizer code safety valves from plus or minus (±) 1 percent (%) to ±3%. In addition, the amendment would add an allowable ±1% as-left setpoint tolerance for the pressurizer code safety valves to Unit 1 and Unit 2 TS 3.4.2 and TS 3.4.3.

Date of issuance: November 26, 2002.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment Nos.: 272 and 253.

Facility Operating License Nos. DPR–58 and DPR–74: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register****:* April 2, 2002 (67 FR 15624).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 26, 2002.

No significant hazards consideration comments received: No.

Omaha Public Power District, Docket No. 50–285, Fort Calhoun Station, Unit No. 1, Washington County, Nebraska

Date of amendment request: July 22, 2002.

Brief description of amendment: The amendment removes from Technical Specification (TS) 2.10.4(4)a and b, ''Azimuthal Power Tilt (T),'' the reference to a specific computer program for monitoring core radial peaking factors when a core power tilt is present. Instead, the functional requirement is specified. This change clarifies the requirements for core tilt monitoring associated with a computer system upgrade and changes in computer programs. Also, a clarification is made in the Bases section for TS 2.10.4 regarding the application of TS 2.10.4(1)(b) when the plant computer incore detector alarms for monitoring core linear heat rate become inoperable.

Date of issuance: October 29, 2002.

Effective date: October 29, 2002, and shall be implemented within 120 days from the date of issuance.

Amendment No.: 211.

Facility Operating License No. DPR–40: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register****:* September 3, 2002 (67 FR 56326).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated October 29, 2002.

No significant hazards consideration comments received: No.

Nuclear Management Company, LLC, Docket Nos. 50–266 and 50–301, Point Beach Nuclear Plant, Units 1 and 2, Town of Two Creeks, Manitowoc County, Wisconsin

Date of application for amendments: January 11, 2002.

Brief description of amendments: The amendments revise Technical Specification 3.6.4, ''Containment Pressure,'' to reduce the maximum allowable pressure from 3 pounds per square inch gauge (psig) to 2 psig.

Date of issuance: November 26, 2002.

Effective date: As of the date of issuance and shall be implemented within 45 days.

Amendment Nos.: 206 and 211.

Facility Operating License Nos. DPR–24 and DPR–27: The amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register****:* March 19, 2002 (67 FR 12605).

The Commission's related evaluation of the amendments is contained in a Safety Evaluation dated November 26, 2002.

No significant hazards consideration comments received: No.

Pacific Gas and Electric Company, Docket No. 50–133, Humboldt Bay Power Plant, Unit 3, Humboldt County, California

Date of application for amendment: December 28, 2000, as supplemented by letters dated March 29, 2001; October 31, 2001; December 21, 2001; and October 18, 2002.

Brief description of amendment: The amendment replaces the current technical specifications with a set of permanently defueled technical specifications (PDTS) to reflect the permanently defueled condition of the plant.

Date of issuance: November 18, 2002.

Effective date: November 18, 2002, and shall be implemented within 60 days of issuance, including the incorporation of the revised Quality Assurance Program description that contains the relocated administrative control requirements as described in the licensee's March 29, October 31, and December 21, 2001 letters.

Amendment No.: 34.

Facility Operating License No. DPR–7: The amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register****:* December 26, 2001 (66 FR 66471).

The December 21, 2001, and October 18, 2002, supplemental letters provided additional information that clarified the application, did not expand the scope of the application as originally noticed,

and did not change the staff original no significant hazards consideration.

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 18, 2002.

No significant hazards consideration comments received: No.

Tennessee Valley Authority, Docket Nos. 50–260 and 50–296, Browns Ferry Nuclear Plant, Units 2 and 3, Limestone County, Alabama

Date of application for amendments: August 20, 2002.

Brief description of amendments: The amendments revised TS Table 3.3.6.1–1, ''Primary Containment Isolation Instrumentation,'' Functional Unit 5.a, Reactor Water Cleanup System Isolation, Main Steam Valve Vault Area Temperature—High, to extend the frequency of the channel calibration surveillance requirement from 122 days to 24 months, and revised applicable Bases.

Date of issuance: November 26, 2002.

Effective date: As of date of issuance and shall be implemented within 60 days from the completion of Browns Ferry Units 2 and 3 refueling outages currently scheduled for early 2003, and the spring of 2004, respectively.

Amendment Nos.: 277 and 236.

Facility Operating License Nos. DPR–52 and DPR–68: Amendments revised the Technical Specifications.

Date of initial notice in ***Federal Register****:* October 15, 2002 (67 FR 63698).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 26, 2002.

No significant hazards consideration comments received: No.

Tennessee Valley Authority, Docket No. 50–390, Watts Bar Nuclear Plant, Unit 1, Rhea County, Tennessee

Date of application for amendment: January 14, 2002.

Brief description of amendment: The amendment reduced the steady-state specific activity of the primary coolant. The amendment also changes the allowable value for the main control room air intake radiation monitor made necessary by reducing the specific activity.

Date of issuance: November 18, 2002.

Effective date: As of the date of issuance and shall be implemented within 45 days of issuance.

Amendment No.: 41.

Facility Operating License No. NPF–90: Amendment revised the Technical Specifications.

Date of initial notice in ***Federal Register:*** April 2, 2002 (67 FR 15629).

The Commission's related evaluation of the amendment is contained in a Safety Evaluation dated November 18, 2002.

No significant hazards consideration comments received: No.

Dated at Rockville, Maryland, this 2nd day of December 2002.

For the Nuclear Regulatory Commission.

Ledyard B. Marsh,

Deputy Director, Division of Licensing Project Management, Office of Nuclear Reactor Regulation.

[FR Doc. 02–30921 Filed 12–9–02; 8:45 am]

BILLING CODE 7590–01–P

OFFICE OF PERSONNEL MANAGEMENT

SES Performance Review Board

AGENCY: Office of Personnel Management.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members of the OPM Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Teresa Floyd, Office of Human Resources and EEO, Office of Personnel Management, 1900 E Street, NW., Washington, DC 20415, (202) 606–2309.

SUPPLEMENTARY INFORMATION: Section 4314(c) (1) through (5) of title 5, U.S.C., requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES performance review boards. The board reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and considers recommendations to the appointing authority regarding the performance of the senior executive.

Office of Personnel Management.

Kay Coles James,

Director.

The following have been designated as regular members of the Performance Review Board of the Office of Personnel Management:

Paul T. Conway, Chief of Staff—Chair.
Kathy L. Dillaman, Acting Director, Investigations Service.
William E. Flynn, Senior Policy Advisor to the Director.
John C. Gartland, Director, Office of Congressional Relations.
Doris L. Hausser, Acting Director, Workforce Compensation and Performance Service.
Teresa M. Jenkins, Director, Office of Workforce Relations.
Gail Lovelace, Chief People Officer, General Services Administration.
Mark A. Robbins, General Counsel.

[FR Doc. 02–31085 Filed 12–9–02; 8:45 am]

BILLING CODE 6325–45–P

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46942; File No. SR–NASD–99–60]

Self-Regulatory Organizations; Notice of Filing of Amendment Nos. 3 and 4 to a Proposed Rule Change by the National Association of Securities Dealers, Inc. Regarding Restrictions on the Purchase and Sale of Initial Public Offerings of Equity Securities

December 4, 2002.

On October 15, 1999, the National Association of Securities Dealers, Inc. (''NASD'') 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 that would govern trading in ''hot equity'' offerings. The proposed rule, NASD Rule 2790, would revise and replace NASD IM–2110–1, known as the Free-Riding and Withholding Interpretation. On December 21, 1999, the NASD submitted Amendment No. 1 to the proposed rule change.[3] The proposed rule change and Amendment No. 1 were published for comment in the **Federal Register** on January 18, 2000.[4] On October 11, 2000, the NASD submitted Amendment No. 2 to the proposal[5] which, among other things, changed the subject of the proposed rule from ''hot issues'' to ''new issues.'' Amendment No. 2 was published for comment in the **Federal Register** on December 6, 2000.[6] The NASD submitted Amendment No. 3 to the proposal on March 20, 2001,[7] and Amendment No. 4 to the proposal on

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

[3] *See* Letter from Gary L. Goldsholle, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated December 20, 1999 (''Amendment No. 1''). In Amendment No. 1, the NASD made certain technical amendments to the proposed rule change.

[4] Securities Exchange Act Release No. 42325 (January 10, 2000), 65 FR 2656 (''Original Notice'').

[5] *See* Letter from Alden S. Adkins, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated October 10, 2000 (''Amendment No. 2'').

[6] Securities Exchange Act Release No. 43627 (November 28, 2000), 65 FR 76316 (''Amendment No. 2 Notice'').

[7] *See* Letter from Patrice M. Gliniecki, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated March 20, 2001 (''Amendment No. 3'').

June 27, 2002.[8] The Commission is publishing this notice of Amendment Nos. 3 and 4 to solicit comments on proposed rule change, as amended, from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The NASD has proposed to establish new NASD Rule 2790, Restrictions on the Purchase and Sale of Initial Equity Public Offerings, which would replace NASD IM–2110–1, the Free-Riding and Withholding Interpretation. Consolidated changes made to the proposed rule text as a result of Amendment Nos. 3 and 4 are shown below. The base text is that proposed in Amendment No. 2. Text added by Amendment Nos. 3 and 4 is underlined; deleted text is in brackets.

* * * * *

Rule 2790. Restrictions on the Purchase and Sale of Initial Equity Public Offerings

(a) General Prohibitions

(1) A member or a person associated with a member may not sell, or cause to be sold, a new issue to any account in which a restricted person has a beneficial interest, except as otherwise permitted herein.

(2) A member or a person associated with a member may not purchase a new issue in any account in which such member or person associated with a member has a beneficial interest, except as otherwise permitted herein.

(3) A member may not continue to hold new issues acquired by the member as an underwriter, selling group member, or otherwise, except as otherwise permitted herein.

(4) Nothing in this paragraph (a) shall prohibit:

(A) sales or purchases from one member of the selling group to another member of the selling group that are incidental to the distribution of a new issue to a non-restricted person at the public offering price; or

(B) sales or purchases by a broker/dealer of a new issue at the public offering price as part of an accommodation to a non-restricted person customer of the broker/dealer.

(b) Preconditions for Sale

Before selling a new issue to any account, a member must in good faith have obtained within the twelve months prior to such sale, a representation from:

(1) Beneficial Owners

The account holder(s), or a person authorized to represent the beneficial owners of the account, that the account is eligible to purchase new issues in compliance with this rule; *or*

(2) Conduits

A bank, foreign bank, broker/dealer, or investment adviser, or other conduit that all purchases of new issues are in compliance with this rule.

A member may not rely upon any representation that it believes, or has reason to believe, is inaccurate. A member shall maintain a copy of all records and information relating to whether an account is eligible to purchase new issues in its files for at least three years following the member's last sale of a new issue to that account.

(c) General Exemptions

The general prohibitions in paragraph (a) of this rule shall not apply to sales to and purchases by *the following accounts or persons, whether directly or through accounts in which such persons have a beneficial interest:*

(1) An investment company registered under the Investment Company Act of 1940;

(2) A common trust fund or similar fund as described in Section 3(a)(12)(A)(iii) of the Act, provided that:

(A) The fund has investments from 1,000 or more [trust] accounts; and

(B) The fund does not limit beneficial interests in the fund principally to trust accounts of restricted persons;

(3) An insurance company general, separate or investment account, provided that:

(A) The account has investments from 1,000 or more policyholders; and

(B) The insurance company does not limit beneficial interests in the account principally to restricted persons;

(4) An account or joint back office broker/dealer (''JBO'') if the beneficial interests of restricted persons do not exceed in the aggregate 10% of such account or JBO [that is beneficially owned in part by restricted persons, provided that such restricted persons in the aggregate own less than 5% of such account, and that:

(A) each such restricted person does not manage or otherwise direct investments in the account; and

(B) on a pro rata basis, each such restricted person who is a natural person receives less than 100 shares of any new issue];

(5) A publicly traded entity (other than a broker/dealer [) that]*or an affiliate of a broker/dealer where such broker/dealer is authorized to engage in the public offering of new issues either as a selling group member or underwriter) that:*

(A) Is listed on a national securities exchange; [or]

(B) Is traded on the Nasdaq National Market; *or*

(C) Is a foreign issuer whose securities meet the quantitative designation criteria for listing on a national securities exchange or trading on the Nasdaq National Market; [, provided that the gains or losses from new issues are passed on directly or indirectly to public shareholders;]

(6) An investment company organized under the laws of a foreign jurisdiction, provided that:

(A) The investment company is listed on a foreign exchange or authorized for sale to the public by a foreign regulatory authority; and

(B) No person owning more than 5% of the shares of the investment company is a restricted person;

(7) An Employee Retirement Income Security Act benefits plan that is qualified under Section 401(a) of the Internal Revenue Code, provided that such plan is not sponsored solely by a broker/dealer;

(8) A state or municipal government benefits plan that is subject to state and/or municipal regulation; [or]

(9) A tax exempt charitable organization under Section 501(c)(3) of the Internal Revenue Code[.]; *or*

(10) A church plan under Section 414(e) of the Internal Revenue Code.

(d) Issuer-Directed Securities

The prohibitions on the purchase and sale of new issues in this rule shall not apply to securities that:

(1) Are specifically directed by the issuer to *persons that are restricted under the rule;* provided, however, that [this exemption shall not apply to] securities directed by [the issuer to]*an issuer may not be sold to or purchased by* an account in which any restricted person specified in subparagraphs [(i)(10)(B) or (i)(10)(C)]*(i)(11)(B) or (i)(11)(C)* of this rule has a beneficial interest, unless such person, or a member of his or her immediate family, is an employee or director of the issuer, the issuer's parent, or a subsidiary of the issuer *or the issuer's parent.* Also, for purposes of this [sub]paragraph (d)(1) only, a parent/subsidiary relationship is established if the parent has the right to vote 50% or more of a class of voting security of the subsidiary, or has the power to sell or direct 50% or more of a class of voting [securities] *security* of the subsidiary;

[8] *See* Letter from Gary L. Goldshalle, NASD, to Katherine A. England, Division of Market Regulation, SEC, dated June 27, 2002 (''Amendment No. 4'').

(2) Are part of a program sponsored by the issuer or an affiliate of the issuer that meets the following criteria:

(a) The opportunity to purchase a new issue under the program is offered to at least 10,000 participants;

(b) Every participant is offered an opportunity to purchase an equivalent number of shares, or will receive a specified number of shares under a predetermined formula applied uniformly across all participants;

(c) If not all participants receive shares under the program, the selection of the participants eligible to purchase shares is based upon a random or other non-discretionary allocation method; *and*

(d) The class of participants does not contain a disproportionate number of restricted persons as compared to the investing public generally; [and

(e) Sales are not made to participants who are managing underwriter(s), the broker/dealer administering the program (''Administering Broker/Dealer''), the officers or directors of the managing underwriter(s) or Administering Broker/Dealer, or any employee of the managing underwriter(s) or Administering Broker/Dealer with access to non-publicly available information about the new issue;] or

(3) Are directed to eligible purchasers *who are otherwise restricted under the rule* as part of a conversion offering in accordance with the standards of the governmental agency or instrumentality having authority to regulate such conversion offering.

(e) Anti-Dilution Provisions

The prohibitions on the purchase and sale of new issues in this rule shall not apply to an account in which a restricted person has a beneficial interest that meets the following conditions:

(1) The [restricted person] *account* has held an equity ownership interest in the issuer, or a company that has been acquired by the issuer in the past year, for a period of one year prior to the effective date of the offering;

(2) The sale of the new issue to the account shall not increase the [restricted person's] *account's* percentage equity ownership in the issuer above the ownership level as of three months prior to the filing of the registration statement in connection with the offering;

(3) The sale of the new issue to the account shall not include any special terms; and

(4) The new issue purchased pursuant to this [sub]paragraph (e) shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

(f) Stand-by Purchasers

The prohibitions on the purchase and sale of new issues in this rule shall not apply to the purchase and sale of securities pursuant to a stand-by agreement that meets the following conditions:

(1) The stand-by agreement is disclosed in the prospectus;

(2) The stand-by agreement is the subject of a formal written agreement;

(3) The managing underwriter(s) represents in writing that it was unable to find any other purchasers for the securities; and

(4) The securities sold pursuant to the stand-by agreement shall not be sold, transferred, assigned, pledged or hypothecated for a period of three months following the effective date of the offering.

(g) Under-Subscribed Offerings

Nothing in this rule shall prohibit an underwriter, pursuant to an underwriting agreement, from placing a portion of a public offering in its investment account when it is unable to sell that portion to the public.

(h) Exemptive Relief

Pursuant to the Rule 9600 series, the staff, for good cause shown after taking into consideration all relevant factors, may conditionally or unconditionally exempt any person, security or transaction (or any class or classes of persons, securities or transactions) from this rule to the extent that such exemption is consistent with the purposes of the rule, the protection of investors, and the public interest.

(i) Definitions

(1) ''Beneficial interest'' means any economic interest, such as the right to share in gains or losses. The receipt of a management or performance based fee for operating a collective investment account, *or other fees for acting in a fiduciary capacity,* shall not be considered a beneficial interest in the account.

(2) ''Collective investment account'' means any hedge fund, investment partnership, investment corporation, or any other collective investment vehicle *that is engaged primarily in the purchase and/or sale of securities. A ''collective investment account'' does not include a ''family investment vehicle'' or an ''investment club.''*[.]

(3) ''Conversion offering'' means any offering of securities made as part of a plan by which a savings and loan association, insurance company, or other organization converts from a mutual to a stock form of ownership.

(4) ''Family [partnership'' means a partnership comprised solely of] *investment vehicle'' means a legal entity that is beneficially owned solely* by immediate family members.

(5) ''Immediate family member'' means a person's parents, mother-in-law or father-in-law, spouse, brother or sister, brother-in-law or sister-in-law, son-in-law or daughter-in-law, and children, and any other individual to whom the person provides material support.

(6) ''Investment club'' means a group of friends, neighbors, business associates, or others that pool their money to invest in stock or other securities and are collectively responsible for making investment decisions.

(7) *''Joint Back Office Broker/Dealer'' means any domestic or foreign private investment fund that has elected to register as a broker/dealer solely to take advantage of the margin treatment afforded under Section 220.7 of Regulation T of the Federal Reserve. The activities of a joint back office broker/dealer must not require that it register as a broker/dealer under Section 15(a) of the Act.*

(8) ''Limited business broker/dealer'' means any broker/dealer whose authorization to engage in the securities business is limited solely to the purchase and sale of investment company/variable contracts securities and direct participation program securities.

[*(8)*]*(9)* ''Material support'' means directly or indirectly providing more than 25% of a person's income in the [current or] prior calendar year. Members of the immediate family living in the same household are deemed to be providing each other with material support.

[(9)]*(10)* ''New issue'' means any initial public offering of an equity security as defined in Section 3(a)(11) of the Act, made pursuant to a registration statement or offering circular[, or other securities distributions of any kind whatsoever, including securities that are specifically directed by the issuer on a non-underwritten basis]. New issue shall not include:

(A) Offerings made pursuant to an exemption under Section 4(1), 4(2) or 4(6) of the Securities Act of 1933, or SEC Rule 504 if the securities are ''restricted securities'' under SEC Rule 144(a)(3), *or Rule 144A* or Rule 505 or Rule 506 adopted thereunder;

(B) Offerings of exempted securities as defined in Section 3(a)(12) of the Act*, and rules promulgated thereunder;*

(C) *Offerings of securities of a commodity pool operated by a commodity pool operator as defined under Section 1a(5) of the Commodity Exchange Act;*

(D) Rights offerings, exchange offers, or offerings made pursuant to a merger or acquisition;

[(D)]*(E)* Offerings of investment grade asset-backed securities;

[(E)]*(F)* Offerings of convertible securities;

[(F)]*(G)* Offerings of preferred securities; and

[(G)]*(H)* Offerings of [securities of closed-end companies as defined under Section (5)(a)(2) of] a*n investment company registered under* the Investment Company Act of 1940.

[(10)]*(11)* ''Restricted person'' means:

(A) Members or other broker/dealers;

(B) Broker/Dealer Personnel:

(i) Any officer, director, general partner, associated person, or employee of a member or any other broker/dealer (other than a limited business broker/dealer); [, or any]

(ii) Any agent of a member or any other broker/dealer (other than a limited business broker/dealer) that is engaged in the investment banking or securities business; *or*

[(ii)](*iii*) An immediate family member of a person specified in subparagraph (B)(i) *or* (ii) if the person specified in subparagraph (B)(i) *or* (ii):

(a) Materially supports, or receives material support from, the immediate family member;

(b) Is employed by or associated with the member, or an affiliate of the member, selling the new issue to the immediate family member; or

(c) Has an ability to control the allocation of the new issue.

(C) Finders and Fiduciaries:

(i) With respect to the security being offered, a finder or any person acting in a fiduciary capacity to the managing underwriter, including, but not limited to, attorneys, accountants and financial consultants; and

(ii) An immediate family member of a person specified in subparagraph (C)(i) if the person specified in subparagraph (C)(i) materially supports, or receives material support from, the immediate family member.

(D) Portfolio Managers:

(i) Any person who has authority to buy or sell securities for a bank, savings and loan institution, insurance company, investment company, investment advisor, or collective investment account[, other than with respect to a beneficial interest in the bank, savings and loan institution, insurance company, investment company, investment advisor, or collective investment account over which such person has investment authority;].

(ii) An immediate family member of a person specified in subparagraph (D)(i) that *materially supports, or receives material support from, such person* [is materially supported by such person, other than with respect to a beneficial interest in the bank, savings and loan institution, insurance company, investment company, investment advisor, or collective investment account over which such person has investment authority.

Provided, however, that the term ''restricted person'' under this subparagraph (D) shall not include a person solely because he or she is a participant in an investment club or a family partnership].

(E) Persons Owning a Broker/Dealer

(i) Any person listed, or required to be listed, in Schedule A of a Form BD *(other than with respect to a limited business broker/dealer),* except persons [with] *identified by an* ownership [interests] *code* of less than 10%;

(ii) [any] *Any* person listed, or required to be listed, in Schedule B of a Form BD *(other than with respect to a limited business broker/dealer),* except persons whose listing on Schedule B relates to an ownership interest in a person listed on Schedule A [with] *identified by* an ownership [interest] code of less than 10%;

(iii) [any] *Any* person listed, or required to be listed, in Schedule C of a Form BD that meets the criteria of subparagraphs (E)(i) and (E)(ii) above;

(iv) [any] *Any* person that directly or indirectly owns 10% or more of a public reporting company listed [on], *or required to be listed, in* Schedule A of a Form BD (other than a reporting company that is listed on a national securities exchange or is traded on the Nasdaq National Market, [provided that the gains or losses from new issues are passed on directly or indirectly to public shareholders);] *or other than with respect to a limited business broker/dealer);*

(v) Any person that directly or indirectly owns 25% or more of a public reporting company listed [on], *or required to be listed,* in Schedule B of a Form BD (other than a reporting company that is listed on a national securities exchange or is traded on the Nasdaq National Market, [provided that the gains or losses from new issues are passed on directly or indirectly to public shareholders)] *or other than with respect to a limited business broker/dealer).*

(vi) An immediate family member of a person specified in subparagraphs (E)(i)–(v) unless the person owning the broker/dealer:

(a) Does not materially support, or receive material support from, the immediate family member;

(b) Is not an owner of the member, or an affiliate of the member, selling the new issue to the immediate family member; and

(c) Has no ability to control the allocation of the new issue.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NASD included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The NASD has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

Between December 2000 and March 2001, the Commission received 14 comment letters on the proposed rule change.[9] These comment letters offered a number of suggestions to improve the clarity and consistency of the proposed rule change. Some comment letters also sought additional exemptions that are not in NASD IM–2110–1. The NASD

[9] *See* Letter from The Washington Group to Jonathan G. Katz, SEC, dated December 21, 2000; Letter from Fried, Frank, Harris, Shriver & Jacobson to Jonathan G. Katz, SEC, dated December 22, 2000; Letter from Capital International, Inc. to Jonathan G. Katz, SEC, dated December 22, 2000; Letters from Cadwalader, Wickersham & Taft to Jonathan G. Katz, SEC, dated December 22, 2000 and January 4, 2001; Letter from Testa, Hurwitz & Thibeault to Jonathan G. Katz, SEC, dated December 26, 2000; Letter from Managed Funds Association to Jonathan G. Katz, SEC, dated December 26, 2000; Letter from Mayor, Day, Caldwell & Keeton, L.L.P. to Jonathan G. Katz, SEC, dated December 26, 2000; Letter from Sullivan & Cromwell to Jonathan G. Katz, SEC, dated December 29, 2000; Letter from Willkie Farr & Gallagher to Jonathan G. Katz, SEC, dated January 8, 2001; Letter from Securities Industry Association to Margaret H. McFarland, SEC, dated January 10, 2001; Letter from Chicago Board Options Exchange to Jonathan G. Katz, SEC, dated January 12, 2001; Letter from Morgan Stanley Dean Witter to Secretary, SEC, dated January 31, 2001; Letter from The Washington Group to Laura S. Unger, Acting Chair, SEC, dated March 27, 2001. Recently, the Commission has received two additional comment letters that, among other things, advocate the publication of Amendment No. 4 in the **Federal Register**. *See* Letter from Willkie Farr & Gallagher to SEC dated September 24, 2002; Letter from Managed Funds Association to SEC dated October 15, 2002.

reviewed the 14 comment letters and made various revisions to proposed NASD Rule 2790. Interested persons may view Amendment Nos. 3 and 4, which explain these revisions and respond to the comments received, at the following Web site: *http://www.nasdr.com/filings/rf99_60.asp.* Amendment Nos. 3 and 4 are also available at the principal offices of the NASD and at the Commission's Public Reference Room.

2. Statutory Basis

The NASD previously has stated that the proposed rule change is consistent with the provisions of Section 15A(b)(6) of the Act.[10] The NASD believes that the proposal would protect investors and further the public interest by ensuring that NASD members make a *bona fide* public offering of securities at the public offering price; ensuring that members do not withhold securities in a public offering for their own benefit or use such securities to reward certain persons who are in a position to direct future business to the member; and ensuring that industry ''insiders,'' including members and their associated persons, do not take advantage of their ''insider'' position in the industry to purchase new issues for their own benefit at the expense of public customers.[11] The NASD continues to believe that the amended proposal is consistent with this statement.[12]

B. Self-Regulatory Organization's Statement on Burden on Competition

The NASD previously has stated that the proposed rule change would not result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.[13] The NASD continues to believe that the amended proposal is consistent with this statement.[14]

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants, or Others

Amendment Nos. 3 and 4 reflect changes to the proposal made by the NASD in response to the 14 comments received between December 2000 and March 2001.[15]

[10] 15 U.S.C. 78o–3(b)(6).

[11] *See* Amendment No. 2 Notice, 65 FR at 76328.

[12] Telephone conversation between Gary Goldsholle, NASD, and Michael Gaw, Division of Market Regulation, SEC, on November 25, 2002.

[13] *See* Amendment No. 2 Notice, 65 FR at 76328.

[14] Telephone conversation between Gary Goldsholle, NASD, and Michael Gaw, Division of Market Regulation, SEC, on November 25, 2002.

[15] *Id.*

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding, or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve such proposed rule change; or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views, and arguments concerning the foregoing, including whether the proposed rule change, as amended, is consistent with the Act. The Commission notes that the NASD is continuing to consider the need for additional rule changes relating to IPO allocation practices.[16] For example, the NASD has separately sought comment on a practice referred to as ''spinning.'' The NASD has solicited comment on whether it should adopt rule changes prohibiting NASD members from allocating IPO shares to an executive officer or director of a company on the condition that the officer or director send the company's investment banking business to the member, or as consideration for investment banking services previously rendered.[17] Those proposals are not covered by the present rule change proposals and would be addressed in a future filing.

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 NASD. All submissions should refer to File No. SR–NASD–99–60 and should be submitted by December 31, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[18]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–31161 Filed 12–9–02; 8:45 am]

BILLING CODE 8010–01–P

[16] *See, e.g.*, NASD Notice to Members 02–55 (August 2002).

[17] *See id.*

[18] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–46943; File No. SR–NYSE–2002–58]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the New York Stock Exchange, Inc. Amending the Exchange's Automatic Execution Facility (NYSE Direct+)

December 4, 2002.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on November 1, 2002, the New York Stock Exchange, Inc. (''NYSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the NYSE. 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 consists of amendments to Exchange Rules governing NYSE Direct+® (''NYSE Direct +''). The rule amendments propose to amend NYSE Rule 1005 to permit entry of limit orders up to 1,099 shares within 30 seconds for an account in which the same person has an interest, provided that the orders are entered from different terminals and that the member or member organization responsible for the entry of the orders to the trading floor (''Floor'') has procedures to monitor compliance with the separate terminal requirement. Below is the text of the proposed rule change. Proposed new text is *italicized* and proposed deleted text is [bracketed].

* * * * *

Rule 1005 An auto ex order for any account in which the same person is directly or indirectly interested may

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

only be entered at intervals of no less than 30 seconds between entry of each such order in a stock[.]*, unless the orders are entered by means of separate order entry terminals, and the member or member organization responsible for entry of the orders to the Floor has procedures in place to monitor compliance with the separate terminal requirement.*

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the NYSE 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 and is set forth in Sections A, B, and C below.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The NYSE Direct+ pilot [3] provides for the automatic execution of limit orders of 1099 shares or less (known as an ''NX order'' or auto ex order) against trading interest reflected in the Exchange's published quotation. It is not mandatory that all limit orders of 1099 shares be entered as NX orders; rather, the member organization entering the order, or its customer if enabled by the member organization, can choose to enter an NX order when such member organization (or customer) believes that the speed and certainty of an execution at the Exchange's published bid or offer price is in its customer's best interest.

An order placed in NYSE Direct+ is executed when the limit price is equal to or better than the published bid or offer. If an order placed in NYSE Direct+ is not executed, it is placed on the specialist's book for representation in the market at its limit price.

NYSE Rule 1005 provides that an NX order for any account in which the same person is directly or indirectly interested may only be entered at intervals of no less than 30 seconds between entry of each such order. The restriction against the same customer entering an order within 30 seconds focuses on the identity of the ultimate beneficial owner of an account. Thus, an order cannot be entered for the same beneficial owner within 30 seconds. The purpose of this restriction is to limit the ability of a trader to circumvent the restriction on order size by breaking a large order into smaller components and repetitively entering them to exhaust liquidity at the published bid or offer price. The restriction in NYSE Rule 1005 applies across an entire firm, even if separate traders are making independent decisions with respect to an account in which the firm has an interest.

The Exchange is proposing to amend NYSE Rule 1005 to permit entry of NX orders within 30 seconds for an account in which the same person has an interest, provided that the orders are entered from different terminals and that the member or member organization responsible for the entry of the orders to the Floor has procedures to monitor compliance with the separate terminal requirement. Such procedures, at a minimum, would require member organization compliance departments to review patterns of order entry from individual terminals on a periodic basis to ensure compliance with the 30 second requirement. The Exchange will include compliance with NYSE Rule 1005 in its examination scope when conducting its periodic examinations of member organizations. This amendment is not inconsistent with the original intent of Rule 1005 to preclude the intentional breaking up of large size orders to circumvent the 1099 NX order size limitation because orders are typically entered by traders who are independent decision makers and who operate from his or her own discrete order entry terminal. Thus, as a practical matter, the Exchange believes that the proposed amendment to NYSE Rule 1005 cannot reasonably be expected to facilitate the ability of any individual trader to break up large orders at less than 30 second intervals to circumvent the 1099 share size limitation for NX orders.

2. Statutory Basis

The Exchange believes that the proposed rule change is consistent with section 6(b)(5),[4] which requires an Exchange to have rules that are designed to promote just and equitable principles of trade, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest. The Exchange also believes that the proposed rule change is designed to support the principles of section 11A(a)(1) of the Act [5] in that it seeks to assure economically efficient execution of securities transactions, make it practicable for brokers to execute investors' orders in the best market, and provide an opportunity for investors' orders to be executed without the participation of a dealer.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the NYSE consents, the Commission will:

(A) by order approve the proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal 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

[3] *See* Securities Exchange Act Release No. 43767 (December 22, 2000), 66 FR 834 (January 4, 2001) (SR-NYSE–2000–18) (Approving the NYSE Direct + pilot). The one-year pilot was subsequently extended for another year in Securities Exchange Act Release No. 45331 (January 24, 2002), 67 FR 5024 (February 1, 2002) (SR-NYSE–2001–50). In addition, we have recently requested another year extension, beginning December 24, 2002. *See* Securities Exchange Act Release No. 46906 (November 25, 2002) (SR–NYSE–2002–47). This proposal, if approved, would be part of the pilot and only run while the pilot runs. Telephone conversation between Donald Siemer, Director, Market Surveillance, NYSE, and Sonia Patton, Special Counsel, Division of Market Regulation, Commission, December 3, 2002.

[4] 15 U.S.C. 78f(b)(5).

[5] 15 U.S.C. 78k–1(a)(1).

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 NYSE. All submissions should refer to File No. SR–NYSE–2002–58 and should be submitted by December 31, 2002.

For the Commission, by the Division of Market Regulation, pursuant to delegated Authority.[6]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–31162 Filed 12–9–02; 8:45 am]

BILLING CODE 8010–01–P

SOCIAL SECURITY ADMINISTRATION

Modifications to the Disability Determination Procedures; Extension of Testing of Some Disability Redesign Features

AGENCY: Social Security Administration (SSA).

ACTION: Notice of the extension of tests involving modifications to the disability determination procedures.

SUMMARY: We are announcing the extension of tests involving modifications to our disability determination procedures that we are conducting under the authority of current rules codified at 20 CFR 404.906 and 416.1406. These rules provide authority to test several modifications to the disability determination procedures that we normally follow in adjudicating claims for disability insurance benefits under title II of the Social Security Act (the Act) and for supplemental security income payments based on disability under title XVI of the Act. We have decided to extend the testing of two redesign features of the disability prototype for 6 months to enable us to address transition issues.

DATES: We are extending our selection of cases to be included in these tests from December 30, 2002, until no later than June 30, 2003. If we decide to continue selection of cases for these tests beyond this date, we will publish another notice in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Phil Landis, Disability Process Redesign Staff, Office of Disability Determinations, Social Security Administration, 6401 Security Boulevard, Baltimore, Maryland 21235–6401, 410–965–5388.

SUPPLEMENTARY INFORMATION: Current regulations at 20 CFR 404.906 and 416.1406 authorize us to test, individually, or in any combination, different modifications to the disability determination procedures. We have conducted several tests under the authority of these rules, including a prototype that incorporates a number of modifications to the disability determination procedures that the State agencies use. The prototype included three redesign features, and we previously extended the tests of two of those features: the use of a single decisionmaker, in which a disability examiner may make the initial disability determination in most cases without requiring the signature of a medical consultant; and elimination of the reconsideration level of review. We are now announcing a further extension of the testing of these two features.

We also have conducted another test involving the use of a single decisionmaker who may make the initial disability determination in most cases without requiring the signature of a medical consultant. We are also extending the period during which we will select cases to be included in this test of the single decisionmaker feature.

Extension of Testing of Some Disability Redesign Features

On August 30, 1999, we published in the **Federal Register** a notice announcing a prototype that would test a new disability claims process in 10 States, also called the prototype process (64 FR 47218). On December 23, 1999, we published a notice in the **Federal Register** (65 FR 72134) extending the period during which we would select cases to be included in a separate test of the single decisionmaker feature. In these notices, we stated that selection of cases was expected to be concluded on or about December 31, 2001. We also stated that, if we decided to continue the tests beyond that date, we would publish another notice in the **Federal Register**. We subsequently published notices in the **Federal Register** extending selection of cases for these tests. Most recently, on June 24, 2002, we published a notice extending selection of cases for the tests until no later than December 30, 2002 (67 FR 42594). We also stated that, if we decided to continue selection of cases for these tests beyond that date, we would publish another notice in the **Federal Register**. We have decided to extend selection of cases for two features of the prototype process (single decisionmaker and elimination of the reconsideration step), and the separate test of single decisionmaker beyond December 30, 2002. We expect that our selection of cases for these tests will end on or before June 30, 2003.

This extension also applies to the locations in the State of New York that we added to the prototype test in a notice published in the **Federal Register** on December 26, 2000 (65 FR 81553).

Dated: December 3, 2002.

Martin H. Gerry,

Deputy Commissioner for Disability and Income Security Programs.

[FR Doc. 02–31074 Filed 12–9–02; 8:45 am]

BILLING CODE 4191–02–P

DEPARTMENT OF STATE

[Public Notice 4195]

Overseas Buildings Operations; Industry Advisory Panel: Meeting Notice

Due to scheduling constraints, the Industry Advisory Panel of Overseas Buildings Operations will meet on Thursday, December 19, 2002 from 9:45 until 11:45 a.m. and 1 until 3:30 p.m. Eastern Standard Time. The meeting will be held in conference room 1105 at the Department of State, 2201 C Street, NW. (entrance on 23rd Street), Washington, DC. The purpose of the meeting is to discuss new technologies and successful management practices for design, construction, security, property management, emergency operations, the environment, and planning and development. An agenda will be available prior to the meeting.

The meeting will be open to the public, however, seating is limited. Prior notification and a valid photo ID are mandatory for entry into the building. Members of the public who plan to attend must notify Luigina Pinzino at 703/875–7109 before Friday, December 13, 2002, to provide date of birth, Social Security number, and telephone number.

FOR FURTHER INFORMATION CONTACT: Luigina Pinzino 703/875–7109.

Dated: November 25, 2002.

Charles E. Williams,

Director/Chief Operating Officer, Overseas Buildings Operations, Department of State.

[FR Doc. 02–31147 Filed 12–9–02; 8:45 am]

BILLING CODE 4710–24–P

[6] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Surface Transportation Board

[STB Docket No. AB–6 (Sub–No. 399X)]

The Burlington Northern and Santa Fe Railway Company—Abandonment Exemption—in Jefferson County, NE

The Burlington Northern and Santa Fe Railway Company (BNSF) has filed a verified notice of exemption under 49 CFR 1152 subpart F—*Exempt Abandonments* to abandon a 10.8-mile line of railroad between milepost 127.83, near Reynolds, and milepost 117.03, near Endicott, in Jefferson County, NE (line). The line traverses United States Postal Service zip codes 68429, 68350, and 68352.

Applicant has certified that: (1) No local traffic has moved over the line for the prior 2 years; (2) there is no overhead traffic to be rerouted; (3) no formal complaint filed by a user of rail service on the line (or by a state or local government agency acting on behalf of such user) regarding cessation of service over the line either is pending with the Surface Transportation Board (Board) or any U.S. District Court or has been decided in favor of complainant within the last two years; and (4) the requirements at 49 CFR 1105.7 (environmental reports), 49 CFR 1105.8 (historic reports), 49 CFR 1105.11 (transmittal letter), 49 CFR 1105.12 (newspaper publication), and 49 CFR 1152.50(d)(1) (notice to governmental agencies) have been met.

As a condition to this exemption, any employee adversely affected by the abandonment shall be protected under *Oregon Short Line R. Co.—Abandonment—Goshen,* 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10502(d) must be filed. Provided no formal expression of intent to file an offer of financial assistance (OFA) has been received, this exemption will be effective on January 9, 2003, unless stayed pending reconsideration. Petitions to stay that do not involve environmental issues,[1] formal expressions of intent to file an OFA under 49 CFR 1152.27(c)(2),[2] and trail use/rail banking requests under 49 CFR 1152.29 must be filed by December 20, 2002. Petitions to reopen or requests for public use conditions under 49 CFR 1152.28 must be filed by December 30, 2002, with the Surface Transportation Board, 1925 K Street, NW., Washington, DC 20423–0001.

A copy of any petition filed with the Board should be sent to applicant's representative: Michael Smith, Esq., Freeborn & Peters, 311 S. Wacker Drive, Suite 3000, Chicago, IL 60606–6677. If the verified notice contains false or misleading information, the exemption is void *ab initio.*

Applicant has filed a separate environmental report which addresses the abandonment's effects, if any, on the environment and historic resources. SEA will issue an environmental assessment (EA) by December 16, 2002. Interested persons may obtain a copy of the EA by writing to SEA (Room 500, Surface Transportation Board, Washington, DC 20423–0001) or by calling SEA, at (202) 565–1552. (Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1–800–877–8339.) Comments on environmental and historic preservation matters must be filed within 15 days after the EA becomes available to the public.

Environmental, historic preservation, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Pursuant to the provisions of 49 CFR 1152.29(e)(2), BNSF shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by BNSF's filing of a notice of consummation by December 10, 2003, and there are no legal or regulatory barriers to consummation, the authority to abandon will automatically expire.

Board decisions and notices are available on our website at *http://www.stb.dot.gov.*

Decided: November 26, 2002.

By the Board, David M. Konschnik, Director, Office of Proceedings.

Vernon A. Williams,

Secretary.

[FR Doc. 02–30803 Filed 12–9–02; 8:45 am]

BILLING CODE 4915–00–P

[1] The Board will grant a stay if an informed decision on environmental issues (whether raised by a party or by the Board's Section of Environmental Analysis (SEA) in its independent investigation) cannot be made before the exemption's effective date. *See Exemption of Out-of-Service Rail Lines,* 5 I.C.C.2d 377 (1989). Any request for a stay should be filed as soon as possible so that the Board may take appropriate action before the exemption's effective date.

[2] Each offer of financial assistance must be accompanied by the filing fee, which currently is set at $1,100. *See* 49 CFR 1002.2(f)(25).

DEPARTMENT OF TRANSPORTATION

Transportation Security Administration

Reports, Forms, and Record Keeping Requirements: Agency Information Collection Activity under OMB Review; Security Programs for Foreign Air Carriers

AGENCY: Transportation Security Administration (TSA), DOT.

ACTION: Notice.

SUMMARY: This notice announces that TSA has forwarded the Information Collection Request (ICR) abstracted below to the Office of Management and Budget (OMB) for review and clearance of an extension of the currently approved collection under the Paperwork Reduction Act. The ICR describes the nature of the information collection and its expected burden. TSA published a **Federal Register** notice, with a 60-day comment period soliciting comments, of the following collection of information on August 13, 2002.

DATES: Send your comments by January 9, 2003. A comment to OMB is most effective if OMB receives it within 30 days of publication.

ADDRESSES: Address your comments to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: DOT–TSA Desk Officer.

FOR FURTHER INFORMATION CONTACT: Dan Mullarkey, Office of Security Regulation & Policy, Transportation Security Administration, 400 7th Street, SW., Washington, DC 20590–0001; telephone (202) 385–1236; facsimile (202) 493–1818; e-mail *Dan.Mullarkey@tsa.dot.gov.*

SUPPLEMENTARY INFORMATION:

Transportation Security Administration (TSA)

Title: Security Programs for Foreign Air Carriers.

Type of Request: Extension of a currently approved collection.

OMB Control Number: 2110–0006.

Forms(s): 1650–17, 1650–8.

Affected Public: A total of 171 foreign air carriers.

Abstract: The information collected is used to determine compliance of 49 CFR part 1546 and to ensure passenger safety by monitoring foreign air carrier security procedures. These security programs establish procedures that foreign air carriers must carry out to protect persons and property against acts of criminal violence, aircraft piracy, and terrorist activities.

Estimated Annual Burden Hours: An estimated 5,193 hours annually.

TSA is soliciting comments to—

(1) evaluate whether the proposed information requirement is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) evaluate the accuracy of the agency's estimate of the burden;

(3) enhance the quality, utility, and clarity of the information to be collected; and

(4) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology.

Issued in Washington, DC, on December 4, 2002.

Susan T. Tracey,

Deputy Chief Administrative Officer.

[FR Doc. 02–31148 Filed 12–9–02; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF THE TREASURY

Office of Foreign Assets Control

Payments to Persons Who Hold Certain Categories of Judgments Against Cuba or Iran

AGENCY: Department of the Treasury; Office of Foreign Assets Control.

ACTION: Notice.

SUMMARY: This notice specifies a widening of the scope of eligibility for payment under Section 2002 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106–386 (''Section 2002''), that has resulted from an amendment to Section 2002. Section 2002 directs the Secretary of the Treasury to make payments to persons who hold certain categories of judgments against Cuba or Iran in suits brought under 28 U.S.C. 1605(a)(7).

This notice also provides updated telephone numbers for contact persons at the Department of the Treasury.

DATES: This Notice is effective December 10, 2002.

FOR FURTHER INFORMATION CONTACT: For questions regarding submission of applications, Rochelle E. Stern, Chief, Policy Planning and Program Management Division, Office of Foreign Assets Control, can be reached at 202–622–2500 (not a toll free call). For legal questions, call the Office of the Chief Counsel (Foreign Assets Control) at 202–622–2410 (not a toll free call).

SUPPLEMENTARY INFORMATION: On November 22, 2000, at 65 FR 70382, the Office of Foreign Assets Control, Department of the Treasury, published a **Federal Register** Notice (''November Notice'') specifying the procedures necessary for persons to establish their eligibility for payments authorized by Section 2002. The November Notice specified information and documentation that applicants must submit to establish eligibility. Part 2(e) of the November Notice implements Section 2002(a)(2) by providing that an applicant for payment under Section 2002 must meet one of two alternative requirements. To meet the first requirement, Part 2(e)(1) of the November Notice provides that the applicant must establish that he or she had, as of July 20, 2000, a final judgment for a claim brought under 28 U.S.C. 1605(a)(7) against Iran or Cuba. For those applicants who do not satisfy the requirements of Part 2(e)(1), Part 2(e)(2) of the November Notice requires the submission of satisfactory proof of the date on which applicants filed suit against Iran or Cuba under 28 U.S.C. 1605(a)(7), and it lists the five dates upon which applicants must have filed suit in order to be eligible for payment. Such applicants must also establish that they have final judgments in these suits.

On September 30, 2002, Section 2002 was amended by Section 686 of Pub. L. No. 107–228. The amendment of Section 2002(a)(2)(A)(ii) replaced ''or July 27, 2000'' with ''June 6, 2000, July 27, 2000, or January 16, 2002'', adding two additional dates for the filing of suits by persons eligible for payment under Section 2002.

Accordingly, Part 2(e)(2) of the November Notice is amended to read as follows:

(2) If an applicant does not satisfy paragraph (1) above, the applicant shall submit satisfactory proof of the date on which the applicant filed a suit against Iran or Cuba under 28 U.S.C. 1605(a)(7). This proof shall be in the form of a docket sheet or other document that has been certified by the clerk of the court in which the suit was filed. Applicants proceeding under this paragraph shall be eligible for payment only if suit was filed on February 17, 1999, December 13, 1999, January 28, 2000, March 15, 2000, June 6, 2000, July 27, 2000, or January 16, 2002. The applicant must also establish that he or she has a final judgment in this suit by submitting the judgment specified in Part 2(b) above, along with all appellate orders on that judgment, if any, and a signed statement demonstrating why further appellate review is unavailable.

Dated: November 7, 2002.

R. Richard Newcomb,

Director, Office of Foreign Assets Control.

Approved: November 20, 2002.

Kenneth Lawson,

Assistant Secretary (Enforcement), Department of the Treasury.

[FR Doc. 02–31212 Filed 12–6–02; 2:24 pm]

BILLING CODE 4810–25–P

DEPARTMENT OF VETERANS AFFAIRS

President' Task Force To Improve Health Care Delivery for Our Nation's Veterans, Notice of Meeting

The Department of Veterans Affairs (VA) gives notice under Public Law 92–463 that a meeting of the President's Task Force to Improve Health Care Delivery for Our Nation's Veterans is scheduled for Wednesday, December 11, 2002, beginning at 8 a.m. and adjourning at 5 p.m. The meeting will be held in the Horizon Ballroom of the Ronald Reagan Building International Trade Center, 1300 Pennsylvania Avenue, NW., Washington, DC and is open to the general public.

The purpose of the President's Task Force to Improve Health Care Delivery for Our Nation's Veterans is to:

(a) Identify ways to improve benefits and services for Department of Veterans Affairs (VA) beneficiaries and Department of Defense (DOD) military retirees who are also eligible for benefits from VA, through better coordination of the activities of the two departments;

(b) Identify opportunities to remove barriers that impede VA and DOD coordination, including budgeting processes, timely billing, cost accounting, information technology, and reimbursement; and

(c) Identify opportunities through partnership between VA and DOD, to maximize the use of resources and infrastructure, including buildings, information technology and data sharing systems, procurement of supplies, equipment, and services.

The morning and afternoon sessions will be a discussion of format and issues for the final report to the President.

Interested parties can provide written comments to Mr. Dan Amon, Communications Director, President's Task Force to Improve Health Care Delivery for Our Nation's Veterans, 1401 Wilson Boulevard, 4th Floor, Arlington, Virginia, 22209.

Dated: November 29, 2002.

By Direction of the Secretary.

Nora E. Egan,

Committee Management Officer.

[FR Doc. 02–31122 Filed 12–9–02; 8:45 am]

BILLING CODE 8320–01–M

DEPARTMENT OF VETERANS AFFAIRS

Enhanced-Use Lease Development of Property at the Department of Veterans Affairs Medical Center, Hines, IL

AGENCY: Department of Veterans Affairs.

ACTION: Notice of intent to designate.

SUMMARY: The Secretary of the Department of Veterans Affairs (VA) is designating a site at the Edward Hines Jr., Veterans Affairs Medical Center, Hines, Illinois, for an enhanced-use lease development. The Department intends to enter into a long-term lease of real property with Catholic Charities, a not-for-profit charitable organization that will finance, design, develop, maintain and manage a transitional living center and low-income senior residence for veterans and non-veterans, at no cost to VA.

FOR FURTHER INFORMATION CONTACT: Jake Gallun, Office of Asset Enterprise Management (004B2), Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 273–8862.

SUPPLEMENTARY INFORMATION: 38 U.S.C. 8161 *et seq.*, specifically provides that the Secretary may enter into an enhanced-use lease, if he determines that: At least part of the use of the property under the lease will be to provide appropriate space for an activity contributing to the mission of the Department; the lease will not be inconsistent with and will not adversely affect the mission of the Department; and the lease will enhance the property or result in improved services to veterans. This project meets these requirements.

Approved: December 2, 2002.

Anthony J. Principi,

Secretary of Veterans Affairs.

[FR Doc. 02–31123 Filed 12–9–02; 8:45 am]

BILLING CODE 8320–01–P

Corrections

Federal Register
Vol. 67, No. 237
Tuesday, December 10, 2002

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–124667–02]

RIN 1545–BA78

Disclosure of Relative Values of Optional Forms of Benefit

Correction

In proposed rule document 02–25338 beginning on page 62417 in the issue of Monday, October 7, 2002, make the following correction:

§ 1.417(a)(3)–1 [Corrected]

On page 62425, in § 1.417(a)(3)–1, the table is being republished in its entirety.

AGE 55 COMMENCEMENT

Optional form	Amount of distribution per $1,000 of immediate single life annuity	Relative value
Life Annuity	$1,000 per month	Approximately the same value as the OJSA.
QJSA (joint and 75% survivor annuity)	$956 per month	n/a.
Joint and 100% survivor annuity	$886 per month	Approximately the same value as the QJSA.
Lump sum	$165,959	Approximately the same value as the QJSA.

AGE 60 COMMENCEMENT

Optional form	Amount of distribution per $1,000 of immediate single life annuity	Relative value
Life Annuity	$1,000 per month	Approximately 94% of the value of the QJSA.
QJSA (joint and 75% survivor annuity)	$945 per month	n/a.
Joint and 100% survivor annuity	$859 per month	Approximately 94% of the value of the QJSA.
Lump sum	$151,691	Approximately the same value as the QJSA.

AGE 65 COMMENCEMENT

Optional form	Amount of distribution per $1,000 of immediate single life annuity	Relative value
Life Annuity	$1,000 per month	Approximately 93% of the value of the QJSA.
QJSA (joint and 75% survivor annuity)	$932 per month	n/a.
Joint and 100% survivor annuity	$828 per month	Approximately 93% of the value of the QJSA.
Lump sum	$135,759	Approximately 93% of the value of the QJSA.

[FR Doc. C2–25338 Filed 12–9–02; 8:45 am]
BILLING CODE 1505–01–D

Federal Register

Tuesday,
December 10, 2002

Part II

Department of Transportation

Federal Highway Administration

23 CFR Parts 627, et al.
Design-Build Contracting; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

23 CFR Parts 627, 635, 636, 637 and 710

[FHWA Docket No. FHWA–2000–7799]

RIN 2125–AE79

Design-Build Contracting

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is implementing regulations for design-build contracting as mandated by section 1307(c) of the Transportation Equity Act for the 21st Century (TEA–21), enacted on June 9, 1998. The TEA–21 requires the Secretary of Transportation (Secretary) to issue regulations to allow design-build contracting for selected projects. The regulations list the criteria and procedures that will be used by the FHWA in approving the use of design-build contracting by State Transportation Departments (STDs). The regulation does not require the use of design-build contracting, but allows STDs to use it as an optional technique in addition to traditional contracting methods.

EFFECTIVE DATE: The final rule is effective January 9, 2003.

FOR FURTHER INFORMATION CONTACT: For technical information: Mr. Gerald Yakowenko, Office of Program Administration (HIPA), (202) 366–1562. For legal information: Mr. Harold Aikens, Office of the Chief Counsel (HCC–30), (202) 366–1373, Federal Highway Administration, 400 Seventh Street, SW., Washington, DC 20590–0001. Office hours are from 8 a.m. to 4:30 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users may access all comments received by the U.S. DOT Dockets, Room PL–401, by using the universal resource locator (URL) *http://dms.dot.gov.* It is available 24 hours each day, 365 days each year. Please follow the instructions on-line for more information and help. An electronic copy of this document may be downloaded using a modem and suitable communications software from the Government Printing Office's Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the **Federal Register**'s home page at *http://www.nara.gov/fedreg* and the Government Printing Office's web page at *http://www.access.gpo.gov/nara.*

Background

Section 1307 of the Transportation Equity Act for the 21st Century (TEA–21, Public Law 105–178, 112 Stat. 107 (1998)) amends 23 U.S.C. 112 to allow the design-build contracting method after the FHWA promulgates a regulation prescribing the Secretary's approval criteria and procedures on qualified projects. The TEA–21 defined qualified projects as projects that comply with the criteria in this regulation and whose total costs are estimated to exceed: (1) $5 million for intelligent transportation system projects, and (2) $50 million for any other project. It also provides certain key requirements that the FHWA must address in the development of these regulations. These requirements include, but are not limited to, the following:

- Prior to initiating the rulemaking process, the FHWA must consult with representatives from the American Association of State Highway and Transportation Officials (AASHTO) and representatives from other affected industries;
- The FHWA must complete the rulemaking process within three years of the date of TEA–21 enactment, or by June 9, 2001; and
- The regulation must: (1) Identify the criteria to be used by the Secretary in approving design-build projects, and (2) establish the procedures to be followed by Federal-aid recipients in seeking the FHWA's approval.
- Section 1307(f) of the TEA–21 requires the FHWA to assess the impacts of design-build contracting by June 9, 2003.

The FHWA has been allowing the STDs to evaluate design-build contracting under Special Experimental Project No. 14 (SEP–14). To date, approximately 25 STDs and several local public agencies have evaluated design-build projects under SEP–14.

Notice of Proposed Rulemaking (NPRM)

This final rule is based on the NPRM published at 66 FR 53288 on October 19, 2001. All comments received in response to the NPRM have been considered in adopting this final rule. Comments were received from 42 entities. The commenters include: fourteen STDs, two local public agencies, thirteen interest groups, and thirteen other representatives from government and industry.

Discussion of Rulemaking Text

The following discussion summarizes the comments submitted to the docket by the commenters on the NPRM, notes where and why changes have been made to the rule, and, where relevant, states why particular recommendations or suggestions have not been incorporated into the following regulations. Paragraph references are as designated in the NPRM.

Discussion of Comments and Responses by Section

General

The majority of commenters provided specific comments and/or recommendations for individual sections of the NPRM. In addition, some entities provided general comments on the NPRM as noted below.

Requests for an Extension of Comment Period

The General Machine Corporation requested a 120-day extension and the National Society of Professional Engineers (NSPE) requested a 60-day extension of the comment period to provide additional review time and opportunity for comment. Since a full 60-day comment period was provided and the majority of commenters did not state that an extension was necessary, the FHWA is not extending the comment period.

Request to Withdraw NPRM

The Council on Federal Procurement of Architectural & Engineering Services (COFPAES) opposed the proposed regulation and urged the FHWA to immediately withdraw the NPRM. The COFPAES stated the proposed regulation is inconsistent with Federal law based on the following: (1) The FHWA failed to meet the June 9, 2001, statutory deadline to issue the rule and therefore, the authority to issue the rule has expired; (2) representatives from affected industries were not consulted as required by section 1307 of the TEA–21; and (3) the NPRM violates other provisions of law. It stated that the FHWA does not have the authority to repeal or supersede other provisions of law that require the use of qualifications-based selection procedures for architectural and engineering service contracts (23 U.S.C. 112(b)(2)).

The FHWA recognizes the concern regarding the statutory deadline; however, the lateness of the proposed regulation does not relieve the FHWA of its statutory responsibilities. Section 1307 of the TEA–21 requires the FHWA to issue design-build regulations and the

FHWA will comply with this statutory provision even though we did not meet the statutory deadline.

The FHWA also acknowledges, but disagrees with the comment concerning outreach efforts prior to the NPRM. A similar comment from the Missouri DOT expressed a concern that the outreach efforts did not contact the AASHTO Subcommittee on Civil Rights, the Minority Contractor's Association, or the National Association of Women in Construction. On the other hand, other commenters expressed support for the manner in which the FHWA conducted its outreach efforts. The FHWA conducted an extensive outreach program in an effort to fulfill the TEA–21 requirement of consulting with representatives from the AASHTO and affected industries. The FHWA met on numerous occasions with entities that it believed would be affected by the proposed rulemaking. Due to the broad nature of design-build contracting, the FHWA was not able to identify all entities that might potentially be affected by the NPRM. However, several pre-rule coordination events were organized to capture the recommendations and opinions of various entities that might not be represented by the AASHTO or industry associations. These events include a special two-hour pre-rule outreach session related to the design-build rulemaking effort at the national ''Design-Build for Transportation Conference'' (April 21–23, 1999, Salt Lake City, UT) and a one-day pre-rule workshop (December 16, 1999, Washington, D.C.).

The FHWA also conducted a detailed field review of existing design-build projects in seven States. The FHWA representatives interviewed contractors, consultants, owners and other industry entities to gather information for the NPRM.

The FHWA disagrees with the comment from the COFPAES concerning the NPRM violating other provisions of law. By definition, design-build contracts include both construction and engineering services. Design-build contracts are not contracts strictly for the procurement of architectural or engineering services and, therefore, they are not subject to the requirement to use qualifications-based selection procedures. In many design-build contracts, the engineering or architectural services comprise a relatively small percent of the total contract amount. The FHWA recognizes the importance of architectural and engineering services in reducing the life-cycle cost of projects. However, design-build contracts are not architectural and engineering contracts and the provisions of 23 U.S.C. 112(b)(2) do not apply to design-build contracts.

Compliance With Other Federal Laws

The American Society of Civil Engineers (ASCE) and the NSPE expressed concerns similar to those suggested above. They suggested that the NPRM violates the requirements of the Federal Acquisition Reform Act of 1996 (Public Law 104–106, Div. D, 110 Stat. 642), which mandates the use of the two-phase competitive source selection procedures for federally funded projects.

The FHWA disagrees with these commenters. The Federal Acquisition Reform Act of 1996 does not apply to the Federal-aid highway program. The FHWA is encouraging the use of two-phase selection procedures in 23 CFR 636, Subpart B; however, it is not requiring the use of two-phase selection procedures.

Flexibility

The AASHTO, the Design-Build Institute of America (DBIA), the Transportation Corridors Agencies (TCA) and one private individual suggested that the NPRM is too prescriptive and did not provide enough flexibility to the States who are administering the Federal-aid program. These commenters noted that the provisions in 23 U.S.C. 112(b)(3)(A) provide an indication of congressional intent not to interfere in State and local legislative decisions regarding the appropriate methods for procurement of design-build contracts. They stated that this provision requires the FHWA to allow State and local agencies to use any procurement process permitted by State and local law. These commenters further said that, if not revised, the proposed regulation would require State and local agencies to follow specific requirements that may be inconsistent with their existing enabling authorization. The commenters expressed the belief that, if not changed, the proposed regulation would result in a monumental nationwide effort, requiring each agency to analyze its enabling authorization to determine whether it complies with the FHWA's requirements, and in many cases requiring agencies to seek legislative modifications to enable compliance.

The FHWA disagrees with these commenters. The language in section 1307 of the TEA–21 must be considered in its entirety. While section 1307(a) indicates that STDs ''may award a design-build contract for a qualified project described in subparagraph (c) using any procurement process permitted by applicable State and local law,'' other provisions in section 1307(c) prescribe specific responsibilities for the FHWA in developing a design-build regulation. Section 1307(c)(2) specifies the contents of the design-build regulation. This section states that the regulations shall ''(A) identify the criteria to be used by the Secretary in approving the use by a State transportation department or local transportation agency of design-build contracting; and (B) establish the procedures to be followed by a State or local transportation agency for obtaining the Secretary's approval of the use of design-build contracting by the department or agency.''

If the Congress intended that the design-build statute be implemented by States using applicable State or local laws (without identifying specific design-build criteria that a State must adhere to in order to receive the FHWA's approval), there would have been no need to add subsection (c) to section 1307. In Section 1307(c) of the TEA–21, the Congress set forth the need for the Secretary to identify specific criteria in approving design-build contracting and establish the procedures to be followed in obtaining the Secretary's approval for a design-build project. In order for section 1307(c) to have any meaning, the FHWA must identify the approval criteria (whether best practice criteria, minimum criteria or some combination of best practice) and establish procedures for contracting agencies to obtain the FHWA's approval. Thus, when read in its entirety, section 1307 requires the FHWA to develop approval criteria and procedures and not simply allow any procedure that meets State or local law.

The FHWA believes that only a few, if any, State and local agencies will need to seek legislative change to comply with the regulation. Generally, this situation would arise where a Federal regulation would prohibit certain procedures and the State or local law would require the same procedure. The FHWA is not aware of any State law that would not be in compliance with the regulation. Although some State laws may allow certain procedures that would not comply with the regulation (such as procedures that would give a preference to local firms in the selection process), these States could not use these procedures on Federal-aid design-build projects. In addition, the use of design-build is not mandatory. It is merely another project delivery technique for qualified projects.

One private individual suggested that the FHWA's decision to use modified Federal Acquisition Regulation (FAR)

terminology and requirements (48 CFR 15) is likely to create numerous problems in practice. This individual noted that even where State law is generally consistent with the procurement approach set forth in the Federal Acquisition Regulation, it is likely that terminology will be different, and that specific requirements will be inconsistent.

The FHWA's decision to adopt a modified version of the Federal Government's competitive negotiation policies (48 CFR part 15) was based on the fact that a large body of case law on this subject already exists. In the long run, the use of these concepts and terminology will promote fairness and minimize the opportunity for lawsuits and challenges on Federal-aid highway projects. Many firms in the industry work with Federal Government agencies and are familiar with the terminology and concepts in competitive negotiation. The adoption of these concepts is appropriate for Federal-aid highway program.

Several commenters indicated that much of the content of the proposed NPRM should be issued as guidance rather than as a regulation.

The TEA–21 clearly requires the development of a regulation and not a set of guidelines. Although some commenters suggested the need for guidelines in lieu of regulations, the FHWA is complying with the intent of the Congress in issuing this regulation. The FHWA acknowledges that there are many design-build issues where guidelines (developed with the assistance of AASHTO and industry) will be helpful. However, the approval criteria and procedures identified in this regulation are necessary for the FHWA to continue its stewardship of the Federal-aid highway program and to comply with the provisions of section 1307.

The TCA suggested that the FHWA approve design-build projects upon receipt of a certification from the contracting agency providing evidence that the project complies with, or will comply with, all applicable requirements. The TCA suggested that the FHWA issue a ''statement of no objection'' in response to a written request from the contracting agency.

The FHWA disagrees with this comment. The FHWA is accountable for the appropriate expenditure of funds from the highway trust fund. It is important for the FHWA to implement sufficient accountability standards so that it can fulfill its stewardship obligation.

Finally, the AASHTO and the Virginia DOT indicated that additional modifications should be made to ensure that the rule does not limit a State's ability to gain the maximum possible benefit from the design-build delivery method and to ensure that the rule does not restrict the States from using the most effective selection process for each individual project. They expressed support for the flexibility in the NPRM but also encouraged the FHWA to think progressively to provide for other variations of design-build, such as, design-build-warrant, design-build-operate, design-build-operate-maintain and finance-design-build-operate-maintain.

While we agree with these commenters, the FHWA believes the regulation provides sufficient flexibility for Federal-aid recipients while maintaining the FHWA's stewardship responsibilities for the Federal-aid highway program. We believe these requirements are necessary to maintain open, fair, competitive contracting while providing the States with complete flexibility in project selection and great flexibility in choosing the appropriate selection procedures, award criteria, and evaluation factors that fit their needs. With this flexibility, the STDs should have few, if any, requirements that hinder project delivery, innovation or cost savings. Sufficient flexibility has been provided to account for numerous variations of the design-build project delivery system. While not specifically addressed in the NPRM, the regulation applies to all variations of design-build contracts including contracts that would also include financing, warranties, operations, and maintenance functions.

In the final rule, the FHWA removed proposed Subpart F, Notifications and Debriefings, and replaced these requirements with a provision that allows contracting agencies to provide notifications and debriefings in accordance with State law. While notifications and debriefings are a very important part of the overall procurement process, the FHWA believes that the goals of this rulemaking can still be achieved if contracting agencies rely on State approved procedures in this area (*see* the discussion for Subpart F below for additional information).

Applicability of Requirements

One private individual suggested that there should be greater flexibility when Federal funding is a relatively small percentage of the total project funding. This commenter stated that there is a national trend toward smaller projects that are largely funded with other than Federal funds. It was suggested that the FHWA recognize this special condition and allow STDs to proceed in accordance with applicable State laws and Federal requirements such as the National Environmental Policy Act (NEPA) but without some of the restrictions placed on the STD by this rule. It was further suggested that a modified SEP–14 process might be appropriate for such projects.

We disagree with this comment. There is no statutory basis for waiving selected regulatory requirements for certain projects because the overall percentage of Federal funding is relatively small. This would be inconsistent with the FHWA policy in other Federal-aid program areas.

Report to Congress

The Professional Engineers in California Government (PECG) questioned whether the study completed by Florida DOT (Transportation Research Record 1351) is applicable to other contracting agencies. The PECG questioned whether the limited number of projects is representative of the cost or efficiency of design-build projects in other States. This commenter suggested that a broader evaluation of the design-build concept with a detailed study of the costs incurred and the safety impacts on the user of completed projects would be warranted.

The American Council of Engineering Companies (ACEC) provided recommendations on issues that should be addressed in the Report to Congress. These include the following: (1) Design-build is an appropriate delivery method to select if it offers the best value, given the unique opportunities, constraints, risks and demands of a particular project; (2) preliminary design should be advanced to the extent that risks are identified and each properly allocated to the party who is best able to manage it; (3) the design-build regulation should not give preferential treatment to a firm based on its size during the selection process; and (4) there should be flexibility in all procurement policies to allow the situation where a design firm of any size serves as the leader on a design-build team.

The Florida DOT suggested that the FHWA evaluate the reduction in total time (from project authorization to the completion of construction) in comparison with design-bid-build projects and the reduction in STD construction engineering and inspection costs.

The Report to Congress required by section 1307(f) should provide an unbiased evaluation of a broad range of projects. However, to the FHWA's

knowledge, the Florida DOT study is the best comprehensive comparison of a limited number of transportation projects that is currently available. The FHWA will consider all of the issues that have been identified in the comment period during the development of the Report to Congress.

Simplification of SEP–14

Several commenters recommended that the SEP–14 be simplified. Others expressed an appreciation for the availability of this technique to proceed with projects that did not meet the statutory definition of a qualified project. Still others felt that it was appropriate for the FHWA to delegate approval authority to the Division Offices as proposed in the NPRM.

We agree with these comments. The NPRM described several proposed methods to simplify the SEP–14 approval process. In addition, given the statutory definition for ''qualified projects,'' it will be necessary to maintain the SEP–14 program and make it available for non-qualified projects and other innovative contracting techniques. See the discussion for § 636.107 for additional details.

Miscellaneous

Two private individuals representing construction companies did not provide specific recommendations but expressed their concern regarding the use of design-build in the Federal-aid highway program. Generally, these commenters indicated the following concerns: (1) Design-build will limit competition and overall prices will increase; (2) the proposal process is too expensive except for the largest of firms; (3) quality and safety will suffer because design-build provides no incentive for either; (4) some contracting agencies might be biased in the evaluation process against firms that have a claim on a previous project; and (5) the benefits of faster project delivery have been improperly addressed by some in the industry. One commenter believed that the actual inconvenience to the public during construction is no shorter for design-build than it is for the traditional design-bid-build delivery system and this should be a primary consideration in selecting a project delivery method.

The TCA provided specific recommendations to revise FHWA policy in 23 CFR 645.109, 23 CFR 645.113, and 23 CFR 645.115 to utilize design-build terminology.

The FHWA recognizes this concern; however, we note that some sections of 23 CFR use terms that relate to the traditional design-bid-build process (*i.e.*, plans, specifications, estimates, bids, etc.) and do not include terms that relate to the design-build process (*i.e.*, Request for Proposal document, proposals, offerors, etc.). We did not propose to revise all sections of 23 CFR with this rulemaking. Such revisions are beyond the scope of this rulemaking action and will be considered in future rulemakings by the appropriate FHWA program office.

Section-by-Section Analysis

Part 627—Value Engineering

Section 627.5 General Principles and Procedures

The ACEC and the Design Professionals Coalition (DPC) were generally in agreement with the proposed value engineering provisions and the flexibility provided in the NPRM.

The AASHTO, the DBIA, the Virginia DOT and the TCA suggested replacing the word ''shall'' with ''may'' in § 627.5(e) to allow for additional flexibility.

The Associated General Contractors of America (AGC) and the American Road and Transportation Builders Association (ARTBA) generally supported the proposed value engineering language in the NPRM and recommended against the use of value engineering as part of the design-build proposal process.

While the FHWA agrees with the commenters who suggested clarification of the NPRM language, we disagree with the suggestion that the use of the word ''may'' in lieu of ''shall'' would provide sufficient clarification. We agree that the final rule must explain how contracting agencies can meet the value engineering analysis requirement for design-build projects.

Several commenters suggested that the final sentence of § 627.5(e)(2) be deleted as the existing value engineering regulation does not address value engineering change proposals during construction. The FHWA agrees with these commenters. This issue is not addressed in the existing value engineering regulation. Therefore, we have removed that sentence from the regulation.

The AGC believed that including value engineering proposals as part of the proposal process only tends to add more subjective variables to the selection process. The ARTBA took a different viewpoint from the AGC. It suggested that the FHWA should consider the use of alternate technical concepts as a means of allowing the STDs to fulfill the value engineering analysis requirements.

The Washington State DOT indicated that design-build proposers should have the widest possible range of expertise at their disposal when developing a proposal in a competitive environment. It suggested that the FHWA should provide flexibility to allow value engineering proposals developed by a design-build proposer to fulfill the value engineering analysis requirement.

The TCA suggested that it had received a number of significant value engineering proposals under contract provisions and it is inappropriate for the FHWA to discourage such provisions.

The DBIA suggested that while it is possible to request value engineering ideas during the procurement process and post-award, the fruitfulness of this process is highly questionable and very unlikely to yield measurable results. It concurred with the NPRM provisions that stated that ''value engineering reviews are generally not recommended as part of the design-build proposal process.''

The FHWA recognizes the differing viewpoints concerning the use of value engineering reviews conducted during the procurement process and post award. While such reviews may be useful in meeting a contracting agency's project objectives, they do not necessarily meet the objectives of FHWA's value engineering analysis requirement.

The ARTBA, the TCA, the Colorado DOT and the Texas DOT suggested that the FHWA allow the use of alternate technical concepts during the proposal development process. These entities suggested that the alternate technical proposal process is similar to value engineering and may be even more thorough than any formal value engineering procedure presently required. These commenters stated that the proposed alternative technical proposals are typically well developed since they incorporate both designer and contractor input. Both the proposer and the contracting agency benefit from the use of this procedure as it gives the proposer a potential means of lowering its proposal price and the contracting agency receives 100 percent of the cost saving. The Colorado DOT requested that the FHWA make it clear that alternate technical concepts be allowed in the design-build procurement process.

While the FHWA questions the overall effectiveness of a value engineering requirement during the proposal process or after contract award, several commenters provided convincing testimony that such provisions should not be prohibited. As long as the contracting agency maintains a fair and competitive process in reviewing, evaluating and recognizing

alternate technical concepts, the FHWA has no objection to the use of alternate technical concepts. For this reason, we have modified the language in § 636.209 to allow the use of the alternate technical proposal concept as long as such alternate concepts do not change the assumptions used in the environmental decision making process. However, contracting agencies must not rely solely on an alternate technical concept requirement to fulfill the FHWA's value engineering analysis requirement.

SAVE International, a value engineering society, proposed a revision to this section that would require STDs to perform a value engineering analysis prior to the procurement process and allow other value engineering studies during the procurement process and during the life of the design-build contract at the discretion of the STD. This association stated that the greatest opportunity for savings exists prior to the initiation of the design-build procurement process, and therefore, recommended that the FHWA require a value engineering analysis at this point and allow additional value engineering studies afterwards.

The FHWA agrees with the concept of requiring a value engineering analysis prior to the release of the Request for Proposal (RFP) document. SAVE International suggested two additional value engineering reviews but recommended that these two be discretionary; therefore, we did not feel it was necessary to include these provisions in the regulation.

The AASHTO and the DBIA suggested that value engineering is inherent in the design-build process but also suggested that this section needs further clarification. The AASHTO questioned why the FHWA was modifying the existing value engineering regulation and several STDs (Florida, Utah, New Jersey and Washington) recommended no changes to the existing value engineering regulation. They indicated that the existing regulation applies to any Federal-aid highway project on the National Highway System greater than $25 million, regardless of whether is it a design-build or a design-bid-build project. These commenters suggested that the proposed modifications are not necessary.

Still other commenters suggested several modifications to the NPRM language to clarify requirements. The TCA suggested that contracting agencies should be given the flexibility to determine which project procedures or contract requirements could be used to fulfill the value engineering analysis required by the FHWA.

While the FHWA agrees with the commenters who suggested that value engineering concepts may be inherent in the design-build process, we disagree with the commenters who suggested that all design-build projects would fulfill the FHWA's value engineering analysis requirement. The use of the design-build project delivery method does not fulfill the congressional mandate for a value engineering analysis on National Highway System projects greater than $25 million.

In consideration of all of these comments, the FHWA believes that it is necessary to amend the NPRM language to clarify the minimum requirements for fulfilling the value engineering analysis requirement on design-build projects. For the purpose of clarification, we revised the language to require a value engineering analysis prior to the release of the RFP document. The NPRM provisions of paragraph (e)(2) have been deleted. The final rule clearly states that a value engineering analysis is required prior to the release of the RFP document. This will be the only requirement for fulfilling the value engineering analysis requirement for design-build projects on the National Highway System greater than $25 million. This does not preclude further value engineering reviews or studies at subsequent points in the procurement process or even after contract award. However, subsequent value engineering reviews will not be acceptable for the purposes of fulfilling the value engineering analysis requirement.

Part 630—Preconstruction Procedures

Section 630.203 Applicability

The TCA suggested that this section be modified to provide an exception for design-build projects such that contracting agencies would not be subject to the FHWA's requirements for the preparation, submission and approval of plans, specifications, estimates and supporting documents on Federal-aid projects.

The FHWA disagrees with this comment. The FHWA's requirements for reviewing and approving design-build RFP documents are contained in 23 CFR 635.112. Therefore, it is not necessary to modify § 630.203.

Section 630.1010 Contents of the Agency Procedures

The TCA suggested that a revision be made to the FHWA's policies in Subpart J, Traffic Safety in Highway and Street Work Zones, to accommodate design-build projects. This commenter suggested that the existing regulations be modified to indicate that, for design-build projects, the design-builder would develop the traffic control plan. It was also suggested that the responsible person be an employee of the design-builder or a subcontractor.

The FHWA disagrees with this comment. We did not modify this section and traffic control plans are beyond the scope of this rulemaking action. The FHWA will consider appropriate revisions to its policy in this area in a future rulemaking.

Part 633—Required Contract Provisions

Section 633.102 Applicability

The TCA suggested that this section be modified to allow contracting agencies to strike or modify Section VII of Form FHWA–1273, Required Contract Provisions, that concerns minimum contracting responsibilities of the prime contractor. A similar recommendation was provided for Appendix B, Section VIII(4) for Appalachian projects.

The FHWA disagrees with this comment. Although the FHWA proposed to change the contracting requirements of § 635.116 for design-build contracts in the NPRM, such a change would best be implemented with a modification to Form FHWA 1273, Required Contract Provisions and Attachment A for Appalachia projects. These changes are beyond the scope of this rulemaking.

Part 635—Construction and Maintenance

Section 635.102 Definitions

The ACEC indicated the proposed modifications were acceptable. The TCA suggested that the FHWA add a definition for the term ''contracting agency'' (or cross-reference the definition in part 636), revise the definition of ''design-build project,'' revise the definition of ''incentive/disincentive for early completion,'' and use the term ''contracting agency'' instead of ''STD'' in many sections within part 635. The TCA also suggested that the current definition of ''design-build project'' might preclude the STD from entering into multiple contracts relating to a single project.

The FHWA agrees with the comment concerning the definition of a design-build project. We have modified the definition to read as follows: ''Design-build project means a project to be developed using one or more design-build contracts.'' The other suggested revisions are either beyond the scope of this rulemaking or are not appropriate.

Section 635.104 Method of Construction

The ACEC indicated the proposed modifications were acceptable. The TCA recommended that the FHWA modify this section to clearly indicate that contracting agencies do not need to justify design-build as being more cost-effective than design-bid-build.

Section 636.106 clearly indicates that a contracting agency may use design-build for any project that the contracting agency believes is appropriate. However, we added a sentence to § 635.104 to indicate that no justification of cost effectiveness is necessary in selecting projects for the design-build delivery method.

Section 635.105 Supervising Agency

The TCA recommended that the FHWA modify this section to clarify the relationships among the FHWA, the STDs and local agencies.

The FHWA disagrees with this comment. This subject is not appropriate for the scope of this rulemaking. Section 635.105(c) describes the responsibilities for STDs and locals when a project is administered by a local public agency. The details of these relationships are defined in the local stewardship agreement between the FHWA Division Office and the STD.

Section 635.107 Participation by Disadvantaged Business Enterprises

The ACEC and the ARTBA found the disadvantaged business enterprises (DBE) provisions in the NPRM to be satisfactory. On the other hand, numerous commenters suggested that the NPRM language in § 635.107(b) was not clear or that it conflicts with the requirements of 49 CFR part 26.

The Missouri DOT and several individuals were concerned with a provision that would allow contractors to furnish specific DBE commitment information after the award of contract. The DBIA and the California DOT suggested that the NPRM was not clear in defining what information, material and/or data should be used to make a fair and reasonable judgment concerning proposer's efforts to meet the DBE goal during the evaluation process.

Several individuals expressed the concern that post-award DBE commitment requirements would make the STD's enforcement efforts problematic since it would be difficult for the STD to be certain that any DBE participation would actually occur once the contract is awarded and underway.

Some individual commenters recommended that, as a minimum, proposers be required to sign and notarize letters of subcontract intent (co-signed by the DBE) confirming that the contractor actually discussed the project with the DBE for specific products/services at specific amounts.

The FHWA appreciates the concerns of the commenters who must administer DBE provisions on design-build projects. We agree with the commenters who suggested that it is not always feasible to require proposers to submit DBE commitments prior to award. The level of design provided in the RFP document is often not sufficient to allow the design-builder to enter into subcontracts. In many cases, the design-builder may not have advanced the design to a sufficient level during the proposal process to serve as a basis for negotiating subcontracts. In many cases, it will be impractical to require design-build proposers to provide DBE subcontract commitments prior to the award of the contract.

The New Jersey DOT commented that many DBEs do not have the capacity to perform significant subcontracts on large design-build projects and that opportunities for DBE engineering firms may be limited by contractors who are used to dealing with DBE construction contractors.

The California DOT suggested that separate goals for the design and construction phases might be appropriate to allow greater opportunities for DBE engineering firms.

We agree with these commenters. In setting project DBE goals, the STDs should consider separate DBE goals for the various elements of a design-build project. At the STD's discretion, separate goals may be used based on the amount and availability of DBEs for certain elements of the project. In some cases it may be appropriate to utilize separate DBE goals for design and construction services (or other services such as right-of-way acquisition, construction inspection, etc.). However, we recognize that the goal setting process is governed by 49 CFR part 26 and STDs are to be guided by interpretations provided for in § 26.9.

The AASHTO commented that the use of DBE commitments as proposal evaluation factors, as described in § 635.107(b)(4) should be left to the State's discretion. On the other hand, the AGC suggested that DBE commitments ''above or below'' the contractual requirements must not be used as a proposal evaluation factor in determining the successful offeror. The AGC indicated that where the design-builder has demonstrated a good faith effort to achieve contract goals, failure to achieve the goals should not be a determining factor in the selection process.

The FHWA appreciates the differing viewpoints of both contracting agencies and industry participants. At their discretion, contracting agencies may require design-build proposers to submit DBE utilization information or DBE commitments and such information may be used in a determination of responsiveness prior to contract award. However, we kept the NPRM provision that precludes contracting agencies from using proposal evaluation factors that are based on DBE commitments above the contractual requirements. The degree of DBE use in excess of the goal should not be used as an evaluation factor that would provide an additional credit or preference in the selection process.

The AASHTO and three STDs (Florida, South Carolina, and Virginia) suggested that this section was too prescriptive and did not account for all possible measures of ensuring equality. The AASHTO recommended that this section of the regulation merely provide a requirement for the contracting agency's design-build program to comply with the State's approved DBE plan. The Colorado DOT suggested that the regulations give the STDs more flexibility to determine the methodology to implement DBE programs based on the specific requirements of the design-build project. The FHWA agrees with these commenters.

In light of the above, the FHWA believes that the comments provided to the docket concerning this section of the NPRM raised significant DBE/design-build issues and highlighted the fact that NPRM paragraph (b) was not clear. However, few commenters provided suggestions that would provide sufficient clarity for the resolution of these issues in all cases. We have elected to simplify the language in the regulatory section by requiring compliance with 49 CFR part 26 and the STD's approved DBE plan. It will be incumbent upon those States that are using the design-build project delivery method to modify their DBE plans to address these issues. The STDs will have the flexibility to structure their DBE plans to meet individual design-build project goals while complying with the requirements of 49 CFR part 26.

Section 635.109 Standardized Changed Condition Clauses

Several commenters suggested that the FHWA does not have the statutory authority to require the use of the standardized change condition clauses on design-build projects. Title 23, U.S.

Code, section 112(e)(2)(B) specifically exempts design-build contracts from being required to include these clauses. Some of these commenters believed that the terminology used in the existing clauses might be incompatible with the common use of design-build terminology. For example, the standardized ''Suspension of Work Ordered by the Engineer'' clause uses the term ''engineer'' to refer to the owner's representative. However, several commenters noted an inconsistency with common design-build terminology where the term ''engineer'' refers to the design-builder's engineer.

The ARTBA recommended that the FHWA ''strongly encourage'' STDs to use these clauses instead of mandating the use of standardized clauses. The DPC suggested that the use of these clauses should generally be left to each STD to assess on a project-by-project basis. There could potentially be a situation where risk allocation is unbalanced because of the use of such clauses. The TCA suggested that where the design-builder is given responsibility for tasks, such as, quality assurance or environmental mitigation, the owner may want to have the ability to temporarily stop work, without providing a time extension or declaring a default, so as to enable it to determine whether a problem exists.

Several commenters representing the contracting industry strongly urged the FHWA to require the use of a standard ''changed conditions'' clause and also supported the use of a ''Suspensions of Work Ordered by the Engineer'' clause on design-build projects. These commenters believed that the clauses are appropriate for the risk and responsibilities that are shared with the design-builder in creating a fair and equitable contract for all parties. They suggested that inappropriate risk shifting will only increase the overall project cost and may increase the potential for unneeded litigation.

The FHWA believes that flexibility is appropriate for this issue. Section 1307 of the TEA–21 clearly indicates that the standardized change condition clauses may not be applied to design-build projects. In the proposed rule, the FHWA took the position that it would be appropriate to require one of the three clauses—the suspensions of work ordered by the engineer. The FHWA also proposed that the two other standardized clauses be used appropriately where the risk and responsibility are shared with the design-builder.

In traditional design-bid-build projects, risk and responsibility are generally well defined and there is little variation from project to project. The standardized changed condition clauses are very appropriate for these projects. However, for design-build projects, risk sharing and the ability to manage and control risk vary with each project. In light of the comments received, the FHWA has elected to provide flexibility to the contracting agencies who must perform risk analysis and structure contract provisions based on the individual characteristics of each project. Therefore, the final rule strongly encourages but does not mandate the use of ''suspensions of work ordered by the engineer'' clause. Contracting agencies may also consider ''differing site condition'' and ''significant changes in the character of work'' clauses which are appropriate for the risk and responsibilities that are shared with the design-builder.

Section 635.110 Licensing and Qualification of Contractor

Several commenters agreed with the NPRM language that allows STDs to use their own licensing and pre-qualification requirements. However, the ARTBA expressed a concern regarding a provision that would allow proposers to demonstrate their ability to become licensed. Instead it recommended that, if required, proof of licensing and/or prequalification should be demonstrated at the time of submission of the proposal. We disagree and have not made this change to the rule.

The ACEC expressed a concern that by allowing STDs to use their own prequalification and licensing statutes and procedures, design firms may be precluded from leading a design-build team if the State requirements are too stringent.

The DPC agreed with the FHWA's approach in allowing STDs to use their prequalification procedures, but expressed a concern that STDs may rely heavily on existing prequalification practices instead of developing procedures specifically for design-build. This commenter believed that this could limit the formation of joint ventures. The FHWA recognizes this concern but does not believe that it is appropriate to require STDs to modify their existing procedures to use design-build.

The TCA suggested that the NPRM language for this section was confusing and did not appear to be necessary. This commenter was concerned that the NPRM could be interpreted to require local agencies to comply with State prequalification requirements. The FHWA agrees and incorporated minor revisions in § 635.110(f)(2) to clarify that local public agencies are not required to comply with State prequalification requirements.

The AASHTO questioned a perceived discrepancy between the prohibition against geographical preferences in the preamble versus the use of the words ''may not'' in the regulatory section of 23 CFR 635.110(f)(1). The final rule provides a prohibition for geographic preferences. Such preferences limit competition and may not be used.

In consideration of the above comments, the FHWA made minor changes to this section. As stated in the NPRM, prequalification and licensing procedures may be used, however, such procedures may not limit competition or preclude an otherwise qualified proposer from submitting a proposal. The STDs have the flexibility to develop prequalification procedures appropriate for the specific characteristics of a given design-build project.

Section 635.112 Advertising for Bids and Proposals

The DBIA suggested that the FHWA authorization should be based on the contract award rather than the RFP document. The DBIA and the Orange North-American Trade Rail Access Corridor Authority were concerned that the requirement for the FHWA to approve the RFP document would only lead to extensive time delays. The DBIA believed that the FHWA's approval process would serve to add additional time to what is usually a very time-sensitive project schedule, thereby diminishing any possible time savings advantage. The DBIA further suggested that STDs be allowed to proceed ''at risk'' with the procurement process, with the recognition that they must comply with the rules in order to obtain the FHWA authorization prior to contract award.

The FHWA disagrees with these comments. Since the release of the RFP document is a key point in the project development process, it is also an appropriate point for the FHWA's project approval.

The TCA suggested that contracting agencies should have the ability to proceed with a project using their own funds and at their own risk, without the FHWA's approval, pending the final NEPA decision. This commenter suggested that the FHWA project authorization is only necessary prior to the commencement of final design or the initiation of construction work. This commenter recommended that the FHWA issue a ''statement of no objection'' in response to a written request from the contracting agency accompanied by certificates evidencing

compliance with applicable requirements.

The FHWA disagrees with this comment. It is not appropriate to make Federal-aid participation decisions after major project decisions have been made and possibly after a contracting agency has incurred costs.

The Colorado DOT recommended that the FHWA clarify the difference between ''major'' and ''minor'' addenda. The FHWA does not agree that this clarification is appropriate in the final rule. The FHWA Division Administrator currently has the flexibility to define ''major'' and ''minor'' addenda. This flexibility will continue for design-build projects.

Several commenters provided recommendations concerning the delegation of the FHWA's approval authority from Headquarters to the Division Offices. See § 636.107 for details.

In summary, the FHWA is not revising this section. As previously noted, the FHWA is accountable for the appropriate expenditure of funds from the highway trust fund. It is important for the FHWA to implement sufficient review and accountability procedures so that it can fulfill its stewardship obligation. The FHWA Division Administrator's review and approval of the RFP document is an important and timely approval in the FHWA's authorization of a design-build project. The STD and the FHWA Division Office should identify the review and approval procedures that will enable the FHWA to fulfill its stewardship obligations for design-build projects.

Section 635.113 Bid Opening and Bid Tabulations

The Orange North-American Trade Rail Access Corridor Authority was concerned about the requirement to furnish a tabulation of proposal costs. This commenter was concerned with a possible breach in confidentiality procedures and the need to maintain the integrity of the selection process while minimizing chances for protests or disputes over the selection method.

One private individual suggested that the requirement to furnish a tabulation of price information should only be associated with post contract award information.

The TCA recommended that the FHWA revise § 635.113(c)(2) to refer to ''price proposal line items'' instead of ''proposal costs.'' In addition, this commenter suggested changing references to ''STD'' to ''contracting agency.''

In consideration of these comments, the FHWA has incorporated some minor revisions in this section to indicate that the tabulation of proposal prices is to be done after the award of contract. This should address the confidentiality concerns expressed by two commenters. The FHWA does not believe is it necessary to use the term ''price proposal line item'' as the rule language is sufficiently clear. The FHWA also prefers to use the term ''STD'' rather than ''contracting agency'' to maintain consistency throughout this part.

Section 635.114 Award of Contract and Concurrence in Award

Several commenters suggested that paragraph (k) appeared to preclude STDs from entering negotiations following the proposal being submitted but before the contract award. The AASHTO suggested revising this statement to read ''Design-build contracts shall be awarded in accordance with the RFP document.'' The TCA suggested that the reference to Part 636 is inconsistent with the TEA–21 requirement that allows contracting agencies to use any procurement process permitted by applicable State or local law.

We made a minor change to this section to indicate that design-build contracts shall be awarded in accordance with the RFP document. The FHWA did not intend to preclude the use of the part 636 competitive acquisition procedures. The comment regarding inconsistencies was previously addressed in the Background portion of this preamble.

Section 635.116 Subcontracting and Contractor Responsibilities

Peter Kiewit and Sons, Inc. supported the proposed changes while the ARTBA objected to waiving the current 30 percent self-performance requirement. The ARTBA believed that the 30 percent requirement should remain in place for projects under the $50 million threshold that will continue to be approved under SEP–14. The ARTBA suggested that the FHWA should clarify what type of work done by a design-builder would be applicable to a minimum percentage level of work (design work for example). The ARTBA, ACEC and the DPC recommended that the FHWA offer some guidance to the STDs so that self-performance requirements match the actual needs of the project and are not set arbitrarily.

The FHWA appreciates these concerns, however, we do not believe it is appropriate to provide guidance concerning self-performance requirements in the final rule. Contracting agencies will have the flexibility to implement minimum self-performance requirements for a project if they feel that this is appropriate. The FHWA believes that flexibility is appropriate in this area and does not believe that it is appropriate for continued evaluation under SEP–14. While a joint AASHTO/Industry/FHWA guidance paper on this subject may be desirable, that is outside of the scope of this final rule.

The TCA believed the term ''design-builder'' as used in this section warranted further definition to include any firms which are equity participants in the design-builder, their sister and parent companies, and their wholly owned subsidiaries. The FHWA agrees with this comment. We added a sentence to clarify the definition of a design-builder for this section to include equity participants in the design-build firm, its sister and parent companies, and their wholly owned subsidiaries.

Several commenters expressed opposition to the FHWA's proposal to eliminate the 30 percent requirement. These commenters believed that such requirements are necessary to minimize the potential for fraud that could occur when certain companies are used as pass-through firms to meet DBE requirements.

We disagree with this comment. We do not believe that the elimination of the 30 percent self-performance requirement will lead to an increased potential for fraud. The DBE provisions at 49 CFR part 26 define commercially useful function and provide adequate guidance for the crediting of DBE related work to minimize the potential for fraud.

The Colorado DOT objected to the prohibition regarding subcontract goals. This commenter believed that subcontract goals ensure that the design-build contractor on large projects use all different sizes and levels of subcontractors. This commenter further suggested that provision be reduced to a guideline and a recommendation. We disagree with this comment. The FHWA continues to believe that such requirements could serve as a local contracting preference and thereby create an artificial contractual barrier to the design-builder's ability to manage an efficient contract. Therefore, we did not make any modifications to this paragraph.

Section 635.122 Participation in Progress Payments

Three commenters suggested that this proposed section was satisfactory. One commenter suggested that the term ''STD'' be revised to ''contracting agency.'' For reasons previously

indicated, the FHWA prefers to use the term STD throughout this section.

Section 635.309 Authorization

The Wisconsin DOT suggested an amendment to the proposed language in § 635.309(p)(2) that would allow a design-build project to continue during a conformity lapse, if the NEPA process was completed as it applies to transportation and the project has not changed significantly in design scope. This commenter recommended that the project be allowed to continue because it has already gone through the air quality analysis and it had been shown not to increase regional emissions. The FHWA agrees with this comment but also recognizes that projects cannot proceed during a conformity lapse unless the FHWA has granted project approval or authorization prior to the conformity lapse. Accordingly, the FHWA has elected to revise the language in § 635.309(p)(2) to allow a design-build project to continue during a conformity lapse if the NEPA process was completed and the FHWA authorized the design-build project, prior to the conformity lapse.

The Florida DOT suggested that contracting agencies should not have to provide any certification of right-of-way prior to release of the RFP document. This commenter suggested that the project assurances required by 49 CFR 24.4 should be adequate to cover all subsequent federally assisted projects. Several commenters suggested a revision to § 635.309(p)(1)(v) since the design-builder's schedule is not known at the time of the release of the RFP document. The suggested revision would allow the STD to certify that all necessary arrangements will be made for the completion of right-of-way, utility, and railroad work and would allow the STD to include such work in the design-build contract if desired.

The TCA suggested the contracting agency should be allowed to certify that arrangements have been made by: (1) Delegating responsibility to the design-builder, or (2) obtaining a commitment from the contracting agency to complete or arrange for the completion of all right-of-way, utility and railroad relocations.

The FHWA agrees with these commenters and has elected to revise the language in § 635.309(p)(1)(v) to allow contracting agencies to certify that sufficient arrangements will be made for the completion of the necessary right-of-way, utility, or railroad relocation work. The FHWA agrees that STDs may base this certification on their use of provisions in the RFP document to accomplish this work or by their own coordination efforts during the contract. The STDs need this flexibility in allocating risk and preparing the appropriate contract documents.

The TCA suggested that there could be numerous problems interpreting § 635.309 paragraphs (a) through (o) unless paragraph (p) supersedes rather than supplements prior paragraphs. We agree in part with this comment. We provided a modification of this section such that the certification requirements of § 635.309 are superseded by paragraph (p).

Several commenters suggested a change to § 635.309(p)(1)(iii) to allow STDs to release the RFP document prior to the conclusion of the NEPA process. The AASHTO recommended that the NEPA process be allowed to continue until contract award, as the amount of time between RFP and contract award can be significant and time savings is one of the primary advantages of the design-build process. The New York State DOT suggested that the design-builder be allowed to perform some work necessary to complete the NEPA document as long as appropriate trigger points were included (*i.e.* stop or control points for final design and construction). The FHWA disagrees with these commenters. The issue of NEPA compliance is discussed in § 636.109 below.

Section 635.411 Material or Product Selection

Several commenters indicated that the NPRM language in this section was acceptable. Several commenters agreed with the NPRM language and expressed a concern regarding the use of proprietary product provisions in the RFP document that may limit DBE participation. These commenters believed that certain DBE firms might lack access to purchasing, distribution or production of certain proprietary materials. The TCA suggested that the intent of this paragraph was to supersede existing paragraphs (a) through (e) of the existing regulation and recommended language to accomplish this. The FHWA does not agree with this comment.

No revisions of this section are provided. It was not the FHWA's intent to supersede paragraphs (a) through (e). The intent of the existing regulation is to ensure open competition in the contracting agency's material or product selection requirements. The intent of the language was to supplement the existing regulation for design-build projects by limiting the requirement to materials, specifications, or processes specifically set forth in the RFP document.

Section 635.413 Warranty Clauses

The ARTBA suggested that the FHWA should not require warranties but that this decision should be at the STD's discretion. However, the ARTBA went on to say that it agreed with the FHWA's proposal to only allow warranties for specific products or construction features on Federal-aid design-build projects. It suggested that if warranties are allowed beyond this, that their coverage be limited to line items related to workmanship and materials. Peter Kiewit and Sons', Inc. recommended that warranty requirements should include specific performance criteria for a specific product or feature.

Several commenters representing STDs and local public agencies suggested that the use of warranties should be left to the discretion of the States and that the limitation of warranties to specific products or construction features is too restrictive. These commenters suggested that ''bumper-to-bumper, blanket, or general workmanship-and-material warranties'' are appropriate for design-build. The AASHTO and the Virginia DOT cited an agreement with the advocacy for asset management at the Federal level for recommending this. The FHWA appreciates the concern of these commenters. We agree that it is desirable to provide performance criteria in the RFP document for performance warranties but we also believe that contracting agencies should have some flexibility in preparing warranty provisions.

The Texas DOT suggested that there is a significant difference between the use of warranties on a traditional design-bid-build project and a design-build project that must be taken into account. It suggested that a warranty identifying specific pieces of the work may omit a particular component and shift the very risk the contracting agency was hoping to delegate back to the project owner, thereby nullifying one of the critical benefits and innovations of design-build. The Texas DOT went on to describe the successful use of ''blanket warranty'' clauses on major design-build projects and suggested that such warranties are already an industry standard and are expected, priceable and enforceable. It was suggested that the FHWA allow the use of ''blanket warranty'' clauses for a limited, but reasonable period of time, in order to give the owner time after the completion of the project to discover defects in the work. The FHWA agrees that limited, general project warranties may be appropriate in some circumstances.

The DBIA suggested that performance warranties are routinely negotiated into design-build contracts. It further suggested that due to the unique and specific performance requirements of each project, STDs need the flexibility to negotiate these warranties with the offerors on each project. The FHWA agrees that some flexibility is appropriate, however, we are concerned with the concept of negotiating warranties into design-build contracts. Contracting agencies must include warranty performance criteria in the RFP document. These conditions should not be ''negotiated into the contract'' through discussions with the proposers. This is important to keep a level playing field and provide all proposers with the opportunity to provide competitive proposals.

The DPC supported the proposed limitation of warranties to certain features or construction products. This association was concerned with the potential for unbalanced risk allocation, especially as it might apply, directly or indirectly, to the project design. The ACEC expressed concern regarding attempts by STDs to directly or indirectly extend uninsurable warranty provisions to professional engineering services, for example, those that go beyond legal standards of care in the industry. The FHWA appreciates the concern of these commenters, however, we do not believe it is appropriate to address this in the final rule.

The National Association of Surety Bond Producers expressed support for the FHWA's proposed position not to alter the current level of discretion provided STDs on the use of warranties. It suggested that the STDs must have sufficient discretion in developing contracts to provide for the proper allocation of risk. However, this commenter went on to express many concerns regarding the potential negative effects of warranties that extend beyond a reasonable duration or include requirements that are beyond the control of the design-builder.

In light of the above comments, we elected to provide additional flexibility in the final rule. We agree with the STDs who suggested that contracting agency discretion is appropriate in this area. Based on the comments provided, it appears that general project warranties are a valuable asset in preventing and correcting construction defects on design-build projects. Contracting agencies must still incorporate a quality assurance program as a means for accepting the final product; however, the FHWA agrees that short term, general warranties may be beneficial in providing the contracting agency with a method for addressing obvious defects with the work. Several commenters indicated that this is already industry practice for workmanship and material warranties. In addition, the FHWA is aware that certain State laws already require contractors to furnish one-year maintenance bonds on traditional construction contracts to protect against any failure due to defective workmanship or materials. For this reason, we revised this section to allow general project warranties on NHS design-build projects with the conditions that: (1) They are short term (one to two years); (2) they are not the sole means of acceptance; (3) they do not include items of routine maintenance which are not eligible for Federal participation; and (4) they may include the quality of workmanship, materials and other specific tasks identified in the contract.

A provision for performance warranties for specific products or features is also provided. The contracting agency must include detailed performance criteria in the RFP document so that all proposers are competing on a level playing field. The final rule also includes a provision that allows contracting agencies to receive alternate warranty proposals that improve upon the warranty terms in the RFP document. For best value selections, such alternate warranty proposals must be in addition to the base proposal that responds to the RFP requirements.

Also, see the discussion regarding quality assurance programs in Section 637.207.

Part 636—Design-Build Contracting

Section 636.101 What Does This Part Do?

The TCA suggested revisions to this section to indicate that the TEA–21 allows contracting agencies to use any procurement procedure allowed by applicable State and local law. It stated that the Congress did not authorize the FHWA to regulate this area and suggested that the FHWA's role should be limited to providing guidelines on this subject. For the reasons listed in the General section above, the FHWA disagrees and we did not make any changes in this section.

Section 636.102 Does This Part Apply to Me?

One commenter indicated that the language for this section was acceptable. Other commenters did not provide specific comments on this section. Therefore, no revisions are made in the final rule for this section.

Section 636.103 What Are the Definitions of Terms Used in This Part?

The DBIA recommended several revisions to the definitions used in this section. The suggested revisions include the following:

- Delete the term ''clarifications'' and revise the definition of ''communications'' to apply to a single-phase selection procedure or both phases of a two-phase procedure. The DBIA suggested that all exchanges between the contracting agency and the offerors prior to establishing a competitive range (and subsequent discussions) or selection without discussions, are for the purpose of correcting non-substantive errors and omissions and addressing issues and ambiguities in order to enhance understanding and facilitate evaluation of the qualification submissions or proposals.

The FHWA disagrees with the recommendation to delete the term ''clarifications'' and revise the term ''communications.'' These terms have specific meanings based on case law. The use of the commenter's recommended definition would not clarify this issue. However, there is merit in clarifying that the terms ''clarifications, communications, and discussions'' only apply to information exchanges after the release of the RFP document. We added a new section, 636.401 titled ''What types of information exchange may take place prior to the release of the RFP document?'' to clarify that such information exchanges (in the first-phase of a two-phase selection procedure) must be consistent with State and/or local procurement integrity requirements. In the final rule, we revised Section 636.401 to Section 636.402 ''What types of information exchange may take place after the release of the RFP document?''

- Revise the second sentence of the definition of ''fixed price/best design'' to read: ''Design solutions and other qualitative factors are evaluated and rated, with award going to the firm offering the best qualitative proposal for the established price.'' This commenter suggested this change to eliminate potentially restrictive and ambiguous language. We agree with this recommendation and have incorporated this in the final rule.
- Revise the definition of ''stipend'' by inserting the term ''unsuccessful offerors'' in lieu of the term ''most highly qualified unsuccessful offerors.'' This commenter stated that some

agencies pay stipends to all responsive, unsuccessful offerors; others pay only to those offerors in the competitive range. The commenter suggested a change in the definition to remove a potential ambiguity. We agree with this recommendation and have incorporated this in the final rule. With this revision, contracting agencies will have more discretion in providing stipends.

• Revise the term ''technical proposal'' to read as follows: ''Technical proposal means that portion of a design-build proposal which contains design solutions and other qualitative factors, which may include, without limitation, schedule, quality control/quality assurance (QC/QA), management plans, maintenance of traffic, maintainability and community relations.'' This commenter suggested that the term could include any relevant information that the contracting agency deems to be important. We partially agree with the recommended revision for the term ''technical proposal,'' however, it would seem more practical to keep the definition as simple as possible. Therefore, we provided the following definition in the final rule: ''Technical proposal means that portion of a design-build proposal which contains design solutions and other qualitative factors that are provided in response to the RFP document.''

• Revise the definition of ''tradeoff'' to read as follows: ''Tradeoff means an analysis technique involving tradeoffs among price and non-price factors, which can be used by the contracting agency to assist in the comparative assessment of proposals to determine the best value when considering selection of other than the lowest priced proposal.'' This commenter believed that a tradeoff is not a separate best value selection method, but rather an analysis technique to determine best value. We agree with this recommendation and have incorporated this in the final rule.

• Revise the definition of ''discussions'' to use the plural versions of the words offeror and proposal to be consistent with the requirement to include all offerors in the competitive range in discussions. We agree with this recommendation and have incorporated this in the final rule.

• Revise the definitions of the ''request for qualification'' and ''short listing'' to provide consistent terminology by using the term ''most highly qualified offerors'' in each. We agree with this recommendation and have incorporated this in the final rule.

A private individual suggested revisions similar to the recommendations above for the terms ''discussions,'' ''fixed price/best design,'' ''stipend,'' ''technical proposal,'' ''tradeoff,'' ''request for qualification,'' and ''short listing.'' In addition, this commenter suggested that FHWA consider the following:

• It would make more sense to include the definitions for ''clarifications'' and ''communications'' in the same section as the regulatory text. We disagree with this suggestion.

• Consider deleting the term ''modified design-build.'' This commenter stated that the design-builder's role is not generally limited to completion of the design and construction. It was suggested that there is no need to have a defined term for a level of preliminary design if the FHWA kept this definition. We agree that the level of design should be removed, however, many contracting agencies continue to utilize modified design-build method of contracting and therefore, we believe that it is appropriate to maintain this definition in the final rule.

• The FHWA needs to recognize the difference in meaning between the terms ''price'' and ''cost.'' The price offered by the design-builder is the owner's cost. From the design-builder's perspective, the price is its cost plus overhead and profit. This commenter suggested that when considering mostly fixed price, lump sum design-build contracts, the FHWA should consider using the term ''price'' when discussing the consideration and evaluation of proposals (*e.g.*, in the definitions for ''best value selection,'' ''single-phase selection,'' ''two-phase selection,'' and ''weighted criteria process,'' and §§ 636.201, 636.203, and 636.302). We agree with this recommendation and revisions have been made as appropriate in the final rule.

The TCA suggested that the terminology used in part 636 is inconsistent with the terminology contained in legislation in various States allowing agencies to use design-build and further suggested that this would not be an issue if the part 636 requirements were converted to guidance. This entity also suggested revisions to two proposed definitions as follows:

• Revise the definition of ''contracting agency'' as follows: ''Contracting agency means the public agency awarding and administering a design-build contract, which may be the STD or another State or local public agency.'' This commenter stated that in some cases, projects are developed by an entity which is not the ultimate owner, and which is not acting as an agent for the ultimate owner. We agree with this comment and have incorporated similar language in the final rule.

• Revise the definition of ''design-build contract'' as follows: ''Design-build contract means an agreement that provides for design and construction of improvements by a contractor or private developer. The term encompasses design-build-maintain, design-build-operate, design-build-finance and other contracts that include services in addition to design and construction. Franchise and concession agreements are included in the term if they provide for the franchisee or concessionaire to develop the project that is the subject of the agreement.'' We agree with this recommendation and have incorporated this revision in the final rule.

The ASCE suggested that the FHWA incorrectly used the term ''stipend'' but did not provide a recommendation for the proper term to use. We disagree with this comment. Many contracting agencies have used stipends in SEP–14 design-build projects. The definition in § 636.103 reflects the current usage and is appropriate.

Section 636.104 Does This Part Apply to All Federal-Aid Design-Build Projects?

Several commenters recommended different revisions to the first sentence of this section to clarify the applicability of the regulation to Federal-aid projects. We agree with these commenters. The FHWA is revising the first sentence of this section to remove references to highway systems. The final rule applies to all Federal-aid design-build projects within the highway right-of-way or linked to a Federal-aid highway project (*i.e.*, the project would not exist without another Federal-aid highway project). Projects that are not located within the highway right-of-way, and not linked to a Federal-aid highway project may use State-approved procedures. This rule applies to all Federal-aid projects in the highway right-of-way (or linked to a Federal-aid highway project) regardless of whether that project is located on the NHS or non-NHS systems.

The TCA suggested that it would be advisable to divide this section into two subparts—one of which is binding and one of which is advisory. This commenter went on to say that many of the rules should be converted to guidelines, rather than imposing restrictions that reduce the agency's flexibility under applicable State and local procurement law, and which in some cases may conflict with requirements of State and local laws. This entity suggested that the public interest would be best served by

allowing applicable State and local law to control the procurement process, including the rules that apply to the source selection decision. We disagree with this comment. The FHWA response to this issue was previously provided in the ''Flexibility'' section above.

Section 636.105 Is the FHWA Requiring the Use of Design-Build?

Peter Kiewit Sons', Inc. supported the language and indicated that a program that gives the States options is appropriate. The FHWA agrees and did not make any revisions to this section.

Section 636.106 What Type of Projects May Be Used With Design-Build Contracting?

Several commenters supported the flexibility provided by this section; however, one commenter suggested that contracting agencies be required to justify their decision to use design-build. The AGC recommended that STDs be required to submit their rationale for electing to use the design-build contracting method for a specific project rather than using the traditional design-bid-build selection procedure. This association further stated that contracting agencies should be required to specify what they hope to gain in using design-build that could not be achieved by using the traditional process.

On the other hand, Sundt Construction, Inc. suggested that owners should be able to select a contracting method that will provide the greatest opportunity for success based on the project objectives deemed to be most important for that particular project. This commenter stated that project size, type and location are immaterial to the contracting method and should not limit the selection of the appropriate delivery method.

While the FHWA appreciates the differing viewpoints voiced by the construction industry association, we agree with the majority of commenters who agreed with the flexibility provided by this section, and therefore, no changes are provided in the final rule.

Section 636.107 Does the Definition of a Qualified Project Limit the Use of Design-Build Contracting?

The Missouri DOT acknowledged that the definition of a ''qualified project'' is a statutory requirement that the FWHA cannot change. The Utah DOT recommended that if the definition could be modified, it be revised to include small projects and not list a dollar amount. Several commenters believed the definition of a qualified project is too narrow and suggested that the FHWA expand the definition to include what is currently termed ''modified design-build,'' as well as ''quality based selection,'' where selection is based solely on technical merit and where cost is negotiated at a later date with the selected contractor. While we appreciate the concerns of the contracting agencies concerning the implications of the definition of a ''qualified project,'' the FHWA cannot revise the statutory definition. Furthermore, the FHWA believes that this definition will have little or no impact on a contracting agency's decision to use design-build.

The New Jersey DOT suggested that neither the TEA–21 nor the proposed rule clearly defines a qualifying design-build project. It suggested that if the final rule does not provide a more complete definition, the STDs should have the ability to select design-build projects under the authority of 23 U.S.C. 145. We agree with this commenter. The final rule incorporates the statutory definition of a ''qualified project'' without further limitation. The FHWA believes that it is important to provide discretion to contracting agencies in the selection of design-build projects.

The Missouri DOT recommended the removal of SEP–14 from existing rules. However, the New York State DOT was pleased that the SEP–14 process would continue so that design-build could continue for projects that did not meet the ''qualified projects'' definition. This commenter believed the statutory definition of a ''qualified project'' was too narrow and hoped that future legislation would remedy this. Numerous commenters agreed with the concept of delegating SEP–14 approval authority to the FHWA Division offices. In addition, several commenters suggested that, for those States with an approved design-build program in place, the STD may elect to assume the approval authority for the design-build RFP, any addenda, and for the SEP–14 process.

The TCA recommended specific revisions to this section and suggested the rule also address the use of SEP–14 for innovative contracting approaches for ''qualified projects.''

The FHWA believes the rule is clear; however, we agree with one of the commenters who suggested that SEP–14 approval might be appropriate for qualified projects that incorporate innovative contracting techniques and might not fully comply with the rule. These types of projects would still need SEP–14 concept approval. Therefore, the last sentence of § 636.107(a) is revised to read as follows: ''Projects which do not meet the requirements of this part (either ''qualified'' or ''non-qualified'' projects) must be submitted to the FHWA Headquarters for concept approval.''

Section 636.108 How Does the Definition of a Qualified Project Apply to ITS Projects?

The AASHTO suggested that there needs to be consistency between the definitions of ITS among the various segments of the Federal government but did not offer a specific recommendation. The ITS definition is taken from section 1307 of the TEA–21. No revisions are made in the final rule.

Section 636.109 How Does the NEPA Review Process Relate to the Design-Build Procurement Process?

As noted in § 635.309 above, several commenters suggested that the FHWA remove the limitation that prohibits the STDs from releasing the RFP document prior to the conclusion of the NEPA process. The AASHTO suggested that this could be accomplished without compromising the intent of NEPA process. It suggested that the procurement process could stretch out over several months, or even years. The AASHTO believed that the FHWA's requirement for a complete NEPA process followed by the release of the RFP document would only lengthen an already lengthy process and negate any potential time saving benefits of the design-build delivery method. We disagree with this commenter for the NEPA policy reasons noted below.

An individual commenter suggested that, without the limitation on the release of the RFP document, offerors could simultaneously be preparing and submitting their proposals for evaluation while the NEPA process is concluding. In addition, contract award, mobilization and continuation of preliminary design by the design-builder could also take place if the contracting agency elected to do so. We disagree with this commenter for the NEPA policy reasons noted below.

The New York State DOT suggested that the design-builder be allowed to perform work necessary to complete the NEPA document as long as appropriate trigger points were included in the contract (*i.e.* stop or control points for final design and construction). Other commenters suggested that the RFP document could be released prior to the completion of the NEPA process, but award of the contract should not be made until the NEPA process is complete. The TCA suggested that a design-build contract award could be made prior to the conclusion of the

NEPA process, as long as there were provisions made to modify or terminate the contract. It indicated that the design-builder could proceed with the contract work as long as it did not include final design or construction. We disagree with these commenters for the NEPA policy reasons stated below. We have made no changes to the rule.

On the other hand, the AGC and the ACEC agreed with the NPRM limitation on the release of the RFP document. The AGC stated that asking for proposals prior to the conclusion of NEPA shifts an unnecessary risk to the proposers. It believed that it is not fair to ask proposers to undertake design and proposal costs on a project that has the potential for not moving forward. The AGC believed that STDs would not be willing to compensate proposers for their development costs should the project be stopped in the NEPA process. The AGC believed that this would limit competition to those firms that are willing to accept certain risks. The ARTBA suggested that it is important to maintain an even playing field with the traditional low-bid system that currently requires the NEPA process to reach conclusion before a project advances. The DPC expressed a concern regarding concurrent NEPA and project delivery processes with a guaranteed completion date that would add significant cost if the project is unexpectedly delayed. We agree with the industry commenters who are concerned about unreasonable risk allocation through an early release of the RFP document. However, we do not believe that modifications are necessary in the final rule.

The New Jersey DOT and Sundt Construction, Inc. seem to be concerned that the proposed rule would require all environmental clearances (permits) to be obtained prior to advertising design-build projects. The AASHTO noted that the subject of environmental permitting was not discussed in the NPRM, but suggested that there be no FHWA restrictions that would prohibit the STDs from delegating the responsibility for obtaining environmental permits to the design-builder.

The FHWA agrees with AASHTO's comment. The rule does not address the subject of environmental permits and provides complete flexibility to contracting agencies regarding the responsibility for obtaining these permits. Contracting agencies may delegate the responsibility for obtaining such permits from other resource agencies (*e.g.*, Corps of Engineers, U.S. Coast Guard, *etc.*) to the design-builder. Therefore, the FHWA made no changes concerning this topic.

The AASHTO and the DBIA noted that there is no requirement in the TEA–21 or the NEPA that limits a contracting agency from issuing the RFP prior to concluding the NEPA process. They suggested the limitation in the rule would unnecessarily extend the time for putting the project under contract and therefore the ultimate timeline for project completion. The FHWA disagrees with this comment. While there may be some delay in the procurement process for certain projects, the overriding NEPA policy concerns noted below are more important from the FHWA's perspective.

The DBIA stated that Congress enacted 23 U.S.C. 112 (b)(3)(B) to resolve disputes between the FHWA and State and local agencies regarding whether the NEPA prohibits local and State agencies from entering into design-build contracts prior to the completion of the NEPA process. This commenter contended that 23 U.S.C. 112(b)(3)(B) resolved this dispute by clarifying that those portions of the design-build process, up to but not including final design, may be initiated prior to the completion of the NEPA process. The FHWA disagrees with this commenter who interprets the TEA–21 provisions to allow the release of the RFP document at any time during the NEPA process. We disagree for the NEPA policy reasons noted below.

Several commenters suggested that case law interpreting the NEPA permits State and local agencies to proceed with projects at their own risk prior to completion of the NEPA process, so long as the agency does not take irretrievable action to develop the project. These commenters believed that STDs should be granted the flexibility to take these actions when warranted on a particular project. We disagree with these commenters and have made no changes in the final rule.

Based on the comments provided to the docket, there is apparently a certain degree of confusion regarding NEPA compliance as it relates to design-build. First, the FHWA disagrees with the commenters who suggested that the provisions of the TEA–21 allow the RFP document to be released at any time during the NEPA process. Title 23, U.S. Code, section 112(b)(3)(B) states the following: ''Final design under a design-build contract referred to in subparagraph (A) shall not commence before compliance with section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).'' We believe the congressional intent of this provision was to ensure full compliance with the NEPA for all design-build projects. It was not meant to nullify the independent NEPA decision-making process by allowing STDs to award design-build contracts and proceed with all work except for final design and construction. To ensure a completely unbiased NEPA process, it is imperative that the STDs perform a level of design and environmental review that is adequate to fully evaluate the range of reasonable alternatives chosen to meet project goals and avoid adverse environmental impact. Only after the STD concludes the NEPA independent decision-making process, is it acceptable to release the final RFP document.

Second, the FHWA's NEPA review process was developed to ensure that environmental impact information for any federally funded action is available to public officials and citizens before decisions are made and before actions are taken. The success of the NEPA process is based on the assumption that there will be an objective and unbiased review of all reasonable alternatives that address project needs and are prudent in terms of avoiding potential environmental effects. Moreover, the public perception of the NEPA review process is very important to the FHWA and the States. The perception of an unbiased review process (which includes a no-build alternate) must not be compromised by a decision to release the design-build RFP prior to the conclusion of the NEPA review process. Therefore, the NEPA review process must be complete (an approval received for a Categorical Exclusion, Finding of No Significant Impact, or a Record of Decision as defined in 23 CFR 771.113(a)) prior to releasing the RFP document. The FHWA's environmental regulations in 23 CFR 771 require the evaluation of alternatives, their environmental consequences, and the incorporation of mitigation measures (avoidance, minimization, and compensation) prior to proceeding with an action. Project activities beyond those necessary to answer environmental questions during the NEPA review process (for example: final design, right-of-way acquisition, and construction) are not permitted prior to the conclusion of the NEPA review process.

Third, due to the nature of the design-build process, proposers often expend significant effort preparing technical and price proposals in response to an RFP. Therefore, STDs have a responsibility to: ensure that the RFP scope of work includes the details related to all environmental commitments, and, assure proposers that the scope will not change as a result

of the environmental review process. All proposers on design-build projects must be given the opportunity to consider environmental mitigation commitments in their price proposals. This is important for ensuring reasonable risk allocation for environmental commitments and maintaining the integrity of the competitive acquisition process.

Fourth, many of the commenters to the docket may not have been aware that the rule provides some degree of flexibility in this area. Section 636.109 allows contracting agencies to solicit qualifications prior to the conclusion of the NEPA process as long as the solicitation informs proposers of the general status of the NEPA process. Therefore, a contracting agency can request, receive, and evaluate qualifications and develop a short list of the most qualified offerors. In addition, § 636.115 allows contracting agencies to issue draft RFPs and to exchange certain types of information prior to releasing the final RFP document. Draft RFPs may be released prior to the conclusion of the NEPA process as long as the draft RFP informs proposers of the general status of the NEPA process and lists all NEPA alternatives (including the no-build alternative) under consideration by the contracting agency. The draft RFP document, however, must make it clear that the final RFP document will not be released until the conclusion of the NEPA process. Contracting agencies have the discretion to determine how a draft RFP document may be revised to develop and release a final RFP document.

For all of the above reasons, the FHWA is not revising the language for this section. We believe that the limitation concerning the release of the RFP document is appropriate and necessary to maintain an objective and unbiased NEPA review process for design-build projects.

Section 636.110 What Procedures May Be Used for Solicitations and Receipt of Proposals?

Peter Kiewit and Sons'', Inc. indicated the proposed rule was acceptable however, they expressed a concern that all contracting agencies might not actually have ''procedures'' to adequately address a process that involves design-build. It was suggested that the FHWA work with industry to develop guidelines in this area. The FHWA will be glad to work with the AASHTO and industry in developing any guidelines that might be appropriate for design-build contracting. However, we believe the language for this section is satisfactory and we made no revisions to the final rule.

Section 636.111 Can Oral Presentations Be Used During the Procurement Process?

Most comments supported this section, however, the TCA suggested this section should be converted to a guideline. The FHWA believes the language for this section is satisfactory and no revisions are made in the final rule.

Section 636.112 May Stipends Be Used?

Most comments supported this section. The DBIA recommended that all information regarding the proposed use of stipends on a particular procurement must be included in the solicitation documents. The FHWA believes that flexibility is appropriate here. Therefore, contracting agencies may, at their own discretion, include information regarding the use of stipends in solicitation documents.

Peter Kiewit and Sons'', Inc. and the DBIA recommended the deletion of the phrase ''the most highly ranked'' for the reasons noted in the preamble discussion for § 636.103 above. We agree with these commenters. As noted in the definitions section above, the final rule provides a revision to delete the phrase ''the most highly ranked'' from the definition of a ''stipend'' in § 636.103 and the regulatory text in § 636.112. Otherwise, the FHWA believes this section is sufficiently clear.

Section 636.113 Is the Stipend Amount Eligible for Federal Participation?

Most comments supported this section. Several commenters suggested that the proposed language could be interpreted to mean that there is a difference between ''If provided by State law'' and ''If not prohibited by State law.'' These commenters provided differing recommendations to allow flexibility if it is not prohibited by State law.

The FHWA agrees with the recommendation for clarity. The final rule provides a revision for § 636.113(b) to read as follows: ''Unless prohibited by State law, you may retain the right to use ideas from unsuccessful offerors if they accept stipends.''

Section 636.114 What Factors Should Be Considered in Risk Allocation?

Most comments supported this section. The ACEC suggested that contracting agencies should consider establishing a comment period on proposed terms and conditions prior to requesting qualifications on a project. Additionally, they might consider owner controlled insurance programs as market trends indicate an increasing unavailability of policies for design firms in the design-build market based on severe owner provisions and requirements.

The TCA suggested that this section be converted to guidance. This commenter also suggested adding the phrase ''or the impact of a given risk'' be added to the second sentence of paragraph (a), as in some cases a party may not be able to control the occurrence of a risk, but does have the ability to manage the impact.

The FHWA appreciates the concerns of the industry representatives regarding risk allocation, and we believe that a minor revision is appropriate in the final rule. The FHWA has incorporated the TCA's recommendation in the second sentence of § 636.114(a) in the final rule.

Section 636.115 May I Meet With Industry To Gather Information Concerning the Appropriate Risk Allocation Strategies?

Several commenters recommended the use of the term ''potential offerors'' or ''other offerors'' instead of the word ''public'' in paragraph (e) so that a public hearing process is not inadvertently invoked. The FHWA agrees that this language needs clarification so the term ''all potential offerors'' is used instead of the term ''the public.''

Peter Kiewit Sons'', Inc. supported the proposed language and the concept of information exchanges about project risks that have become known as ''industry review sessions.'' This commenter believed that such sessions benefit both offerors and contracting agencies and often result in a less costly project with fewer disputes and claims.

The TCA suggested that this section be converted to guidance and also recommended that a clause be added to the second sentence of paragraph (e) such that it would read as follows: ''Information provided to a particular offeror in response to that offeror's request shall not be disclosed if such information was provided in accordance with procedures established in the RFP and if disclosure would reveal the potential offeror's confidential business strategy.'' This commenter suggested that this revision is necessary to avoid problems that may arise when the procedures for communications set forth in the RFP document are not followed. The FHWA does not believe that the second sentence of paragraph (e) needs additional clarification.

Section 636.116 What Organizational Conflict of Interest Requirements Apply to Design-Build Projects?

The AASHTO, the New York State DOT and the Virginia DOT recommended that paragraph (a)(2)(v) be revised to require all proposers to provide information concerning potential organizational conflicts of interest in their proposals (not prior to award as stated in the proposed rule). These commenters believed that this would avoid unnecessary delays. The FHWA agrees and the final rule provides the following for this section: ''(v) Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals.''

The Colorado DOT suggested that this section is inconsistent with its State law, which is more specific than the proposed language. This commenter said it is not clear whether its State rules would have to be amended to comply with the proposed rules even though the State rules are more specific. This commenter also questioned the use of the phrase ''Involvement with the design-build procurement process'' in paragraph (a)(1)(ii). This entity believed that all actions leading up to issuance of the RFP document are part of the design-build process. Finally, this commenter believed that this section be converted to guidance or that the regulation provide that local statutes or policies regarding conflicts of interest are applicable to design-build projects. The FHWA does not agree that this section should be converted to guidance because paragraph (b) indicates this section only provides minimum standards to identify actual or potential conflicts of interest. To the extent State or local standards are more stringent than those in the rule, the State or local standards prevail. We partially agree with this commenter that this section needs clarification (see below).

Two individual commenters suggested that consultants and sub-consultants used by owners in the development or preparation of the RFP document be prohibited from participating on a team proposing on the project. These commenters suggested that as a minimum, contracting agencies should require written disclosure. The commenters suggested that the FHWA's proposed language, which gives the STDs flexibility in this area, is a mistake given the potential for STDs to ignore these conflicts in the interest of contracting expediency. We note the concerns of these commenters and have revised paragraph (a)(1) for clarification (see below).

The TCA recommended a number of revisions to paragraph (a)(1) to clarify that contracting agencies may determine that an organizational conflict of interest does not exist for both consultants and sub-consultants under certain conditions. The recommended revision reads as follows:

(1) Consultants and/or sub-consultants who assist the owner in the preparation of a RFP document will not be allowed to participate as an offeror or join a team submitting a proposal in response to the RFP. However, a contracting agency may determine there is not an organizational conflict of interest for a consultant or sub-consultant where:

(i) The role of the consultant or sub-consultant was limited to provision of preliminary design, reports, or similar ''low-level'' documents that will be incorporated into the RFP, and did not include assistance in development of instructions to offerors or evaluation criteria, or

(ii) Where all documents and reports delivered to the agency by the consultant or sub-consultant is made available to all offerors.

We agree with this recommendation to clarify paragraph (a)(1) and the final rule incorporates the text recommended by the TCA.

Section 636.117 What Conflict of Interest Standards Apply to Individuals Who Serve as Selection Team Members for the Owner?

The Shamrock Paving Company suggested that the regulations should require that those involved in the selection process sign a certification (under penalty of perjury) that no bias entered into the selection process. The TCA recommended specific revisions to require contracting agencies to adopt a policy rather than imposing Federal Acquisition Requirements.

The FHWA believes the language is appropriate and no revisions are made in the final rule. The rule clearly indicates that the requirements of 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will only apply in the absence of such State provisions.

Section 636.118 Is Team Switching Allowed After Contract Award?

The AASHTO and the Virginia DOT noted that the proposed language did not address the subject of consultants joining multiple teams. These commenters recommended that the FHWA continue to allow flexibility in this area. The TCA suggested that this section be converted to guidance.

The FHWA's primary concern is that post-award team switches do not result in a reduction in the quality of team members. We did not specifically address the subject of consultants joining multiple teams in the proposed rule. We do not believe it is appropriate to develop a policy in this area as this is a business decision that should be left to the discretion of the industry representatives. No revisions are made in the final rule.

Section 636.119 How Does This Part Apply to a Project Developed Under a Public-Private Partnership?

The ARTBA suggested that the NPRM provisions regarding public-private partnerships were confusing. This commenter questioned the appropriateness of the requirement for a competitive process as a basis for Federal-aid participation. The commenter believed that there may be situations where a public agency followed its own policies, but would not be eligible for Federal-aid because the process was not deemed to be a competitive process by the FHWA. We do not agree with this comment.

The Texas DOT suggested that the language needs to be clarified to describe the eligibility of a process where a contracting agency receives an unsolicited proposal based on a State law that does not require a competitive process. While the language in this section needed some clarification, the FHWA maintains that we are not obligated to participate in a project simply because a contracting agency followed its own procedures. Such procedures may include local preferences, minimal incentives for open competition or other provisions that are unacceptable for Federal-aid participation. Generally speaking, the FHWA does not participate in contracts that are based on unsolicited proposals (or developed under other non-competitive procedures) unless an emergency exists or the contract is shown to be cost effective. Upon receiving an unsolicited proposal, a contracting agency has the option of notifying other potential proposers of the receipt of an unsolicited proposal in the hope of receiving other competitive proposals or developing a new project with a similar scope of work. If a contracting agency wishes to use Federal-aid funding, it should develop procedures that address unsolicited proposals and provide for open and fair competition.

The TCA reiterated its belief that these provisions should be revised to be consistent with the TEA–21 provisions allowing ''any procurement process permitted by applicable State and local law.'' This commenter also suggested that a requirement that private developers comply with Federal

procurement procedures is likely to ''chill'' private interest in public-private agreements and negate potential private sector efficiencies. This entity believed that private developers should be permitted to enter into subcontracts in accordance with the terms of the public-private agreement and any applicable requirements of State and local laws without any Federal requirements that might be tied to Federal funding. This commenter also suggested that contracting agencies be allowed to provide price justifications if the private partner elected not to follow Federal procurement requirements for a project where Federal-aid funding was requested. The price justifications would be used to convince the FHWA that prices are fair and reasonable.

The FHWA disagrees with this commenter. Private developers will need to be aware of FHWA's requirements if the contracting agency anticipates using Federal-aid funds in the project. We disagree with the approach of using price justifications instead of open competition as a basis for Federal-aid participation.

We believe this section is consistent with the FHWA's long-standing policies for competitive contracting and to assure adequate procedures for the stewardship of public funds. The FHWA is merely being consistent with traditional Federal-aid funding and loan assistance programs in setting the policy for this section. Owners must be aware that they will have to comply with the FHWA's policies if they wish to use Federal-aid funding at some point in the project development process.

The final rule includes a provision that requires a competitive process and compliance with State and local laws as a basis for Federal participation in public-private partnerships. In addition, in order for such projects to be eligible for traditional Federal-aid funds, the final rule clarifies the FHWA's eligibility criteria. When the developer is acting as an agent of the owner, it must follow the appropriate Federal-aid procurement requirements (part 172 for engineering service contracts, part 635 for construction contracts and the requirements of this part for design-build contracts) for all prime contracts.

General Comments—Subparts B Through F

Several commenters felt that these sections are more prescriptive than necessary and that Federal preferences should not be stated in a rule. These commenters believed that the procurement mechanism used for a design-build project should be left to each contracting agency's discretion. Several of these commenters suggested that 23 U.S.C. 112(b)(3)(A) provides a clear indication of congressional intent not to interfere in State and local legislative decisions regarding the appropriate methods for procurement of design-build contracts.

The AASHTO and the TCA indicated that if this language is not changed, a monumental nationwide effort would be necessary to revise State and local laws and regulations to comply with the FHWA's requirements. Several of the commenters recommended that Subparts B through F be removed from the regulation and be provided to the industry as guidance. We disagree with these comments. The FHWA has already addressed the issue of congressional intent and disagrees with the recommendation to provide this section as guidance (see the discussion in the Flexibility section above).

The DBIA supported the use of two-phase selection procedures but recommended that all selection procedures have value and that the FWHA should consider allowing qualification-based selection procedures. This commenter suggested that qualification-based selection procedures are already authorized in a number of States and this would be consistent with the congressional intent of section 1307. The FHWA disagrees with this recommendation. We believe that price must be considered in the selection of the design-builder where construction is a major component of the scope of work under the design-build contract. The use of qualifications-based selection procedures or even quality based selection procedures is appropriate when the scope of work primarily consists of engineering or architectural services; however, where construction is the major component of the contract, price must be considered in selecting the design-builder.

A private individual supported the use of an alternate procurement process and suggested that, even when a competitive procurement process is used, the regulations should not preclude the opportunity for negotiations between the selected offeror and the contracting agency prior to award. This commenter believed that it is impossible to award a contract, where the design-builder is to provide financing, without a negotiations phase. The commenter stated that there simply are too many variables to address through a proposal process and suggested that this section be revised to specifically allow negotiations and to permit use of alternative procurement processes. This commenter further suggested that, where a pure qualifications-based selection process is used, or another alternative procurement process is used that does not include price competition, it would be appropriate to require some sort of price justification as a condition for Federal participation.

The FHWA agrees that there is merit in allowing limited negotiations after the selection of the design-builder but prior to the execution of the contract, however, we believe that such negotiations should be restricted to the clarifications that are necessary to prepare the final contract language. In order to be fair to the other proposers, such negotiations must not be used to substantially change the basic concepts that were provided in the successful offeror's proposal. We agree that when the design provided in the RFP documents is very conceptual, limited negotiations may be beneficial and necessary in order for both parties to clearly understand the issues and to ensure the contract clearly reflects this understanding.

Therefore, we have added § 636.513, Are limited negotiations allowed prior to contract execution? This provision allows for limited negotiations to clarify any remaining misunderstanding regarding scope, schedule and financing issues. However, the limited negotiations must not violate the prohibitions of § 636.507. It is not acceptable to use concepts from other proposers in final negotiations prior to contract execution.

The Texas DOT suggested, that when design is in the very conceptual stage (less than 5 percent complete), negotiations prior to award are often beneficial and necessary in order for both parties to ensure that their intent is clearly understood and reflected in the contract documents. This commenter noted that the Federal Transit Administration encourages negotiated design-build contracts. As noted above, we agree with the need for limited negotiations; however, we note that the Federal Transit Administration also requires a competitive acquisition process where price must be considered in the selection process if construction is a major element of the scope of work.

The ACEC recommended that contracting agencies use fully developed, pre-defined point award systems and judging rules that are described in the RFQ and/or RFP documents. This commenter believed that contracting agencies should place significant weight on technical qualifications and not over emphasize price at the expense of other essential criteria. The commenter believed that owners must assign knowledgeable

people to the selection team and require separate price and technical proposal submissions whereby price proposals are opened only after the technical scoring is completed and published. We agree that a contracting agency's evaluation and selection process need to be clearly defined in the RFQ and RFP documents; however, we believe the final rule provides appropriate flexibility while fostering an open and competitive process.

Section 636.201 What Selection Procedures and Award Criteria May Be Used?

The ASCE and NSPE expressed support for the mandatory use of the two-phase competitive source selection procedures and recommended that the FHWA amend the proposed regulation to require all STDs to use the two-phase competitive source-selection procedures for design-build projects, to the extent that the awarding of a design-build contract is consistent with State law.

On the other hand, the AGC supported the provisions that recommend, but do not require, the use of two-phase selection procedures. Based on its experiences, this commenter suggested that the two-phase selection process works well in most instances, but there may be certain cases where it might be appropriate to use a different selection procedure. This commenter highlighted the fact that the Congress recognized this, when debating the inclusion of design-build language in the TEA–21, it decided to reject a requirement for the use of the two-phase process. This commenter believed that the provisions address both of these concerns.

The FHWA does not believe it is appropriate to mandate the use of two-phase selection procedures in the Federal-aid highway program. While the Federal Government has elected to do so for Federal contracting, we do not believe that this is appropriate for the transportation industry. We strongly encourage contracting agencies to utilize two-phase selection procedures, however, the use of two-phase procedures remains optional.

Sections 636.202, 636.203, 636.204, 636.208 and 636.212

Very few substantive comments were received regarding these sections and, therefore, we are addressing these sections cumulatively. Peter Kiewit Sons', Inc. expressed support for these provisions while the TCA suggested that these provisions be converted to guidance.

We previously addressed the section to convert this rule to guidance. We made a minor revision in the final rule to use the term ''price'' instead of ''cost'' when referring to price proposals.

Section 636.205 Can Past Performance Be Used as an Evaluation Criteria?

The AGC suggested that in order for a two-phase selection process to work properly, it is important that contractors have faith in the system and that as much subjectivity as possible be removed from the process. It suggested that the FHWA work with the industry to develop guidance for the fair evaluation of past performance. The AGC indicated that this guidance should provide for a neutral appeals process, a means of ensuring the opinions of a single individual do not control the process, and a means to eliminate or at least mitigate a poor performance evaluation.

The ARTBA opposed the use of past performance as an evaluation criteria since it opens up the process to significant subjectivity. This commenter suggested that, if contracting agencies are allowed to use past performance as a selection criteria, its use should be limited to the short listing process and should not be used in final selection.

While the FHWA appreciates the industry concerns concerning the use of past performance, we believe that contracting agencies should have the ability to consider past performance in the procurement process; therefore, no revisions are made in the final rule. The FHWA concurs with the suggestions that guidance be cooperatively developed with the industry but this is outside the scope of this rulemaking.

Section 636.206 How Do I Evaluate Offerors Who Do Not Have a Record of Relevant Past Performance?

The DBIA and the Colorado DOT suggested that the provisions of this section were problematic and inconsistent with the provision in § 636.205(a) and (b). These commenters suggested that this requirement be deleted in its entirety. The TCA suggested that these provisions be converted to guidelines.

The FHWA utilized the FAR provisions for the language in this section. The intent of this section is to provide an equal footing for those firms who do not have a record of relevant past performance. Federal agencies have used similar requirements for several years and are available as a resource for contracting agencies that may have questions in this area.

Section 636.207 Is There a Limit on Short Listed Firms?

The AASHTO and the Virginia DOT suggested using the word ''shall'' with ''should'' in the first sentence and striking the phrase, ''and is consistent with the purposes and objectives of two-phase design-build contracting,'' as this appears to reinforce a preference for a two-phase procurement process. The South Carolina DOT recommended removing any restriction on the maximum number of firms to be short listed.

On the other hand, the DBIA supported the provisions; however, it suggested that there are times when it is appropriate to short list only two offerors and a provision should be made for this in the regulation as well.

The FHWA believes that there is sufficient flexibility in the language of the rule to address most of these concerns. However, it is not appropriate to short list only two firms as one commenter suggested.

Section 636.209 What Items Must Be Included in a Phase-Two Solicitation?

The AASHTO and the DBIA supported the provisions of this section. The TCA suggested that these provisions be converted to guidelines. Peter Kiewit Sons', Inc. suggested that the phase-two solicitation also should include the prime contract, applicable design and construction standards and criteria, procedures for requesting clarifications or changes in the RFP documents, intergovernmental agreements (if applicable), and any other item that offerors reasonably require to develop their proposed price, schedule and technical approach for the project.

The FHWA believes that language in the rule is sufficiently broad and clear. As noted in § 627.5 above, the final rule is also modified to clarify that contracting agencies may allow proposers to submit alternate technical proposals.

Section 636.210 What Requirements Apply to Projects Which Use the Modified Design-Build Procedure?

The New Jersey DOT disagreed with the provision that indicated the modified design-build technique should be limited to projects that are ''simple in scope.'' Based on its experience, this commenter believed that it is possible to use modified design-build on very complex projects. The FWHA agrees and has removed the term ''simple in scope'' from the final rule. We agree that many projects that have used the modified design-build method are not simple projects.

The AASHTO, the Florida DOT and the Virginia DOT recommended that this section be deleted. Assuming that the STDs would have discretion in choosing the appropriate procurement method for a given project, these commenters believed that the information in this section is unnecessary. The FHWA disagrees and believes that it is important to include a provision that describes this process.

The ASCE and the NSPE recommended that the FHWA delete any reference to the use of the ''modified design-build contracting method'' included in this section as it believed that this novel low-bid method is not sanctioned by other provisions of law and violates the requirements of the Federal Acquisition Reform Act of 1996. We disagree with these commenters. The Federal Acquisition Reform Act of 1996 does not apply to the Federal-aid highway program.

The Utah DOT noted the benefits of tradeoff techniques and questioned why tradeoffs were not allowed for modified design-build projects. This commenter suggested that the FHWA re-evaluate this decision. We disagree with this suggestion. Since modified design-build projects are awarded to the lowest price responsive proposer, it is not appropriate to consider tradeoffs between price and non-price factors when awarding such projects.

Section 636.211 When and How Should Tradeoffs Be Used?

Several commenters recommended that this section be deleted from the regulation as STDs should have the discretion to develop their own evaluation criteria, award formulas and selection procedures for each project.

The DBIA and Peter Kiewit Sons', Inc. questioned the requirement that cost or price must have a weight of at least 50 percent in the award criteria. These commenters believed that contracting agencies should have more flexibility in developing evaluation criteria and award formulas in order to obtain a best value selection. The DBIA questioned why the procedure of dividing the submitted price by the technical evaluation score would be viewed as complying with the 50 percent requirement. We appreciate the concern regarding the 50 percent price-weight criteria. The FHWA has used this criteria as a rule of thumb in providing guidance for the SEP–14 program. However, we recognize the problems associated with compliance with this requirement. Therefore, we have revised this section and § 636.302 of the final rule to be consistent with the provisions in 48 CFR 15.302 which provides that the solicitation shall state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—(1) Significantly more important than cost or price; (2) Approximately equal to cost or price; or (3) Significantly less important than cost or price.

The DBIA and a private individual suggested that the term ''tradeoff process'' be replaced with ''tradeoff technique'' as discussed in the definition discussion above. As noted in § 636.103 above, we agree. We have revised the appropriate sections of this part in the final rule.

The ARTBA suggested that when tradeoff techniques are used, the solicitation should not only include all of the factors that will be evaluated, but also the numeric scale that will be applied to each factor. This commenter believed that many design-build solicitations only list weighted percentages for each factor, which can be easily manipulated after the fact. We disagree with this suggestion and believe contracting agencies need the ability to develop and appropriately weight evaluation criteria.

Section 636.301 How Should Proposal Evaluation Factors Be Selected?

The Illinois DOT suggested that STDs be provided maximum discretion in their decisionmaking process concerning the selection of evaluation factors. This commenter suggested that they be allowed to mirror the prequalification requirements in the request for proposal.

The FHWA believes the provisions were sufficiently broad and flexible. No revisions were made to the final rule.

Section 636.302 Are There Any Limitations on the Selection and Use of Proposal Evaluation Factors?

Two private individuals, the AASHTO, the Virginia DOT and the South Carolina DOT suggested that this section be deleted and rewritten to give the STDs broad discretion in selecting proposal evaluation factors. Peter Kiewit Sons', Inc. and the Washington State DOT questioned the requirement that cost or price must have a weight of at least 50 percent in the award criteria and suggested that contracting agencies be provided more flexibility.

On the other hand, the AGC and the Shamrock Paving Company believed that both the FHWA and the States have a fiduciary responsibility to manage the expenditure of Highway Trust Fund dollars in the most efficient fashion possible. This commenter recommended that price be a significant factor in contractor selection in the design-build process whether using the two-phase selection method or some other method.

As noted in the discussion for § 636.211 above, we are revising the language in this section to remove the 50 percent criteria. The final rule provides the following text in paragraph (a)(1): ''You must evaluate price in every source selection where construction is a significant component of the scope of work.''

Section 636.303 May Pre-Qualification Standards Be Used as Proposal Evaluation Criteria in the RFP?

Peter Kiewit Sons', Inc. commented that it is unclear whether ''proposal evaluation criteria'' are the same as ''selection criteria.'' This commenter believed that prequalification standards should be included in the selection criteria because qualifications are part of the value an owner receives. The FHWA believes that the proposed rule was clear in this respect. The term ''proposal evaluation criteria'' was used to describe the criteria for evaluating proposals.

A private individual suggested that there is always a range in the quality of the short listed offerors and it would be appropriate to further consider these differences in the second phase of a two-phase selection procedure. This commenter recommended that this section be deleted. The FHWA disagrees with this commenter. For most projects utilizing a two-phase selection process, proposers who are prequalified or short listed must be allowed to submit price and technical proposals with the understanding that the contracting agency considers their qualifications to be satisfactory and that they will be afforded equal standing in their preparation of price and technical proposals. However, we acknowledge that there may be certain projects where it is important to consider technical expertise and financial considerations as evaluation factors in the second phase of a two-phase selection process. For this reason, we have included the term ''specialized financial qualifications'' in paragraph (b)(1).

The TCA believed that it is absolutely critical that contracting agencies have the ability to reconsider the offeror's qualifications during proposal evaluations. This entity believed that this is especially true for revenue-financed projects, where the contractor's financial status and other qualifications are a key factor in making underwriting decisions. As noted above, we agree that a firm's financial qualification is an important criteria which, at the owner's discretion, merits additional consideration as an evaluation factor in

the second phase of a two-phase selection process.

Section 636.304 What Process May Be Used To Rate and Score Proposals?

The AASHTO and the Virginia DOT recommended that this statement be deleted from the rule as it does not add value. They recommended that a reference be made to compliance with each State's procurement laws.

The TCA believed the intent of this section is to reduce subjectivity in the evaluation process. This commenter suggested that, as a practical matter, it will not reduce subjectivity, because the decisions underlying a ''best value'' determination are, by their nature, subjective. The commenter stated that the best way to assure fairness in the evaluation process is to make sure that the individuals conducting the evaluations are qualified and do not have personal or business interests that would impact their evaluations.

We disagree with the recommendation to delete this section. The intent of this section is to clearly indicate that proposals will be evaluated solely on the factors and subfactors in the solicitation; to clearly indicate rating methods that are acceptable; and to clearly indicate that the relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract file. These provisions are necessary to ensure the integrity of the competitive proposal process. No revisions were made in the final rule.

Section 636.305 Can Price Information Be Provided to Analysts Who Are Reviewing Technical Proposals?

Peter Kiewit Sons' Inc. recommended that the FHWA require technical evaluations to be completed before the price proposals are reviewed, so that knowledge of pricing does not affect technical evaluations.

The TCA suggested that some contracting agencies may wish to use qualifications-based selection procedures and may not have a price proposal.

While it is desirable to perform the technical evaluations first so that knowledge of price does not influence technical review team members, the FHWA does not believe that it is appropriate to require this. This section is consistent with the FAR provisions used by the Federal government. No revisions are made in the final rule.

Sections 636.401 and 636.402

Peter Kiewit Sons' Inc. suggested that communications should be controlled to prevent the appearance of positive or negative prejudice towards an offeror.

The DBIA suggested eliminating the term ''clarifications'' and revising the term ''communications'' (see the discussion for § 636.103). A private individual suggested revising these sections to eliminate the need for the defined terms ''clarifications'' and ''communications'' but this commenter did not provide a recommended revision. The FHWA disagrees with the recommendations to modify the definitions of ''clarifications'' and ''communications'' for the reasons previously discussed (*see* § 636.103). Communications, clarifications and discussions are all important aspects of competitive acquisition. Each has a specific meaning based on case law. While the FHWA appreciates the concern of the commenter who suggested that such communications be controlled to prevent the appearance of positive or negative prejudice, we believe that the policies incorporated in this final rule will form the cornerstone of a fair, equitable process.

The TCA and the Colorado DOT recommended § 636.402 be revised to make it clear that proposers may get clarifications of the owner's RFP. That process is necessary to allow owners to clarify any sections of the RFP that are not clear at the time of issuance. The FHWA does not object to the concept of proposers asking the contracting agency for clarifications of the RFP documents. If it is necessary to clarify and revise the RFP document, the contracting agency could issue an addenda for this purpose. The following sentence will be added to § 636.402 for clarity: ''You may wish to clarify and revise the RFP document through an addenda process in response to questions from potential offerors.''

Sections 636.403, 636.404, 636.405, and 636.406

Peter Kiewit Sons' Inc. objected to the use of the competitive range. This commenter suggested, that if properly used, a two-phase selection process should eliminate the need to establish a competitive range.

The TCA believed that the issues associated with establishment of a competitive range are complex, and are intertwined with the laws applicable to the contracting agency, as well as its policies, and therefore, it is not appropriate for the FHWA to regulate the procurement process used by State and local agencies.

The FHWA disagrees with these commenters. The intent of § 636.403 is to allow contracting agencies to establish a competitive range to minimize the overall impact to industry proposers in a lengthy procurement process. The contracting agency will have the discretion to do this. This section will serve as the FHWA basis for participation in such decisions provided they do not unnecessarily restrict competition. No revisions are made in the final rule.

Sections 636.407 and 636.408

The New York State DOT recommended that these sections be revised to allow ''communications'' to cure minor proposal deficiencies, such as, inadvertent omissions. The Texas DOT perceived the provisions in § 636.407 as prohibiting the correction of a clerical error, an unclear term or an omission in a proposal. This commenter stated that design-build projects are typically long and costly, the proposals are relatively complex, and the proposal review process is very detailed. This commenter felt that it is reasonable to allow proposers to cure minor omissions.

The FHWA believes the rule language is satisfactory. The table that accompanies § 636.401 clearly indicates that minor or clerical revisions in a proposal are allowable during a clarification. The term ''deficiencies'' has a specific meaning based on case law (see § 636.103) , and therefore, the language in § 636.407 appropriately prohibits the use of communications to cure proposal deficiencies or material omissions. No revisions are made to the final rule.

Sections 636.501 Through 636.512

The AASHTO recommended that the provision of § 636.512(a) be deleted. It recommended that the evaluation of proposals be based on each State's procurement laws. Peter Kiewit Sons', Inc. strongly objected to the use of bargaining in the selection process as described in § 636.501. This commenter believed that the contracting agency should be limited to identifying sections of a proposal that do not meet RFP requirements, but no assistance or guidance should be given to the offeror regarding how the deficiency should be corrected. However, if all price proposals exceed an advertised budget, this commenter suggested that the contracting agency should have individual discussions with all offerors regarding the factors that may have led to high prices. The contracting agency should then issue a revised RFP document to all offerors.

The FHWA appreciates the viewpoints of this commenter. While we agree that contracting agencies will need to be judicious in their use of bargaining techniques, we also believe that the

provisions of § 636.507 will offset some of these concerns. The FHWA also believes that contracting agencies must have the right to maximize their ability to obtain the best value based on the requirements and evaluation factors set forth in the RFP document.

The Orange North-American Trade Rail Access Corridor Authority suggested that contracting agencies be allowed to negotiate with the apparent winning proposer as they would under a qualifications-based selection procedure. This commenter believed that negotiating with more than one team at a time can often lead to misunderstandings and disputes. As previously noted in the discussion of Subparts B through F, we believe that limited negotiations may be appropriate for clarifying certain contract provision prior to contract execution.

The DBIA, the Texas DOT and a private individual noted the use of the term ''final proposal revision'' in § 636.511 and suggested that it would be helpful to add the phrase ''also called best and final offer (BAFO)'' to the end of that sentence. We agree with this suggestion and have revised § 636.511 to incorporate the term ''best and final offer'' in the final rule.

The AASHTO and the Virginia DOT recommended the provisions of § 636.512(a) be deleted and, if necessary, a reference be provided for compliance with each State's procurement laws. We disagree with this recommendation and believe the rule is sufficiently clear.

Subpart F—Sections 636.601 Through 636.608

The AASHTO and the South Carolina, Virginia, Colorado and Washington State DOTs recommended that § 636.602(a) be replaced with the following sentence: ''The STD must follow State procedures and regulations for notification of unsuccessful offerors.'' These commenters stated that the procurement code in certain States does not allow the inclusion of the issues listed in paragraph (a) to be listed in the contracting agency's written notification to unsuccessful offerors.

These commenters also suggested that §§ 636.605 through 636.608 be deleted as these provisions are too prescriptive and contradict too many existing State procurement laws. The AASHTO recommended that § 636.604 be replaced with the following: ''Any offeror may request a debriefing. The STD may provide preaward and postaward debriefings in accordance with the State's procurement process.'' The Colorado DOT indicated that three days was not sufficient time to provide proposers with the information required by § 636.602.

The FHWA agrees with the commenters that this subpart is prescriptive. While notifications and debriefings are very important in maintaining the integrity of a competitive acquisition process, the FHWA believes that the goals and objectives of this rule can be maintained by allowing contracting agencies to follow State procedures in these areas. Therefore, the proposed rule for Subpart F is removed in its entirety. A new section, § 636.514 How may I provide notifications and debriefings?, has been added to Subpart E to allow contracting agencies to conduct pre-award and post-award notifications and debriefing in accordance with State approved procedures.

Section 637.207 Quality Assurance Program

Similar to the comments made in § 635.413, a number of commenters indicated that the use of warranties should be left to the discretion of the States and that the limitation of warranties to specific products or construction features is too restrictive. The FHWA is providing minor revisions to § 637.207(a)(1)(iv) to reference the revisions made to § 635.413(e). This will provide greater flexibility to STDs in allocating risk and appropriately structuring design-build contracts.

The Florida DOT suggested that contracting agencies be allowed to incorporate all construction engineering and inspection services (including verification testing) under the design-build contract. While this STD would still provide some level of oversight, it expressed a preference for including all construction, engineering and inspection services under one contract to avoid redundant inspection services. This commenter suggested that the FHWA's requirement for independent verification leads to unnecessary duplication, inefficient operations and wasted funding that could be better used elsewhere.

We disagree with this commenter and believe that it is necessary to have a reliable, verifiable program for accepting the completed work. This program must rely on a system of checks and balances, including verification tests that must be done by the owner (or the owner's agent). It is not acceptable to allow the design-builder to perform (or contract with another firm to perform) all of the acceptance tests for the project. While the FHWA's quality assurance policy provides the STDs with the flexibility to structure a broad-based acceptance program (even including the design-builder's quality control test results as part of the acceptance program), it is still absolutely critical that there be an independent, verification check on the design-builder's results by the owner for acceptance purposes.

The TCA suggested revisions to use the term ''engineer of record'' in lieu of the term ''State Engineer''. We disagree with this comment. In the case of the materials certification documentation referenced in this section, the term ''State Engineer'' is a term used to refer to the contracting agency's representative, and if a project was performed by a local public agency, it would refer to that agency's engineer, not the design-builder's engineer. The responsibility for this certification must remain with the contracting agency.

The Washington State DOT recommended that this section be modified to direct STDs not to use warranties for items of routine maintenance. We do not agree with this comment. The reference to § 635.413 should be sufficient for this purpose.

Part 710—Right-of-Way and Real Estate

Section 710.313 Design-Build Projects

The DPC agreed with the flexibility provided in this section, but noted that contracting agencies have powers that the private sector does not have (such as the right of eminent domain) and, therefore, the acquisition of right-of-way should generally rest with the contracting agency. Sundt Construction, Inc. indicated that right-of-way acquisitions should be the responsibility of the party that can best control this risk and that is normally the owner except in very unique circumstances. The FHWA agrees, but there may be certain circumstances, where it is reasonable to assign certain right-of-way related responsibilities to the design-builder. We believe the provisions in this section adequately address these circumstances.

The TCA recommended a specific revision to paragraph (c) to provide additional flexibility to the contracting agency. This commenter believed that in some cases, it may be desirable to allow the design-builder to start construction on parcels for which rights of access have been obtained pursuant to condemnation authority or negotiations, with the formal transfer of title occurring at a later date. We do not agree with this comment and believe that the final rule provides sufficient flexibility.

A private individual suggested that the FHWA perform a complete review for consistency, as there are a variety of references to right-of-way acquisition.

This commenter also suggested that, in general, the FHWA should allow the contracting agencies to advance the projects as long as there is a plan for the acquisition of right-of-way consistent with the schedule, State and Federal law and good business practice. We generally agree with this comment and believe that the final rule provides sufficient flexibility for this purpose.

The Florida DOT provided detailed comments and recommended revisions for several paragraphs as noted below. This commenter:

• Suggested that clarifications be provided for the submittal of right-of-way certifications and right-of-way availability statements. As previously indicated, we revised § 635.309(p)(1)(v) to allow contracting agencies to provide a right-of-way certification at the time of project authorization to certify that either all right-of-way work has been completed or that all necessary arrangements will be made for the completion of the necessary right-of-way related work. This certification is a necessary requirement for the FHWA's authorization of the project. On the other hand, not all STDs use right-of-way availability statements. The STDs must ensure that right-of-way is available prior to the design-builder entering onto the property and the start of physical construction. In the final rule, we have provided a modification to § 710.313(a) to require compliance with the right-of-way certification requirements of § 635.309(p) and a sentence to ensure that right-of-way is available prior to the start of physical construction.

• Disagreed with the provisions of paragraph (d)(1)(i) which require the design-builder to submit written acquisition and relocation procedures for the STD's approval. This commenter believed that this requirement is not necessary and compliance could be achieved through proper oversight of the contract. We agree that a revision is appropriate in this case. We have added a sentence to paragraph (d)(1)(i) that reads as follows: ''STD's which have an FHWA approved procedures manual, in accordance with 23 CFR 710.201(c), may comply with this section by requiring the design-builder to execute a certification in its proposals that it has received the approved right-of-way manual and will comply with the procedures.''

• Recommended that paragraph (d)(1)(ii) should explicitly reference 49 CFR 24.205 and its requirements. We agree with this comment and an appropriate reference is provided in paragraph (d)(1)(ii). The commenter further suggested that the additional detailed schedule related requirements should be removed as it may be more appropriate to provide for compliance through the contracting agency's oversight of the contract. We disagree with this comment. This language is appropriate and necessary to ensure compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Uniform Act) as many contracting agencies do not have sufficient experience with the design-build contracting method.

• Believed that the requirement of paragraph (d)(2)(i) for a quality control system would be a good management tool. However, this commenter questioned the need for a regulation on this subject. We disagree. Paragraph (d)(2)(ii) provides great latitude to the STDs in complying with the requirement for a quality control system for right-of-way activities. This section is permissive to allow a consultant to perform the activity desired by the STD.

• Questioned the necessity for, and recommended that the deletion of paragraphs (d)(3) through (d)(6). We disagree with this comment. Although not a requirement, the establishment of a hold off zone around occupied properties is encouraged in paragraph (d)(3). While regulations of the U.S. Department of Labor's Occupational Safety and Health Administration may provide policy concerning the safety of construction workers, the FHWA believes that it is important to address this issue specifically for the instance where there are occupied properties adjacent to construction activities. Therefore, no changes were made in the final rule.

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866, and within the meaning of the U.S. Department of Transportation's regulatory policies and procedures because of the substantial State and industry interest in the design-build contracting technique. The Office of Management and Budget has reviewed this document under E.O. 12866. The FHWA anticipates that the economic impact of this rulemaking would be minimal. However, this rule is considered to be significant because of the substantial State and industry interest in the design-build contracting technique.

None of the commenters provided evidence to indicate that there would be a material or adverse economic impact. The FHWA hereby certifies that the final rule would not adversely affect, in a material way, any sector of the economy.

In addition, this rule will not interfere with any action taken or planned by another agency and will not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. This rule allows the STDs to use the design-build contracting technique—a contracting method that has been used only on an experimental basis to date in the Federal-aid highway program. The rule will not affect the total Federal funding available to the STDs under the Federal-aid highway program. Therefore, it is anticipated that an increased use of design-build delivery method will not yield significant economic impacts to the Federal-aid highway program. Consequently, a full regulatory evaluation is not required. The increased usage of the design-build contracting method may result in certain efficiencies in the cost and/or time it normally takes to deliver a transportation project.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (5 U.S.C. 601–612), the FHWA has evaluated the effects of this action on small entities and has determined that the final rule will not have a significant economic impact on a substantial number of small entities.

Several commenters expressed a concern that this rule may have an adverse impact on small disadvantaged business enterprises and other small firms; however, one commenter recommended that the FHWA not give preferential treatment to a firm based on its size during the selection process because such a limitation may limit the ability of engineering firms from leading the design-build team.

By its very nature, design-build contracting is best suited to large transportation projects. However, several STDs such as Pennsylvania, Ohio and Michigan have successfully completed several relatively small design-build contracts (less than $5 million) under SEP–14. Approximately 50 percent of the projects approved under SEP–14 have been less than $5 million. We expect that this trend will continue after the final rule is enacted.

Design-build contracts will present subcontracting opportunities that are similar to or greater than those available under design-bid-build contracts. In many cases, design-build contractors will subcontract for design services. Under the traditional design-bid-build system, owners typically prepare a

design with their own staff or will contract with a design consultant for this work. Based on 2001 data provided by the Pennsylvania Department of Transportation (PennDOT), the average subcontracting amount for design-build contracts compares favorably with the average subcontracting amount for design-bid-build projects in the same contract size range. While the number of PennDOT completed design-build projects is small, this data (shown in Table 1) shows that there are comparable subcontracting opportunities for relatively small design-build projects.

TABLE 1

PennDOT projects contract size	Design-build		Design-bid-build	
	No. of projects	Subcontracting percentage	No. of projects	Subcontracting percentage
$0–5 million	3	19	517	18
$5–10 million	2	33	25	29
$10–20 million	0	.....	13	30
> $20 million	0	.....	15	38

Large design-build contracts will present significant subcontracting opportunities for firms of all sizes. Table 2 illustrates the subcontracting opportunities that have been associated with medium to large-sized highway design-build contracts.

TABLE 2

Project	Owner	Contract size (million)	Subcontracting percentages
Eastern Toll Road	Transportation Corridors Agency, CA	$767	39
San Joaquin Hills Toll Road	Transportation Corridors Agency, CA	799.7	41
I–15 Reconstruction	Utah DOT	1,318	54
I–17 Reconstruction	Arizona DOT	79.7	33
E–470 Segments I and II	E–470 Public Highway Authority	323.6	90
Southern Connector	South Carolina DOT	106.4	87
Conway Bypass	South Carolina DOT	386.0	89

Thus, from the data available, the FHWA believes that the subcontracting opportunities for small entities will be similar under both design-build and design-bid-build contracts.

To offset potential adverse impacts on small entities, the final rule eliminates the FHWA's existing requirement for the prime contractor to perform 30 percent of all contract work, less specialty items (see § 635.116). This will provide greater flexibility for STDs in administering design-build contracts. For design-builders, it will remove potential barriers regarding the choice of subcontractors, and most important, it will provide greater subcontracting opportunities for firms of all sizes. For these reasons and because the final rule is directed to the States and directly affects the STDs, which are not considered small entities for the purposes of the Regulatory Flexibility Act, the FHWA certifies that the final rule will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This final rule will not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995, 109 Stat. 48). This final 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. (2 U.S.C. 1531 *et seq.*). This rulemaking allows STDs to use a contracting method that has only been used in the Federal-aid highway program on an experimental basis to date. There is no requirement for a State to use the design-build contracting technique. It is strictly an optional contracting method.

Executive Order 13132 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 13132, dated August 4, 1999, and the FHWA has determined that this action would not have sufficient federalism implications to warrant the preparation of a Federal assessment. Nothing in this document directly preempts any State law or regulation or affects the States' ability to discharge traditional State governmental functions. Section 1307 of the TEA–21 directs the FHWA to develop regulations that will: (1) Identify Secretary's approval criteria for design-build contracts, and (2) establish procedures for obtaining the FHWA's approval for design-build contracts. Throughout the final rule there is an effort to give the STDs flexibility in deciding where to appropriately use design-build contracting while keeping administrative burdens to a minimum.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this final rule under Executive Order 13175, dated November 6, 2000, and believes that the final rule will not have substantial direct effects on one or more Indian tribes; will not impose substantial direct compliance costs on Indian tribal governments; and will not preempt tribal law. The final rule does not address issues that are related to tribal operations. Therefore, a tribal summary impact statement is not required.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.205, Highway planning and construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on

Federal programs and activities apply to this program.

Executive Order 12988 (Civil Justice Reform)

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

Executive Order 13045 (Protection of Children)

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

Executive Order 12630 (Taking of Private Property)

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

Executive Order 13211 (Energy Effects)

We have analyzed this final rule under Executive Order 13211, Action Concerning Regulation That Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a significant energy action under that order because, although it is a significant regulatory action under Executive Order 12866, it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Therefore, a Statement of Energy Effects under Executive Order 13211 is not required.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et. seq.), Federal agencies must obtain approval from the Office of Management and Budget (OMB) for each collection of information they conduct, sponsor, or require through regulations. The FHWA has reviewed this rule and determined that it does not contain collection of information requirements for the purposes of the PRA.

Since 1990 the FHWA has been allowing the STDs to evaluate design-build contracting on an experimental basis through Special Experimental Project No. 14 (SEP–14). To receive the FHWA's approval, STDs were requested to prepare experimental project work plans and evaluation reports for all design-build projects.

Under the final rule, the STDs will no longer be required to develop work plans or evaluation reports for ''qualified projects.'' However, because of the ''qualified project'' definition in section 1307 of TEA–21, the FHWA will continue to approve ''non-qualified'' design-build projects under SEP–14. Therefore, a SEP–14 work plan and evaluation will continue to be necessary for these projects. The evaluation reports will document the lessons learned through design-build contracting and this information will be shared with others in the highway industry. The collection of SEP–14 information does not entail the reporting of information in response to identical questions. The SEP–14 design-build evaluation reports do not involve answering specific questions; they address issues relating to competitive acquisition. Each is a one of a kind document that relates to the lessons learned on a particular project.

National Environmental Policy Act

The agency has analyzed this rule for the purposes of the National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), and has determined that this rule will not have any effect on the quality of the environment. Design-build projects must comply with NEPA requirements and the final rule includes guidance concerning compliance with NEPA in relation to the release of the Request for Proposals document.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this proposed action with the Unified Agenda.

List of Subjects

23 CFR Part 627

Government procurement, Grant programs-transportation, Highways and roads.

23 CFR Part 635

Grant programs-transportation, Highways and roads, Reporting and recordkeeping requirements.

23 CFR Part 636

Design-build, Grant programs-transportation, Highways and roads.

23 CFR Part 637

Construction inspection and approval; Highways and roads.

23 CFR 710

Grant programs-transportation, Highway and roads, Real property acquisition, Rights-of-way, Reporting and recordkeeping requirements.

Issued on: November 22, 2002.

Mary E. Peters,

Federal Highway Administrator.

For reasons set forth in the preamble, the FHWA amends Chapter I of title 23, Code of Federal Regulations, as set forth below:

PART 627—VALUE ENGINEERING

1. Revise the authority citation for part 627 to read as follows:

Authority: 23 U.S.C. 106(d), 106(f), 112(b), 302, 307, and 315; 49 CFR 18.

2. In part 627 revise all references to ''State highway agencies'' to read ''State transportation departments''; and revise the acronyms ''SHA'' and ''SHAs'' to read ''STD'' and ''STDs'', respectively.

3. In § 627.5, add paragraph (e) to read as follows:

§ 627.5 General principles and procedures.

* * * * *

(e) In the case of a Federal-aid design-build project meeting the project criteria in 23 CFR 627.1(a), the STDs shall fulfill the value engineering analysis requirement by performing a value engineering analysis prior to the release of the Request for Proposals document.

PART 635—CONSTRUCTION AND MAINTENANCE

4. Revise the authority citation for part 635 to read as follows:

Authority: 23 U.S.C. 101 (note), 109, 112, 113, 114, 116, 119, 128, and 315; 31 U.S.C. 6505; 42 U.S.C. 3334, 4601 *et seq.*; Sec. 1041 (a), Pub. L. 102–240, 105 Stat. 1914; 23 CFR 1.32; 49 CFR 1.48(b).

5. In part 635 revise all references to ''State highway agencies'' to read ''State transportation departments''; and revise the acronyms ''SHA'' and ''SHAs'' to read ''STD'' and ''STDs'', respectively.

6. Amend § 635.102 by removing the definition of ''certification acceptance,'' and by adding the definition of ''design-build project'' to read as follows:

§ 635.102 Definitions.

* * * * *

Design-build project means a project to be developed using one or more design-build contracts.

* * * * *

7. Amend § 635.104 by adding paragraph (c) to read as follows:

§ 635.104 Method of construction.

* * * * *

(c) In the case of a design-build project, the requirements of 23 CFR part 636 and the appropriate provisions pertaining to design-build contracting in this part will apply. However, no justification of cost effectiveness is necessary in selecting projects for the design-build delivery method.

8. Revise § 635.107 to read as follows:

§ 635.107 Participation by disadvantaged business enterprises.

(a) The STD shall schedule contract lettings in a balanced program providing contracts of such size and character as to assure an opportunity for all sizes of contracting organizations to compete. In accordance with Title VI of the Civil Rights Act of 1964, subsequent Federal-aid Highway Acts, and 49 CFR part 26, the STD shall ensure equal opportunity for disadvantaged business enterprises (DBEs) participating in the Federal-aid highway program.

(b) In the case of a design-build project funded with title 23 funds, the requirements of 49 CFR part 26 and the State's approved DBE plan apply. If DBE goals are set, DBE commitments above the goal must not be used as a proposal evaluation factor in determining the successful offeror.

9. Amend § 635.109 by adding paragraph (c) to read as follows:

§ 635.109 Standardized changed condition clauses.

* * * * *

(c) In the case of a design-build project, STDs are strongly encouraged to use ''suspensions of work ordered by the engineer'' clauses, and may consider ''differing site condition'' clauses and ''significant changes in the character of work'' clauses which are appropriate for the risk and responsibilities that are shared with the design-builder.

10. Amend § 635.110 by adding paragraph (f) to read as follows:

§ 635.110 Licensing and qualification of contractors.

* * * * *

(f) In the case of a design-build project, the STDs may use their own bonding, insurance, licensing, qualification or prequalification procedure for any phase of design-build procurement.

(1) The STDs may not impose statutory or administrative requirements which provide an in-State or local geographical preference in the solicitation, licensing, qualification, pre-qualification, short listing or selection process. The geographic location of a firm's office may not be one of the selection criteria. However, the STDs may require the successful design-builder to establish a local office after the award of contract.

(2) If required by State statute, local statute, or administrative policy, the STDs may require prequalification for construction contractors. The STDs may require offerors to demonstrate the ability of their engineering staff to become licensed in that State as a condition of responsiveness; however, licensing procedures may not serve as a barrier for the consideration of otherwise responsive proposals. The STDs may require compliance with appropriate State or local licensing practices as a condition of contract award.

11. Amend § 635.112 by revising the section heading and by adding paragraph (i) to read as follows:

§ 635.112 Advertising for bids and proposals.

* * * * *

(i) In the case of a design-build project, the following requirements apply:

(1) The FHWA Division Administrator's approval of the Request for Proposals document will constitute the FHWA's project authorization and the FHWA's approval of the STD's request to release the document. This approval will carry the same significance as plan, specification and estimate approval on a design-bid-build Federal-aid project.

(2) The STD may decide the appropriate solicitation schedule for all design-build requests. This includes all project advertising, the release of the Request for Qualifications document, the release of the Request for Proposals document and all deadlines for the receipt of qualification statements and proposals. Typical advertising periods range from six to ten weeks and can be longer for large, complicated projects.

(3) The STD must obtain the approval of the Division Administrator prior to issuing addenda which result in major changes to the Request for Proposals document. Minor addenda need not receive prior approval but may be identified by the STD at the time of or prior to requesting the FHWA's concurrence in award. The STD must provide assurance that all offerors have received all issued addenda

12. Amend § 635.113 by adding paragraph (c) to read as follows:

§ 635.113 Bid opening and bid tabulations.

* * * * *

(c) In the case of a design-build project, the following requirements apply:

(1) All proposals received must be opened and reviewed in accordance with the terms of the solicitation. The STD must use its own procedures for the following:

(i) The process of handling proposals and information;

(ii) The review and evaluation of proposals;

(iii) The submission, modification, revision and withdrawal of proposals; and

(iv) The announcement of the successful offeror.

(2) The STD must submit a post-award tabulation of proposal prices to the FHWA Division Administrator. The tabulation of price proposal information may include detailed pricing information when available or lump sum price information if itemized prices are not used.

13. Amend § 635.114 by adding paragraph (k) to read as follows:

§ 635.114 Award of contract and concurrence in award.

* * * * *

(k) In the case of a design-build project, the following requirements apply: Design-build contracts shall be awarded in accordance with the Request for Proposals document. *See* 23 CFR Part 636, Design-build Contracting, for details.

14. Amend § 635.116 by adding paragraph (d) to read as follows:

§ 635.116 Subcontracting and contractor responsibilities.

* * * * *

(d) In the case of a design-build project, the following requirements apply:

(1) The provisions of paragraph (a) of this section are not applicable to design-build contracts;

(2) At their discretion, the STDs may establish a minimum percentage of work that must be done by the design-builder. For the purpose of this section, the term design-builder may include any firms that are equity participants in the design-builder, their sister and parent companies, and their wholly owned subsidiaries;

(3) No procedure, requirement or preference shall be imposed which prescribes minimum subcontracting requirements or goals (other than those necessary to meet the Disadvantaged Business Enterprise program requirements of 49 CFR part 26).

15. Amend § 635.122 by adding paragraph (c) to read as follows:

§ 635.122 Participation in progress payments.

* * * * *

(c) In the case of a design-build project, the STD must define its procedures for making progress payments on lump sum contracts in the Request for Proposal document.

16. Amend § 635.309 by adding paragraph (p) to read as follows:

§ 635.309 Authorization.

* * * * *

(p) In the case of a design-build project, the following certification requirements apply:

(1) The FHWA's project authorization (authorization to advertise or release the Request for Proposals document) will not be issued until the following conditions have been met:

(i) All projects must conform with the statewide and metropolitan transportation planning requirements (23 CFR part 450).

(ii) All projects in air quality nonattainment and maintenance areas must meet all transportation conformity requirements (40 CFR parts 51 and 93).

(iii) The NEPA review process has been concluded. (*See* 23 CFR 636.109).

(iv) The Request for Proposals document has been approved.

(v) A statement is received from the STD that either all right-of-way, utility, and railroad work has been completed or that all necessary arrangements will be made for the completion of right of way, utility, and railroad work.

(vi) If the STD elects to include right-of-way, utility, and/or railroad services as part of the design-builder's scope of work, then the Request for Proposals document must include:

(A) A statement concerning scope and current status of the required services, and

(B) A statement which requires compliance with the Uniform Relocation and Real Property Acquisition Policies Act of 1970, as amended, and 23 CFR part 710.

(2) During a conformity lapse, a design-build project (including right-of-way acquisition activities) may continue if, prior to the conformity lapse, the NEPA process was completed and the project has not changed significantly in design scope, the FHWA authorized the design-build project and the project met transportation conformity requirements (40 CFR parts 51 and 93).

(3) Changes to the design-build project concept and scope may require a modification of the transportation plan and transportation improvement program. The project sponsor must comply with the metropolitan and statewide transportation planning requirements in 23 CFR part 450 and the transportation conformity requirements (40 CFR parts 51 and 93) in air quality nonattainment and maintenance areas, and provide appropriate approval notification to the design-builder for such changes.

17. Amend § 635.411 by adding paragraph (f) to read as follows:

§ 635.411 Material or product selection.

* * * * *

(f) In the case of a design-build project, the following requirements apply: Federal funds shall not participate, directly or indirectly, in payment for any premium or royalty on any patented or proprietary material, specification, or process specifically set forth in the Request for Proposals document unless the conditions of paragraph (a) of this section are applicable.

18. Amend § 635.413 by revising the section heading and adding paragraph (e) to read as follows:

§ 635.413 Guaranty and warranty clauses.

* * * * *

(e) In the case of a design-build project, the following requirements will apply instead of paragraphs (a) through (d) of this section.

(1) General project warranties may be used on NHS projects, provided:

(i) The term of the warranty is short (generally one to two years);

(ii) The warranty is not the sole means of acceptance;

(iii) The warranty must not include items of routine maintenance which are not eligible for Federal participation; and,

(iv) The warranty may include the quality of workmanship, materials and other specific tasks identified in the contract.

(2) Performance warranties for specific products on NHS projects may be used at the STD's discretion. If performance warranties are used, detailed performance criteria must be provided in the Request for Proposal document.

(3) The STD may follow its own procedures regarding the inclusion of warranty provisions on non-NHS Federal-aid design-build contracts.

(4) For best value selections, the STD may allow proposers to submit alternate warranty proposals that improve upon the warranty terms in the RFP document. Such alternate warranty proposals must be in addition to the base proposal that responds to the RFP requirements.

19. Add Part 636 to read as follows:

PART 636—DESIGN-BUILD CONTRACTING

Subpart A—General

Sec.

636.101 What does this part do?
636.102 Does this part apply to me?
636.103 What are the definitions of terms used in this part?
636.104 Does this part apply to all Federal-aid design-build projects?
636.105 Is the FHWA requiring the use of design-build?
636.106 What type of projects may be used with design-build contracting?
636.107 Does the definition of a qualified project limit the use of design-build contracting?
636.108 How does the definition of a qualified project apply to ITS projects?
636.109 How does the NEPA review process relate to the design-build procurement process?
636.110 What procedures may be used for solicitations and receipt of proposals?
636.111 Can oral presentations be used during the procurement process?
636.112 May stipends be used?
636.113 Is the stipend amount eligible for Federal participation?
636.114 What factors should be considered in risk allocation?
636.115 May I meet with industry to gather information concerning the appropriate risk allocation strategies?
636.116 What organizational conflict of interest requirements apply to design-build projects?
636.117 What conflict of interest standards apply to individuals who serve as selection team members for the owner?
636.118 Is team switching allowed after contract award?
636.119 How does this part apply to a project developed under a public-private partnership?

Subpart B—Selection Procedures, Award Criteria

636.201 What selection procedures and award criteria may be used?
636.202 When are two-phase design-build selection procedures appropriate?
636.203 What are the elements of two-phase selection procedures for competitive proposals?
636.204 What items may be included in a phase-one solicitation?
636.205 Can past performance be used as an evaluation criteria?
636.206 How do I evaluate offerors who do not have a record of relevant past performance?
636.207 Is there a limit on short listed firms?
636.208 May I use my existing prequalification procedures with design-build contracts?
636.209 What items must be included in a phase-two solicitation?
636.210 What requirements apply to projects which use the modified design-build procedure?
636.211 When and how should tradeoffs be used?
636.212 To what extent must tradeoff decisions be documented?

Subpart C—Proposal Evaluation Factors

636.301 How should proposal evaluation factors be selected?
636.302 Are there any limitations on the selection and use of proposal evaluation factors?
636.303 May pre-qualification standards be used as proposal evaluation criteria in the RFP?
636.304 What process may be used to rate and score proposals?
636.305 Can price information be provided to analysts who are reviewing technical proposals?

Subpart D—Exchanges

636.401 What types of information exchange may take place prior to the release of the RFP document?
636.402 What types of information exchange may take place after the release of the RFP document?
636.403 What information may be exchanged with a clarification?
636.404 Can a competitive range be used to limit competition?
636.405 After developing a short list, can I still establish a competitive range?
636.406 Are communications allowed prior to establishing the competitive range?
636.407 Am I limited in holding communications with certain firms?
636.408 Can communications be used to cure proposal deficiencies?
636.409 Can offerors revise their proposals during communications?

Subpart E—Discussions, Proposal Revisions and Source Selection

636.501 What issues may be addressed in discussions?
636.502 Why should I use discussions?
636.503 Must I notify offerors of my intent to use/not use discussions?
636.504 If the solicitation indicated my intent was to award contract without discussions, but circumstances change, may I still hold discussions?
636.505 Must a contracting agency establish a competitive range if it intends to have discussions with offerors?
636.506 What issues must be covered in discussions?
636.507 What subjects are prohibited in discussions, communications and clarifications with offerors?
636.508 Can price be an issue in discussions?
636.509 Can offerors revise their proposals as a result of discussions?
636.510 Can the competitive range be further defined once discussions have begun?
636.511 Can there be more than one round of discussions?
636.512 What is the basis for the source selection decision?
636.513 Are limited negotiations allowed prior to contract execution?
636.514 How may I provide notifications and debriefings?

Authority: Sec. 1307 of Pub. L. 105–178, 112 Stat. 107; 23 U.S.C. 101, 109, 112, 113, 114, 115, 119, 128, and 315; 49 CFR 1.48(b).

Subpart A—General

§ 636.101 What does this part do?

This part describes the FHWA's policies and procedures for approving design-build projects financed under title 23, United States Code (U.S.C.). This part satisfies the requirement of section 1307(c) of the Transportation Equity Act for the 21st Century (TEA–21), enacted on June 9, 1998. The contracting procedures of this part apply to all design-build project funded under title 23, U.S.C.

§ 636.102 Does this part apply to me?

(a) This part uses a plain language format to make the rule easier for the general public and business community to use. The section headings and text, often in the form of questions and answers, must be read together.

(b) Unless otherwise noted, the pronoun ''you'' means the primary recipient of Federal-aid highway funds, the State Transportation Department (STD). Where the STD has an agreement with a local public agency (or other governmental agency) to administer a Federal-aid design-build project, the term ''you'' will also apply to that contracting agency.

§ 636.103 What are the definitions of terms used in this part?

Unless otherwise specified in this part, the definitions in 23 U.S.C. 101(a) are applicable to this part. Also, the following definitions are used:

Adjusted low bid means a form of best value selection in which qualitative aspects are scored on a 0 to 100 scale expressed as a decimal; price is then divided by qualitative score to yield an ''adjusted bid'' or ''price per quality point.'' Award is made to offeror with the lowest adjusted bid.

Best value selection means any selection process in which proposals contain both price and qualitative components and award is based upon a combination of price and qualitative considerations.

Clarifications means a written or oral exchange of information which takes place after the receipt of proposals when award without discussions is contemplated. The purpose of clarifications is to address minor or clerical revisions in a proposal.

Communications are exchanges, between the contracting agency and offerors, after receipt of proposals, which lead to the establishment of the competitive range.

Competitive acquisition means an acquisition process which is designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to the selection of the proposal representing the best value to the contracting agency.

Competitive range means a list of the most highly rated proposals based on the initial proposal rankings. It is based on the rating of each proposal against all evaluation criteria.

Contracting agency means the public agency awarding and administering a design-build contract. The contracting agency may be the STD or another State or local public agency.

Deficiency means a material failure of a proposal to meet a contracting agency requirement or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level.

Design-bid-build means the traditional project delivery method where design and construction are sequential steps in the project development process.

Design-build contract means an agreement that provides for design and construction of improvements by a contractor or private developer. The term encompasses design-build-maintain, design-build-operate, design-build-finance and other contracts that include services in addition to design and construction. Franchise and concession agreements are included in the term if they provide for the franchisee or concessionaire to develop the project which is the subject of the agreement.

Design-builder means the entity contractually responsible for delivering the project design and construction.

Discussions mean written or oral exchanges that take place after the establishment of the competitive range with the intent of allowing the offerors to revise their proposals.

Fixed price/best design means a form of best value selection in which contract price is established by the owner and stated in the Request for Proposals document. Design solutions and other qualitative factors are evaluated and rated, with award going to the firm offering the best qualitative proposal for the established price.

Intelligent Transportation System (ITS) services—means services which provide for the acquisition of technologies or systems of technologies (*e.g.*, computer hardware or software, traffic control devices, communications link, fare payment system, automatic vehicle location system, *etc.*) that provide or contribute to the provision of one or more ITS user services as defined in the National ITS Architecture.

Modified design-build means a variation of design-build in which the

contracting agency furnishes offerors with partially complete plans. The design-builders role is generally limited to the completion of the design and construction of the project.

Organizational conflict of interest means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the owner, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Prequalification means the contracting agency's process for determining whether a firm is fundamentally qualified to compete for a certain project or class of projects. The prequalification process may be based on financial, management and other types of qualitative data. Prequalification should be distinguished from short listing.

Price proposal means the price submitted by the offeror to provide the required design and construction services.

Proposal modification means a change made to a proposal before the solicitation closing date and time, or made in response to an amendment, or made to correct a mistake at any time before award.

Proposal revision means a change to a proposal made after the solicitation closing date, at the request of or as allowed by a contracting officer, as the result of negotiations.

Qualified project means any design-build project with a total estimated cost greater than $50 million or an intelligent transportation system project greater than $5 million (23 U.S.C. 112 (b)(3)(C)).

Request for Proposals (RFP) means the document that describes the procurement process, forms the basis for the final proposals and may potentially become an element in the contract.

Request for Qualification (RFQ) means the document issued by the owner in Phase I of the two-phased selection process. It typically describes the project in enough detail to let potential offerors determine if they wish to compete and forms the basis for requesting qualifications submissions from which the most highly qualified offerors can be identified.

Short listing means the narrowing of the field of offerors through the selection of the most qualified offerors who have responded to an RFQ.

Single-phase selection process means a procurement process where price and/or technical proposals are submitted in response to an RFP. Short listing is not used.

Solicitation means a public notification of an owner's need for information, qualifications, or proposals related to identified services.

Stipend means a monetary amount sometimes paid to unsuccessful offerors.

Technical proposal means that portion of a design-build proposal which contains design solutions and other qualitative factors that are provided in response to the RFP document.

Tradeoff means an analysis technique involving a comparison of price and non-price factors to determine the best value when considering the selection of other than the lowest priced proposal.

Two-phase selection process means a procurement process in which the first phase consists of short listing (based on qualifications submitted in response to an RFQ) and the second phase consists of the submission of price and technical proposals in response to an RFP.

Weakness means a flaw in the proposal that increases the risk of unsuccessful contract performance. A significant weakness in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

Weighted criteria process means a form of best value selection in which maximum point values are pre-established for qualitative and price components, and award is based upon high total points earned by the offerors.

§ 636.104 Does this part apply to all Federal-aid design-build projects?

The provisions of this part apply to all Federal-aid design-build projects within the highway right-of-way or linked to a Federal-aid highway project (*i.e.*, the project would not exist without another Federal-aid highway project). Projects that are not located within the highway right-of-way, and not linked to a Federal-aid highway project may utilize State-approved procedures.

§ 636.105 Is the FHWA requiring the use of design-build?

No, the FHWA is neither requiring nor promoting the use of the design-build contracting method. The design-build contracting technique is optional.

§ 636.106 What type of projects may be used with design-build contracting?

You may use the design-build contracting technique for any qualified or non-qualified project which you deem to be appropriate on the basis of project delivery time, cost, construction schedule and/or quality.

§ 636.107 Does the definition of a qualified project limit the use of design-build contracting?

(a) No, the use of the term ''qualified project'' does not limit the use of design-build contracting. It merely determines the FHWA's procedures for approval. The FHWA Division Administrator may approve the design-build method for ''qualified projects'' which meet the requirements of this part.

(b) The FHWA Division Administrator may also approve other design-build projects (which do not meet the ''qualified projects'' definition) by using Special Experimental Projects No. 14 (SEP–14), ''Innovative Contracting Practices,'' [1] provided the project meets the requirements of this part. Projects which do not meet the requirements of this part (either ''qualified or non-qualified'' projects) must be submitted to the FHWA Headquarters for concept approval.

§ 636.108 How does the definition of a qualified project apply to ITS projects?

For the purpose of this part, a Federal-aid ITS design-build project meets the criteria of a ''qualified project'' if:

(a) A majority of the scope of services provides ITS services (at least 50 percent of the scope of work is related to ITS services); and

(b) The estimated contract value exceeds $5 million.

§ 636.109 How does the NEPA review process relate to the design-build procurement process?

In terms of the design-build procurement process:

(a) The RFQ solicitation may be released prior to the conclusion of the NEPA review process as long as the RFQ solicitation informs proposers of the general status of the NEPA process.

(b) The RFP must not be released prior to the conclusion of the NEPA process. The NEPA review process is concluded with either a Categorical Exclusion classification, an approved Finding of No Significant Impact, or an approved Record of Decision as defined in 23 CFR 771.113(a).

(c) The RFP must address how environmental commitments and mitigation measures identified during the NEPA process will be implemented.

[1] Information concerning Special Experimental Project No. 14 (SEP–14), ''Innovative Contracting Practices,'' is available on FHWA's home page: *http://www.fhwa.dot.gov.* Additional information may be obtained from the FHWA Division Administrator in each State.

§ 636.110 What procedures may be used for solicitations and receipt of proposals?

You may use your own procedures for the solicitation and receipt of proposals and information including the following:

(a) Exchanges with industry before receipt of proposals;

(b) RFQ, RFP and contract format;

(c) Solicitation schedules;

(d) Lists of forms, documents, exhibits, and other attachments;

(e) Representations and instructions;

(f) Advertisement and amendments;

(g) Handling proposals and information; and

(h) Submission, modification, revisions and withdrawal of proposals.

§ 636.111 Can oral presentations be used during the procurement process?

(a) Yes, the use of oral presentations as a substitute for portions of a written proposal can be effective in streamlining the source selection process. Oral presentations may occur at any time in the acquisition process, however, you must comply with the appropriate State procurement integrity standards.

(b) Oral presentations may substitute for, or augment, written information. You must maintain a record of oral presentations to document what information you relied upon in making the source selection decision. You may decide the appropriate method and level of detail for the record (*e.g.*, videotaping, audio tape recording, written record, contracting agency notes, copies of offeror briefing slides or presentation notes). A copy of the record should be placed in the contract file and may be provided to offerors upon request.

§ 636.112 May stipends be used?

At your discretion, you may elect to pay a stipend to unsuccessful offerors who have submitted responsive proposals. The decision to do so should be based on your analysis of the estimated proposal development costs and the anticipated degree of competition during the procurement process.

§ 636.113 Is the stipend amount eligible for Federal participation?

(a) Yes, stipends are eligible for Federal-aid participation. Stipends are recommended on large projects where there is substantial opportunity for innovation and the cost of submitting a proposal is significant. On such projects, stipends are used to:

(1) Encourage competition;

(2) Compensate unsuccessful offerors for a portion of their costs (usually one-third to one-half of the estimated proposal development cost); and

(3) Ensure that smaller companies are not put at a competitive disadvantage.

(b) Unless prohibited by State law, you may retain the right to use ideas from unsuccessful offerors if they accept stipends. If stipends are used, the RFP should describe the process for distributing the stipend to qualifying offerors.

§ 636.114 What factors should be considered in risk allocation?

(a) You may consider, identify, and allocate the risks in the RFP document and define these risks in the contract. Risk should be allocated with consideration given to the party who is in the best position to manage and control a given risk or the impact of a given risk.

(b) Risk allocation will vary according to the type of project and location, however, the following factors should be considered:

(1) Governmental risks, including the potential for delays, modifications, withdrawal, scope changes, or additions that result from multi-level Federal, State, and local participation and sponsorship;

(2) Regulatory compliance risks, including environmental and third-party issues, such as permitting, railroad, and utility company risks;

(3) Construction phase risks, including differing site conditions, traffic control, interim drainage, public access, weather issues, and schedule;

(4) Post-construction risks, including public liability and meeting stipulated performance standards; and

(5) Right-of-way risks including acquisition costs, appraisals, relocation delays, condemnation proceedings, including court costs and others.

§ 636.115 May I meet with industry to gather information concerning the appropriate risk allocation strategies?

(a) Yes, information exchange at an early project stage is encouraged if it facilitates your understanding of the capabilities of potential offerors. However, any exchange of information must be consistent with State procurement integrity requirements. Interested parties include potential offerors, end users, acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

(b) The purpose of exchanging information is to improve the understanding of your requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy your requirements, and enhancing your ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

(c) An early exchange of information can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules. This also includes the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are as follows:

(1) Industry or small business conferences;

(2) Public hearings;

(3) Market research;

(4) One-on-one meetings with potential offerors (any meetings that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (e) of this section regarding restrictions on disclosure of information);

(5) Presolicitation notices;

(6) Draft RFPs;

(7) Request for Information (RFI) ;

(8) Presolicitation or preproposal conferences; and

(9) Site visits.

(d) RFIs may be used when you do not intend to award a contract, but want to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted to form a binding contract. There is no required format for an RFI.

(e) When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information shall be made available to all potential offerors as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a particular offeror in response to that offeror's request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy. When a presolicitation or preproposal conference is conducted, materials distributed at the conference should be made available to all potential offerors, upon request.

§ 636.116 What organizational conflict of interest requirements apply to design-build projects?

(a) State statutes or policies concerning organizational conflict of interest should be specified or referenced in the design-build RFQ or RFP document as well as any contract for engineering services, inspection or technical support in the administration of the design-build contract. All design-build solicitations should address the following situations as appropriate:

(1) Consultants and/or sub-consultants who assist the owner in the preparation of a RFP document will not be allowed to participate as an offeror or join a team submitting a proposal in response to the RFP. However, a contracting agency may determine there is not an organizational conflict of interest for a consultant or sub-consultant where:

(i) The role of the consultant or sub-consultant was limited to provision of preliminary design, reports, or similar ''low-level'' documents that will be incorporated into the RFP, and did not include assistance in development of instructions to offerors or evaluation criteria, or

(ii) Where all documents and reports delivered to the agency by the consultant or sub-consultant are made available to all offerors.

(2) All solicitations for design-build contracts, including related contracts for inspection, administration or auditing services, must include a provision which:

(i) Directs offerors attention to this subpart;

(ii) States the nature of the potential conflict as seen by the owner;

(iii) States the nature of the proposed restraint or restrictions (and duration) upon future contracting activities, if appropriate;

(iv) Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this subpart to the contract are subject to negotiation; and

(v) Requires offerors to provide information concerning potential organizational conflicts of interest in their proposals. The apparent successful offerors must disclose all relevant facts concerning any past, present or currently planned interests which may present an organizational conflict of interest. Such firms must state how their interests, or those of their chief executives, directors, key project personnel, or any proposed consultant, contractor or subcontractor may result, or could be viewed as, an organizational conflict of interest. The information may be in the form of a disclosure statement or a certification.

(3) Based upon a review of the information submitted, the owner should make a written determination of whether the offeror's interests create an actual or potential organizational conflict of interest and identify any actions that must be taken to avoid, neutralize, or mitigate such conflict. The owner should award the contract to the apparent successful offeror unless an organizational conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated.

(b) The organizational conflict of interest provisions in this subpart provide minimum standards for STDs to identify, mitigate or eliminate apparent or actual organizational conflicts of interest. To the extent that State-developed organizational conflict of interest standards are more stringent than that contained in this subpart, the State standards prevail.

§ 636.117 What conflict of interest standards apply to individuals who serve as selection team members for the owner?

State laws and procedures governing improper business practices and personal conflicts of interest will apply to the owner's selection team members. In the absence of such State provisions, the requirements of 48 CFR Part 3, Improper Business Practices and Personal Conflicts of Interest, will apply to selection team members.

§ 636.118 Is team switching allowed after contract award?

Where the offeror's qualifications are a major factor in the selection of the successful design-builder, team member switching (adding or switching team members) is discouraged after contract award. However, the owner may use its discretion in reviewing team changes or team enhancement requests on a case-by-case basis. Specific project rules related to changes in team members or changes in personnel within teams should be explicitly stated by the STD in all project solicitations.

§ 636.119 How does this part apply to a project developed under a public-private partnership?

(a) In order for a project being developed under a public-private agreement to be eligible for Federal-aid funding (including traditional Federal-aid funds, direct loans, loan guarantees, lines of credit, or some other form of credit assistance), the contracting agency must have awarded the contract to the public-private entity through a competitive process that complies with applicable State and local laws.

(b) If a contracting agency wishes to utilize traditional Federal-aid funds in a project under a public-private agreement, the applicability of Federal-aid procurement procedures will depend on the nature of the public-private agreement.

(1) If the public-private agreement establishes price and an assignment of risk, then all subsequent contracts executed by the developer are considered to be subcontracts and are not subject to Federal-aid procurement requirements.

(2) If the public-private agreement does not establish price and an assignment of risk, the developer is considered to be an agent of the owner, and the developer must follow the appropriate Federal-aid procurement requirements (23 CFR part 172 for engineering service contracts, 23 CFR part 635 for construction contracts and the requirements of this part for design-build contracts) for all prime contracts (not subcontracts).

(c) The STD must ensure such public-private projects comply with all non-procurement requirements of 23 U. S. Code, regardless of the form of the FHWA funding (traditional Federal-aid funding or credit assistance). This includes compliance with all FHWA policies such as environmental and right-of-way requirements and compliance with such construction contracting requirements as Buy America, Davis-Bacon minimum wage rate requirements, for federally funded construction or design-build contracts under the public-private agreement.

Subpart B—Selection Procedures, Award Criteria

§ 636.201 What selection procedures and award criteria may be used?

You should consider using two-phase selection procedures for all design-build projects. However, if you do not believe two-phase selection procedures are appropriate for your project (based on the criteria in § 636.202), you may use a single phase selection procedure or the modified-design-build contracting method. The following procedures are available:

Selection procedure	Criteria for using a selection procedure	Award criteria options
(a) Two-Phase Selection Procedures (RFQ followed by RFP).	§ 636.202	Lowest price, Adjusted low-bid (price per quality point), meets criteria/low bid, weighted criteria process, fixed price/best design, best value.
(b) Single Phase (RFP)	Project not meeting the criteria in § 636.202	All of the award criteria in item (a) of this table.
(c) Modified Design-Build (may be one or two phases).	Any project	Lowest price technically acceptable.

§ 636.202 When are two-phase design-build selection procedures appropriate?

You may consider the following criteria in deciding whether two-phase selection procedures are appropriate. A negative response may indicate that two-phase selection procedures are not appropriate.

(a) Are three or more offers anticipated?

(b) Will offerors be expected to perform substantial design work before developing price proposals?

(c) Will offerors incur a substantial expense in preparing proposals?

(d) Have you identified and analyzed other contributing factors, including:

(1) The extent to which you have defined the project requirements?

(2) The time constraints for delivery of the project?

(3) The capability and experience of potential contractors?

(4) Your capability to manage the two-phase selection process?

(5) Other criteria that you may consider appropriate?

§ 636.203 What are the elements of two-phase selection procedures for competitive proposals?

The first phase consists of short listing based on a RFQ. The second phase consists of the receipt and evaluation of price and technical proposals in response to a RFP.

§ 636.204 What items may be included in a phase-one solicitation?

You may consider including the following items in any phase-one solicitation:

(a) The scope of work;

(b) The phase-one evaluation factors and their relative weights, including:

(1) Technical approach (but not detailed design or technical information);

(2) Technical qualifications, such as—

(i) Specialized experience and technical competence;

(ii) Capability to perform (including key personnel); and

(iii) Past performance of the members of the offeror's team (including the architect-engineer and construction members);

(3) Other appropriate factors (excluding cost or price related factors, which are not permitted in phase-one);

(c) Phase-two evaluation factors; and

(d) A statement of the maximum number of offerors that will be short listed to submit phase-two proposals.

§ 636.205 Can past performance be used as an evaluation criteria?

(a) Yes, past performance information is one indicator of an offeror's ability to perform the contract successfully. Past performance information may be used as an evaluation criteria in either phase-one or phase-two solicitations. If you elect to use past performance criteria, the currency and relevance of the information, source of the information, context of the data, and general trends in contractor's performance may be considered.

(b) Describe your approach for evaluating past performance in the solicitation, including your policy for evaluating offerors with no relevant performance history. You should provide offerors an opportunity to identify past or current contracts (including Federal, State, and local government and private) for efforts similar to the current solicitation.

(c) If you elect to request past performance information, the solicitation should also authorize offerors to provide information on problems encountered on the identified contracts and the offeror's corrective actions. You may consider this information, as well as information obtained from any other sources, when evaluating the offeror's past performance. You may use your discretion in determining the relevance of similar past performance information.

(d) The evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the current acquisition.

§ 636.206 How do I evaluate offerors who do not have a record of relevant past performance?

In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror may not be evaluated favorably or unfavorably on past performance.

§ 636.207 Is there a limit on short listed firms?

Normally, three to five firms are short listed, however, the maximum number specified shall not exceed five unless you determine, for that particular solicitation, that a number greater than five is in your interest and is consistent with the purposes and objectives of two-phase design-build contracting.

§ 636.208 May I use my existing prequalification procedures with design-build contracts?

Yes, you may use your existing prequalification procedures for either construction or engineering design firms as a supplement to the procedures in this part.

§ 636.209 What items must be included in a phase-two solicitation?

(a) You must include the requirements for technical proposals and price proposals in the phase-two solicitation. All factors and significant subfactors that will affect contract award and their relative importance must be stated clearly in the solicitation. Use your own procedures for the solicitation as long as it complies the requirements of this part.

(b) At your discretion, you may allow proposers to submit alternate technical concepts in their proposals as long as these alternate concepts do not conflict with criteria agreed upon in the environmental decision making process. Alternate technical concept proposals may supplement, but not substitute for base proposals that respond to the RFP requirements.

§ 636.210 What requirements apply to projects which use the modified design-build procedure?

(a) Modified design-build selection procedures (lowest price technically

acceptable source selection process) may be used for any project.

(b) The solicitation must clearly state the following:

(1) The identification of evaluation factors and significant subfactors that establish the requirements of acceptability.

(2) That award will be made on the basis of the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors.

(c) The contracting agency may forgo a short listing process and advertise for the receipt of proposals from all responsible offerors. The contract is then awarded to the lowest responsive bidder.

(d) Tradeoffs are not permitted, however, you may incorporate cost-plus-time bidding procedures (A+B bidding), lane rental, or other cost-based provisions in such contracts.

(e) Proposals are evaluated for acceptability but not ranked using the non-cost/price factors.

(f) Exchanges may occur (see subpart D of this part).

§ 636.211 When and how should tradeoffs be used?

(a) At your discretion, you may consider the tradeoff technique when it is desirable to award to other than the lowest priced offeror or other than the highest technically rated offeror.

(b) If you use a tradeoff technique, the following apply:

(1) All evaluation factors and significant subfactors that will affect contract award and their relative importance must be clearly stated in the solicitation; and

(2) The solicitation must also state, at a minimum, whether all evaluation factors other than cost or price, when combined, are—

(i) Significantly less important than cost or price; or

(ii) Approximately equal to cost or price; or

(iii) Significantly less important than cost or price.

§ 636.212 To what extent must tradeoff decisions be documented?

When tradeoffs are performed, the source selection records must include the following:

(a) An assessment of each offeror's ability to accomplish the technical requirements; and

(b) A summary, matrix, or quantitative ranking, along with appropriate supporting narrative, of each technical proposal using the evaluation factors.

Subpart C—Proposal Evaluation Factors

§ 636.301 How should proposal evaluation factors be selected?

(a) The proposal evaluation factors and significant subfactors should be tailored to the acquisition.

(b) Evaluation factors and significant subfactors should:

(1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and

(2) Support meaningful comparison and discrimination between and among competing proposals.

§ 636.302 Are there any limitations on the selection and use of proposal evaluation factors?

(a) The selection of the evaluation factors, significant subfactors and their relative importance are within your broad discretion subject to the following requirements:

(1) You must evaluate price in every source selection where construction is a significant component of the scope of work.

(2) You must evaluate the quality of the product or service through consideration of one or more non-price evaluation factors. These factors may include (but are not limited to) such criteria as:

(i) Compliance with solicitation requirements;

(ii) Completion schedule (contractual incentives and disincentives for early completion may be used where appropriate); or

(iii) Technical solutions.

(3) At your discretion, you may evaluate past performance, technical experience and management experience (subject to § 636.303(b)).

(b) All factors and significant subfactors that will affect contract award and their relative importance must be stated clearly in the solicitation.

§ 636.303 May pre-qualification standards be used as proposal evaluation criteria in the RFP?

(a) If you use a prequalification procedure or a two-phase selection procedure to develop a short list of qualified offerors, then pre-qualification criteria should not be included as proposal evaluation criteria.

(b) The proposal evaluation criteria should be limited to the quality, quantity, value and timeliness of the product or service being proposed. However, there may be circumstances where it is appropriate to include prequalification standards as proposal evaluation criteria. Such instances include situations where:

(1) The scope of work involves very specialized technical expertise or specialized financial qualifications; or

(2) Where prequalification procedures or two-phase selection procedures are not used (short listing is not performed).

§ 636.304 What process may be used to rate and score proposals?

(a) Proposal evaluation is an assessment of the offeror's proposal and ability to perform the prospective contract successfully. You must evaluate proposals solely on the factors and subfactors specified in the solicitation.

(b) You may conduct evaluations using any rating method or combination of methods including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract file.

§ 636.305 Can price information be provided to analysts who are reviewing technical proposals?

Normally, technical and price proposals are reviewed independently by separate evaluation teams. However, there may be occasions where the same experts needed to review the technical proposals are also needed in the review of the price proposals. This may occur where a limited amount of technical expertise is available to review proposals. Price information may be provided to such technical experts in accordance with your procedures.

Subpart D—Exchanges

§ 636.401 What types of information exchange may take place prior to the release of the RFP document?

Verbal or written information exchanges (such as in the first-phase of a two-phase selection procedure) must be consistent with State and/or local procurement integrity requirements. See § 636.115(a) for additional details.

§ 636.402 What types of information exchange may take place after the release of the RFP document?

Certain types of information exchange may be desirable at different points after the release of the RFP document. The following table summarizes the types of communications that will be discussed in this subpart. These communication methods are optional.

Type of information exchange	When	Purpose	Parties involved
(a) Clarifications	After receipt of proposals	Used when award without discussions is contemplated. Used to clarify certain aspects of a proposal (resolve minor errors, clerical errors, obtain additional past performance information, etc.).	Any offeror whose proposal is not clear to the contracting agency.
(b) Communications	After receipt of proposals, prior to the establishment of the competitive range.	Used to address issues which might prevent a proposal from being placed in the competitive range.	Only those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. All offerors whose past performance information is the determining factor preventing them from being placed in the competitive range.
(c) Discussions (see Subpart E of this part).	After receipt of proposals and after the determination of the competitive range.	Enhance contracting agency understanding of proposals and offerors understanding of scope of work. Facilitate the evaluation process.	Must be held with all offerors in the competitive range.

§ 636.403 What information may be exchanged with a clarification?

(a) You may wish to clarify any aspect of proposals which would enhance your understanding of an offeror's proposal. This includes such information as an offeror's past performance or information regarding adverse past performance to which the offeror has not previously had an opportunity to respond. Clarification exchanges are discretionary. They do not have to be held with any specific number of offerors and do not have to address specific issues.

(b) You may wish to clarify and revise the RFP document through an addenda process in response to questions from potential offerors.

§ 636.404 Can a competitive range be used to limit competition?

If the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, you may limit the number of proposals to the greatest number that will permit an efficient competition. However, you must provide written notice to any offeror whose proposal is no longer considered to be included in the competitive range. Offerors excluded or otherwise eliminated from the competitive range may request a debriefing. Debriefings may be conducted in accordance with your procedures as long as you comply with § 636.514.

§ 636.405 After developing a short list, can I still establish a competitive range?

Yes, if you have developed a short list of firms, you may still establish a competitive range. The short list is based on qualifications criteria. The competitive range is based on the rating of technical and price proposals.

§ 636.406 Are communications allowed prior to establishing the competitive range?

Yes, prior to establishing the competitive range, you may conduct communications to:

(a) Enhance your understanding of proposals;

(b) Allow reasonable interpretation of the proposal; or

(c) Facilitate your evaluation process.

§ 636.407 Am I limited in holding communications with certain firms?

Yes, if you establish a competitive range, you must do the following:

(a) Hold communications with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range;

(b) Address adverse past performance information to which an offeror has not had a prior opportunity to respond; and

(c) Hold communications only with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain.

§ 636.408 Can communications be used to cure proposal deficiencies?

(a) No, communications must not be used to:

(1) Cure proposal deficiencies or material omissions;

(2) Materially alter the technical or cost elements of the proposal; and/or

(3) Otherwise revise the proposal.

(b) Communications may be considered in rating proposals for the purpose of establishing the competitive range.

§ 636.409 Can offerors revise their proposals during communications?

(a) No, communications shall not provide an opportunity for an offeror to revise its proposal, but may address the following:

(1) Ambiguities in the proposal or other concerns (*e.g.*, perceived deficiencies, weaknesses, errors, omissions, or mistakes); and

(2) Information relating to relevant past performance.

(b) Communications must address adverse past performance information to which the offeror has not previously had an opportunity to comment.

Subpart E—Discussions, Proposal Revisions and Source Selection

§ 636.501 What issues may be addressed in discussions?

In a competitive acquisition, discussions may include bargaining. The term bargaining may include: persuasion, alteration of assumptions and positions, give-and-take, and may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract.

§ 636.502 Why should I use discussions?

You should use discussions to maximize your ability to obtain the best value, based on the requirements and the evaluation factors set forth in the solicitation.

§ 636.503 Must I notify offerors of my intent to use/not use discussions?

Yes, in competitive acquisitions, the solicitation must notify offerors of your intent. You should either:

(a) Notify offerors that discussions may or may not be held depending on the quality of the proposals received (except clarifications may be used as described in § 636.401). Therefore, the offeror's initial proposal should contain the offeror's best terms from a cost or price and technical standpoint; or

(b) Notify offerors of your intent to establish a competitive range and hold discussions.

§ 636.504 If the solicitation indicated my intent was to award contract without discussions, but circumstances change, may I still hold discussions?

Yes, you may still elect to hold discussions when circumstances dictate, as long as the rationale for doing so is documented in the contract file. Such circumstances might include situations where all proposals received have deficiencies, when fair and reasonable prices are not offered, or when the cost or price offered is not affordable.

§ 636.505 Must a contracting agency establish a competitive range if it intends to have discussions with offerors?

Yes, if discussions are held, they must be conducted with all offerors in the competitive range. If you wish to hold discussions and do not formally establish a competitive range, then you must hold discussions with all responsive offerors.

§ 636.506 What issues must be covered in discussions?

(a) Discussions should be tailored to each offeror's proposal. Discussions must cover significant weaknesses, deficiencies, and other aspects of a proposal (such as cost or price, technical approach, past performance, and terms and conditions) that could be altered or explained to enhance materially the proposal's potential for award. You may use your judgment in setting limits for the scope and extent of discussions.

(b) In situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, you may hold discussions regarding increased performance beyond any mandatory minimums, and you may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased.

§ 636.507 What subjects are prohibited in discussions, communications and clarifications with offerors?

You may not engage in conduct that:

(a) Favors one offeror over another;

(b) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;

(c) Reveals an offerors price without that offeror's permission;

(d) Reveals the names of individuals providing reference information about an offeror's past performance; or

(e) Knowingly furnish source selection information which could be in violation of State procurement integrity standards.

§ 636.508 Can price or cost be an issue in discussions?

You may inform an offeror that its price is considered to be too high, or too low, and reveal the results of the analysis supporting that conclusion. At your discretion, you may indicate to all offerors your estimated cost for the project.

§ 636.509 Can offerors revise their proposals as a result of discussions?

(a) Yes, you may request or allow proposal revisions to clarify and document understandings reached during discussions. At the conclusion of discussions, each offeror shall be given an opportunity to submit a final proposal revision.

(b) You must establish a common cut-off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the contracting agency intends to make award without obtaining further revisions.

§ 636.510 Can the competitive range be further defined once discussions have begun?

Yes, you may further narrow the competitive range if an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award. That offeror may be eliminated from the competitive range whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision. You must provide an offeror excluded from the competitive range with a written determination and notice that proposal revisions will not be considered.

§ 636.511 Can there be more than one round of discussions?

Yes, but only at the conclusion of discussions will the offerors be requested to submit a final proposal revision, also called best and final offer (BAFO). Thus, regardless of the length or number of discussions, there will be only one request for a revised proposal (*i.e.*, only one BAFO).

§ 636.512 What is the basis for the source selection decision?

(a) You must base the source selection decision on a comparative assessment of proposals against all selection criteria in the solicitation. While you may use reports and analyses prepared by others, the source selection decision shall represent your independent judgment.

(b) The source selection decision shall be documented, and the documentation shall include the rationale for any business judgments and tradeoffs made or relied on, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

§ 636.513 Are limited negotiations allowed prior to contract execution?

Yes, after the source selection but prior to contract execution, you may conduct limited negotiations with the selected design-builder to clarify any remaining issues regarding scope, schedule, financing or any other information provided by that offeror. You must comply with the provisions of § 636.507 in the exchange of this information.

§ 636.514 How may I provide notifications and debriefings?

You may provide pre-award or post-award notifications in accordance with State approved procedures. If an offeror requests a debriefing, you may provide pre-award or post-award debriefings in accordance with State approved procedures.

PART 637—CONSTRUCTION INSPECTION AND APPROVAL

20. The authority citation for part 637 is revised to read as follows:

Authority: Sec. 1307, Pub. L. 105–178, 112 Stat. 107; 23 U.S.C. 109, 114, and 315; 49 CFR 1.48(b).

PART 637—[AMENDED]

21. In part 637 revise all references to ''State highway agency's'' to read ''State transportation department's''; revise the acronyms ''SHA'' and ''SHAs'' to read ''STD'' and ''STDs'', respectively; and revise the references to ''non-SHA'' to read ''non-STD''.

22. Amend § 637.207 by adding paragraph (a)(1)(iv) and paragraph (b) to read as follows:

§ 637.207 Quality assurance program.

(a) * * *

(1) * * *

(iv) In the case of a design-build project on the National Highway

System, warranties may be used where appropriate. See 23 CFR 635.413(e) for specific requirements.

* * * * *

(b) In the case of a design-build project funded under title 23, U.S. Code, the STD's quality assurance program should consider the specific contractual needs of the design-build project. All provisions of paragraph (a) of this section are applicable to design-build projects. In addition, the quality assurance program may include the following:

(1) Reliance on a combination of contractual provisions and acceptance methods;

(2) Reliance on quality control sampling and testing as part of the acceptance decision, provided that adequate verification of the design-builder's quality control sampling and testing is performed to ensure that the design-builder is providing the quality of materials and construction required by the contract documents.

(3) Contractual provisions which require the operation of the completed facility for a specific time period.

PART 710—RIGHT-OF-WAY AND REAL ESTATE

23. The authority citation for part 710 is revised to read as follows:

Authority: Sec. 1307, Pub. L. 105–178, 112 Stat. 107; 23 U.S.C. 101(a), 107, 108, 111, 114, 133, 142(f), 156, 204, 210, 308, 315, 317, and 323; 42 U.S.C. 2000d *et seq.*, 4633, 4651–4655; 49 CFR 1.48(b) and (cc), 18.31, and parts 21 and 24; 23 CFR 1.32.

24. Amend part 710 by adding § 710.313 to subpart C to read as follows:

§ 710.313 Design-build projects.

(a) In the case of a design-build project, right-of-way must be acquired and cleared in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and STD right-of-way procedures. The STD shall submit a right-of-way certification in accordance with 23 CFR 635.309(p) when requesting FHWA's authorization. If the right-of-way services are included in the Request for Proposal document, the STD shall ensure that right-of-way is available prior to the start of physical construction on individual properties.

(b) The decision to advance a right-of-way segment to the construction stage shall not impair the safety or in anyway be coercive in the context of 49 CFR 24.102(h) with respect to unacquired or occupied properties on the same or adjacent segments of project right-of-way.

(c) Certain right-of-way acquisition and clearance services may be incorporated into the design-build contract if allowed under State law. The contract may include language that provides that construction will not commence until all property is acquired and relocations have been completed; or, the construction could be phased or segmented to allow right-of-way activities to be completed on individual properties or a group of properties, thereby allowing certification in a manner satisfactory to the STD for each phase or segment.

(d) If the STD elects to include right-of-way services in the design-build contract, the following provisions must be addressed in the request for proposals document:

(1)(i) The design-builder must submit written acquisition and relocation procedures to the STD for approval prior to commencing right-of-way activities. These procedures should contain a prioritized appraisal, acquisition, and relocation strategy as well as check points for STD approval, such as approval of just compensation, replacement housing payment calculations, replacement housing payment and moving cost claims, appraisals, administrative and stipulated settlements that exceed determined thresholds based on a risk management analysis, etc. STD's which have an FHWA approved procedures manual, in accordance with 23 CFR 710.201(c), may comply with this section by requiring the design-builder to execute a certification in its proposal that it has received the approved right-of-way manual and will comply with the procedures.

(ii) The written relocation plan must provide reasonable time frames for the orderly relocation of residents and businesses on the project as provided at 49 CFR 24.205. It should be understood that these time frames will be based on best estimates of the time it will take to acquire the right-of-way and relocate families in accordance with certain legal requirements and time frames which may not be violated. Accordingly, the time frames estimated for right-of-way acquisition will not be compressed in the event other necessary actions preceding right-of-way acquisition miss their assigned due dates.

(2)(i) The design-builder must establish a project tracking system and quality control system. This system must show the appraisal, acquisition and relocation status of all parcels.

(ii) The quality control system may be administered by an independent consultant with the necessary expertise in appraisal, acquisition and relocation policies and procedures, who can make periodic reviews and reports to the design-builder and the STD.

(3) The STD may consider the establishment of a hold off zone around all occupied properties to ensure compliance with right-of-way procedures prior to starting construction activities in affected areas. The limits of this zone should be established by the STD prior to the design-builder entering on the property. There should be no construction related activity within the hold off zone until the property is vacated. The design-builder must have written notification of vacancy from the right-of-way quality control consultant or STD prior to entering the hold off zone.

(4) Adequate access shall be provided to all occupied properties to insure emergency and personal vehicle access.

(5) Utility service must be available to all occupied properties at all times prior to and until relocation is completed.

(6) Open burning should not occur within 305 meters (1,000 feet) of an occupied dwelling.

(7) The STD will provide a right-of-way project manager who will serve as the first point of contact for all right-of-way issues.

(e) If the STD elects to perform all right-of-way services relating to the design-build contract, the provisions in § 710.311 will apply. The STD will notify potential offerors of the status of all right-of-way issues in the request for proposal document.

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Part III

Department of Transportation

Federal Railroad Administration

49 CFR Part 241

U.S. Locational Requirement for Dispatching of U.S. Rail Operations; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 241

[FRA Docket No. FRA–2001–8728, Notice No. 3]

RIN 2130–AB38

U.S. Locational Requirement for Dispatching of U.S. Rail Operations

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Final rule.

SUMMARY: This Final Rule will supplant an interim Final Rule (IFR) that has been in effect since January 10, 2002, while FRA has gathered comments on whether to permit extraterritorial dispatching (the act of dispatching of a railroad operation that occurs on trackage in the United States by a dispatcher located outside of the United States). Through January 10, 2003, the IFR generally bars extraterritorial dispatching with the following three exceptions: extraterritorial dispatching is permitted in the case of emergencies, but only for the duration of the emergency; extraterritorial dispatching that was normally occurring in December of 1999 is allowed to continue (''grandfathering exception''); and very limited additional extraterritorial dispatching from Canada or Mexico of railroad track in the United States immediately adjacent to the borders is authorized (''fringe border exception''). After considering the comments on the IFR, FRA has determined that while special treatment is appropriate for extraterritorial dispatching that was conducted pursuant to the terms of the IFR, such treatment is better handled through a special waiver process discussed below.

Effective January 11, 2003, the Final Rule adds a new regulation that generally requires, in the absence of a waiver, that all dispatching of railroad operations that occur in the United States be performed in the United States, with two minor exceptions.

First, a railroad is allowed to conduct extraterritorial dispatching from Mexico or Canada in emergency situations, but only for the duration of the emergency. A railroad relying on the exception must provide prompt written notification of its action to the FRA Regional Administrator of each FRA region in which the railroad operation occurs; such notification is not required before addressing the emergency situation.

Second, a railroad that was normally conducting extraterritorial dispatching from Canada or Mexico in accordance with the terms of the IFR may continue to so dispatch these operations for a transitional 90-day period to permit the railroad to file a waiver petition. This regulation lists of the four lines of track that meet the terms of the ''grandfathering exception'' of the IFR; FRA is not aware of any additional operations that have been commenced under the ''fringe border exception'' of the IFR. If a waiver request is filed within the transitional period, the railroad may continue to conduct the extraterritorial dispatching until FRA acts on the waiver petition.

As mentioned above, existing extraterritorial dispatching, as well as proposed new extraterritorial dispatching from Canada or Mexico of railroad track in the United States in the area immediately adjacent to the borders, will be considered under a special fringe border waiver process. A fringe border waiver request by a railroad will generally be granted if the railroad has taken adequate steps to ensure the security of its dispatch center, the railroad has in place specified safety programs for its extraterritorial dispatchers, a government safety agency in the country where the dispatching will occur has safety jurisdiction over the railroad and the dispatchers and is satisfied with the railroad's safety programs, and the railroad agrees to abide by the operating restrictions specified in the rule. FRA anticipates that both Canadian and Mexican railroads can easily meet these requirements for fringe border dispatching of operations, and that FRA will be able to work out satisfactory arrangements with the railroads and the regulatory agencies in Canada and Mexico concerning the monitoring of the agreed upon safety programs.

Railroads that wish to commence additional extraterritorial dispatching may apply for a waiver from the domestic locational requirement. Such a waiver may be granted if an applicant can demonstrate to the satisfaction of FRA that the waiver can be made without compromising or diminishing rail safety.

FRA will continue to explore areas of bilateral cooperation with the governments of Canada and Mexico on extraterritorial dispatching and other cross-border safety issues. FRA will also continue working with the railroads in those countries on cross-border safety issues.

DATES: This regulation is effective January 11, 2003, except for §§ 241.7(a), (b), and (c); 241.9(c); 241.11(c); 241.13(c) and 241.15, which contain information collection requirements that have not been approved by OMB. FRA will publish a document in the **Federal Register** announcing the effective date.

ADDRESSES: Any petition for reconsideration should reference the FRA docket and notice numbers (Docket No. FRA–2001–8728, Notice No. 3). You may submit your petition and related material by only one of the following methods:

By mail to the Docket Management System, United States Department of Transportation, room PL–401, 400 7th Street, SW., Washington, DC 20590–0001; or

Electronically through the Web site for the Docket Management System at *http://dms.dot.gov.* For instructions on how to submit comments electronically, visit the Docket Management System Web site and click on the ''Help'' menu.

The Docket Management Facility maintains the public docket for this rulemaking. The docket is available for inspection or copying at room PL–401 on the Plaza Level of the Nassif Building at the same address during regular business hours. You may also obtain access to this docket on the Internet at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: For technical issues related to alcohol and controlled substance matters, Lamar Allen, Alcohol and Drug Program Manager, FRA Office of Safety, RRS–11, 1120 Vermont Avenue, NW., Stop 25, Washington, DC 20590 (telephone 202–493–6313); or for other technical issues,Dennis Yachechak, Railroad Safety Specialist, Office of Safety, RRS–11, FRA 1120 Vermont Avenue, NW., Stop 25, Washington, DC 20590 (telephone 202–493–6260). For legal issues related to alcohol and controlled substance matters, Patricia Sun, Trial Attorney, Office of the Chief Counsel, RCC–11, FRA 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590 (telephone 202–493–6038); or for other legal issues, John Winkle, Trial Attorney, Office of the Chief Counsel, RCC–12, FRA 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590 (telephone 202–493–6067).

SUPPLEMENTARY INFORMATION:

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I. Notice Reopening Comment Period on Alcohol and Drug Testing NPRM

Elsewhere in today's **Federal Register**, FRA is publishing a notice soliciting additional comments on its NPRM to amend its alcohol and drug testing rule (49 CFR part 219). 66 FR 64000 (Dec. 11, 2001). (Hereinafter, references to a numbered part are to a part in title 49 of the CFR.) Under the proposed amendments to part 219, employees of a foreign railroad whose primary reporting point is outside the United States who perform train or dispatching service in the United States covered by hours of service laws (''covered service'') would become subject to all of the requirements of part 219.

II. Proceedings to Date

On December 11, 2001, (66 FR 63942), FRA published an IFR that prohibited any extraterritorial dispatching for a period of 365 days, but included exceptions for emergency situations, any United States track segment that was regularly extraterritorially dispatched in December of 1999, and fringe border operations, as those operations were defined in the IFR. The IFR went into effect on January 10, 2002, and remains in effect through January 10, 2003.

In the IFR, FRA solicited comments on the benefits and costs of FRA's proposal as well as comments on whether FRA should adopt an alternative regulatory scheme under which extraterritorial dispatching of United States rail operations would be permitted and, if so, under what conditions. The IFR generated ten written comments, which may be found in the docket and which are discussed below.[1]

One of the commenters, CP, requested that FRA delay indefinitely the effective date of the IFR. CP requested the delay because it felt that it was not possible for FRA to resolve all of the issues surrounding the IFR and the related NPRM revising part 219 in such a short period of time. CP felt that it would be better to delay the effective date until written comments could be submitted and FRA's Railroad Safety Advisory Committee consultations could take place. In return for the delay, CP pledged to refrain from expanding any extraterritorial dispatching of United States rail operations.

FRA did not grant the request, however, because CP's operations were not the sole impetus for the IFR. Instead, as explained below, FRA concerns were and still are the recent increase in mergers and acquisitions by and between the larger railroads that has raised the potential for extensive extraterritorial dispatching, the fact that present technology enables any railroad operating in the United States to move its dispatching of United States train operations to any location in the world, and the safety and security problems associated with extraterritorial dispatching of domestic rail operations. In order to preserve the status quo that FRA believed would be jeopardized by delaying the effective date of the IFR, FRA determined that the safest course of action would be to proceed with the IFR and then make a final determination based on the comments received after the IFR had become effective.

In addition to requesting written comments, FRA held a public hearing on the IFR in Washington, DC, on February 12, 2002, at which four parties submitted oral comments. These parties consisted of CP, Canadian National Railway Company (CN), the Brotherhood of Locomotive Engineers (BLE), and the American Train Dispatchers Department of the BLE (ATDD). A transcript of this hearing is available in the public docket of this rulemaking. After reviewing both the written and oral comments, FRA has decided that the safety and security issues presented by extraterritorial dispatching mandate that FRA proceed with this Final Rule.

[1] Canadian Pacific Railway Company (CP) submitted two items to the docket. Shortly after publication of the IFR, CP submitted a request to delay the effective date of the rule. CP then followed up the letter by submitting comments addressing the issues in the IFR. Thus, there were nine commenters, but FRA considered ten submissions in determining a course of action.

III. Concerns Regarding Extraterritorial Dispatching that Led FRA To Adopt the Interim Final Rule

A. The Importance of Safe Dispatching and the Possibility that Railroads May Conduct Widespread Extraterritorial Dispatching

Proper dispatching is essential for safe railroad operations of both freight and passenger trains. Freight trains can be more than a mile in length, typically carry hazardous materials, and require a mile or more to stop. Freight trains sometimes carry arms, ammunition, and implements of war as well as spent nuclear fuel. Shipments of spent nuclear fuel will dramatically increase once the storage site in Nevada's Yucca Mountain opens in 2010. As was explained in detail in the preamble to the IFR, dispatchers are the railroad employees primarily responsible for the safe movement of trains. *See* 66 FR 63492. Dispatchers actually steer the train by remotely aligning switches. They determine whether the train should stop or move, and if so, at what speed, by operating signals and issuing train orders and other forms of movement authority or speed restriction. In addition, dispatchers protect track gangs and other roadway workers from passing trains by issuing authorities for working limits. Train crews on board locomotives carry out the dispatchers' instructions and are responsible for actually moving the train, but dispatchers make it possible to do so safely.

Currently, dispatchers located outside of the United States control only very limited train movements in the United States. Their operations are listed in appendix A to the rule and are as follows: 1.8 miles from Windsor, Ontario, to Detroit, Michigan (dispatched by CP); 3.1 miles from Sarnia, Ontario, to Port Huron, Michigan (dispatched by CN); 43.8 miles of the Sprague Subdivision between Baudette, Minnesota, and International Boundary, Minnesota (dispatched by CN); and 99 miles between Vanceboro, Maine, and Brownville Junction, Maine (dispatched by the Eastern Maine Railway Company).[2]

[2] The listed distances are the distances dispatched from Canada and not necessarily the distance that a Canadian crew operates a train into

Continued

It is commonplace in today's railroad operations for dispatchers to be located at a significant distance from the trackage and operations they control. For example, CSX Transportation, Inc. (CSX) dispatchers in Jacksonville, Florida, control the operations of CSX, Amtrak, and commuter rail lines throughout the Southeast and Mid-Atlantic. In addition, nearly all of the dispatching operations for the Union Pacific Railroad Company (UP), which is the Nation's largest railroad, are conducted from one facility in Omaha, Nebraska. FRA does not believe there are any inherent safety risks in this type of centralized operation, but because current technology allows for such operations, FRA recognizes that this technology allows railroads operating in the United States that now dispatch their trains in the United States to instead dispatch these trains from anywhere in the world.

In addition, FRA is also concerned about the increase in business combinations in the rail industry. Prior to the imposition of a moratorium on railroad mergers by the Surface Transportation Board (STB), there were several high-profile mergers involving both domestic and Canadian railroads. The mergers involving the Canadian railroads resulted in a dramatic increase in the amount of domestic track owned by Canadian railroads. For example, CN acquired the Grand Trunk Western Railroad, Inc. (GTW) (646 miles of track operated by GTW (1998 figures)), the Illinois Central Railroad Company (2,591 miles of track), and the 2,500 route miles of United States Class II and III railroads formerly owned by the Wisconsin Central Transportation Company. In addition, CP acquired the Soo Line Railroad Company (3225 miles of track operated). Now that the STB moratorium has been lifted, it is legally possible that more railroads will combine, resulting in larger multinational railroads and increasing the appeal of cross-border operations.

B. Regulatory Oversight and the Potential for a Regulatory Gap

Any dispatcher, wherever located, who controls rail operations while under the influence of alcohol or drugs, exhausted because of working excessive hours, or not properly trained and tested on railroad operating rules could issue incorrect directions or could fail to issue directions, thereby jeopardizing the safety of railroad employees or causing a train collision or derailment with resulting injuries or death to train crews, passengers, or both, and possible harm to surrounding communities and the environment; the harm could be widespread if the trains are carrying hazardous materials such as spent nuclear fuels. Domestically, there have been accidents resulting from, for example, a dispatcher failing to relay to a train crew that a grade crossing was out of service (*e.g.*, on January 9, 2001, a dispatcher at a CN/Illinois Central Railroad communications facility mistakenly cleared a grade crossing for normal operations, resulting in a collision between a train and a motor vehicle at the crossing); a dispatcher routing a train into the path of another train (*e.g.*, on June 22, 1997, a dispatcher failed to communicate correct track warrant information, causing two freight trains to collide head-on in Devine, Texas, killing four persons); and a dispatcher allowing a train to enter working limits when roadway workers and equipment were present (*e.g.*, on January 29, 1988, an Amtrak passenger train struck maintenance-of-way equipment, resulting in numerous injuries and substantial property damage; the National Transportation Safety Board determined that the accident was caused by a dispatcher who was impaired by drugs).

Because problems such as fatigue, drug and alcohol abuse, and lack of effective job training seriously compromise the safety-critical performance of employees who dispatch trains, the United States has established safety requirements that, together with FRA safety oversight, effectively deal with these problems for railroad dispatchers located in the United States. 49 U.S.C. ch. 51, 201–213; 49 CFR 1.49. Examples of safety rules and laws governing domestic dispatchers include operating rules and efficiency testing (part 217), drug and alcohol testing (part 219), and hours of service restrictions (49 U.S.C. 21105, and part 228). To promote compliance, FRA may conduct inspections and investigations and impose sanctions for violations of its safety standards against both railroads and individuals, including dispatchers, if the individual or railroad is located in the United States. *See, e.g.,* 49 U.S.C. 20107; 49 U.S.C. ch. 213; and part 209, appendix A (a description of FRA's safety enforcement program and policy). However, paragraph (c) of § 219.3 currently exempts employees of a foreign railroad, including dispatchers, whose primary reporting point is located outside of the United States and who perform service in the United States covered by the hours of service laws from subparts E (identification of troubled employees), F (pre-employment testing), and G (random testing). As previously noted, FRA has issued an NPRM that would amend part 219 to require drug and alcohol testing of such an employee. The comment period on the part 219 NPRM has been extended by a notice published elsewhere in the **Federal Register** today.

Besides enforcing the Federal railroad safety laws, FRA may also take other safety-related actions. For example, FRA may conduct investigations of railroad accidents in the United States, including those involving dispatching, and may issue reports on the agency findings, including its determination of probable cause. *See, e.g.*, 49 U.S.C. 20107, 20902; 49 CFR 225.31. In addition, FRA may conduct research and development as necessary for every area of railroad safety, including dispatching. 49 U.S.C. 20108. Moreover, FRA may issue rules and orders, as necessary, for every area of railroad safety, including dispatching. *See* 49 U.S.C. 20103. Such orders may include emergency orders to eliminate or reduce an unsafe condition or practice, identified through testing, inspecting, investigation, or research, that causes an emergency situation involving a hazard of death or injury to persons. *See* 49 U.S.C. 20104. Finally, FRA has recently taken a pro-active approach in its ability to influence non-regulated aspects of dispatching operations through its Safety Assurance and Compliance Program (SACP),[3] through its safety advisories published in the **Federal Register**, and through its visits to dispatching centers to ensure that dispatching is being safely conducted whether or not specific federal standards are being violated (see discussion under section IV B of the supplementary information section of the preamble, below).

With regard to dispatchers located in foreign countries, FRA may be unable to rely on foreign laws and rules governing dispatchers, in themselves, to ensure safety in accordance with FRA requirements. There can be a number of complexities in the ways foreign laws and regulations apply to dispatching. First, although dispatching can be performed from any country in the world, not every country in the world has an entity that regulates rail

the United States. A Canadian crew could operate the train further into the United States than a listed distance but a U.S.-based dispatcher would control the movement beyond the listed distance.

[3] FRA's SACP is an approach to safety that emphasizes the active partnership of FRA, rail labor representatives, and railroad management in identifying current safety problems and jointly developing effective solution to those problems. For more information *see* 66 FR 63946.

transportation safety. Second, even if the host country has established a transportation regulatory entity, that entity may well lack full safety jurisdiction over the railroad operations in the United States that are being dispatched from the host country. In either situation, the rail operations in the United States may not fall completely under the jurisdiction of any rail safety regulatory body, resulting in a regulatory gap that could jeopardize the safety and security of domestic operations.

This potential regulatory gap could significantly interfere with FRA's ability to ensure that extraterritorial dispatching operations are conducted with the same level of regulatory oversight that occurs in the United States and which FRA believes is vital to the safety of those operations. As noted in the preamble to the IFR, FRA is particularly concerned that current regulations and statutes applicable to dispatchers, which govern such areas as hours of service limitations, operational testing, and drug and alcohol programs, most notably random drug testing, are not uniform throughout foreign countries, and may fall below the safety standards established by the United States statutes and regulations. *See* 66 FR 63948. Therefore, even if a foreign country's regulations and statutes applied to and completely covered cross-border dispatching of United States rail operations, the safety of the United States rail operations may not be protected to the same degree as when dispatchers are subject to United States' statutory and regulatory requirements or their equivalents.

C. Security Concerns

In addition to the above-described potential negative implications on rail safety of extraterritorial dispatching, FRA is also concerned about the security of domestic rail operations and how that security would be impacted if FRA permitted increased extraterritorial dispatching. As the terrorist attacks of September 11, 2001, vividly demonstrated, this nation and its citizens are targets of international terrorists, and railroad dispatch centers are logical terrorist targets. While those attacks have resulted in increased railroad security domestically, dispatching centers located in foreign countries would be outside the jurisdiction of domestic security and law enforcement agencies. Thus, if FRA permits extraterritorial dispatching, the United States would increase its exposure to security threats that exist in foreign countries and be forced to rely upon the security apparatus of foreign countries. As noted above, current technology allows dispatching of domestic rail operations from anywhere in the world, including countries that may not offer the same levels of security and security measures that are offered by domestic agencies.

In addition, given the threat that terrorists pose to railroad systems, including their dispatch centers, railroad security measures (*e.g.*, guards that control access to railroad facilities, proximity cards that allow access to dispatching locations, use of railroad police to detect unauthorized persons on railroad property, and background checks on applicants for employment as dispatchers and train crew members) are increasingly important to protect railroad property, railroad cargo, railroad employees, and railroad passengers from violent actions. FRA is working with domestic railroads as they review the adequacy of their security plans and expects that the railroads will voluntarily take whatever steps are needed to safeguard their systems from terrorists. In the event that FRA is not satisfied with the security measures undertaken by a domestic railroad, however, FRA has the authority to require, through regulations and orders, additional security measures that FRA determines are necessary to protect the security of domestic railroad operations against potential terrorist threats.[4] FRA may have limited access to and ability to influence security arrangements at a foreign dispatch center if the security procedures at that center were not sufficient to protect domestic rail operations. Furthermore, law enforcement and security agencies in the United States are not authorized to protect foreign dispatch facilities.

FRA does not know, at this time, whether all foreign railroads employ security measures comparable to those of United States railroads, or whether foreign governments have enforceable security requirements that would effectively protect foreign dispatch facilities. In addition, domestic railroads that locate dispatching facilities in foreign countries may not necessarily employ the same security measures that they use in the United States. As a result, foreign-based facilities, whether owned by a foreign or a domestic railroad, could be more attractive targets than facilities located in the United States and be more susceptible to terrorist infiltration or attack.

There is also a national defense aspect to the security of railroad operations. There are both railroad safety and national defense risks posed by extraterritorial dispatch centers having access to information regarding the shipment of military goods and weapons and hazardous materials (including nuclear materials and nuclear waste), and having the capability to control the movement of these items. The Military Traffic Management Command of the Department of Defense (DOD) and FRA have worked together to identify and designate a Strategic Rail Corridor Network (STRACNET). STRACNET consists of more than 38,000 miles of interconnected network of rail corridors (not actual rail lines) in the United States that the agencies have deemed vital to national defense. In the event of a large-scale military mobilization, it is very important that this network be fully responsive to national defense needs and priorities.

D. Other Safety-Related Concerns

In the preamble to the IFR, FRA also detailed other potential concerns with regard to extraterritorial dispatching. *See* 66 FR 63950–63951. First, it is essential for safe railroad operations that employees involved with directing and effectuating train movements be able to communicate clearly with each other. The railroad personnel most directly involved with train movements are the dispatchers who transmit written and oral instructions to train crews and the train crews who are responsible for carrying out the dispatchers' instructions and for operating trains in accordance with railroad traffic control devices. In addition, dispatchers must also be able to communicate with roadway workers who may control entry onto the stretches of track on which they are working. If it is allowed, extraterritorial dispatching raises the possibility that some of these employees may not be able to communicate with each other because they speak different languages.

FRA's primary safety concern is that one of the parties (either the train crew or the dispatcher) involved in an extraterritorially dispatched operation may not be proficient in the language that is being used to conduct train operations. Thus, there is the potential for miscommunication where one of the parties, unbeknownst to the other, fails to convey necessary safety-critical

[4] Section 20103(a) of title 49, United States Code, gives the Secretary of Transportation plenary authority to address any hazards to life and property that may arise in the context of railroad operations. To date, FRA's exercise of this authority has been fairly limited. For example, FRA has issued rules on Passenger Train Emergency Preparedness (part 239) that require passenger railroads to conduct detailed planning for emergency situations, which are defined to include ''security situations'' such as bomb threats. (*See* § 239.7 and 49 U.S.C. 20133(a)(4).)

information, inadvertently conveys false or misleading information, or fails to properly understand safety-critical information that has been conveyed. The results of such a miscommunication could be disastrous. Such a lack of understanding would be even more problematic if railroad operations crossed more than one border (*e.g.*, Canada, the United States, and Mexico).

Another problem related to communication that could arise if extraterritorial dispatching is allowed concerns possible differences in railroad terminology between one country and another. The railroad industry in the United States is both a highly technical industry that uses modern terms and an industry that has existed for 170 years and uses terms that have existed since the beginning of the last century. It would be unreasonable to assume that, absent appropriate training, railroad employees in other countries would be familiar with terms used in the United States. Given the immediacy with which problems sometimes develop while trains are on the tracks, it would be dangerous to discover such a miscommunication at a time when lives and property are in the balance. This problem would be compounded if the dispatcher and the train crew were having problems communicating because of language differences.

Second, given the centralized nature of most major railroads' dispatching facilities, FRA is concerned that a disruption of communications at a dispatching facility could cause system-wide problems for a railroad as it scrambles to transfer operations from the centralized location to local dispatch centers. The preamble to the IFR notes the two recent occasions where the CSX dispatch center in Jacksonville, Florida, went off line due to extreme weather conditions. *See* 66 FR 63951. As those examples demonstrated, domestic dispatch centers are not immune to such problems, but FRA is concerned that the effects of such a disruption could be exacerbated if the dispatching facility were located in a foreign country far away from the railroad's infrastructure.

FRA is also concerned about the potential effects that a labor disruption involving an extraterritorial dispatch facility could have on domestic rail operations. Dispatchers are typically unionized employees subject to the Railway Labor Act (45 U.S.C. 151–188) (''RLA''), which prohibits strikes over contract interpretations. Congress has the power to legislate an end to a strike by United States railroad employees, and has done so in 13 rail labor contract disputes. Dispatchers located in a foreign country, however, are not subject to the RLA, and Congress may not legislate an end to a labor dispute in that country despite the fact that such a dispute could severely affect United States rail operations, and possibly jeopardize transportation safety.

The implications of a strike that cannot be readily controlled by government authorities have the potential of being quite severe, especially to the extent that it affects the shifting of rail freight and passenger traffic to crowded highways, the delivery of perishable goods to market, the delivery of coal for energy to parts of the country in need during extreme weather conditions, and transport of defense materials needed to ensure national security. The railroad industry carries nearly 40 percent of United States intercity freight traffic in terms of ton-miles (over 1 trillion ton-miles a year), including huge quantities of hazardous materials of all types, including spent nuclear waste. By comparison, trucks carry about 29 percent of the ton-miles, and pipelines and inland water transport account for the remainder. In addition, railroads provide commuter rail service in and around many of the Nation's large cities; provide the infrastructure Amtrak uses for its intercity passenger operations outside the Northeast Corridor; and provide freight service to military facilities across the country. Other modes would be able to replace only a small portion of the transportation services provided by the railroads in the short term in the event of a disruption of service affecting the national major freight railroads, and diverting hazardous materials from railroads to other modes of transportation, such as trucks and barges, would increase the exposure of both the public and the environment to these hazardous materials and could increase the possibility of accidents.[5] Furthermore, loaded railroad tank cars that cannot be delivered to customers and that are stranded on rail lines pose ready targets for terrorists. A disruption affecting any one of the major railroads could, of course, have a critical impact over time through cascading impacts across the national rail system because of the extensive interchange of rail traffic among the railroads and the impact on other railroads of service disruptions on lines where they enjoy trackage or haulage rights.

Finally, it is also essential for safe railroad operations in the United States that certain railroad communications concerning such operations that relate to measurements of such critical factors as location, distance, and speed, use a common standard of measurement. The two currently used standards of measurement are English units, used predominately in the United States, and the International System of Units (''SI''), which is more commonly known as the ''metric system'' and is used by most of the rest of the world. Because a kilometer (roughly 3,280.8 feet) is approximately six-tenths the length of a mile (5,280 feet), the potential for confusion is obvious, especially where a measurement of such matters as speed, location, or distance is concerned. If a dispatcher instructs a train and engine crew to travel a specified number of kilometers at a certain speed measured in kilometers per hour and the crew mistakenly thinks that the dispatcher is referring to either or both measurements in miles, the consequences could be at best problematic and, at worst, devastating.[6]

Commenters' responses to FRA's concerns leading to the issuance of the IFR are discussed below.

IV. Discussions of Specific Comments and Conclusions

A. Overview of the Comments and FRA's Conclusions

In the IFR, FRA offered two options with regard to increased extraterritorial dispatching operations. The first option, which was reflected in the IFR, is to bar extraterritorial dispatching with the three minor exceptions explained above (emergencies, grandfather operations in place since December 1999, and fringe border operations that met the terms of the IFR). The second option is to permit extraterritorial dispatching so long as (1) the foreign-based dispatchers are subject to the same safety standards applicable to dispatchers located in the United States (and enforced by FRA or by the host country with supplementary FRA oversight), and (2) the additional safety concerns previously identified, such as security, language differences, possible

[5] Railroad tank cars can typically carry up to four times the volume typically carried by truck cargo tanks, so diverting hazardous material movements to the highways would significantly increase the highway movements of these dangerous commodities. In addition, any transloading of hazardous materials from rail tank cars to truck cargo tanks cars poses additional risks.

[6] FRA recognizes that the Hazardous Materials Regulations require that most measurements regarding the transportation of hazardous materials be given in metric units. Under 49 CFR 171.10, in order to ensure compatibility with international transportation standards, most units of measurement in the hazardous materials regulations are expressed using the SI. This requirement should have no impact on extraterritorial dispatching, however, as SI is currently the standard for domestic railroad operations involving hazardous materials.

labor strikes and other disruptions, are adequately addressed. FRA noted that the second option could be implemented by a more detailed version of the waiver provision (section 241.7) of the IFR. In the preamble to the IFR, FRA solicited comments both on the benefits and costs of the approach advocated by the IFR as well as on the feasibility of adopting the alternate option and allow extraterritorial dispatching provided FRA's safety and security concerns are effectively addressed. FRA indicated that after considering the comments FRA might make the IFR permanent with any substantive changes FRA determines are appropriate.

As noted above, nine parties submitted written comments, and four of those parties offered oral comments, as well. The parties submitting written comments were CN and CP, which, when appropriate, will be referred to jointly as ''the Canadian railroads,'' the Brotherhood of Maintenance of Employes (BMWE), the Northeast Illinois Railroad Company (METRA), the Brotherhood of Railroad Signalmen (BRS), the BLE, the Association of American Railroads (AAR), the ATDD, and the Mexican government.

The Canadian railroads, either individually or collectively, commented on most of the issues raised in the IFR, so FRA's responses will focus primarily on those comments. In general, both railroads objected in principle to the regulation and argued that a better resolution to this issue would be for FRA and Transport Canada, along with the individual railroads, to work out problems on a case-by-case basis, instead of FRA implementing a ''one size fits all'' regulation for a safety problem that they believe does not currently exist. Both railroads wanted to retain sufficient flexibility to conduct their existing operations and, if FRA promulgates part 241, both were in favor of retaining both the grandfathering provision and the exception for ''fringe border operations,'' although in a slightly modified form. In addition, both expressed concern that the definitions of ''dispatch'' and ''dispatcher'' were too broad and could be read to include employees who should not be included.

The comments from the BLE, the BMWE, METRA, and the BRS were all fairly general in nature and supported FRA's implementation of a bar on additional extraterritorial dispatching. The comments from the ATDD were also generally supportive of the IFR but, in addition, offered suggestions on specific provisions of the rule that it believes should be slightly modified. The brief comments from the AAR focused solely on the definitions of ''dispatch'' and ''dispatcher'' contained in the IFR. The Canadian government did not submit comments on the IFR, but did comment on the NPRM on part 219. Some of the Canadian government's comments are relevant to FRA's position on the necessity of random testing of dispatchers and will be addressed below. Finally, the comments from the Mexican government supported the banning of extraterritorial dispatching and noted that Mexico has banned extraterritorial dispatching.

Before reviewing the specific comments, FRA notes that all of the negative comments on the IFR related to the safety and security of dispatching United States rail operations from Canada, but did not address extraterritorial dispatching from any other country. Therefore, the safety and security concerns detailed in the IFR and reiterated above remain unchallenged with respect to any country other than Canada. Accordingly, unless otherwise noted, FRA's analysis of the comments is limited to whether the actions taken by the Canadian railroads and Canadian authorities adequately address FRA's concerns.

Based on FRA's analysis of the comments, FRA has decided that the general bar on extraterritorial dispatching, except relief in cases of emergency, should continue. However, FRA has determined that it is appropriate to provide special relief for the four existing extraterritorial dispatching operations (listed in appendix A to the Final Rule), and for limited new extraterritorial dispatching of fringe border areas in the United States designed to facilitate the smooth handoff of dispatching between dispatchers in Canadian and Mexican dispatching centers and those in the United States. Such relief is best granted in the context of waivers rather than blanket approvals of the operations, and a special fringe border waiver process has been established to facilitate that relief. (The fringe border waiver process is briefly discussed below and in more detail in the section-by-section analysis.) The Final Rule provides that existing extraterritorial dispatching can continue for a transitional period 90-days to permit the railroads to file a waiver petition under the new special fringe border waiver provision. If a waiver request is filed within the transitional period, the railroad may continue to conduct the extraterritorial dispatching until FRA acts on the waiver petition.

The fringe border waiver process applies to existing extraterritorial dispatching operations and to new extraterritorial dispatching of operations that do not extend more than five route miles into the United States from the Canadian or Mexican border. A fringe border waiver request by a railroad will generally be granted if (1) the railroad has taken adequate steps to ensure the security of its dispatch center, (2) the railroad has in place specified safety programs for its extraterritorial dispatchers, (3) a government safety agency in the country where the dispatching will occur has safety jurisdiction over the railroad and the dispatchers and is satisfied with the railroad's safety programs, and (4) the railroad agrees to abide by the operating restrictions specified in the rule. Given the limited length of these operations, FRA is willing to permit the operations to be conducted with fewer safety requirements than would be required for longer operations. FRA anticipates that both Canadian and Mexican railroads can easily meet these requirements for cross-border dispatching of operations, and that FRA will be able to work out satisfactory arrangements with the railroads and the regulatory agencies in Canada and Mexico concerning the monitoring of the agreed upon safety programs.

Railroads that wish to commence additional extraterritorial dispatching may apply for a waiver under subpart C of 49 CFR part 211 from the domestic locational requirement set forth in part 241. Such a waiver may be granted if an applicant can demonstrate to the satisfaction of FRA that relief is consistent with safety and in the public interest. As discussed in the section-by-section analysis, an applicant will be expected to discuss how it has adequately addressed the various safety concerns that FRA laid above in section III of the supplementary information section of the preamble.

FRA believes that the approach that it is adopting is necessary to ensure the safety and security of United States railroad operations.

B. Regulatory Oversight

CN was the only commenter that directly addressed regulatory oversight, although CP's comments included many references to the adequacy of the Canadian regulatory system. The main focus of the Canadian railroads' comments was that while the regulatory construct in Canada may be different from that in the United States, there are sufficient protections in place in Canada to ensure that any United States rail

operations dispatched from Canada would be done so safely.

In particular, CN stated that Transport Canada and Human Resources Development Canada combine to regulate any dispatchers located in Canada regardless of the territory they dispatch, even territory located in the United States. In addition, during the public hearing, CN's representative stated that Transport Canada's regulations would cover contractors located in Canada who were conducting dispatching operations for a Canadian railroad. The commenters noted that Transport Canada's Safety Management Systems regulations require the railroads to develop a comprehensive plan covering all aspects of rail safety, and that the Canadian Labour Code, together with the collective bargaining agreements of the railroads, effectively control the number of hours that dispatchers may work. Finally, CN claims it would allow FRA access to CN dispatching facilities located in Canada in order to conduct site inspections and safety assessments.

There are contrasts between the regulatory systems of the United States and Canada. Domestically, Congress and FRA have concentrated on promulgating nationwide safety standards that apply uniformly to all railroads. Congress has established the maximum number of hours that a dispatcher may work, has directed FRA to establish comprehensive drug and alcohol testing for safety-sensitive railroad employees such as dispatchers, including random drug testing, and has given FRA authority to regulate all areas of railroad safety. FRA has established minimum safety standards, and the railroads are required to conduct their own inspections to ensure that these safety standards are being met. FRA leads a cadre of approximately 550 Federal and State safety inspectors and specialists whose role is to monitor the railroad industry and its own inspection forces for compliance with rail safety laws and to work with the railroad industry on resolving safety problems that are not subject to those laws.

FRA's safety oversight has proven effective in identifying and resolving safety problems that are not directly addressed through FRA's regulations. For example, in 1997 FRA conducted extensive audits of the UP's Harriman Dispatch Center which controls operations on approximately 95 percent of UP's territory. These audits revealed ineffective and unsafe practices by supervisors and dispatchers. FRA made specific recommendations that UP accepted, such as creating additional dispatch positions, realigning dispatchers' territories to better balance the workload, hiring new dispatchers, tripling the number of dispatching supervisors, making improvements to the dispatching software, and forming a working group consisting of representatives from FRA, rail labor, and UP management to continually monitor and address dispatching issues that may arise. This is one just one example of the United States' more proactive approach to regulatory oversight, which is intended to ensure that railroad safety does not fall below an acceptable level.

The Canadian regulatory system, on the other hand, tends to rely more heavily on acceptance of railway-submitted rules. Under this approach, railways conduct consultations with government (and often labor organizations) and submit standards and procedures for approval. In some cases the rules apply to individual railways, and in other cases the rules apply in common to the major railways.

Under Transport Canada's Railway Safety Management Systems regulation, railroads are required to identify the following: (1) Their company railroad safety rules and orders, and the procedures they will use in demonstrating compliance with them; (2) systems for accident and incident reporting, investigation, analysis, and corrective action; (3) systems for ensuring that employees have appropriate skills and training and adequate supervision to ensure that they comply with all safety requirements; and (4) procedures for periodic internal safety audits. Railroads are also required to do the following: (1) Maintain accident and incident investigation reports and corrective actions they take for the purpose of assessing its safety records; (2) report yearly to the Minister on their safety management system; and (3) keep readily available all documents mentioned in their safety management system to enable a railway safety inspector to monitor compliance with Transport Canada's safety management system regulation. Transport Canada then monitors the railroads' compliance with their safety programs. The Safety Management System approach is a new element in the Canadian regulatory structure, and initial audits are only now underway.

As will be detailed below in the preamble sections on drug and alcohol testing and hours of service, the safety programs that the Canadian railroads have developed and the Canadian standards and the government oversight in these areas are significantly different from FRA standards. While FRA requires domestic railroads to conduct efficiency testing of their dispatchers to ensure that they understand the necessary operating rules, and issues civil penalties against those railroads for failing to conduct such testing, Transport Canada has no such requirement (apart from the recently adopted Safety Management System process). While Canadian carriers have voluntarily conducted such efficiency testing, they are not assessed monetary fines should they fail to follow their programs. On the other hand, administrative officials from the inspector level to the Minister enjoy broad powers to order changes in operations and address unsafe conditions. Based on available information, it appears that the Canadian Transportation Safety Board has broad accident reporting requirements; however, the means for enforcing those requirements are not immediately evident.

Given the differences in Canadian railway culture, methods of governance, safety standards (including regulations and rules), safety data systems, and mechanisms for enforcement, it is extremely difficult to evaluate the relative equivalence of the two regulatory approaches in terms of overall safety results, let alone at the level of safety of dispatching. Without question, cooperation and understanding between Transport Canada and FRA is maturing at a more rapid pace due to enhanced communication and joint endeavors; and much remains to be learned through appropriate consultation. Cooperation with respect to security presents a new a special challenge, given divisions of responsibility within both governments and evolving policies in both countries. Accordingly, it is appropriate that FRA continue consultations with Transport Canada and develop the necessary factual predicates and institutional arrangements before giving consideration to permitting more extensive dispatching of U.S. operations. Appropriate institutional arrangements might include express mutual undertakings (which do not currently exist) for each government to look out for the safety of operations in territory outside its jurisdiction that are dispatched from anywhere within its jurisdiction.

Mexico also recognized that extraterritorial dispatching poses a safety risk to rail operations and has addressed the issue by requiring, in Article 26 of Title III of the Regulatory Law of Railroad Service (Ley Reglamentaria del Servicio Ferroviario), that railroads depend on dispatching facilities that must be established within

Mexico. In addition, Article 96 of Title III of the Railroad Service Regulations (Reglamento del Servicio Ferroviario) reiterates that a railroad's system of train control must guarantee the safe and fluid operation of services and must adhere to what is established by Mexican law. In comments submitted by the Directorate of Technical Operations Regulations of Railroad Transportation, the Mexican government indicated that it believes FRA is acting in the best interests of rail safety by barring extraterritorial dispatching. The comments specifically noted the differences in regulations between countries and the problems that could arise when personnel in foreign countries dispatching Mexican operations are not subject to Mexican law as justifications for a bar on extraterritorial dispatching of Mexican operations.

C. Existing Extraterritorially Dispatched Operations

In the preamble to the IFR, FRA noted that there are several existing extraterritorially dispatched operations, and then gave the specifics of those operations. CP commented on both the safety records of their existing operations as well as the details of those operations offered by FRA in the preamble while CN's comments only offered additional information on the specifics of their cross-border operations. CP's comments noted that they have safely dispatched seven cross-border operations for some time. Along with their comments, the Canadian railroads submitted updated lists of their current cross-border operations and requested clarification on whether those operations would be grandfathered under the applicable provisions of the Final Rule. CN acknowledged the three segments listed in the IFR and added a fourth. CP asserted that it dispatched seven cross-border operations and listed those operations in an appendix to its comments.

After reviewing those submissions and further researching the track segments, FRA has concluded that only the four segments listed in appendix A to the Final Rule are actually dispatched and the other segments are either controlled by another method of operation or no longer in service. Operations on six on the track segments are currently controlled by Rule 105 of the Canadian Rail Operating Rules, which mandates that trains operate at ''reduced speed.'' Reduced speed is defined as a speed no faster than that necessary to stop within one-half the range of vision. No actual permission is required to operate on the track but, any train that does run on those segments must operate in accordance with Rule 105. The final track segment was in operation during December 1999 but has since been abandoned.[7]

In commenting on the IFR, CP also pointed out that neither the Federal Motor Carrier Safety Administration nor the Federal Aviation Administration (FAA) has a locational requirement for dispatchers of trucks and airliners that come into the United States from another country. FRA does not find the absence of such regulations instructive in resolving the question of whether any form of extraterritorial dispatching of railroad operations is consistent with railroad safety and the security of the United States. Nevertheless, it should be recognized that truck dispatchers have virtually no safety role, while railroad train dispatchers are the primary protectors of safe railroad operations. As previously discussed train dispatchers actually steer the train by remotely aligning switches; they determine whether the train should move or stop by operating signals and issuing train orders and other forms of movement authority; and they protect roadway workers from passing trains. Air traffic controllers, as contrasted to truck dispatchers, do perform a safety role although not as comprehensive as train dispatchers. FRA recognizes that the FAA permits limited cross-border dispatching of airlines into the fringe border areas of the United States to facilitate the safe hand-off of air operations to domestic air traffic controllers. The final rule provides for waivers of such fringe border rail operations. Other aircraft operations over/on U.S. soil are handled by U.S. air traffic controllers at U.S.-based control centers. There are of course differences between airline and railroad operations, and each mode of operation presents different safety concerns requiring different regulatory approaches.

As noted above, FRA has decided not to include a grandfathering exception for existing lines in the Final Rule. Given the possibility that railroads could increase extraterritorial dispatching, FRA issued the IFR in order to preserve the status quo until all the issues surrounding extraterritorial dispatching could be fully examined. After reviewing the comments and further examining the issues, FRA has determined that the safety and security risks inherent in extraterritorial dispatching are too serious to allow an operation to continue merely because it was in existence at a certain point in time. FRA acknowledges the comments from CP attesting to the fact that its cross-border operations have been safely conducted for many years, but FRA does not believe that reason alone can justify allowing these operations, especially since the nature of the operations (such as traffic levels in general, and volumes of hazardous materials being handled) can greatly increase in the future, thereby increasing the safety risk to the areas surrounding that track.[8] The North American Free Trade Agreement (NAFTA) has increased trade among the United States, Mexico, and Canada. This in turn has increased the amount of transborder rail traffic in the United States. Incoming train crossing data are collected monthly at border ports by the United States Customs Service. In 1997, there were 7,479 train crossings into the United States from Mexico and 30,337 from Canada. This translates into an average of 104 trains crossing into the United States daily. As transborder traffic continues to increase on existing rail lines, it is likely that train speeds, which currently do not exceed 55 miles per hour at the borders, and train lengths will increase along with the actual number of trains crossing into the United States. This will increase the exposure of trains and other rail vehicles to railroad accidents at or near the borders with Mexico and Canada.[9] As it faces this new operating environment with greater risk, the railroad industry must take precautions

[7] One of the segments listed in CN's submission is still in existence but is now dispatched by CP. That segment is the 1.8 mile stretch of track between Windsor, Ontario, and Detroit, Michigan.

[8] Each of the four existing extraterritorial dispatched lines carries hazardous materials, with the volume on two of the lines being substantial; unsafe dispatching of any of the four operations would jeopardize safety. The loaded hazardous materials carloads carried on the four lines in 2001 were as follows: the CN line from Sarina, Ontario, to Port Huron, Michigan—41,819 carloads; the CN Sprague Subdivision line between Baudette, Minnesota, and International Boundary, Minnesota—25,598 carloads; the CP line from Windsor, Ontario, to Detroit, Michigan—2,831 carloads; and the Eastern Maine Railway Company's line between Vanceboro, Maine, and Brownville Junction, Maine—464 carloads.

[9] Between 1998 and 2001, the value of rail traffic moving between the United States and Canada has grown from $49.65 billion (U.S. dollars) to $60.17 billion, which is a 21.2 percent increase over the period or an annual rate of 4.9 percent. (Since the traffic mix has not changed significantly during this period, ''value'' can be considered a good proxy for physical units such as tons or carloads.) Traffic attributable to eastern gateways (Customs ports in United States border states of Michigan and eastward) has grown slightly more rapidly: $39.69 billion (U.S. dollars) to $49.07 billion, or 23.6 percent overall, or 5.4 percent per year. It is commonly expected that trade between the United States and Canada will continue to increase in the future. These data are based on USDOT, Bureau of Transportation Statistics, Transborder Surface Freight Data public files.

to avoid an increase in the number of accidents and incidents caused by human error.

FRA has a responsibility to ensure that existing extraterritorial dispatching operations will be conducted in accordance with minimum safety programs for the dispatchers in the areas of efficiency testing, hours of service, and alcohol and drug abuse that are actively monitored by a government regulatory agency, that communication by the foreign-based dispatchers with train crews and maintenance of way workers in this country are understood and that there is no misunderstanding with regard to references to units of measurements such as location, distance, and speed, and that the dispatching operations will be conducted in a dispatch center that has adequate security measures in place. The fringe border waiver provision of the Final Rule is the most effective way for FRA to address these matters. The section-by-section analysis provides a detailed discussion of the fringe border waiver process.

FRA anticipates that the Canadian railroads can easily meet the requirements for approval of fringe border dispatching. FRA is delaying the effective date of the rule with respect to these four existing operations for 90 days to enable the railroads to file a waiver request under the special fringe border waiver process. If a waiver request is filed by April 11, 2003, such operations can continue until the waiver request is acted upon by FRA.

D. Drug and Alcohol Testing

One of FRA's main concerns with regard to extraterritorial dispatching is the potential lack of an effective drug and alcohol testing program in other countries. In the Omnibus Transportation Employee Testing Act of 1991, Pub. L. 102–143 (the Act), Congress recognized the importance of drug and alcohol testing in protecting the safety of domestic transportation systems. As stated in the fifth Congressional finding in that Act, Congress believed that ''the most effective deterrent to abuse of alcohol and use of illegal drugs is increased testing, including random testing.'' Given that the misuse of alcohol and drugs has proven to be a critical factor in transportation accidents, testing is integral to ensuring that domestic transportation systems, including railroads, operate in the safest possible manner. In response to Congress' directives in the Act, FRA expanded the testing requirements in its existing part 219 regulations. *See* 49 U.S.C. 20140.

As was stated in the preamble to the IFR, under FRA's mandatory alcohol and drug testing program, dispatchers working in the United States are now subject to general restrictions on the possession and use of alcohol and drugs, employer policies covering voluntary referral and co-worker reporting of drug and alcohol abuse problems, and random, reasonable suspicion, return-to-duty, follow-up, and post-accident drug and alcohol testing, as well as pre-employment testing for drugs. Post-accident testing is required for a dispatcher who is directly and contemporaneously involved in the circumstances of any train accident meeting FRA thresholds. *See* § 219.203. A dispatcher found to have violated FRA's drug and alcohol rules at §§ 219.101 or 219.102 is required to be removed from covered service and is required to complete a rehabilitation program. *See* § 219.104. A dispatcher who refuses to submit a required sample must be removed from covered service for nine months and must complete a rehabilitation program. *See* §§ 219.104, 219.107, and 219.213. All dispatchers working in the United States who are controlling United States railroad operations are covered by part 219, and FRA believes, with the two exceptions previously noted, that any extraterritorial dispatcher controlling domestic operations must be covered by the same or fully equivalent requirements.[10] To allow any other dispatchers who are not subject to the comprehensive and stringent testing requirements that DOT and FRA believe are necessary for rail safety to control domestic operations would be contrary to FRA's safety efforts.

The Canadian Government, in its comments on part 219 NPRM, and CN and CP in their comments in both the part 219 and part 241 rulemakings argued that the Canadian regulatory system, together with the railroads' voluntary drug and alcohol programs provide a functional equivalent to part 219. They cite to the following as five elements of the Canadian rail safety program: (1) The Canadian railroads' operating Rule G (Canadian Rule G), which prohibits the use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty; (2) the Canadian railroads' voluntary implementation of comprehensive drug and alcohol programs that provide for pre-employment and pre-placement (or pre-assignment) drug testing to risk-sensitive positions, reasonable cause testing, and return-to-service testing; (3) the Railway Safety Management System Regulations, which require Canadian railroads to implement and maintain safety programs; (4) the Canadian Railway Safety Act, which mandates regular medical examination every three to five years, depending upon the age of the employee, for all persons occupying safety-critical positions (including dispatchers and train crews), and which requires physicians and optometrists to notify the employing railroad's Chief Medical Officer if the employee has a medical condition that could be a threat to safe railroad operations; (5) Transport Canada's role in monitoring compliance with Canadian Rule G and auditing railroad safety programs; and (6) criminal prosecutions—under the Canadian Criminal Code it is an offense to operate railway equipment while impaired by alcohol or a drug, or to have a blood alcohol concentration level greater than .08 percent.[11]

CN indicated that despite the drug and alcohol measures that have been adopted in Canada, it believed that random drug testing is also needed. CN urged FRA to continue to press Transport Canada to adopt a random drug testing requirement. However, both CN and CP expressed concern that, under current Canadian human rights legislation, employees could challenge implementation of part 219's random drug testing requirement to Canadian railroad employees (such as Canadian train crews operating in the United States), and such challenges would lead to significant costs and potential disruption to their rail operations.

FRA commends the Canadian railroads and Canadian Government for their efforts to stem drug and alcohol abuse by Canadian railroad employees. However, FRA believes that the measures that have been implemented to date in Canada are neither

[10] As previously noted, an employee of a foreign railroad whose primary reporting point is located outside of the United States and who performs dispatching service in the United States is exempt from certain part 219 requirements. *See* § 219.3(c). FRA has published an NPRM that would revise part 219 to require drug and alcohol testing of such employees. Elsewhere in today's edition of the **Federal Register**, FRA is publishing a notice extending the comment period on the NPRM.

[11] Under the Canadian criminal code police officers (including railway police officers) are entitled to test for presence of alcohol through approved breathalyser machines on reasonable cause. Penalties for violation of the criminal code include the possibility of fines and imprisonment. CN reported that over the past five years there have been four CN employees charged with this offense, one of which was a member of a train crew; the others were engineering or mechanical employees operating on or off-track equipment. CP reported that , between January 1998 and February 2002, five of its employees were charged with this offense; seven others were investigated but no charges were filed after an arrest, or the individuals were cleared of the charge.

comparable to the requirements of part 219, nor adequate to safeguard United States railroad operations were Canadian dispatching of these operations to become widespread. FRA also notes that since July 1, 1997, Canadian trucking companies with drivers assigned to operate commercial motor vehicles in the United States have had to comply with United States Department of Transportation substance-testing requirements similar to part 219, and that compliance with part 219 (in the case of Canadian train crews that operate in the United States) may not be as troublesome as CN and CP anticipate.

Transport Canada has approved Canadian Rule G, which was developed by the Canadian railroad industry, but Transport Canada has not reviewed and approved individual railroad plans implementing Canadian Rule G.[12] Like other aspects of the Canadian regulatory scheme, Canadian Rule G relies very much on self-regulation and implementation with broad oversight by the Canadian government. Such an approach is in stark contrast to part 219, which mandates very specific requirements that the testing plans of domestic railroads must include.

Canadian Rule G has several significant differences compared to part 219. First, it fails to provide for alcohol and drug testing of railroad employees to detect and deter violations. Prior experience with a Rule G approach in the United States has revealed that such a rule alone, without the random and other tests required by part 219, is not effective in detecting and deterring drug and alcohol abuse among safety sensitive railroad employees. Second, Canadian Rule G does not directly prohibit the off-duty use of drugs and abuse of alcohol by dispatchers, in contrast to FRA's regulations, which prohibit any off-duty use of drugs, and which prohibit use of alcohol within four hours of reporting for covered service or after receiving notice to report for covered service since such usage may ultimately affect an individual's performance on the job. *See* §§ 219.101(a)(3) and 219.102.

Prior to the adoption of part 219 in 1985, railroads in the United States had attempted to deter alcohol and drug use by their employees by their Rule G, which prohibited operating employees from possessing and using alcohol and drugs while on duty, and from consuming alcoholic beverages while subject to being called for duty. The customary sanction for violation of Rule G was dismissal. Unfortunately, accident reports revealed that the United States railroads' Rule G efforts were not effective in curbing alcohol and drug abuse by railroad employees. 47 FR 30726 (1983). Railroads were able to detect only a relatively small number of Rule G violations owing, primarily, to their practice of relying on observations by supervisors and co-workers to enforce the rule. FRA found that there was a ''conspiracy of silence'' among railroad employees concerning alcohol and drug use. 49 FR 24281 (1984). Despite Rule G, industry participants confirmed that alcohol and drug use occurred on the United States railroads with unacceptable frequency. Available information from all sources ''suggest[ed] that the problem includ[ed] 'pockets' of drinking and drug use involving multiple crew members (before and during work), sporadic cases of individuals reporting to work impaired, and repeated drinking and drug use by individual employees who were chemically or psychologically dependent on those substances.'' *Id.* at 24253–24254. FRA identified multiple accidents, fatalities, injuries and property damage that resulted from the errors of alcohol- and drug-impaired railroad employees. *Id.* at 24254. Some of these accidents involved the release of hazardous material and, in one case, the release required the evacuation of an entire Louisiana community. *Id.* at 24254, 24259. These findings led FRA to promulgate the initial version of part 219 in 1985. The regulations do not restrict a railroad's authority to impose more stringent requirements. 50 FR 31538 (1985).

A review of the Canadian Rule G violations reported by CP indicates that the Canadian Rule G has resulted in the identification of an extremely low number of operating crew violators. CP reported that in the period 1995–2001, when there were between 3,900 to 4,700 operating crew employees per year, there was a total of only 26 Canadian Rule G operating crew violators for the period. It is likely that the true level of drug and alcohol abuse among Canadian operating crew employees was much higher. For example, a 1987 survey commissioned by a Canadian Task Force on the Control of Drug and Alcohol Abuse in the Railway Industry revealed that 20 percent of 1,000 randomly-selected Canadian railway workers admitted that they had come to work feeling the effects of alcohol, and 2.5 percent admitted that they had used illegal drugs during their shift. In addition, CN's drug screening of its employees has shown a significant level of drug abuse among its employees.[13] Furthermore, alcohol and drug testing of safety sensitive railroad employees in the United States found a significantly higher level of substance abuse prior to the introduction of random testing.

FRA's own data, compiled from domestic railroad reports, shows a significantly higher level of substance abuse among safety-sensitive railroad employees in the United States prior to the introduction of random testing. For example, in 1988, the industry positive rates for reasonable cause testing were 4.7 percent for drugs and 4.5 percent for alcohol. After the introduction of random testing in 1989, these rates declined respectively to 2.02 percent and 1.32 percent. While the positive rates for reasonable cause testing have continued to fall, a comparison of the data for post-accident testing reveals an even stronger impact on positive testing rates. In 1988 the positive rate for drugs after qualifying accident events was 5.6 percent. After the commencement of random testing in 1990, this rate fell to 1.1 percent positive. There was a corresponding reduction in post-accident positives from 41 in 1988 to 17 in 1990.

The Canadian Government and CN and CP also rely heavily on the medical assessment that is required for dispatchers under the new Medical Rules for Safety Critical Employees as providing a functional equivalent to random testing. Under these rules, an assessment must be performed every

[12] The Canadian Rule G provides that:

(a) The use of intoxicants or narcotics by employees subject to duty, or their possession or use while on duty, is prohibited.

(b) The use of mood altering agents by employees subject to duty, or their possession or use while on duty, is prohibited except as prescribed by a doctor.

(c) The use of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely, by employees subject to duty, or on duty is prohibited.

(d) Employees must know and understand the possible effects of drugs, medication or mood altering agents, including those prescribed by a doctor, which, in any way, will adversely affect their ability to work safely.

[13] CN's submission to a Canadian Standing Committee on Transportation noted that CN had utilized pre-employment drug screening of job applicants since 1986, and these tests yielded a positive rate of 12 percent; similar testing of CN employees transferring to safety-sensitive positions (''pre-placement testing''), such as dispatcher positions, also yielded a positive rate of 12 percent. *In the Matter of an Arbitration Between Canadian National Railway Company and National Automobile, Aerospace, Transportation and General Workers Union of Canada (Union) and Canadian Council of Railway Operating Unions (Intervener), Re: the Company's Drug and Alcohol Policy*, decision of Arbitrator Michel G. Picher at 56 (July 18, 2000). CN drug screening results from of all sources (pre-placement, reasonable cause, medical examinations, promotions and transfer, reinstatement, and EAP follow-ups) in 1995, showed a 6.4 percent positive test rate in the Eastern Canada, and a 10 percent positive rate in Western Canada. *Id.* At 59–60.

three to five years, depending on the age of the employee, and include a medical examination. CP notes that the required intervals between assessments result in approximately 25 percent of Canadian employees being examined annually, and it argues that this is approximately the same number of United States rail employees that receive random drug testing per year under part 219.[14]

Throughout the preamble to the IFR, FRA emphasized the importance of random drug and alcohol testing in detecting and deterring substance abuse by railroad employees. The deterrent effect of random testing, which was implemented by FRA in 1988–1989, most certainly influenced the dramatic reduction in post-accident positives between the 41 that were recorded in 1988 to the 17 that were recorded in 1990. FRA does not believe that the periodic medical assessments Canadian railroad employees must undergo are the functional equivalent of random testing. The medical model relies primarily on medical examinations that are scheduled in advance. The employees know well beforehand that they will be undergoing an exam, giving them the opportunity to refrain from any activity that may reveal a substance abuse problem. Experience in similar programs in the United States (*e.g.*, in the aviation and motor carrier industries) indicates that routine medical examinations will seldom be successful in identifying alcohol or drug use problems except perhaps in the most advanced stages of chemical dependancy when an employee's remaining work life is often limited and major damage has been done to vital organs. Even if an employee is forthcoming in offering that he or she is misusing drugs in his or her personal life, this would apparently not be a disqualifying condition absent medical diagnosis of a specific substance abuse disorder; however, one does not have to be chemically dependant to constitute a threat to public safety. Much of the alcohol and drug use that threatens transportation safety has a voluntaristic component, and random testing is appropriate as a deterrent. Further, Transport Canada is in the early stages of implementing this program and has not yet had the opportunity to determine program outcomes. For these reasons, it would not be appropriate for FRA to rely upon this program as a full substitute for key DOT program elements, including a prohibition on non-medical use of controlled substance and random testing.

In CP's written comments, it argued that the lack of random testing is the only component of a testing program that would create part 241 compliance problems for the Canadian railroads. These comments were filed before the issuance of the Canadian Human Rights Commission Policy on Alcohol and Drug Testing (CHR Policy) in June of this year. The CHR Policy indicates that pre-employment drug testing is not acceptable, throwing into doubt CN and CP's voluntary pre-employment drug testing programs; pre-employment drug testing for safety-sensitive positions (such as dispatchers) is required by part 219. *See* § 219.501. The CHR Policy does note that Canadian trucking and bus companies wishing to do business in the United States are required to develop drug and alcohol testing programs that comply with U.S. regulations (which include pre-employment drug testing), and that not being banned from driving in the United States may be *bona fide* occupational requirement.

Aside from the fact that FRA believes that random testing is the most important aspect of any testing program and that pre-employment testing is important, FRA is also concerned about two other significant differences between part 219 and the Canadian railroads' testing programs.

First, the criteria for post-accident testing are much more subjective under the Canadian programs than under part 219. In the United States, post-accident testing is required for a dispatcher who is directly and contemporaneously involved in the circumstances of any qualifying train accident. *See* § 219.203. Under the Canadian programs, however, a dispatcher is not automatically tested when he or she is involved in an accident. Instead, the railroad must have independent evidence of impairment before a dispatcher involved in an accident may be tested. Thus, a dispatcher under the influence of drugs or alcohol may contribute to an accident and yet must not be tested if he or she does not exhibit some physical manifestation of impairment. That dispatcher may continue to work without undergoing additional scrutiny that may reveal a dependency problem that could continue to negatively impact his or her job performance. CN did indicate in its written comments that it plans to revise its policy this year to add mandatory post-accident testing using criteria identical to that in part 219. The CHR Commission Policy Statement endorses the right of Canadian companies to impose such testing for safety-sensitive employees.

Second, a Canadian rail employee may currently decline to be tested and not suffer adverse consequences unless the employer has an independent basis for concluding that the employee is impaired by drugs or alcohol. Under part 219, however, a dispatcher in the United States who refuses a test is immediately suspended for a period of nine months and must follow specified procedures, including return-to-duty and follow-up testing, before being allowed to return to dispatching service. Obviously, the effectiveness of a testing program is severely compromised if an employee is permitted to simply decline to be tested.

E. Hours of Service

Like alcohol or drug impairment, fatigue can cause dispatchers to make mistakes that lead to catastrophic railroad accidents. Both Canadian railroads acknowledged that Transport Canada does not regulate the total hours that dispatchers are allowed to work, but they pointed out that hours of service are covered generally by the Canada Labour Code, and more specifically by collective bargaining agreements between the railroads and their employees. The Labour Code mandates either a 48-hour weekly limit or an 80-hour biweekly limit, although the Code does not mandate a maximum daily limit. With the Code as guidance, both railroads have negotiated similar agreements with their respective labor organizations that limit the number of hours a dispatcher may work per day to 12. Through collective bargaining agreements, dispatchers on both CN and CP may work no more than 48 hours in one week. In addition, on CP, any time worked in excess of 40 hours in one week must be offset by reducing the total hours worked in the next week. Finally, although not included in the comments from either railroad, FRA has learned that Transport Canada is reexamining Canada's hours of service regulations and may introduce comprehensive revisions sometime in the next year.

Despite the apparent flexibility of the hours of service arrangements for Canadian dispatchers, FRA is concerned by the lack of a daily limit for

[14] CP is not entirely correct in making this assertion. Section 219.602 currently sets a minimum random drug testing rate of 25 percent, but this does not mean that 25 percent of covered employees must be tested each year. The requirement is for each railroad to conduct a sufficient number of random drug tests to equal at least 25 percent of it is covered employees. For example, a railroad with 1,000 covered employees must conduct at least 250 random drug tests during the year, but this should not result in 250 employees being tested, since in a truly random program, some employees will be tested more than once while others will not tested at all. In addition, 25 percent is the minimum random drug testing rate required; railroads remain free to conduct random testing at a higher annual rate.

dispatcher's working hours. In contrast, 49 U.S.C. 21105 mandates strict daily limits on the hours that a dispatcher may work in the United States. Dispatchers in the United States may not work more than nine hours during a 24-hour period in a location where two or more shifts are employed, or 12 hours during a 24-hour period where only one shift is employed. As a practical matter, most domestic railroads, including the Class I and commuter railroads, operate 24-hour dispatching facilities where at least two shifts are employed. The only railroads that might employ a one-shift dispatching operation would be very small short line railroads, although most of those railroads use two shifts, as well. In addition, the fact that many of the limits on hours of service for Canadian dispatchers are dictated by collective bargaining agreements is troublesome to FRA as these agreements are fluid and may change. Although FRA is aware that the duration of daily assignments may be less significant in the onset of fatigue than cumulative effects and biological rhythms, this material difference between U.S. and Canadian practice warrants further review before consideration of expanded cross-border dispatching.

F. Operational Testing

Human performance is critically important to railroad safety. Every year, human factors cause about a third of all train accidents and a large portion of railroad employee injuries in the United States. Under part 217, FRA requires railroads operating in the United States to have operating rules, to periodically instruct dispatchers on those rules, to periodically conduct operational tests (or ''efficiency tests,'' as they are widely known), and inspections on dispatchers to determine the extent of their compliance with the rules, and to keep records of the individual tests and inspections for review by FRA. As with most other regulations, FRA may fine railroads for failure to comply with part 217.

Similar to Transport Canada's regulatory approach to hours of service, Transport Canada does not regulate efficiency testing for dispatchers and, in their comments, the Canadian railroads acknowledged as much. Both railroads, however, use extensive voluntary testing programs and then report the results of the testing to Transport Canada. According to CP's comments, its program provides for the testing of more of the Canadian Rail Operating Rules than is common in the United States. For Canadian-based employees, including dispatchers, CN uses an extensive efficiency testing program called Performance Monitoring and Rule Compliance, which is virtually identical to the United States testing requirements that CN uses for United States-based dispatching offices. Once the Canadian railroads have reported test results to Transport Canada, Transport Canada then has the authority to audit all railroad activities and, according to CP, has conducted several in-depth audits of CP, the most recent of which occurred in December 2001. CP's comments also noted that the number of accident precursors, or ''near misses,'' on CP attributable to CP dispatchers is very small and has been declining.

Obviously, FRA's proactive approach to ensuring rail safety is very different from Transport Canada's method of encouraging voluntary self-evaluation by the Canadian railroads. Based on FRA's review of the comments, the Canadian railroads' testing program may very well be adequate if continually and evenly applied, but, unlike in the United States, there are no assurances that Transport Canada will provide the regulatory oversight to ensure continued compliance. FRA does not believe it is prudent to rely upon the voluntary efforts of foreign railroads to protect domestic rail safety. As previously noted, FRA will continue to discuss its safety concerns with Transport Canada in an attempt to reach an arrangement that is satisfactory to both countries.

G. Service Disruptions

As FRA noted above, domestic dispatchers are usually unionized employees subject to the provisions of the Railway Labor Act, which prohibits strikes over contract interpretations. Congress has the power to legislate an end to a strike by United States railroad employees, but not to strikes by foreign-based railroad employees who do not enter the United States. Both Canadian railroads felt that the Canada Labour Code will protect against service disruptions arising from labor disputes in Canada.

Canadian dispatchers are subject to the provisions of the Canada Labour Code. In the event of a strike, if the Canadian Industrial Relations Board determines that a strike or lockout could pose an immediate and serious threat to the safety or health of the public, it may order the continuation of services to prevent the danger. Furthermore, if a strike or lockout occurs while Parliament is not in session, and the Governor in Council determines the strike or lockout would adversely affect national interests, the Council may issue an order deferring the strike or lockout during the period between Parliaments. In addition, CN's comments noted that CN has contingency plans for any labor disruption, including those involving dispatchers. In the event of a disruption, CN is prepared to use supervisory personnel as dispatchers or, in the event of another type of disruption, to move dispatching operations to an alternate location.

While FRA acknowledges that the Canadian Labour Code grants sufficient power to the Canadian government to end labor disruptions in Canada, there is no guarantee that the Code would cover dispatchers controlling track in the United States, even if they were dispatching for a Canadian railroad. The Code clearly gives governing bodies in Canada the authority to take action to protect safety in Canada, but it is not clear that the law covers the safety of United States rail operations or that the Canadian government would take steps to stop labor disputes that disrupt only United States operations. Even if Canadian law authorized the Canadian government to stop labor disputes that disrupt only United States operations, the Canadian government would only exercise that authority as a volunteer, not as a body charged with serving the people of the United States. Neither of the Canadian railroads addressed this critical issue in their comments. As a result, FRA remains concerned that a labor disruption involving extraterritorial dispatchers who control United States territory could cause severe domestic service problems and, as previously discussed, possibly jeopardize transportation safety.

H. Security Concerns

The security of transportation infrastructure has taken on greater significance in the wake of the terrorist attacks of September 11, 2001. As FRA noted in the preamble to the IFR and again in the above discussion, the security of domestic rail operations involves the following two aspects: (1) The security of, and access to, the actual dispatching facilities; and (2) the safety and national security implications involved with allowing foreign dispatch centers to have access to information on movements of military goods and extremely hazardous materials and control over the movement of these items, particularly on the STRACNET.

Both Canadian railroads indicate that they employ security measures that are similar to those employed by domestic railroads. For example, access to dispatching facilities is controlled by multiple levels of security, including card readers and monitored security cameras. Both Canadian railroads are

members of the North American Association of Railroad Chiefs of Police, and both work closely with the Royal Canadian Mounted Police and other North American law enforcement organizations to ensure an effective exchange of information related to security issues. In addition, following the attacks of September 11, both Canadian railroads, along with the domestic railroads, have participated in AAR security working groups and have begun implementing the recommendations made by those groups. CP also noted that they have a fully equipped back-up dispatching facility that can be utilized in the event of an emergency. Neither CN nor CP directly addressed the security issues surrounding the foreign dispatch centers having access to information regarding the shipment of military goods and hazardous materials, including radioactive substances, in the United States and having the ability to control the movement of these items.

FRA recognizes the efforts undertaken by the Canadian railroads to secure their dispatch centers. However, in light of the increased awareness of the need for heightened transportation security following the attacks of September 11, FRA is concerned about allowing foreign dispatch centers to have access to information on movements of military goods and hazardous materials, and to have control over the movements of these items, particularly on the STRACNET.

Furthermore, many of the commodities that railroads transport in large quantities across the United States are extremely dangerous and, if accidentally or intentionally released in urban or environmentally sensitive areas, could cause catastrophic damage. FRA is particularly concerned that these commodities could prove to be tempting targets for terrorist attacks. Moreover, the projected large rail movements of spent nuclear waste will provide even more dangerous targets for terrorists. Finally, given the rapidly changing world-wide terrorism problem confronting the United States, it is of the utmost importance that the domestic railroad network be fully responsive to national defense needs and priorities, including the need to quickly and secretly move military items.

I. International Trade Implications

CP was the only commenter that raised free trade as an issue. CP indicated that part 241 might violate Articles 906 to 911 of Part 3 of NAFTA. These provisions concern Technical Barriers to Trade, and while CP did not make any express statements to that effect, the comments seemed to imply that part 241 could potentially run afoul of NAFTA. In addition, CP noted that, under the NAFTA, the Land Transportation Standards Subcommittee (LTSS) has authority to address regulatory issues related to cross-border rail operations. CP directed FRA's attention to the latest report from the LTSS, which noted current arrangements do not impede the flow of passenger or freight traffic in North America. CP argued that if FRA believes extraterritorial dispatching to be a legitimate safety threat, the LTSS should first examine the issue before FRA takes any other action. CP also proposed as an alternative to part 241 the formal adoption of a ''border zone'' that would provide a limited distance on both sides of the Canada-United States border where all railway safety regulations of the other country would be recognized as equivalent.

FRA does not believe that part 241 is contrary to NAFTA, which prohibits Parties to NAFTA from creating unnecessary obstacles to trade between each other. NAFTA requires the Parties to strive to establish compatible standards-related measures so as to facilitate trade in a good or service, and to treat technical standards adopted by the other Parties as equivalent to its own where these standards adequately fulfill the importing Party's legitimate objectives. Under Article 904 of NAFTA, however, each Party retains the right to adopt and enforce any safety measure it considers appropriate to address legitimate safety objectives, including prohibiting the provision of service by a service provider of another Party that fails to comply with the safety measure. Furthermore, under Article 2102, each Party has the right to take any actions that it considers necessary for the protection of its essential security interests.

Under Article 2101, a NAFTA Party has the right to bar access to information which it determines to be contrary to its security. A NAFTA Party also has the right to take other actions it considers necessary for the protection of its essential security interests relating to the traffic in arms, ammunition, and implements of war and to such traffic and transactions in other goods, materials, services, and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment. As such, part 241 serves to control access to information the disclosure of which would be contrary to national security. Allowing extraterritorial dispatching would also increase the possibility that train movement of spent nuclear waste and portions of the STRACNET would be controlled by foreign-based dispatchers. Some of the rail lines that make up the STRACNET include lines that aid in routing shipments to and from military bases. Part 241 is clearly permissible under NAFTA.

Finally, FRA notes that Mexico has indicated that extraterritorial dispatching of rail operations in the United States poses a safety risk that justifies the promulgation of a bar to such dispatching. Mexico itself has in place a law requiring that all dispatching of Mexican rail operations occur in Mexico.

In this rulemaking document, FRA has articulated legitimate safety concerns, including security concerns, that would result from extraterritorial dispatching, and that support the issuance of the Final Rule. FRA disagrees with the suggestion that it should have submitted its safety concerns to the LTSS rather than proceeding to resolve these concerns in the manner that it has. The rail working group of the LTSS was set up under NAFTA to evaluate the then existing safety regulations of the three countries to determine if they represented impediments to cross-border rail operations. After a thorough review, the group determined that there were no significant impediments. Once that objective had been met, the group was re-formed as the Rail Safety and Economics group of the Transportation Consultative Group (TCG), a sister group of the LTSS that continues to meet to discuss issues of mutual interest. The TCG, like the LTSS, has no power to mandate any changes to a country's regulations—it is an advisory body only.

NAFTA recognized that the signatories might decide, in the future, to institute changes to their respective regulatory regimes; therefore, the treaty mandates that a country wishing to impose or remove a regulation consult with its partners and offer an opportunity for comment. The United States has met its burden in that regard, through discussions with its NAFTA partners during TCG meetings and other bi-lateral meetings with Transport Canada and Mexican officials, and through the formal notice and comment process followed in the issuance of this Final Rule, where both Mexico and Canada, as well as all other interested parties were specifically given the opportunity to comment on the issue of whether FRA should limit extraterritorial dispatching.

The Final Rule that is being adopted attempts to balance United States' safety standards with the safety standards of its NAFTA partners and their railroads

in order to facilitate cross-border railroad operations. FRA has approved a fringe border waiver process that would permit existing extraterritorial dispatching to continue and that would permit new extraterritorial dispatching from Canada and Mexico in the areas in the United States immediately surrounding the Canadian and Mexican borders, without these dispatchers having to fully comply with all of FRA's safety standards for domestic dispatchers. FRA has also provided for a transitional period for existing extraterritorial dispatching to continue while the railroads qualify the operations under the fringe border waiver provision. FRA does not believe that the Canadian commenters have sufficiently made the case that any broader relief is appropriate, or that FRA needed to take any additional steps in promulgating this Final Rule. FRA has pledged its willingness to continue discussing extraterritorial dispatching with its NAFTA partners and their railroads, as well as all other cross-border safety issues; these discussions, together with the safety experience gained under the rule with respect to extraterritorial dispatching, well may lead to future changes to the Final Rule.

J. Economic Impact

CN was the only commenter that questioned the economic analysis and disagreed that the railroads will experience a savings over the next 20 years as a result of part 241 because of the number of unknown factors associated with the ultimate Final Rule. CN argues that until the rule becomes final, costs associated with eliminating the grandfathering and fringe border operations cannot be measured. Even if these provisions are maintained, CN suggests that the costs do not accurately portray the costs of adding FRA programs or of losing flexibility that would follow from the rule. CN also disagrees that the rule will prevent injuries or fatalities and challenges FRA to support that assertion.

FRA has examined the economic impact of the Final Rule and the results of this analysis are set forth in section VI (Regulatory Impact) of the supplementary information below.

K. Language Differences and Units of Measure

Based on the comments submitted by CN and CP, FRA is satisfied that these two railroads have taken steps that address FRA's concerns regarding language differences and designation of units of measurement with respect to dispatching of United States railroad operations from Canada. Eastern Maine Railway Company did not file comments, and FRA is not aware of how it is handling language and unit of measurement issues.

Both CN and CP use English units and not metric units for all units of measurement, including distance, speed, and locations. In addition, both railroads assured FRA that any dispatching of United States track from Canada would be conducted in the English language. According to CN and CP, the only territory where dispatching is conducted in French is in the Quebec province, and both CN and CP use only bilingual dispatchers and train crews in Quebec. Finally, with only a few minor differences, both Canadian railroads use the same terminology as that used by domestic railroads. FRA notes, however, that while the comments from CN and CP may alleviate FRA's concerns with regard to these railroads, they do not address the potential implications of other railroads dispatching from Canada or of railroad dispatching operations in a country other than Canada.

L. Definitions of ''Dispatch'' and ''Dispatcher,'' and Special Relief for Fringe Border Operations

Both Canadian railroads as well as the AAR raised concerns over the possible interpretation of the definitions of ''dispatch'' and ''dispatcher'' in § 241.5. In addition, CN and CP also argued that the ''fringe border operations'' exception in §§ 241.9, 241.11, and 241.13, while intended by FRA to promote flexibility in allowing minor cross-border operations in the future, actually had just the opposite effect as the language was too narrow to permit many operations that might fall under the exception.[15]

After reviewing the comments, FRA agrees that some of the changes to the definitions of ''dispatch'' and ''dispatcher'' suggested by the commenters would improve the rule. As the comments concern specific language in the rule, FRA will fully address them and explain the rationale for the changes in the section-by-section analysis to follow.

CN and CP supported the concept of a fringe border exception but have asked for greater relief than FRA has determined is appropriate to adequately protect railroad safety. As noted above, the Final Rule does not contain a fringe border operations exception per se, but rather contains a special fringe border waiver process that will permit railroads flexibility in dispatching cross-border operations from Canada or Mexico. See the discussion of the fringe border waiver process in the section-by-section analysis to follow.

M. Comments From Labor Organizations

As noted above, three labor organizations—the BLE, BMWE and ATDD—submitted comments on part 241. The comments from the BLE and the BMWE were general in nature and supported the position taken by FRA in proposing to bar any additional extraterritorial dispatching, although the BMWE did offer one specific comment with regard to the grandfathered operations. Both the BLE and BMWE also supported the comments from the ATDD, which also supported FRA's position but included suggestions to change specific provisions in the rule. After reviewing the ATDD's comments, FRA has decided not to make any of the changes suggested by the ATDD.

The ATDD suggested four changes to the IFR. First, with regard to the operations that are grandfathered, the ATDD wanted FRA to require extraterritorial dispatchers controlling those operations to demonstrate, at least semi-annually, familiarity with the operations they are dispatching. Second, the ATDD suggested that the grandfathering exception apply only to current operations and should terminate when ownership of the United States track changes or when operations over that track change. Similarly, the BMWE suggested that any grandfathered track segment that is abandoned and then restarted should lose the exception. Third, the ATDD wanted to eliminate waivers for part 241. Finally, the ATDD argued that a railroad's ability to move dispatching operations to another country should be limited to situations where the railroad can prove that such operations could not be transferred to another location in the United States. In addition, railroads should have plans in place to provide a domestic alternative to a foreign location.

[15] In the IFR, FRA had suggested possible parameters for a fringe border exception. In their comments, both CN and CP suggested modifications that would have expanded the scope of the exception. Both railroads recognized that FRA was trying to promote flexibility but argued that the exactness of the language in the rule had just the opposite effect. CP pointed out that, many times, the only purpose of a cross-border operation is to set off, pick up, or interchange cars, but the language of the rule could be read narrowly in order to prohibit that. CN questioned both the ''bridge traffic'' and ''hand-off'' operations and offered suggestions to change those operational parameters to make them more practicable. Specifically, CN noted that existing Canadian-based dispatching operations have not presented problems in the past and are of minimal risk, but under the exception as written, very few additional operations would be permissible and suggested that a more reasonable approach would be to allow hand-offs to proceed to a crew change point or a change in traffic control method (not including yard limits) with an overall limit of 15 miles.

As noted above, FRA is not including the grandfathering exception in the Final Rule. Therefore, the ATDD's comments on the grandfathered operations are no longer relevant. With regard to waivers, FRA believes that waivers are necessary in order to maintain flexibility. If a railroad can address all of the concerns that militate in favor of part 241, FRA will definitely consider a waiver. Likewise, in an emergency situation, railroads should be allowed a maximum amount of flexibility in order to safely conduct their operations. By limiting the duration of the permissible extraterritorial dispatching to the duration of the emergency, FRA is effectively balancing the railroads' need for flexibility with the need to maintain domestic rail safety.

V. Section-by-Section Analysis

This section-by-section analysis will explain the provisions of the Final Rule and the changes made from the IFR. Of course, a number of the issues and provisions involving this rule have been discussed and addressed in detail in the preceding discussions. Accordingly, the preceding discussions should be considered in conjunction with those below and will be referred to as appropriate. Also, as the majority of the rule text introduced in the IFR remains unchanged in this Final Rule and there were no comments on the other portions of the section-by-section analysis, much of the section-by-section analysis included in the IFR is repeated here.

Section 241.1 Purpose and Scope

Paragraph (a) states that the purpose of the rule is to prevent railroad accidents and incidents, and consequent injuries, deaths, and property damage, that would result from improper dispatching of railroad operations in the United States by persons located outside of the United States. As noted earlier in the preamble, dispatchers are responsible for establishing a train's route and ensuring that the train has a clear track in front of it. As such, it is essential that dispatching be conducted as safely as possible in order to avoid incidents such as collisions and derailments that endanger train crews, other railroad employees, and the general public.

Paragraph (b) states that the rule prohibits extraterritorial dispatching of railroad operations, conducting railroad operations that are extraterritorially dispatched, and allowing track to be used for such operations, subject to certain stated exceptions. Because FRA believes that extraterritorial dispatching presents serious safety problems and because proper dispatching is such an integral part of safe railroad operations, FRA is generally prohibiting any extraterritorial dispatching of United States rail operations, except in cases of emergencies. However, FRA has determined that it is appropriate to provide special relief for the four existing extraterritorial dispatching operations (listed in appendix A to the rule), and for limited new extraterritorial dispatching of fringe border areas in the United States designed to facilitate the smooth handoff of dispatching between dispatchers in Canadian and Mexico and those in the United States. Such relief is best granted in the context of waivers rather than blanket approvals of the operations; the special waiver process is discussed below. Of course, railroads subject to this part may adopt and enforce additional or more stringent requirements provided they are not inconsistent with this part.

Section 241.3 Application and Responsibility for Compliance

This section employs what is essentially standardized regulatory language that FRA uses in most of its rules. Paragraphs (a) and (b) mean that railroads whose entire operations are conducted on track within an installation that is outside of the general railroad system of transportation in the United States (in this paragraph, ''general system'') are not covered by this part. *See* 49 CFR part 209, appendix A for a discussion of ''general railroad system of transportation.'' Tourist, scenic or excursion operations that occur on tracks that are not part of the general railroad system would, therefore, not be subject to this part. The word ''installation'' is intended to convey the meaning of physical (and not just operational) separateness from the general system. A railroad that operates only within a distinct enclave that is connected to the general system only for the purposes of receiving or offering its own shipments is within an installation. Examples of such installations are chemical and manufacturing plants, most tourist railroads, mining railroads, and military bases. However, a rail operation conducted over the general system in a block of time during which the general system railroad is not operating is not within an installation and, accordingly, not outside of the general system merely because of the operational separation.

Paragraph (c) clarifies FRA's position that the requirements contained in this Final Rule are applicable not only to any ''railroad'' subject to this part but also to any ''person,'' as defined in § 241.5, that performs any function required by this Final Rule. Although various sections of the Final Rule address the duties of a railroad, FRA intends that any person who performs any action on behalf of a railroad or any person who performs any action covered by the Final Rule is required to perform that action in the same manner as required of a railroad or be subject to FRA enforcement action. For example, contractors that perform duties covered by these regulations would be required to perform those duties in the same manner as required of a railroad.

Section 241.5 Definitions

This section contains a set of definitions intended to clarify the meaning of important terms as they are used in the text of the rule. Several of the definitions involve fundamental concepts that require further discussion.

Dispatch. Based on the comments received from the Canadian railroads and the AAR, FRA is modifying the definitions of both ''dispatch'' and ''dispatcher'' in order to avoid confusion about the job categories that could potentially be covered by the definition. FRA intended the definition of ''dispatch'' to be function-specific, not job-specific, but recognizes that the definitions, as written in the IFR and if not read in conjunction with the preamble, could be misinterpreted to include employees, such as yardmasters, performing tasks that FRA did not intend to be included. The commenters agreed with the preamble language but were troubled by the fact that the language was not included in the rule text.

In the IFR, FRA stated that ''dispatch'' means to control the movement of a train or other on-track equipment by the issuance of a written or verbal authority. In addition, the definition of ''dispatcher'' could include, among other specifically mentioned job categories, yardmasters. The Canadian railroads were understandably concerned that a yardmaster performing a duty other than dispatching could fall under the definition merely by virtue of his or her job title. Likewise, the AAR was concerned that a track foreman giving permission to a train to enter working limits would be considered ''controlling the movement of a train'' by issuance of a track authority to the train and, thus, could fall under the definition. The AAR suggested that the problem could be corrected by eliminating the enumeration of the types of employees who may at times perform dispatching functions and asked that FRA clarify that a track foreman giving authority to a train to

proceed is not considered dispatching. CP suggested that the definition of ''dispatch,'' along with the definition of ''dispatcher,'' be revised to more closely parallel the definition used in the hours of service regulations found at part 228.

FRA agrees that the definitions could lead to confusion and has decided to modify both. Therefore, FRA is more explicitly limiting the functions that would fall under the definition of ''dispatch'' to only those duties that would be performed by a ''dispatching service employee'' as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), were these functions to be performed in the United States. To that effect, FRA has removed the portion of the definition providing that '''dispatch'' means to use a telegraph, telephone, radio, * * *'' and ''* * * hand delivery,'' but has retained the provisions for ''electrical or mechanical device'' as an example of how someone who is dispatching can control train movement. FRA retained this portion of the definition to clarify that the definition is intended to more closely track both the statutory definition of ''dispatching service employee'' as well as previous agency interpretations on hours or service. Unlike in the IFR where the first sentence of the definition is an abstract statement of the scope of ''dispatch,'' this sentence now sets the limits of what constitutes dispatching and the remainder of the definition is merely clarification language providing examples of the types of activities FRA intends to cover and to not cover under the definition.

Under 49 U.S.C. 21101(2), a ''dispatching service employee'' is defined as ''an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements.'' This statutory provision has been interpreted by FRA in a statement of agency policy and interpretation codified at part 228, appendix A. Consistent with that interpretation, both the statutory definition and part 241's definition of ''dispatch'' are functional, meaning that an individual's job title is irrelevant in determining whether he or she is dispatching. In addition, whether the individual is employed by a railroad is irrelevant. However, unlike the statutory definition of ''dispatch,'' the regulatory definition makes clear that the location of the individual performing the dispatching is irrelevant to the determination of the function the individual is performing. Thus, an individual located in a foreign country who, because of his or her job duties, would be covered by the statutory definition if he or she were located in the United States would be dispatching within the meaning of § 241.5. Finally, as FRA stated in the preamble to the IFR and wants to make perfectly clear in this Final Rule, FRA does not intend that yardmasters as a job category fall within the scope of the definition. Instead, yardmasters are only covered by this part when they are performing dispatching functions.

Subsection (i) of the definition gives specific examples of the types of functions that one who dispatches would perform in order to be considered dispatching. In particular, FRA intends that anyone controlling the ''movement of a train,'' which is defined in another paragraph of this section as a movement of on-track equipment requiring a power brake test under parts 232 or 238, would be considered dispatching and, therefore, would fall within the scope of the rule. Another type of movement that FRA intends to include is the movement of certain other on-track equipment, such as specialized maintenance-of-way equipment, that is not subject to the power brake regulations. FRA still intends to exclude movements of on-track equipment used in the process of sorting and grouping rail cars inside a railroad yard in order to assemble or disassemble a train.

Subsection (i) also explicitly notes two methods of controlling movements that fall within the scope of the definition. The first method that FRA considers dispatching under part 241 is controlling movements by the issuance of a written or verbal authority or permission that affects a railroad operation, such as through movement authorities and speed restrictions, and includes the following:

> Track Warrants, Track Bulletins, Track and Time Authority, Direct Traffic Control Authorities, and any other methods of conveying authority for trains and engines to operate on a main track, controlled siding, or other track controlled by a [dispatcher].
>
> Operating Practices Safety Advisory (OPSA–96–03), reissued as OP–97–34, p. 7.

''Railroad operation'' is defined in another paragraph of this section as the movement of a train or other on-track equipment (except as specified earlier) or ''the activity that is the subject of an authority issued to a roadway worker for working limits.''

The second method that falls within the scope of the definition of ''dispatch'' is to control a movement ''by establishing a route through the use of a signal or train control system but not merely by aligning or realigning a switch.'' This provision makes clear that the act of aligning or realigning a switch alone is not sufficient to constitute dispatching. In order to constitute dispatching within § 241.5, aligning or realigning a switch must be accompanied by the act of setting a signal authorizing movement over a track segment. This exclusion is consistent with FRA's interpretation in Operating Practices Technical Bulletin (OP–96–04) and Operating Practices Safety Advisory (OPSA–96–03), reissued as OP–97–34 (hereinafter, ''OP–97–34'').

Subsection (ii) of the definition of ''dispatch'' clarifies that those railroad employees who issue an authority for either a roadway worker or stationary on-track equipment, or both, to occupy a certain stretch of track while performing repairs, inspections, etc., will also be covered by this rule. FRA included this section to distinguish this activity from that of authorizing movement of trains or other on-track equipment onto track.

Subsection (iii) of the definition of ''dispatch'' states another function of a dispatcher, which is to issue an authority for working limits to a roadway worker. As defined in another paragraph of this section,

> *[w]orking limits* means a segment of track with definite boundaries established in accordance with part 214 of this chapter upon which trains and engines may move only as authorized by the roadway worker having control over that defined segment of track. Working limits may be established through ''exclusive track occupancy,'' ''inaccessible track,'' ''foul time'' or ''train coordination'' as defined in part 214 of this chapter.

Finally, paragraph (2) of the definition of ''dispatch'' has been rewritten to further clarify that the term excludes several types of activities that might mistakenly be considered to fall within the scope of the definition. Paragraph (2) limits the exclusions, however, to personnel in the field. Subsection (i) specifically excludes from the scope of the definition the carrying out of a written or verbal authority or permission or an authority for working limits. As further clarification, subsection (i) notes two examples of activities that would fall under the exclusion, provided they were carried out by field personnel: Initiating an interlocking timing device and, in response to the AAR's comments, authorizing a train to enter working limits. Subsection (ii) specifically excludes from the scope of the definition the operation by field personnel of a function of a signal system intended to be used by those

field personnel, such as initiating an interlocking timing device.

Dispatcher. As noted above, in order to make explicitly clear that an individual's job title does not determine whether the functions he or she performs will be considered ''dispatching'' FRA has revised the definition of ''dispatcher'' to remove all job categories and instead has made the definition entirely function-specific. Therefore, any individual, regardless of job title, performing any of the functions encompassed by the definition of ''dispatch'' will be considered a ''dispatcher'' and will fall within the ambit of part 241.

Emergency. The definition of ''emergency'' remains unchanged from the IFR. An ''emergency'' under this part must be unexpected and unforeseeable and must interfere with a railroad's ability to dispatch a United States railroad operation domestically to the extent that if the operation is not dispatched extraterritorially there would be a substantial disruption in rail traffic or a significant safety risk. Planned shortages of domestic dispatchers relating to vacation scheduling or the railroad's failure to maintain an adequate list of extraboard employees and foreseeable train delays due to substandard maintenance and repair of rail equipment are not emergencies.

Typical examples of emergencies are the following: The sudden illness of a domestic dispatcher about to begin working the next duty shift when there is no other domestic employee nearby who could be called to substitute; the delay of a train operating on mainline track in reaching its station when the delay is due to the derailment of another train and the domestic dispatching office was scheduled to close until the next day after the domestic dispatcher completed his or her tour of duty; and unforeseeable system failures resulting in significant train delays when the available pool of domestic relief dispatchers is insufficient to safely handle the increased traffic density. In addition, other situations may constitute part 241 emergencies, depending on all the facts involved. The determination of whether a situation is an emergency must always be made on a case-by-case basis.

Finally, if extraterritorial dispatching service needed to abate an emergency is concluded before the end of a duty tour, the emergency provision does *not* provide license to continue the extraterritorial dispatching if an emergency no longer exists.

Extraterritorial dispatcher. The definition of ''extraterritorial dispatcher'' remains unchanged from the IFR. An ''extraterritorial dispatcher'' is an individual who, while performing the function of a dispatcher from a country other than the United States, dispatches a railroad operation that takes place in the United States.

Extraterritorial dispatching. The term has been slightly reworded to mean the act of dispatching a railroad operation that occurs on trackage in the United States by a dispatcher located outside the United States.

Fringe border dispatching. This is a new definition that relates to the new fringe border waiver provision. ''Fringe border dispatching'' is defined to mean the act of extraterritorial dispatching a railroad operations that occurs on trackage in the United States immediately adjacent to the border by a dispatcher who is a railroad employee located in Canada or Mexico.

Movement of a train. This term remains unchanged from the IFR. FRA intends it to have the same meaning as does the term ''train'' in 49 CFR 220.5.

Occupancy of a track by a roadway worker or stationary on-track equipment or both. This term remains unchanged from the IFR and refers to the physical presence of a roadway worker or stationary on-track equipment on a track for the purpose of making a repair, an inspection, or another activity not associated with the movement of a train or other on-track equipment. It is intended to cover situations where a stretch of track is being occupied for a certain period of time by roadway workers, with or without on-track equipment, for purposes not related to the movement of a train.

Roadway worker. This term remains unchanged from the IFR and is intended to have the meaning it has in 49 CFR 214.7 and 220.5.

Section 241.7 Waivers

This section sets forth the procedures for seeking waivers of compliance with the prohibitions and requirements of this rule. As noted above in section IV(M) of the supplementary information, above, the ATDD suggested that FRA not allow waivers of compliance with part 241 because the safety implications surrounding part 241 are too important, and because the waiver section has too many loopholes. FRA disagrees with both of those assertions and believes that the waiver provision must remain in order to allow flexibility. If a railroad proves to FRA's satisfaction that it can safely and securely conduct an extraterritorially dispatched operation, FRA may grant a waiver of the requirements of part 241.

The section has been expanded to provide special relief for the limited railroad operation in the United States that are currently being extraterritorially dispatched, and to facilitate further extraterritorial dispatching of fringe border operations. Paragraph (a) provides the general rules governing waiver requests. This paragraph is consistent with the general waiver provisions contained in other Federal regulations issued by FRA. Requests for waivers may be filed by any interested party. Except as provided by paragraph (b), the filing of a waiver petition does not affect that person's responsibility for compliance with the rule while the petition is being considered. In reviewing waiver requests, FRA conducts investigations to determine if a deviation from the general prohibitions and requirements can be made without compromising or diminishing rail safety. FRA recognizes that circumstances may arise when conduct of extraterritorial dispatching that does not fall within one of the exceptions to the prohibition contained in this rule is appropriate and in the public interest. However, FRA will normally expect an applicant to demonstrate that the dispatchers are subject to the same or comparable safety standards as those applicable to dispatchers located in the United States, that those standards will be enforced by FRA or by the host country with supplementary FRA oversight, and that the additional safety concerns previously identified, such as security, language and measurement differences, possible labor strikes and other disruptions, are adequately addressed.

Paragraph (b) is new. It provides special dispensation for existing extraterritorial dispatching. A railroad that files a waiver request seeking to continue extraterritorial dispatch of an operation that it has dispatched pursuant to the terms of the Interim Final Rule, may continue extraterritorial dispatching of that operation until the railroad's waiver request is acted upon by FRA if the petition is filed no later than April 11, 2003. If the waiver request is for an operation not listed in appendix A, the waiver request must describe when the extraterritorial dispatching of the operation commenced and how the dispatching was authorized by the terms of the IFR. FRA will notify the railroad if FRA determines that the operation was not permitted by the terms of the IFR.

Paragraph (c), covering fringe border dispatching, is also new. As previously noted, FRA has determined that it is appropriate to provide special relief for the four existing extraterritorial

dispatching operations (listed in appendix A to the Final Rule, the longest of which is 99 miles), which have been conducted for some time, and for limited new extraterritorial dispatching (limited to 5 route miles from the border) to facilitate hand-offs between foreign and domestic dispatchers. FRA recognizes that it may not always be safe or practical to conduct a hand-off operation exactly at the border, which may be a milepost in the middle of nowhere, and that more appropriate hand-off points may be locations in the United States close to the border. Given the limited length of the operations contemplated under this special waiver process, FRA is willing to permit the operations to be conducted with fewer safety requirements than would be required for longer operations in the United States. FRA is not suggesting that allowing these fringe border operations, even with these restrictions, is completely without risk or as safe as operations that are subject to the full range of safety requirements applicable to domestic dispatchers. However, FRA believes that the fringe border waiver provision strikes the proper balance between the risks of the operations and the necessity of allowing the railroads some flexibility and the need to promote the smooth flow of commerce across the border.

A fringe border waiver request by a railroad will generally be granted if (1) the railroad has taken adequate steps to ensure the security of its dispatch center, (2) the railroad has in place specified safety programs for its extraterritorial dispatchers, (3) a government safety agency in the country where the dispatching will occur has safety jurisdiction over the railroad and the dispatchers and is satisfied with the railroad's safety programs, and (4) the railroad agrees to abide by the operating restrictions specified in the rule. FRA anticipates that both Canadian and Mexican railroads can easily meet these requirements for cross-border dispatching of operations, and that FRA will be able to work out satisfactory arrangements with the railroads and the regulatory agencies in Canada and Mexico concerning the monitoring of the agreed upon safety programs.

An applicant railroad must describe the line proposed to be dispatched and supply the following documents with respect to its safety programs covering the fringe border operation:

(1) A copy of the operating rules of the railroad that would apply to the proposed fringe border dispatching, including hours of service limitations, and the railroad's program for testing the dispatchers in accordance with these operating rules and for ensuring that the dispatchers do not work in excess of the hours of service restrictions. Based on their comments, CP and CN have developed adequate safety programs that address this requirement.

(2) A copy of the railroad's drug and alcohol abuse prevention program that applies to the fringe border dispatchers. The program shall, to the extent permitted by the laws of the country where the dispatching occurs, contain the following: preemployment drug testing; a general prohibition on possession and use of alcohol and drugs while on duty; reasonable cause alcohol and drug testing; a policy dealing with co-worker and self-reporting of alcohol and drug abuse problems; post-accident testing; and random drug testing. FRA is not requiring that a railroad's program track the requirements of part 219. Based on the comments that have been filed, existing CN and CP programs are adequate given the current state of the law in Canada which would seem to bar Canadian railroads from unilaterally conducting random drug testing of their dispatchers. Of course, Canadian law may change in the future.

(3) A verification from a government agency in the country where the dispatching will occur that the agency has safety jurisdiction over the railroad and the proposed dispatching, and that the railroad's safety programs referenced above meet the safety requirements established by the agency or, in the absence of established safety requirements, that the programs are satisfactory to the agency. The purpose of this requirement is to ensure that a government agency with jurisdiction over the railroad and the dispatchers is satisfied with the railroad's safety programs. CN and CP should be able to secure such a statement from Transport Canada. FRA will consult with the relevant government agency to ensure that railroad's safety programs are actually carried out.

(4) An applicant railroad must also detail the steps the railroad has taken to ensure the security of the dispatch center where the fringe border dispatching will take place. CN and CP have indicated in their comments that they believe that their dispatch centers are secure. FRA currently does not have sufficient information to know whether these representations are accurate.

Finally, absent a waiver, the railroad must agree to abide by the following operating requirements, none of which should pose a problem for Canadian or Mexican railroads:

(1) The trackage in the United States being extraterritorially dispatched shall not exceed the following route miles, measured from the point that the trackage crosses the United States border: for operations that were normally operated pursuant to the term of the IFR, the route miles normally operated by the railroad in conducting the operations; or, for all other operations, five route miles.

(2) Except for unforeseen circumstances such as equipment failure, accident, casualty, or incapacitation of a crew member, each extraterritorially dispatched train shall be under the control of the same assigned crew for the entire trip over the extraterritorially dispatched trackage.

(3) The fringe border dispatcher shall communicate instructions to the train crew and maintenance of way employees working on the line in the English language and, when referencing units of measurement, shall use English units of measurement. If the railroad wishes to use some other language it can seek a waiver of this requirement.

(4) The rail line shall be under the exclusive control of a single dispatching district or desk.

(5) The dispatching of the train shall be transferred from the fringe border dispatcher to a dispatcher located in the United States at one of the following locations: interchange point; signal control point; junction of two rail lines; established crew change point; yard or yard limits location; inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture, or other governmental inspection; or location where there is a change in the method of train operations. In the IFR, FRA required that the portion of the line being extraterritorially dispatched extend no farther into the United States than the first of these locations in order to qualify for an exemption. FRA is no longer insisting on such a requirement. At many of these points, a train would actually be required to stop, which would facilitate the hand-off of dispatching functions. If a railroad that extraterritorially dispatches an operation that passes more than one of those points concludes that it would be safer or more efficient to hand-off an operation at a point other than the first point, that railroad may continue to extraterritorially dispatch that operation to another point provided that point is not beyond the mileage limit specified in the rule.

Section 241.9 Prohibition Against Extraterritorial Dispatching; Exceptions

Section 241.11 Prohibition Against Conducting a Railroad Operation Dispatched by an Extraterritorial Dispatcher; Exceptions

Section 241.13 Prohibition Against Track Owner's Requiring or Permitting Use of Its Line for a Railroad Operation Dispatched by an Extraterritorial Dispatcher; Exceptions

These sections contain a series of three prohibitions, each containing two exceptions and a provision on liability for violation of the prohibition. Unlike in the IFR, these sections do not contain exceptions for operations that were regularly being extraterritorially dispatched as of December 1999, or for fringe border operations. As was explained above, FRA has decided to provide special relief for existing extraterritorial dispatching and for new dispatching of fringe border operations through the fringe border waiver process discussed above. To promote compliance, each provision imposes a strict liability standard. Actual or constructive knowledge of the facts constituting the violation is not required to establish a violation. For example, it is not necessary for a railroad conducting a railroad operation to know that the operation is being extraterritorially dispatched in order for the railroad to violate § 241.11.

Section 241.9(a) establishes a general rule barring a railroad from requiring or permitting one of its employees or one of its contractors' employees to dispatch a railroad operation that occurs in the United States while the railroad's employee (or railroad contractor's employee) is located outside the United States. A separate violation occurs for each railroad operation so dispatched, and each day the violation continues is a separate offense. ''Railroad operation'' is defined in § 241.5. A dispatcher working in a foreign country and controlling only railroad operations in that country would not violate § 241.9(a). Likewise, a dispatcher located in the United States and controlling train operations in another country would not violate § 241.9(a), although nothing in this rule authorizes such a practice where it contravenes the domestic law or policy of the country where the railroad operations are conducted.

Section 241.11(a) creates a general prohibition against performing a railroad operation on track in the United States if the railroad operation is dispatched by an individual located outside the United States. A separate violation occurs for each railroad operation performed that was so dispatched; each day the violation continues is a separate offense.

Section 241.13(a) generally forbids a track owner from requiring or permitting a segment of track that it owns to be used for a railroad operation in the United States that is controlled by a dispatcher in another country. A separate violation occurs for each railroad operation so dispatched that was permitted to occur on the owner's track and each day the violation continues is a separate offense.

There are two basic exceptions to each of these three general prohibitions. First, under paragraph (b) of §§ 241.9–241.13, extraterritorial dispatching of railroad operations that was conducted pursuant to the IFR may continue for a 90-day transitional period that ends on April 11, 2003. Second, under paragraph (c) of §§ 241.9–241.13, extraterritorial dispatching is permitted in the event of an emergency. The term ''emergency'' is defined in § 241.5, which has been discussed earlier. The railroad must notify the FRA Regional Administrator for the region in which the railroad operation occurs, in writing as soon as feasible, either on paper or by electronic mail, that the railroad is conducting such extraterritorial dispatching. If the operation occurs in more than one region, the FRA Regional Administrator for each of the regions in which the operation occurs must be notified. In order to facilitate the notification process, appendix C lists FRA's eight regions and the States that are included in those regions as well as the street and e-mail addresses and fax numbers of the eight regional headquarters where the notification(s) must be sent. Notification need not necessarily be in advance of the performance of the extraterritorial dispatching. The exception is allowed only for the period of time that the emergency exists. If a railroad continues extraterritorial dispatching after the emergency is over, the railroad is in violation of § 241.9(a).

In its comments, the ATDD suggested that FRA limit a railroad's ability to move dispatching operations to another country to situations where the railroad can prove that such operations could not be transferred to another location in the United States. In addition, the ATDD suggested that FRA require that railroads have in place a plan to provide a domestic alternative to a foreign location. As explained in Section III(M), above, FRA rejected the ATDD's suggestions. In an emergency situation, FRA believes that a railroad should be allowed the maximum amount of flexibility in order to safely conduct any operations and should not be bound by restrictions that, while they may seem legitimate in the abstract, could exacerbate an emergency situation if that situation needs to be resolved as quickly as possible. In addition, depending on the circumstances of the emergency, the safest alternative may not necessarily be to dispatch an operation domestically. By limiting the duration of the extraterritorial dispatching to the duration of the emergency, FRA is effectively balancing the need for flexibility with the need to maintain domestic rail safety.

Paragraph (d) of §§ 241.9–241.13 discusses liability for violations of those sections. As provided in § 241.9(d), liability for extraterritorial dispatching of a railroad operation in the United States in violation of § 241.9 is on the entity that employs the individual who performed the extraterritorial dispatching, typically a railroad or a contractor to a railroad (if any), and if the employing entity is a contractor to a railroad, liability is also on the railroad. For example, if an employee of a railroad contractor performs the extraterritorial dispatching, FRA may hold either the contractor or the railroad or both liable for the violation (in addition to the individual employee and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)).

As stated in § 241.11(d), liability for conducting a railroad operation that is extraterritorially dispatched in violation of § 241.11 is on the entity that conducts the operation, typically a railroad or a contractor to a railroad. For example, if employees of a railroad contractor engage in the movement of a train that is extraterritorially dispatched and not within the exceptions of paragraphs (b) or (c), then FRA may hold either the contractor or the railroad or both liable for the violation (in addition to the individual train crewmembers and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)).

Finally, as provided in § 241.13(d), liability for requiring or permitting the conduct of a railroad operation that is so dispatched over a segment of track is on the owner of the track segment. For purposes of § 241.13, the track owner includes the owner of the track segment, a person assigned responsibility for the track segment under § 213.5(c), and a railroad operating the track segment pursuant to a directed service order issued by the STB under 49 U.S.C. 11123, during the time that the directed service order is in effect. FRA may hold the track owner, the assignee, or the

railroad operating the track under a directed service order, or some or all of such entities liable for a violation of § 241.13 (in addition to the individuals and any other entity that committed the violation or caused the violation, as provided in § 241.3(c)). For example, if the track owner (Company A) has assigned responsibility for the track under § 213.5(c) to Company B and the track is used by a train that is dispatched by a dispatcher located outside of the United States, not within the exceptions of paragraphs (b) or (c), then FRA may assess a civil penalty for violation of § 241.13 against either Company B or Company A, or both.

In a given instance in which an individual outside the United States dispatches a railroad operation that takes place in the United States (not within the exceptions of paragraphs (b) or (c), three regulatory prohibitions have been violated: §§ 241.9, 241.11, and 241.13. If one single entity dispatches and conducts the railroad operation and owns the track on which the railroad operation occurs, that entity may be assessed a separate civil penalty for each of the three sections violated. On the other hand, if the three functions are performed by a total of three different entities, the entity that performed the function would be assessed a penalty only for the section it violated. As a matter of discretion, in cases where the dispatching railroad fails to notify the FRA Regional Administrator of each region where the track is located of an emergency, FRA may also cite the dispatching railroad for causing the violation of § 241.11(a) by the operating railroad or § 241.13(a) by the track owner.

Section 241.15 Penalties and Other Consequences for Noncompliance

This section identifies three of the sanctions that may be imposed upon a person for violating a requirement of part 241: civil penalties, disqualification, and criminal penalties.

Paragraph (a) on civil penalties parallels the civil penalty provisions included in numerous other safety regulations issued by FRA. Essentially, any person who violates any requirement of this part or causes the violation of any such requirement will be subject to a civil penalty of at least $500 and not more than $11,000 per violation. Civil penalties may be assessed against individuals only for willful violations, and where a grossly negligent violation or a pattern of repeated violations creates an imminent hazard of death or injury to persons, or causes death or injury, a penalty not to exceed $22,000 per violation may be assessed. *See* part 209, appendix A. In addition, each day a violation continues will constitute a separate offense. Civil penalties for violation of part 241 are authorized by 49 U.S.C. 21301, 21302, and 21304 and by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101–410, 104 Stat. 890, 28 U.S.C. 2461 note), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–134, 110 Stat. 1321–358, 378, Apr. 26, 1996), which requires agencies to adjust for inflation the maximum civil monetary penalties within the agencies' jurisdiction. Consequently, the resulting $11,000 and $22,000 maximum penalties were determined by applying the criteria set forth in sections 4 and 5 of the statute to the maximum penalties otherwise provided for in the Federal railroad safety laws. In addition to the civil penalty provision at § 241.15(a), this Final Rule includes a schedule of civil penalties for specific violations of part 241 as appendix B to this part.

Paragraph (b) provides that an individual who fails to comply with a provision of this part or causes the violation of a provision of this part may be prohibited from performing safety-sensitive service in accordance with FRA's enforcement procedures found in subpart D, part 209.

Paragraph (c) of § 241.15 provides that a person may be subject to criminal penalties under 49 U.S.C. 21311 for knowingly and willfully falsifying a report required by these regulations, here, a report to the appropriate FRA Regional Administrator(s) concerning extraterritorial dispatching performed under a claim that it was performed to deal with an emergency. Section 21311(a) of title 49, United States Code, reads as follows:

> (a) Records and Reports Under Chapter 201.—A person shall be fined under title 18, imprisoned for not more than 2 years, or both, if the person knowingly and willfully—
>
> (1) makes a false entry in a record or report required to be made or preserved under chapter 201 of this title;
>
> (2) destroys, mutilates, changes, or by another means falsifies such a record or report;
>
> (3) does not enter required specified facts and transactions in such a record or report;
>
> (4) makes or preserves such a record or report in violation of a regulation prescribed or order issued under chapter 201 of this title; or
>
> (5) files a false record or report with the Secretary of Transportation.

FRA believes that the inclusion of these provisions for failure to comply with the regulations is important to ensure that compliance is achieved.

Section 241.17 Preemptive Effect

Section 241.17 informs the public of FRA's views regarding what will be the preemptive effect of the Final Rule. While the presence or absence of such a section does not in itself affect the preemptive effect of a Final Rule, it informs the public about the statutory provision that governs the preemptive effect of the rule. Section 20106 of title 49 of the United States Code provides that all regulations prescribed by the Secretary relating to railroad safety preempt any State law, regulation, or order covering the same subject matter, except a provision necessary to eliminate or reduce an essentially local safety hazard which provision is not incompatible with a Federal law, regulation, or order and does not unreasonably burden interstate commerce. With the exception of a provision that is not incompatible with Federal law, not an unreasonable burden on interstate commerce, and directed at an essentially local safety hazard, 49 U.S.C. 20106 will preempt any State regulatory agency rule covering the same subject matter as the regulations in this Final Rule.

Section 241.19 Information Collection

This provision shows which sections of this part have been approved by the Office of Management and Budget (OMB) for compliance with the Paperwork Reduction Act of 1995. *See* 44 U.S.C. 3501 *et seq*. A more detailed discussion of the information collection requirements in this part is provided below.

Appendix A—List of Lines Being Extraterritorially Dispatched in Accordance With the Regulations Contained in 49 CFR Part 241, Revised as of October 1, 2002

Appendix B—Schedule of Civil Penalties

This appendix contains a schedule of civil penalties to be used in connection with this part. Because the penalty schedule is a statement of agency policy, notice and comment are not required prior to its issuance. *See* 5 U.S.C. 553(b)(3)(A).

Appendix C—Geographic Boundaries of FRA's Regions and Addresses of FRA's Regional Headquarters

This appendix contains a list of FRA's eight regions and the States that are included in those regions as well as the addresses and fax numbers of the eight regional headquarters where notification of emergency extraterritorial dispatching of domestic operations must be sent.

VI. Regulatory Impact

A. Executive Order 12866 and DOT Regulatory Policies and Procedures

This rule has been evaluated in accordance with existing policies and procedures, and determined to be significant under both Executive Order 12866 and DOT policies and procedures (44 FR 11034; Feb. 26, 1979). FRA has prepared and placed in the docket a regulatory evaluation addressing the economic impact of this proposed rule. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590. Access to the docket may also be obtained electronically through the Web site for the Docket Management System at *http://dms.dot.gov.*

As previously noted, currently extraterritorial dispatching of train operations in the United States is very limited. However, there is the prospect of increased use of extraterritorial dispatchers in the absence of regulatory restrictions. FRA has discussed in detail the significant safety concerns associated with extraterritorial dispatching and how the Final Rule carefully resolves these concerns in a manner designed to facilitate cross-border railroad operations.

FRA expects that overall the requirements in the rule would not impose a significant cost on the rail industry over the next twenty years. For some rail operators, the total costs incurred would exceed the total benefits achieved. For others, the benefits would outweigh the costs incurred.

The following table presents estimated twenty-year monetary impacts associated with the locational and emergency notification requirements for dispatching of United States rail operations. These estimates represent scenarios previously considered by railroads as well as those that could arise from future mergers between Canadian and United States railroads; FRA is not aware of any current merger plans or other plans to use additional extraterritorial dispatchers.

Description	Estimated 20-year costs (NPV)
Canada/U.S. labor rate differential	$7,889,471
Additional dispatcher supervisors (higher labor rate)	235,403
Emergency situation notification	3,332
Dismissed employee compensation	(10,076,059)
Total Net Cost (NPV rounded)	(1,947,853)

B. Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*) requires a review of proposed and Final Rules to assess their impact on small entities. FRA has prepared and placed in the docket a Regulatory Flexibility Assessment (RFA), which assesses the small entity impact. Document inspection and copying facilities are available at 1120 Vermont Avenue, NW., 7th Floor, Washington, DC 20590. Photocopies may also be obtained by submitting a written request to the FRA Docket Clerk, Office of Chief Counsel, Mail Stop 10, Federal Railroad Administration, 1120 Vermont Avenue, NW., Washington, DC 20590.

Pursuant to Section 312 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104–121), FRA has published an interim policy that formally establishes ''small entities'' as being railroads that meet the line-haulage revenue requirements of a Class III railroad. For other entities, the same dollar limit in revenue governs whether a railroad, contractor, or other respondent is a small entity (62 FR 43024, Aug. 11, 1997).

The RFA concludes that this rule will not have an economic impact on a sizable number of small entities. FRA further certifies that this rule is not expected to have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The information collection requirements in this final rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*. The sections that contain the new information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR section	Respondent universe	Total annual responses	Average time per response	Total annual burden hours	Total annual burden cost
241.7—Waivers:					
(a) General	4 railroads	1 waiver pet.	4 hours	4 hours	$157
(b) Special Dispensation—Extraterritorial Dispatching.	4 railroads	4 waiver pet.	4 hours	16 hours	628
(c) Fringe Border Dispatching	4 railroads	2 waiver pet.	4 hours	8 hours	314
241.9—Prohibition against extraterritorial dispatching; exceptions—Notification.	4 railroads	1 notification	8 hours	8 hours	314
241.11—Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher, exceptions.	4 railroads	Included under § 241.9.	Included under § 241.9.	Included under § 241.9.	(1)
241.13—Prohibitions against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher, exceptions.	4 railroads	Included under § 241.9.	Included under § 241.9.	Included under § 241.9.	(1)
241.15—Penalties—False Reports/Records.	$628	None	N/A	N/A	N/A

[1] Included under § 241.9.

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, 725 17th St., NW., Washington, DC 20503. OMB is required to make a decision concerning the collection of information requirements contained in this final rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

FRA is not authorized to impose a penalty on persons for violating information collection requirements which do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any information collection requirements resulting from this rulemaking action prior to the effective date of this rule. The OMB control number, when assigned, will be announced by a separate notice in the **Federal Register**.

D. Federalism Implications

Executive Order 13132, entitled, ''Federalism,'' issued on August 4, 1999, requires that each agency ''in a separately identified portion of the preamble to the regulation as it is to be issued in the **Federal Register**, provide[] to the Director of the Office of Management and Budget a federalism summary impact statement, which consists of a description of the extent of the agency's prior consultation with State and local officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of the State and local officials have been met * * *.''

When issuing the IFR in this proceeding, FRA adhered to Executive Order 13132. Normally, FRA engages in the required Federalism consultation during the early stages of the rulemaking through meetings of the full Railroad Safety Advisory Committee (''RSAC''), on which several representatives of groups representing State and local officials sit. However, when issuing the IFR, FRA determined that, because the possibility existed that railroads could have commenced extensive extraterritorial dispatching at any time, these issues had to be addressed without the benefit of a presentation to the full RSAC. In order to comply with Executive Order 13132, when preparing the IFR, FRA sent a letter soliciting comment on the Federalism implications of this IFR (and the NPRM involving part 219) that FRA simultaneously published to nine groups designated as representatives for various State and local officials. The nine organizations were as follows: the American Association of State Highway and Transportation Officials (AASHTO), the Association of State Rail Safety Managers, the Council of State Governments, the National Association of Counties, the National Association of Towns and Townships, the National Conference of State Legislatures, the National Governors' Association, the National League of Cities, and the U.S. Conference of Mayors.

In addition, FRA representatives had informal discussions with representatives of some of those groups. During one such consultation, a representative of AASHTO expressed confidence that FRA and State interests would closely coincide on these issues. He noted that the September 2000 meeting of AASHTO's Standing Committee on Rail Transportation would include a significant discussion of the pending STB proceeding (involving the proposed consolidation of CN and BNSF), with the implication that FRA's rulemakings may be a current topic at that time. As of the date FRA published the IFR, FRA had not received any indication of concerns about the Federalism implications of this rulemaking from these representatives. In addition, none of the groups submitted comments in response to the IFR. Therefore, FRA does not believe that this Final Rule raises any federalism issues.

E. Environmental Impact

FRA has evaluated this regulation in accordance with its ''Procedures for Considering Environmental Impacts'' (FRA's Procedures) (64 FR 28545, May 26, 1999) as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and related regulatory requirements. FRA has determined that this regulation is not a major FRA action (requiring the preparation of an environmental impact statement or environmental assessment) because it is categorically excluded from detailed environmental review pursuant to section 4(c)(20) of FRA's Procedures. 64 FR 28545, 28547, May 26, 1999. Section 4(c)(20) reads as follows:

(c) Actions Categorically Excluded. Certain classes of FRA actions have been determined to be categorically excluded from the requirements of these Procedures as they do not individually or cumulatively have a significant effect on the human environment. * * * The following classes of FRA actions are categorically excluded:

* * * * *

(20) Promulgation of railroad safety rules and policy statements that do not result in significantly increased emissions of air or water pollutants or noise or increased traffic congestion in any mode of transportation.

In accordance with section 4(c) and (e) of FRA's Procedures, the agency has further concluded that no extraordinary circumstances exist with respect to this regulation that might trigger the need for a more detailed environmental review. As a result, FRA finds that this regulation is not a major Federal action significantly affecting the quality of the human environment.

F. Unfunded Mandates Reform Act of 1995

Pursuant to Section 201 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, 2 U.S.C. 1531), each federal agency ''shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).'' Section 202 of the Act (2 U.S.C. 1532) further requires that ''before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more (adjusted annually for inflation) in any 1 year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a written statement'' detailing the effect on State, local, and tribal governments and the private sector. The Final Rule would not result in the expenditure, in the aggregate, of $100,000,000 or more in any one year, and thus preparation of such a statement is not required.

G. Energy Impact

Executive Order 13211 requires Federal agencies to prepare a Statement of Energy Effects for any ''significant energy action.'' 66 FR 28355 (May 22, 2001). Under the Executive Order, a ''significant energy action'' is defined as any action by an agency (normally published in the **Federal Register**) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry,

advance notices of proposed rulemaking, and notices of proposed rulemaking: (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 effect 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 energy action. FRA has evaluated this Final Rule in accordance with Executive Order 13211. FRA has determined that this Final Rule is not likely to have a significant adverse effect on the supply, distribution, or use of energy. Consequently, FRA has determined that this regulatory action is not a ''significant energy action'' within the meaning of Executive Order 13211.

List of Subjects in 49 CFR Part 241

Communications, Penalties, Railroad safety, Reporting and recordkeeping requirements.

The Rule

For the reasons set forth in the preamble, FRA amends chapter II, subtitle B of title 49, Code of Federal Regulations, by adding part 241 to read as follows:

PART 241—UNITED STATES LOCATIONAL REQUIREMENT FOR DISPATCHING OF UNITED STATES RAIL OPERATIONS

Sec.

241.1 Purpose and scope.
241.3 Application and responsibility for compliance.
241.5 Definitions.
241.7 Waivers.
241.9 Prohibition against extraterritorial dispatching; exceptions.
241.11 Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.
241.13 Prohibition against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.
241.15 Penalties and other consequences for noncompliance.
241.17 Preemptive effect.
241.19 Information collection.
Appendix A to Part 241—List of Lines Being Extraterritorially Dispatched in Accordance With the Regulations Contained in 49 CFR Part 241, Revised as of October 1, 2002
Appendix B to Part 241—Schedule of Civil Penalties
Appendix C to Part 241—Geographical Boundaries of FRA's Regions and Addresses of FRA's Regional Headquarters

Authority: 49 U.S.C. 20103, 20107, 21301, 21304, 21311; 28 U.S.C. 2461, note; 49 CFR 1.49.

§ 241.1 Purpose and scope.

(a) The purpose of this part is to prevent railroad accidents and incidents, and consequent injuries, deaths, and property damage, that would result from improper dispatching of railroad operations in the United States by individuals located outside of the United States.

(b) This part prohibits extraterritorial dispatching of railroad operations, conducting railroad operations that are extraterritorially dispatched, and allowing track to be used for such operations, subject to certain stated exceptions. This part does not restrict a railroad from adopting and enforcing additional or more stringent requirements not inconsistent with this part.

§ 241.3 Application and responsibility for compliance.

(a) Except as provided in paragraph (b) of this section, this part applies to all railroads.

(b) This part does not apply to—

(1) A railroad that operates only on track inside an installation that is not part of the general railroad system of transportation; or

(2) Rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

(c) Although the duties imposed by this part are generally stated in terms of a duty of a railroad, each person, including a contractor for a railroad, who performs a function covered by this part, shall perform that function in accordance with this part.

§ 241.5 Definitions.

As used in this part:

Administrator means the Administrator of the Federal Railroad Administration or the Administrator's delegate.

Dispatch means—

(1) To perform a function that would be classified as a duty of a ''dispatching service employee,'' as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), if the function were to be performed in the United States. For example, to *dispatch* means, by the use of an electrical or mechanical device—

(i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both; or

(iii) To issue an authority for working limits to a roadway worker.

(2) The term *dispatch* does not include the action of personnel in the field—

(i) Effecting implementation of a written or verbal authority or permission affecting a railroad operation or an authority or permission affecting a railroad operation or an authority for working limits to a roadway worker (*e.g.,* initiating an interlocking timing device, authorizing a train to enter working limits); or

(ii) Operating a function of a signal system designed for use by those personnel.

Dispatcher means any individual who dispatches.

Emergency means an unexpected and unforeseeable event or situation that affects a railroad's ability to use a dispatcher in the United States to dispatch a railroad operation in the United States and that, absent the railroad's use of an extraterritorial dispatcher to dispatch the railroad operation, would either materially disrupt rail service or pose a substantial safety hazard.

Employee means an individual who is engaged or compensated by a railroad or by a contractor to a railroad to perform any of the duties defined in this part.

Extraterritorial dispatcher means a dispatcher who, while located outside of the United States, dispatches a railroad operation that occurs in the United States.

Extraterritorial dispatching means the act of dispatching a railroad operation that occurs on trackage in the United States by a dispatcher located outside of the United States.

Fringe border dispatching means the act of extraterritorial dispatching a railroad operation that occurs on trackage in the United States immediately adjacent to the border between the United States and Canada or the border between the United States and Mexico by a dispatcher who is a railroad employee located in Canada or Mexico.

FRA means the Federal Railroad Administration, United States Department of Transportation.

Movement of a train means the movement of one or more locomotives coupled with or without cars, requiring an air brake test in accordance with part 232 or part 238 of this chapter, except during switching operations or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up trains.

Occupancy of a track by a roadway worker or stationary on-track equipment

or both refers to the physical presence of a roadway worker or stationary on-track equipment, or both, on a track for the purpose of making an inspection, repair, or another activity not associated with the movement of a train or other on-track equipment.

Person means an entity of a type covered under 1 U.S.C. 1, including but not limited to the following: a railroad; a manager, supervisor, official, or other employee or agent of a railroad; an owner, manufacturer, lessor, or lessee of railroad equipment, track, or facilities; an independent contractor providing goods or services to a railroad; and an employee of such owner, manufacturer, lessor, lessee, or independent contractor.

Railroad means any form of nonhighway ground transportation that runs on rails or electromagnetic guideways and any person providing such transportation, including—

(1) Commuter or other short-haul railroad passenger service in a metropolitan or suburban area and commuter railroad service that was operated by the Consolidated Rail Corporation on January 1, 1979; and

(2) High speed ground transportation systems that connect metropolitan areas, without regard to whether those systems use new technologies not associated with traditional railroads; but does not include rapid transit operations in an urban area that are not connected to the general railroad system of transportation.

Railroad contractor means a contractor to a railroad or a subcontractor to a contractor to a railroad.

Railroad operation means the movement of a train or other on-track equipment (other than on-track equipment used in a switching operation or where the operation is that of classifying and assembling rail cars within a railroad yard for the purpose of making or breaking up a train), or the activity that is the subject of an authority issued to a roadway worker for working limits.

Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance, or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities, or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts.

State means a State of the United States of America or the District of Columbia.

United States means all of the States.

Working limits means a segment of track with definite boundaries established in accordance with part 214 of this chapter upon which trains and engines may move only as authorized by the roadway worker having control over that defined segment of track. Working limits may be established through ''exclusive track occupancy,'' ''inaccessible track,'' ''foul time,'' or ''train coordination'' as defined in part 214 of this chapter.

§ 241.7 Waivers.

(a) *General.* (1) A person subject to a requirement of this part may petition the Administrator for a waiver of compliance with such requirement. Except as provided in paragraph (b) of this section, the filing of such a petition does not affect that person's responsibility for compliance with that requirement while the petition is being considered.

(2) (i) Each petition for waiver under this section shall be filed in the manner and contain the information required by part 211 of this chapter.

(ii) Petitions seeking approval to conduct fringe border operations shall also comply with the requirements of paragraph (c) of this section.

(iii) Petitioners not filing under paragraph (c) of this section should review the guidelines at 66 FR 63942 (Dec. 11, 2001), and frame their petitions to address the safety and security concerns articulated in the preamble, or contact the Office of the Chief Counsel, RCC–12, FRA, 1120 Vermont Avenue, NW., Stop 10, Washington, DC 20590, for a copy of the guidelines.

(3) If the Administrator finds that a waiver of compliance is in the public interest and is consistent with railroad safety, the Administrator may grant the waiver subject to any conditions that the Administrator deems necessary.

(b) *Special dispensation for existing extraterritorial dispatching.* (1) A railroad that files a waiver request seeking to continue extraterritorial dispatch of an operation that it has dispatched from Canada or Mexico pursuant to regulations contained in 49 CFR part 241, revised as of October 1, 2002, may continue extraterritorial dispatching of that operation until the railroad's waiver request is acted upon by FRA if the petition is filed no later than April 11, 2003.

(2) If the waiver request is for an operation not listed in appendix A to this part, the waiver request must describe when the extraterritorial dispatching of the operation commenced and how the dispatching was authorized by regulations contained in 49 CFR part 241, revised as of October 1, 2002. FRA will notify the railroad if FRA determines that the operation was not permitted by the terms of those regulations.

(c) *Fringe border dispatching.* (1) A waiver request to have a railroad employee located in Canada or in Mexico dispatch a railroad operation in the United States immediately adjacent to the border of the country in which the dispatcher conducts the dispatching will generally be approved by FRA, subject to any conditions imposed by FRA, if the waiver request meets all of the terms of paragraphs (c)(2) and (3) of this section. A proponent of a waiver request may seek relief from the terms of paragraphs (c)(2) and (3) of this section.

(2) The railroad proposing to conduct the fringe border dispatching shall supply the following documents as part of the waiver request:

(i) A description, by railroad division, applicable subdivision(s), and mileposts, of the line proposed to be dispatched;

(ii) A copy of the operating rules of the railroad that would apply to the proposed fringe border dispatching, including hours of service limitations, and the railroad's program for testing the dispatchers in accordance with these operating rules and for ensuring that the dispatchers do not work in excess of the hours of service restrictions;

(iii) A copy of the railroad's drug and alcohol abuse prevention program that applies to the fringe border dispatchers. The program shall, to the extent permitted by the laws of the country where the dispatching occurs, contain the following:

(A) Preemployment drug testing;

(B) A general prohibition on possession and use of alcohol and drugs while on duty;

(C) Reasonable cause alcohol and drug testing;

(D) A policy dealing with co-worker and self-reporting of alcohol and drug abuse problems;

(E) Post-accident testing; and

(F) Random drug testing;

(iv) The steps the railroad has taken to ensure the security of the dispatch center where the fringe border dispatching will take place;

(v) The railroad's plans for complying with the requirements of paragraph (c)(3) of this section; and

(vi) A verification from a government agency in the country where the dispatching will occur that the agency has safety jurisdiction over the railroad and the proposed dispatching, and that the railroad's safety programs referenced

in paragraphs (c)(2)(ii) and (iii) of this section meet the safety requirements established by the agency or, in the absence of established safety requirements, that the programs are satisfactory to the agency.

(3) Except as otherwise approved by FRA, fringe border dispatching must comply with the following requirements:

(i) The trackage in the United States being extraterritorially dispatched shall not exceed the following route miles, measured from the point that the trackage crosses the United States border:

(A) For operations conducted pursuant to the regulations contained in 49 CFR part 241, revised as of October 1, 2002, the route miles shall be the miles normally operated by the railroad in conducting the operation; and

(B) For all other operations, the route miles shall not exceed five miles.

(ii) Except for unforeseen circumstances such as equipment failure, accident, casualty, or incapacitation of a crew member, each extraterritorially dispatched train shall be under the control of the same assigned crew for the entire trip over the extraterritorially dispatched trackage.

(iii) The fringe border dispatcher shall communicate instructions to the train crew and maintenance of way employees working on the line in the English language and, when referencing units of measurement, shall use English units of measurement.

(iv) The rail line shall be under the exclusive control of a single dispatching district or desk; and

(v) The dispatching of the train shall be transferred from the fringe border dispatcher to a dispatcher located in the United States at one of the following locations within the mileage limits mandated in paragraph (c)(3)(i) of this section:

(A) Interchange point;

(B) Signal control point;

(C) Junction of two rail lines;

(D) Established crew change point;

(E) Yard or yard limits location;

(F) Inspection point for U.S. Customs, Immigration and Naturalization Service, Department of Agriculture, or other governmental inspection; or

(G) Location where there is a change in the method of train operations.

§ 241.9 Prohibition against extraterritorial dispatching; exceptions.

(a) *General.* Except as provided in § 241.7(d) and paragraphs (b) and (c) of this section, a railroad subject to this part shall not require or permit a dispatcher located outside the United States to dispatch a railroad operation that occurs in the United States if the dispatcher is employed by the railroad or by a contractor to the railroad.

(b) *Transitional period to continue existing extraterritorial dispatching.* A railroad that has normally extraterritorially dispatched railroad track in the United States from Canada or Mexico pursuant to the regulations contained in 49 CFR part 241, revised as of October 1, 2002, may continue extraterritorial dispatching of that railroad track until April 10, 2003, to permit the railroad an opportunity to file a waiver request pursuant to § 241.7.

(c) *Emergencies.* (1) In an emergency situation, a railroad may require or permit one of its dispatchers located outside the United States to dispatch a railroad operation that occurs in the United States, provided that:

(i) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the railroad operation was conducted, in writing as soon as practicable, of the emergency; and

(ii) The extraterritorial dispatching is limited to the duration of the emergency.

(2) Written notification may be made either on paper or by electronic mail.

(3) A list of the States that make up the FRA regions and the street and e-mail addresses and fax numbers of the FRA Regional Administrators appears in appendix C to this part.

(d) *Liability.* The Administrator may hold either the railroad that employs the dispatcher or the railroad contractor that employs the dispatcher, or both, responsible for compliance with this section and subject to civil penalties under § 241.15.

§ 241.11 Prohibition against conducting a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

(a) *General.* Except as provided in § 241.5(d) or paragraphs (b) and (c) of this section, a railroad subject to this part shall not conduct, or contract for the conduct of, a railroad operation in the United States that is dispatched from a location outside of the United States.

(b) *Transitional period to continue existing extraterritorial dispatching.* A railroad that has normally conducted, or contracted for the conduct of, a railroad operation in the United States that is extraterritorially dispatched pursuant to the regulations contained in 49 CFR part 241, revised as of October 1, 2002, may continue to conduct or contract for the conduct of the operation until April 10, 2003, to permit the railroad an opportunity to file a waiver request pursuant to § 241.7.

(c) *Emergencies.* (1) In an emergency situation, a railroad may conduct, or contract for the conduct of, a railroad operation in the United States that is dispatched from a location outside the United States, provided that:

(i) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the railroad operation was conducted, in writing as soon as practicable, of the emergency; and

(ii) The extraterritorial dispatching is limited to the duration of the emergency.

(2) Written notification may be made either on paper or by electronic mail.

(3) A list of the States that make up the FRA regions and the street and e-mail addresses and fax numbers of the FRA Regional Administrators appears in appendix C to this part.

(d) *Liability.* The Administrator may hold either the railroad that conducts the railroad operation or the railroad contractor that conducts the operation, or both, responsible for compliance with this section and subject to civil penalties under § 241.15.

§ 241.13 Prohibition against track owner's requiring or permitting use of its line for a railroad operation dispatched by an extraterritorial dispatcher; exceptions.

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, an owner of railroad track located in the United States shall not require or permit the track to be used for a railroad operation that is dispatched from outside the United States.

(b) *Transitional period to continue existing extraterritorial dispatching.* An owner of a track segment located in the United States that is extraterritorially dispatched pursuant to the regulations contained in 49 CFR 241, revised as of October 1, 2002, may require or permit the track segment to be continued to be used for a railroad operation that is extraterritorially dispatched until April 10, 2003, to permit the railroad an opportunity to file a waiver request pursuant to § 241.7.

(c) *Emergencies.* In an emergency situation, an owner of railroad track located in the United States may require or permit the track to be used for a railroad operation that is dispatched from outside the United States, provided that:

(1) The dispatching railroad notifies the FRA Regional Administrator of each FRA region where the operation was conducted, in writing as soon as practicable, of the emergency and

(2) The extraterritorial dispatching is limited to the duration of the emergency. Written notification may be made either on paper or by electronic mail.

(d) *Liability.* The Administrator may hold either the track owner or the assignee under § 213.5(c) of this chapter (if any), or both, responsible for compliance with this section and subject to civil penalties under § 241.15. A common carrier by railroad that is directed by the Surface Transportation Board to provide service over the track in the United States of another railroad under 49 U.S.C. 11123 is considered the owner of that track for the purposes of the application of this section during the period that the directed service order remains in effect.

§ 241.15 Penalties and other consequences for noncompliance.

(a) Any person who violates any requirement of this part or causes the violation of any such requirement is subject to a civil penalty of at least $500 and not more than $11,000 per violation, except that: Penalties may be assessed against individuals only for willful violations, and, where a grossly negligent violation or a pattern of repeated violations has created an imminent hazard of death or injury to persons, or has caused death or injury, a penalty not to exceed $22,000 per violation may be assessed. Each day a violation continues shall constitute a separate offense.

(b) An individual who violates any requirement of this part or causes the violation of any such requirement may be subject to disqualification from safety-sensitive service in accordance with part 209 of this chapter.

(c) A person who knowingly and willfully falsifies a record or report required by this part may be subject to criminal penalties under 49 U.S.C. 21311.

§ 241.17 Preemptive effect.

Under 49 U.S.C. 20106, the regulations in this part preempt any State law, regulation, or order covering the same subject matter, except an additional or more stringent law, regulation, or order that is necessary to eliminate or reduce an essentially local safety hazard; is not incompatible with a law, regulation, or order of the United States Government; and does not impose an unreasonable burden on interstate commerce.

§ 241.19 Information collection.

(a) The information collection requirements of this part are being reviewed by the Office of Management and Budget pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

(b) The information collection requirements are found in the following sections: § 241.7(a), (b), (c); 241.9(c); 241.11(c); 241.13(c); and 214.15. When an effective date for these sections is established, FRA will publish notice of that date in the **Federal Register**.

Appendix A to Part 241—List of Lines Being Extraterritorially Dispatched in Accordance With the Regulations Contained in 49 CFR Part 241, Revised as of October 1, 2002

Description of United States track segment being extraterritorially dispatched	Length of United States' track segment	Railroad conducting the dispatching
Maine: Between Vanceboro, Maine and Brownville Junction, Maine.	99 miles	Eastern Maine Ry. Co.
Michigan:		
U.S. trackage between Windsor, Ontario, and Detroit, Michigan.	1.8 miles	Canadian Pacific Railway Company.
U.S. trackage between Sarnia, Ontario, and Port Huron, Michigan.	3.1 miles	Canadian National Railway Company (CN).
Minnesota: Sprague Subdivision, between Baudette, Minnesota, and International Boundary, Minnesota.	43.8 miles	CN.

Appendix B to Part 241—Schedule of Civil Penalties [1]

Section [2]	Violation	Willful violation
241.9(a) Requiring or permitting extraterritorial dispatching of a railroad operation	$7,500	$11,000
(b) Failing to notify FRA about extraterritorial dispatching of a railroad operation in an emergency situation	5,000	7,500
241.11 Conducting a railroad operation that is extraterritorially dispatched:		
(a)(1) Generally	7,500	11,000
(a)(2) In an emergency situation-where dispatching railroad fails to notify FRA of the extraterritorial dispatching	2,500	5,000
241.13 Requiring or permitting track to be used for the conduct of a railroad operation that is extraterritorially dispatched:		
(a)(1) Generally	7,500	11,000
(a)(2) In an emergency situation-where dispatching railroad fails to notify FRA of the extraterritorial dispatching	2,500	5,000

[1] A penalty may be assessed against an individual only for a willful violation. The Administrator reserves the right to assess a penalty of up to $22,000 for any violation where circumstances warrant. See 49 U.S.C. 21301, 21304 and 49 CFR part 209, appendix A.

[2] Further designations for certain provisions, not found in the CFR citation for those provisions, and not found in this Appendix, are FRA Office of Chief Counsel computer codes added as a suffix to the CFR citation and used to expedite imposition of civil penalties for violations. FRA reserves the right, should litigation become necessary, to substitute in its complaint the CFR citation in place of the combined designation cited in the civil penalty demand letter.

Appendix C to Part 241—Geographical Boundaries of FRA's Regions and Addresses of FRA's Regional Headquarters

The geographical boundaries of FRA's eight regions and the addresses for the regional headquarters of those regions are as follows:

(1) *Region 1* consists of Maine, Vermont, New Hampshire, New York, Massachusetts, Rhode Island, Connecticut, and New Jersey. The mailing address of the Regional Headquarters is: 55 Broadway, Room 1077, Cambridge, Massachusetts 02142. The fax number is 617–494–2967. The electronic mail (E-mail) address of the Regional Administrator for Region 1 is: *Mark.McKeon@fra.dot.gov.*

(2) *Region 2* consists of Pennsylvania, Delaware, Maryland, Ohio, West Virginia, Virginia, and Washington, DC. The mailing address of the Regional Headquarters is: Two

International Plaza, Suite 550, Philadelphia, Pennsylvania 19113. The fax number is 610–521–8225. The E-mail address of the Regional Administrator for Region 2 is: *David.Myers@fra.dot.gov.*

(3) *Region 3* consists of Kentucky, Tennessee, North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Florida. The mailing address of the Regional Headquarters is: Atlanta Federal Center, 61 Forsythe Street, SW., Suite 16T20, Atlanta, Georgia 30303. The fax number is 404–562–3830. The E-mail address of the Regional Administrator for Region 3 is: *Fred.Dennin@fra.dot.gov.*

(4) *Region 4* consists of Minnesota, Wisconsin, Michigan, Illinois, and Indiana. The mailing address of the Regional Headquarters is: 300 West Adams Street, Rm 310, Chicago, Illinois 60606. The fax number is 312–886–9634. The E-mail address of the Regional Administrator for Region 4 is: *Laurence.Hasvold@fra.dot.gov.*

(5) *Region 5* consists of New Mexico, Oklahoma, Arkansas, Louisiana and Texas. The mailing address of the Regional Headquarters is: 4100 International Plaza, Suite 450, Fort Worth, Texas, 76109–4820. The fax number is 817–284–3804. The E-mail address of the Regional Administrator for Region 5 is: *John.Megary@fra.dot.gov.*

(6) *Region 6* consists of Nebraska, Iowa, Colorado, Kansas, and Missouri. The mailing address of the Regional Headquarters is: 911 Locust Street, Suite 464, Kansas City, Missouri 64106. The fax number is 816–329–3867. The E-mail address of the Regional Administrator for Region 6 is: *Darrell.Tisor@fra.dot.gov.*

(7) *Region 7* consists of California, Nevada, Utah, Arizona, and Hawaii. The mailing address of the Regional Headquarters is: 801 I Street, Suite 466, Sacramento, California 95814. The fax number is 916–498–6546. The E-mail address of the Regional Administrator for Region 7 is: *Alvin.Settje@fra.dot.gov.*

(8) *Region 8* consists of Washington, Idaho, Montana, North Dakota, Oregon, Wyoming, South Dakota, and Alaska. The mailing address of the Regional Headquarters is: Murdock Executive Plaza, 703 Broadway, Suite 650, Vancouver, Washington 98660. The fax number is 360–696–7548. The E-mail address of the Regional Administrator for Region 8 is: *Dick.Clairmont@fra.dot.gov.*

Allan Rutter,

Federal Railroad Administrator.

[FR Doc. 02–30527 Filed 12–9–02; 8:45 am]

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Federal Register

Tuesday,
December 10, 2002

Part IV

Department of Transportation

Federal Railroad Administration

49 CFR Part 219

Control of Alcohol and Drug Use: Notice Inviting Comment on July 2002 Canadian Human Rights Commission Policy on Alcohol and Drug Testing; Proposed Rule

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 219

[Docket No. FRA 2001–11068, Notice No. 3]

RIN 2130–AB39

Control of Alcohol and Drug Use: Notice Inviting Comment on July 2002 Canadian Human Rights Commission Policy on Alcohol and Drug Testing

AGENCY: Federal Railroad Administration (FRA), DOT.

ACTION: Proposed rule; extension of comment period until further notice.

SUMMARY: In general, FRA's regulation on the control of alcohol and drug use currently applies to all railroads that operate on the general railroad system of transportation in the United States. In a December 11, 2001, notice of proposed rulemaking (NPRM), FRA proposed to amend the regulation to narrow the scope of its current exemption of certain operations by foreign railroads and small railroads from full application of FRA's requirements. Under the NPRM, an employee of a foreign railroad (a railroad incorporated outside the United States) whose primary reporting point is outside the United States (a foreign railroad foreign-based or ''FRFB employee''), who performs train or dispatching service in the United States covered by hours of service laws would no longer be exempt from the pre-employment drug testing, random alcohol and drug testing, and employee assistance program requirements of part 219. FRA held a public hearing on February 14, 2002, and extended the comment period until March 14 to allow interested parties time to supplement the record. (FRFB signal service employees, who are few in number, would continue to be exempt from pre-employment testing, random testing, and employee assistance program requirements.) Elsewhere in today's **Federal Register**, FRA is publishing a Final Rule that, with some amendments, continues in effect an Interim Final Rule requiring all dispatching of railroad operations that occur in the United States to be performed in the United States, with some limited exceptions.

On July 10, 2002, the Canadian Human Rights Commission Policy on Alcohol and Drug Testing (Policy) was published. (A copy of the Policy has been placed in the docket of this rulemaking). In accordance with the North American Free Trade Agreement (NAFTA), FRA is seeking the least-trade-impact solution in furtherance of its national rail safety goals. As part of this process, FRA invites comment on the Policy, which was issued almost four months after the public comment period on the NPRM closed. FRA will keep the comment period open until further notice while it engages in further consultations with the Governments of Canada and Mexico on the safety issues involved in the NPRM.

ADDRESSES: Anyone wishing to file a comment should refer to the FRA docket and notice numbers (FRA Docket No. FRA 2001–11068, Notice No. 3). You may submit your comments and related material by only one of the following methods:

By mail to the Docket Management System, U.S. Department of Transportation, room PL–401, 400 7th Street, SW., Washington, DC 20590–0001; or

Electronically through the Web site for the Docket Management System at *http://dms.dot.gov.* For instructions on how to submit comments electronically, visit the Docket Management System Web site and click on the ''Help'' menu.

The Docket Management Facility maintains the public docket for this rulemaking. Comments, and documents as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room PL–401 on the plaza level of the Nassif Building at the same address during regular business hours. You may also obtain access to this docket on the Internet at *http://dms.dot.gov.*

FOR FURTHER INFORMATION CONTACT: For technical issues, Lamar Allen, Alcohol and Drug Program Manager, FRA Office of Safety, RRS–11, 1120 Vermont Avenue, NW., Mail Stop 25, Washington, DC 20590 (telephone 202–493–6313). For legal issues, Patricia V. Sun, Trial Attorney, Office of the Chief Counsel, RCC–11, 1120 Vermont Avenue, NW., Mail Stop 10, Washington, DC 20590 (telephone 202–493–6038).

SUPPLEMENTARY INFORMATION: As briefly summarized above, on December 11, 2001 (66 FR 64000), FRA proposed to amend its regulation on the control of alcohol and drug use (49 CFR part 219) to narrow the scope of exemptions for FRFB employees and for small railroads. The most controversial part of the NPRM was its proposal to make FRFB employees who perform train or dispatching service in the United States subject to part 219's random alcohol and drug testing requirements. The Embassy of Canada has filed a letter that questioned the need for the NPRM, and requested that FRA withdraw the NPRM, and work with Transport Canada to establish a Canada-United States rail safety working group that would explore areas of bilateral cooperation and exchange information on each country's respective regulations, laws and statistics.

FRA is unwilling to withdraw the NPRM, as requested by the Embassy of Canada, but is willing to extend the comment period until further notice to allow for further consultations between FRA and the Governments of Canada and Mexico on the safety issues involved in the rulemaking. FRA will be contacting the Governments of Canada and Mexico to set up these consultations. FRA will provide interested parties an opportunity to comment on the results of the consultations before FRA makes a final decision on the rulemaking. In light of the major Alcohol and Drug Testing Policy issued by the Canadian Human Rights Commission last month, a copy of which has been placed in the docket, FRA invites additional public comment on the Policy's impact on the legal requirements for workplace alcohol and drug testing in Canada.

Issued in Washington, DC, on November 26, 2002.

Allan Rutter,

Federal Railroad Administrator.

[FR Doc. 02–30528 Filed 12–9–02; 8:45 am]

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Federal Register

Tuesday,
December 10, 2002

Part V

Federal Communications Commission

47 CFR Parts 2, 25, and 87
World Radiocommunication Conferences Concerning Frequency Bands Above 28 MHz; Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2, 25 and 87

[ET Docket No. 02–305; FCC 02–261]

World Radiocommunication Conferences Concerning Frequency Bands Above 28 MHz

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document the Commission proposes to amend our rules in order to implement domestically various allocation decisions from several World Radiocommunication Conferences (''WRCs'') concerning the frequency bands between 28 MHz and 36 GHz and to otherwise update our rules in this frequency range. The following proposals are the most significant to non-Federal Government operations: implementing generic mobile-satellite service (''MSS'') allocations in the bands 1525–1559 MHz and 1626.5–1660.5 MHz (''L-band''); allocating the band 1164–1189 MHz to the radionavigation-satellite service (''RNSS''); and removing unused and limited fixed-satellite and broadcasting-satellite allocations from the band 2500–2690 MHz. In addition, at the request of the National Telecommunications and Information Administration (''NTIA''), the Commission has proposed various allocation changes for the space science services and the inter-satellite service (''ISS''), most of which involve spectrum primarily used by the Federal Government. These proposals would conform the Commission's rules to previous WRC agreements and are expected to provide significant benefits to the American public.

DATES: Written comments are due February 10, 2003, and reply comments are due March 10, 2003.

FOR FURTHER INFORMATION CONTACT: Tom Mooring, Office of Engineering and Technology, (202) 418–2450, TTY (202) 418–2989, e-mail: *tmooring@fcc.gov.*

ADDRESSES: Federal Communications Commission, 445 12th Street, SW., TW–A325, Washington, DC 20554.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's *Notice of Proposed Rulemaking,* ET Docket 02–305, FCC 02–261, adopted September 18, 2002, and released October 7, 2002. The full text of this document is available for inspection and copying during regular business hours in the FCC Reference Center (Room CY–A257), 445 12th Street, SW., Washington, DC 20554. The complete text of this document also may be purchased from the Commission's copy contractor, Qualex International, 445 12th Street, SW., Room, CY–B402, Washington, DC 20554. The full text may also be downloaded at: *www.fcc.gov.* Alternative formats are available to persons with disabilities by contacting Brian Millin at (202) 418–7426 or TTY (202) 418–7365.

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before February 10, 2003, and reply comments on or before March 10, 2003. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998), 63 FR 24121, May 1, 1998. Comments filed through the ECFS can be sent as an electronic file via the Internet to *http://www.fcc.gov/e-file/ecfs.html.* Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to *ecfs@fcc.gov,* and should include the following words in the body of the message, ''get form <your e-mail address.'' A sample form and directions will be sent in reply. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor, Vistronix, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE., Suite 110, Washington, DC 20002. The filing hours at this location are 8 a.m. to 7 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW., Washington, DC 20554.

Summary of Notice of Proposed Rule Making

1. The *Notice of Proposed Rulemaking* (*''NPRM''*) proposes to provide for generic MSS allocations across the bands 1525–1559 MHz and 1626.5–1660.5 MHz. Specifically, we proposed to expand the primary allocation in the bands 1545–1549.5 MHz, 1558.5–1559 MHz, 1646.5–1651 MHz, and 1660–1660.5 MHz from the aeronautical mobile-satellite (route) service (''AMS(R)S'') to all services within the MSS while preserving the requirements of AMS(R)S. The effect of our proposal is that the bands 1545–1559 MHz and 1646.5–1660.5 MHz would be made available to all types of MSS communications on a primary basis, rather than segmented for specialized use. This action will permit more efficient use of this radio spectrum and will facilitate the expansion of MSS use globally. In addition, because the bands 1530–1544 MHz and 1626.5–1645.5 MHz are currently allocated to the maritime mobile-satellite service (''MMSS'') and the MSS on a co-primary basis, we proposed to remove superfluous MMSS allocations. We are also requesting comment on whether the secondary allocation for aeronautical telemetry should be removed from the band 1525–1535 MHz.

2. The Commission proposes to allocate the band 1164–1189 MHz to the RNSS for space-to-Earth (''downlink'') and space-to-space transmissions in order to accommodate a new civil global positioning system (''GPS'') signal. This action would permit the addition of a new GPS signal and support the safety-of-life requirements demanded by civil aviation. We also proposed to allocate the bands 1215–1240 MHz and 1559–1610 MHz, which are currently limited to RNSS downlinks, for RNSS space-to-space transmissions as well. This action would allow use of spaceborne RNSS receivers for scientific and commercial applications.

3. The Commission proposes to downgrade the primary flight test and radiolocation allocations to secondary status in the band 2320–2345 MHz

because the Satellite Digital Audio Radio Service (''Satellite DARS'') has been brought into operation. We also propose to delete limited allocations for the fixed-satellite service (''FSS'') and the broadcasting-satellite service (''BSS'') from the band 2500–2690 MHz in order to remove allocations that are not compatible with two-way, point-to-multipoint fixed uses.

4. The Commission proposes to implement domestically various allocation decisions concerning the space science services and the ISS from several WRCs that have not previously been addressed by the Commission. These proposals deal with the following issues:

- Raising secondary allocations for the Earth exploration-satellite service (''EESS'') and the space research service (''SRS'') to primary status in 1035 megahertz of spectrum in eight frequency bands and to specify that these allocations are to used for active sensor operations (''EESS (active)'' and ''SRS (active)''): 1215–1240 MHz, 1240–1300 MHz, 5250–5255 MHz, 5255–5350 MHz, 8550–8650 MHz, 9500–9800 MHz, 13.4–13.75 GHz, and 17.2–17.3 GHz.
- Allocating 550 megahertz of additional spectrum to the EESS (active) and SRS (active) on a primary basis in the bands 13.25–13.4 GHz and 35.6–36 GHz. We would also change the primary footnote allocation for active spaceborne sensors in the band 35.5–35.6 GHz to a direct Table listing.
- Allocating 110 megahertz of additional spectrum to the EESS (active) on a primary basis in the band 5350–5460 MHz.
- Upgrading the allocation status of EESS uplinks and meteorological-satellite service (''METSAT'') uplinks in the band 401–403 MHz from secondary to primary.
- Allocating the band 410–420 MHz to the SRS on a primary basis for space-to-space transmissions.
- Allocating the band 7750–7850 MHz for METSAT downlinks on a primary basis, limited to non-geostationary satellite systems.
- Allocating the band 8400–8450 MHz for SRS downlinks from deep space on a secondary basis.
- Allocating the band 25.25–27.5 GHz to the ISS on a primary basis.
- Raising the secondary EESS allocation to primary status in the band 25.5–27 GHz and changing its directional indicator from space-to-space to space-to-Earth.

5. In addition, we proposed to: (1) Remove the primary ISS allocation from the band 32–32.3 GHz; (2) remove the secondary allocation for the aeronautical mobile-satellite (route) service (''AMS(R)S'') from the band 136–137 MHz; (3) more than double the size of the geographic area in New Mexico and Texas where amateur stations in the band 420–450 MHz would be limited in power and where spread spectrum radiolocation systems in the sub-band 420–435 MHz should not expect to be accommodated; (4) reflect NTIA's recent action, which specified that Federal Government wind profiler radar systems (''wind profilers'') will operate in the sub-band 448–450 MHz; (5) permit U.S. flagged ships to use more spectrum-efficient equipment for on-board mobile radiotelephony communications in areas outside the territorial waters of the United States; (6) remove unused allocations for the International Fixed Public Radiocommunication Services from the bands 2.1–2.2 GHz and 10.7–11.7 GHz; and (7) allocate the band 14–14.5 GHz to the mobile-satellite (Earth-to-space) except aeronautical mobile-satellite service on a secondary basis. The Commission also proposes to make numerous ministerial amendments to part 2 of our rules.

Initial Regulatory Flexibility Certification

6. The Regulatory Flexibility Act of 1980, as amended (''RFA''),[1] requires that an initial regulatory analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that the ''the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.[2] The RFA generally defines the term ''small entity'' as having the same meaning as the terms ''small business,'' ''small organization,'' and ''small governmental jurisdiction.''[3] In addition, the term ''small business'' has the same meaning as the term ''small business concern'' under the Small Business Act.[4] A ''small business concern'' is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA'').[5]

7. The *Notice of Proposed Rule Making* (''NPRM'') proposed to amend parts 2, 25, and 87 of the Commission's rules in order to implement domestically various allocation decisions from several World Radiocommunication Conferences concerning the frequency bands between 28 MHz and 36 GHz and to otherwise update our rules in this frequency range. These allocation proposals mainly affect Federal agencies.[6] Those proposals that are most significant to non-Federal Government operations are: (1) Implementing generic L-band MSS allocations; (2) allocating the band 1164–1189 MHz to the RNSS; and (3) removing unused and limited FSS and BSS allocations from the band 2500–2690 MHz. Concerning L-band MSS, currently there is only one U.S. licensee. Concerning the RNSS allocation, only one or at most a few large companies are expected to be able to launch and maintain RNSS systems, which are expensive. The last proposal merely deletes unused allocations, with no direct effect on licensees or regulatees.

8. We have determined that the rules proposed in the *NPRM* will not, if promulgated, have a significant economic impact on a substantial number of small entities. Accordingly, we hereby certify that this NPRM will not have a significant economic impact on a substantial number of small entities. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this NPRM, including this certification, to the Chief Counsel for Advocacy of the Small Business Administration.[7]

9. Pursuant to sections 1, 4, 301, 302(a), 303, 307, 309, 316, 332, 334, and 336 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154, 301, 302(a), 303, 307, 309, 316, 332, 334, and 336, the notice of proposed rule making is adopted.

List of Subjects

47 CFR Part 2

Communications equipment, Radio.

47 CFR Part 25

Communications equipment.

47 CFR Part 87

Air transportation, Communications equipment.

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[1] *See* U.S.C. 603. The RFA, *see* 5 U.S.C. 601–612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. 104–121, Title II, 110 Stat. 857 (1996).

[2] 5 U.S.C. 605(b).

[3] 5 U.S.C. 601(6).

[4] 5 U.S.C. 601(3) (incorporating by reference the definition of ''small business concern'' in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**.''

[5] 15 U.S.C. 632.

[6] *See* paras. 5–6, *supra.*

[7] 5 U.S.C. 605(b).

Federal Communications Commission.

William F. Caton,

Deputy Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR parts 2, 25, and 87 as follows:

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

1. The authority citation for part 2 continues to read as follows:

Authority: 47 U.S.C. 154, 302a, 303, and 336, unless otherwise noted.

2. Section 2.1 is revised by adding the following definitions in alphabetic order:

§ 2.1 Terms and definitions.

* * * * *

Differential Global Positioning System (DGPS) Station. A differential RNSS station for specific augmentation of GPS.

Differential Radionavigation Satellite Service (Differential RNSS) Station. A station used for the transmission of differential correction data and related information (such as ionospheric data and RNSS satellite integrity information) as an augmentation to an RNSS system for the purpose of improved navigation accuracy.

* * * * *

3. Section 2.106, the Table of Frequency Allocations, is amended as follows:

a. Revise pages 22–75.

b. In the list of International Footnotes under heading II., remove footnotes 591, 599A, 599B, 608A, 608B, 647B, 669, and 792A.

c. In the list of United States (US) Footnotes, revise US7, US48, US110, US217, US244, US246, US262, US276, US277, US278, US310, US316, US320, US328, and US342; remove US10, US54, US228, US269, US318, and US322; and add footnotes USxxx, USyyy, and USzzz.

d. In the list of Non-Federal Government (NG) Footnotes, remove NG23, NG47, NG63, NG101, and NG102; and revise NG41.

e. In the list of Federal Government (G) Footnotes, revise footnote G2 and add footnote G129.

§ 2.106 Table of Frequency Allocations.

The revisions and additions read as follows:

* * * * *

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28-33 MHz (HF/VHF)

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
28-29.7 AMATEUR AMATEUR-SATELLITE			28-29.89	28-29.7 AMATEUR AMATEUR-SATELLITE US340	Amateur (97)
29.7-30.005 FIXED MOBILE				29.7-29.8 LAND MOBILE US340	Private Land Mobile (90)
			US340	29.8-29.89 FIXED US340	
			29.89-29.91 FIXED MOBILE US340	29.89-29.91 US340	
			29.91-30 US340	29.91-30 FIXED US340	
30.005-30.01 SPACE OPERATION (satellite identification) FIXED MOBILE SPACE RESEARCH			30-30.56 FIXED MOBILE	30-30.56	
30.01-37.5 FIXED MOBILE			30.56-32	30.56-32 FIXED LAND MOBILE NG124	Private Land Mobile (90)
			32-33 FIXED MOBILE	32-33	
			See next page for 33-37.5 MHz		See next page for 33-37.5 MHz

33-50 MHz (VHF) Page 23

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 30.01-37.5 MHz			33-34	33-34 FIXED LAND MOBILE NG124	Private Land Mobile (90)
			34-35 FIXED MOBILE	34-35	
			35-36	35-36 FIXED LAND MOBILE	Public Mobile (22) Private Land Mobile (90)
			36-37 FIXED MOBILE US220	36-37 US220	
			37-37.5	37-37.5 LAND MOBILE NG124	Private Land Mobile (90)
37.5-38.25 FIXED MOBILE Radio astronomy 5.149			37.5-38 Radio astronomy US342	37.5-38 LAND MOBILE Radio astronomy US342 NG59 NG124	
			38-38.25 FIXED MOBILE RADIO ASTRONOMY US81 US342	38-38.25 RADIO ASTRONOMY US81 US342	
38.25-39.986 FIXED MOBILE			38.25-39 FIXED MOBILE	38.25-39	
			39-40	39-40 LAND MOBILE NG124	Private Land Mobile (90)
39.986-40.02 FIXED MOBILE Space research			40-42 FIXED MOBILE	40-40.98	ISM Equipment (18) Private Land Mobile (90)

40.02-40.98 FIXED MOBILE 5.150				5.150 US210	
40.98-41.015 FIXED MOBILE Space research 5.160 5.161				40.98-42	
41.015-44 FIXED MOBILE			5.150 US210 US220	US220	
			42-46.6	42-43.69 FIXED LAND MOBILE NG124 NG141	Public Mobile (22) Private Land Mobile (90)
5.160 5.161				43.69-46.6 LAND MOBILE NG124 NG141	Private Land Mobile (90)
44-47 FIXED MOBILE 5.162 5.162A			46.6-47 FIXED MOBILE	46.6-47	
47-68 BROADCASTING	47-50 FIXED MOBILE	47-50 FIXED MOBILE BROADCASTING 5.162A	47-49.6	47-49.6 LAND MOBILE NG124	Private Land Mobile (90)
			49.6-50 FIXED MOBILE	49.6-50	
5.162A 5.163 5.164 5.165 5.169 5.171	See next page for 50-68 MHz		See next page for 50-73 MHz	See next page for 50-72 MHz	See next page for 50-72 MHz

50-123.5875 MHz (VHF) Page 25

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 47-68 MHz	50-54 AMATEUR 5.162A 5.166 5.167 5.168 5.170		50-73	50-54 AMATEUR	Amateur (97)
	54-68 BROADCASTING Fixed Mobile 5.172	54-68 FIXED MOBILE BROADCASTING 5.162A		54-72 BROADCASTING NG128 NG149	Broadcast Radio (TV) (73) Auxiliary Broadcasting (74)
68-74.8 FIXED MOBILE except aeronautical mobile	68-72 BROADCASTING Fixed Mobile 5.173	68-74.8 FIXED MOBILE			
	72-73 FIXED MOBILE			72-73 FIXED MOBILE NG3 NG49 NG56	Public Mobile (22) Aviation (87) Private Land Mobile (90) Personal Radio (95)
	73-74.6 RADIO ASTRONOMY 5.178		73-74.6 RADIO ASTRONOMY US74 US246		
5.149 5.174 5.175 5.177 5.179	74.6-74.8 FIXED MOBILE	5.149 5.176 5.179	74.6-74.8 FIXED MOBILE US273		Aviation (87) Private Land Mobile (90)
74.8-75.2 AERONAUTICAL RADIONAVIGATION 5.180 5.181			74.8-75.2 AERONAUTICAL RADIONAVIGATION 5.180		Aviation (87)
75.2-87.5 FIXED MOBILE except aeronautical mobile	75.2-75.4 FIXED MOBILE 5.179		75.2-75.4 FIXED MOBILE US273		Private Land Mobile (90)

	75.4-76 FIXED MOBILE	75.4-87 FIXED MOBILE	75.4-88	75.4-76 FIXED MOBILE NG3 NG49 NG56	Public Mobile (22) Private Land Mobile (90) Personal Radio (95)
	76-88 BROADCASTING Fixed Mobile	5.182 5.183 5.188 87-100 FIXED MOBILE BROADCASTING		76-88 BROADCASTING	Broadcast Radio (TV) (73) Auxiliary Broadcasting (74)
5.175 5.179 5.184 5.187 87.5-100 BROADCASTING	5.185			NG128 NG129 NG149	
5.190	88-100 BROADCASTING		88-108	88-108 BROADCASTING	Broadcast Radio (FM) (73) Auxiliary Broadcasting (74)
100-108 BROADCASTING 5.192 5.194			US93	US93 NG2 NG128 NG129	
108-117.975 AERONAUTICAL RADIONAVIGATION 5.197			108-117.975 AERONAUTICAL RADIONAVIGATION US93 US343		Aviation (87)
117.975-137 AERONAUTICAL MOBILE (R)			117.975-121.9375 AERONAUTICAL MOBILE (R) 5.111 5.198 5.199 5.200 US26 US28		
			121.9375-123.0875 5.198 US30 US31 US33 US80 US102 US213	121.9375-123.0875 AERONAUTICAL MOBILE 5.198 US30 US31 US33 US80 US102 US213	
			123.0875-123.5875 AERONAUTICAL MOBILE 5.198 5.200 US32 US33 US112		
5.111 5.198 5.199 5.200 5.201 5.202 5.203 5.203A 5.203B			See next page for 123.5875-137 MHz		See next page for 123.5875-137 MHz

123.5875-148 MHz (VHF) Page 27

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 117.975-137 MHz			123.5875-128.8125 AERONAUTICAL MOBILE (R) 5.198 US26		Aviation (87)
			128.8125-132.0125 5.198	128.8125-132.0125 AERONAUTICAL MOBILE (R) 5.198	
			132.0125-136.00 AERONAUTICAL MOBILE (R) 5.198 US26		
			136-137 US244	136-137 AERONAUTICAL MOBILE (R) US244	
137-137.025 SPACE OPERATION (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 5.208A 5.209 SPACE RESEARCH (space-to-Earth) Fixed Mobile except aeronautical mobile (R) 5.204 5.205 5.206 5.207 5.208			137-137.025 SPACE OPERATION (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) US319 US320 SPACE RESEARCH (space-to-Earth) 5.208		Satellite Communications (25)
137.025-137.175 SPACE OPERATION (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) SPACE RESEARCH (space-to-Earth) Fixed Mobile-satellite (space-to-Earth) 5.208A 5.209 Mobile except aeronautical mobile (R) 5.204 5.205 5.206 5.207 5.208			137.025-137.175 SPACE OPERATION (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) SPACE RESEARCH (space-to-Earth) Mobile-satellite (space-to-Earth) US319 US320 5.208		
137.175-137.825 SPACE OPERATION (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 5.208A 5.209 SPACE RESEARCH (space-to-Earth) Fixed			137.175-137.825 SPACE OPERATION (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) US319 US320 SPACE RESEARCH (space-to-Earth)		

Mobile except aeronautical mobile (R) 5.204 5.205 5.206 5.207 5.208			5.208		
137.825-138 SPACE OPERATION (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) SPACE RESEARCH (space-to-Earth) Fixed Mobile-satellite (space-to-Earth) 5.208A 5.209 Mobile except aeronautical mobile (R) 5.204 5.205 5.206 5.207 5.208			137.825-138 SPACE OPERATION (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) SPACE RESEARCH (space-to-Earth) Mobile-satellite (space-to-Earth) US319 US320 5.208		
138-143.6 AERONAUTICAL MOBILE (OR) 5.210 5.211 5.212 5.214	138-143.6 FIXED MOBILE RADIOLOCATION Space research (space-to-Earth)	138-143.6 FIXED MOBILE Space research (space-to-Earth) 5.207 5.213	138-144 FIXED MOBILE	138-144	
143.6-143.65 AERONAUTICAL MOBILE (OR) SPACE RESEARCH (space-to-Earth) 5.211 5.212 5.214	143.6-143.65 FIXED MOBILE RADIOLOCATION SPACE RESEARCH (space-to-Earth)	143.6-143.65 FIXED MOBILE SPACE RESEARCH (space-to-Earth) 5.207 5.213			
143.65-144 AERONAUTICAL MOBILE (OR) 5.210 5.211 5.212 5.214	143.65-144 FIXED MOBILE RADIOLOCATION Space research (space-to-Earth)	143.65-144 FIXED MOBILE Space research (space-to-Earth) 5.207 5.213	G30		
144-146 AMATEUR AMATEUR-SATELLITE 5.216			144-148	144-146 AMATEUR AMATEUR-SATELLITE	Amateur (97)
146-148 FIXED MOBILE except aeronautical mobile (R)	146-148 AMATEUR 5.217	146-148 AMATEUR FIXED MOBILE 5.217		146-148 AMATEUR	

148-162.0125 MHz (VHF) Page 29

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
148-149.9 FIXED MOBILE except aeronautical mobile (R) MOBILE-SATELLITE (Earth-to-space) 5.209 5.218 5.219 5.221	148-149.9 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.209 5.218 5.219 5.221		148-149.9 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) US319 US320 US323 US325 5.218 5.219 G30	148-149.9 MOBILE-SATELLITE (Earth-to-space) US319 US320 US323 US325 5.218 5.219	Satellite Communications (25)
149.9-150.05 MOBILE-SATELLITE (Earth-to-space) 5.209 5.224A RADIONAVIGATION-SATELLITE 5.224B 5.220 5.222 5.223			149.9-150.05 MOBILE-SATELLITE (Earth-to-space) US319 US320 RADIONAVIGATION-SATELLITE 5.223		
150.05-153 FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY 5.149	150.05-156.7625 FIXED MOBILE		150.05-150.8 FIXED MOBILE US216 G30	150.05-150.8 US216	
			150.8-152.855 US216	150.8-152.855 FIXED LAND MOBILE NG112 US216 NG4 NG51 NG124	Public Mobile (22) Private Land Mobile (90) Personal Radio (95)
153-154 FIXED MOBILE except aeronautical mobile (R) Meteorological aids			152.855-154	152.855-154 LAND MOBILE NG4 NG124	Auxiliary Broadcasting (74) Private Land Mobile (90)
154-156.7625 FIXED MOBILE except aeronautical mobile (R) 5.226 5.227			154-156.2475 5.226	154-156.2475 FIXED LAND MOBILE NG112 5.226 NG117 NG124 NG148	Maritime (80) Private Land Mobile (90) Personal Radio (95)
	5.225 5.226 5.227		156.2475-157.0375	156.2475-157.0375 MARITIME MOBILE	Aviation (87)

156.7625-156.8375 MARITIME MOBILE (distress and calling) 5.111 5.226		5.226 5.227 US77 US106 US107 US266	5.226 5.227 US77 US106 US107 US266 NG117	
156.8375-174 FIXED MOBILE except aeronautical mobile	156.8375-174 FIXED MOBILE	157.0375-157.1875 MARITIME MOBILE 5.226 US214 US266 G109	157.0375-157.1875 5.226 US214 US266	Private Land Mobile (90)
		157.1875-157.45 5.226 US223 US266	157.1875-157.45 LAND MOBILE MARITIME MOBILE 5.226 US223 US266 NG111	Maritime (80) Private Land Mobile (90)
		157.45-161.575 5.226 US266	157.45-161.575 FIXED LAND MOBILE 5.226 US266 NG6 NG28 NG70 NG111 NG112 NG124 NG148 NG155	Public Mobile (22) Maritime (80) Private Land Mobile (90)
		161.575-161.625 5.226 US77	161.575-161.625 MARITIME MOBILE 5.226 US77 NG6 NG17	Public Mobile (22) Maritime (80)
		161.625-161.775 5.226	161.625-161.775 LAND MOBILE 5.226 NG6	Public Mobile (22) Auxiliary Broadcasting (74)
		161.775-162.0125 5.226 US266	161.775-162.0125 LAND MOBILE MARITIME MOBILE 5.226 US266 NG6	Public Mobile (22) Maritime (80) Private Land Mobile (90)
5.226 5.229	5.226 5.230 5.231 5.232	See next page for 162.0125-174 MHz		See next page for 162.0125-174 MHz

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 156.8375-174 MHz			162.0125-173.2 FIXED US13 MOBILE 5.226 US8 US11 US216 US223 US300 US312 G5	162.0125-173.2 5.226 US8 US11 US13 US216 US223 US300 US312	Auxiliary Broadcasting (74) Private Land Mobile (90)
			173.2-173.4	173.2-173.4 FIXED Land mobile	Private Land Mobile (90)
			173.4-174 FIXED MOBILE G5	173.4-174	
174-223 BROADCASTING	174-216 BROADCASTING Fixed Mobile 5.234	174-223 FIXED MOBILE BROADCASTING	174-216	174-216 BROADCASTING NG115 NG128 NG149	Broadcast Radio (TV) (73) Auxiliary Broadcasting (74)
	216-220 FIXED MARITIME MOBILE Radiolocation 5.241 5.242		216-220 Fixed Mobile Radiolocation 5.241 G2 US210 US229	216-220 FIXED MOBILE except aeronautical mobile US210 US229 NG152 NG173	Maritime (80) Private Land Mobile (90) Personal Radio (95) Amateur (97)
	220-225 AMATEUR FIXED MOBILE Radiolocation 5.241		220-222 FIXED LAND MOBILE Radiolocation 5.241 G2 US335	220-222 FIXED LAND MOBILE US335	Private Land Mobile (90)
5.235 5.237 5.243		5.233 5.238 5.240 5.245	222-225 Radiolocation 5.241 G2	222-225 AMATEUR	Amateur (97)

223-230 BROADCASTING Fixed Mobile	225-235 FIXED MOBILE	223-230 FIXED MOBILE BROADCASTING AERONAUTICAL RADIONAVIGATION Radiolocation	225-235 FIXED MOBILE	225-235
5.243 5.246 5.247		5.250		
230-235 FIXED MOBILE		230-235 FIXED MOBILE AERONAUTICAL RADIONAVIGATION		
5.247 5.251 5.252		5.250	G27	
235-267 FIXED MOBILE			235-267 FIXED MOBILE	235-267
5.111 5.199 5.252 5.254 5.256			5.111 5.199 5.256 G27 G100	5.111 5.199 5.256
267-272 FIXED MOBILE Space operation (space-to-Earth)			267-322 FIXED MOBILE	267-322
5.254 5.257				
272-273 SPACE OPERATION (space-to-Earth) FIXED MOBILE				
5.254				
273-312 FIXED MOBILE				
5.254				
312-315 FIXED MOBILE Mobile-satellite (Earth-to-space) 5.254 5.255				
315-322 FIXED MOBILE				
5.254			G27 G100	

322-410 MHz (UHF)					Page 33
International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
322-328.6 FIXED MOBILE RADIO ASTRONOMY 5.149			322-328.6 FIXED MOBILE US342 G27	322-328.6 US342	
328.6-335.4 AERONAUTICAL RADIONAVIGATION 5.258 5.259			328.6-335.4 AERONAUTICAL RADIONAVIGATION 5.258		
335.4-387 FIXED MOBILE 5.254			335.4-399.9 FIXED MOBILE	335.4-399.9	
387-390 FIXED MOBILE Mobile-satellite (space-to-Earth) 5.208A 5.254 5.255					
390-399.9 FIXED MOBILE 5.254			G27 G100		
399.9-400.05 MOBILE-SATELLITE (Earth-to-space) 5.209 5.224A RADIONAVIGATION-SATELLITE 5.222 5.224B 5.260 5.220			399.9-400.05 MOBILE-SATELLITE (Earth-to-space) US319 US320 RADIONAVIGATION-SATELLITE 5.260		
400.05-400.15 STANDARD FREQUENCY AND TIME SIGNAL-SATELLITE (400.1 MHz) 5.261 5.262			400.05-400.15 STANDARD FREQUENCY AND TIME SIGNAL-SATELLITE (400.1 MHz) 5.261		
400.15-401 METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 5.208A 5.209 SPACE RESEARCH (space-to-Earth) 5.263 Space operation (space-to-Earth)			400.15-401 METEOROLOGICAL AIDS (radiosonde) US70 METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) US319 US320 US324	400.15-401 METEOROLOGICAL AIDS (radiosonde) US70 MOBILE-SATELLITE (space-to-Earth) US319 US320 US324 SPACE RESEARCH (space-to-Earth) 5.263	Satellite Communications (25)

	SPACE RESEARCH (space-to-Earth) 5.263 Space operation (space-to-Earth)	Space operation (space-to-Earth)	
5.262 5.264	5.264	5.264	
401-402 METEOROLOGICAL AIDS SPACE OPERATION (space-to-Earth) EARTH EXPLORATION-SATELLITE (Earth-to-space) METEOROLOGICAL-SATELLITE (Earth-to-space) Fixed Mobile except aeronautical mobile	401-402 METEOROLOGICAL AIDS (radiosonde) US70 SPACE OPERATION (space-to-Earth) EARTH EXPLORATION-SATELLITE (Earth-to-space) METEOROLOGICAL-SATELLITE (Earth-to-space)	401-402 METEOROLOGICAL AIDS (radiosonde) US70 SPACE OPERATION (space-to-Earth) Earth exploration-satellite (Earth-to-space) Meteorological-satellite (Earth-to-space)	
	USxxx	USxxx	
402-403 METEOROLOGICAL AIDS EARTH EXPLORATION-SATELLITE (Earth-to-space) METEOROLOGICAL-SATELLITE (Earth-to-space) Fixed Mobile except aeronautical mobile	402-403 METEOROLOGICAL AIDS (radiosonde) US70 EARTH EXPLORATION-SATELLITE (Earth-to-space) METEOROLOGICAL-SATELLITE (Earth-to-space)	402-403 METEOROLOGICAL AIDS (radiosonde) US70 Earth exploration-satellite (Earth-to-space) Meteorological-satellite (Earth-to-space)	Personal Radio (95)
	US345 USxxx	US345 USxxx	
403-406 METEOROLOGICAL AIDS Fixed Mobile except aeronautical mobile	403-406 METEOROLOGICAL AIDS (radiosonde) US70	403-406 METEOROLOGICAL AIDS (radiosonde) US70	
	US345 G6	US345	
406-406.1 MOBILE-SATELLITE (Earth-to-space)	406-406.1 MOBILE-SATELLITE (Earth-to-space)		
5.266 5.267	5.266 5.267		
406.1-410 FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY	406.1-410 FIXED US13 MOBILE RADIO ASTRONOMY US74	406.1-410 RADIO ASTRONOMY US74	
5.149	US117 G5 G6	US13 US117	

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
410-420 FIXED MOBILE except aeronautical mobile SPACE RESEARCH (space-to-space) 5.268			410-420 FIXED US13 MOBILE SPACE RESEARCH (space-to-space) 5.268 G5	410-420 US13	Private Land Mobile (90)
420-430 FIXED MOBILE except aeronautical mobile Radiolocation 5.269 5.270 5.271			420-450 RADIOLOCATION US217 US228 G2 G129	420-450 Amateur US7 NG135	Private Land Mobile (90) Amateur (97)
430-440 AMATEUR RADIOLOCATION 5.138 5.271 5.272 5.273 5.274 5.275 5.276 5.277 5.280 5.281 5.282 5.283	430-440 RADIOLOCATION Amateur 5.271 5.276 5.277 5.278 5.279 5.281 5.282				
440-450 FIXED MOBILE except aeronautical mobile Radiolocation 5.269 5.270 5.271 5.284 5.285 5.286			5.286 US7 US87 US230 G8	5.282 5.286 US87 US217 US228 US230	
450-455 FIXED MOBILE 5.209 5.271 5.286 5.286A 5.286B 5.286C 5.286D 5.286E			450-454 5.286 US87	450-454 LAND MOBILE 5.286 US87 NG112 NG124	Auxiliary Broadcasting (74) Private Land Mobile (90)
			454-456	454-455 FIXED LAND MOBILE NG12 NG112 NG148	Public Mobile (22) Maritime (80)
455-456 FIXED MOBILE 5.209 5.271 5.286A 5.286B 5.286C 5.286E	455-456 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.286A 5.286B 5.286C 5.209	455-456 FIXED MOBILE 5.209 5.271 5.286A 5.286B 5.286C 5.286E		455-456 LAND MOBILE	Auxiliary Broadcasting (74)

456-459 FIXED MOBILE 5.271 5.287 5.288			456-460	456-460 FIXED LAND MOBILE	Public Mobile (22) Maritime (80) Private Land Mobile (90)
459-460 FIXED MOBILE 5.209 5.271 5.286A 5.286B 5.286C 5.286E	459-460 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.286A 5.286B 5.286C 5.209	459-460 FIXED MOBILE 5.209 5.271 5.286A 5.286B 5.286C 5.286E	5.287 5.288	5.287 5.288 NG112 NG124 NG148	
460-470 FIXED MOBILE Meteorological-satellite (space-to-Earth)			460-470 Meteorological-satellite (space-to-Earth)	460-462.5375 FIXED LAND MOBILE 5.289 US201 US209 NG124	Private Land Mobile (90)
				462.5375-462.7375 LAND MOBILE 5.289 US201	Personal Radio (95)
				462.7375-467.5375 FIXED LAND MOBILE 5.287 5.289 US201 US209 US216 NG124	Private Land Mobile (90)
				467.5375-467.7375 LAND MOBILE 5.287 5.289 US201	Personal Radio (95)
				467.7375-470 FIXED LAND MOBILE	Private Land Mobile (90)
5.287 5.288 5.289 5.290			5.287 5.288 5.289 US201 US209 US216	5.288 5.289 US201 US216 NG124	

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
470-790 BROADCASTING	470-512 BROADCASTING Fixed Mobile 5.292 5.293	470-585 FIXED MOBILE BROADCASTING 5.291 5.298	470-608	470-512 BROADCASTING NG128 NG149 FIXED NG127 LAND MOBILE NG66 NG114	Public Mobile (22) Broadcast Radio (TV) (73) Auxiliary Broadcasting (74) Private Land Mobile (90)
	512-608 BROADCASTING 5.297	585-610 FIXED MOBILE BROADCASTING RADIONAVIGATION 5.149 5.305 5.306 5.307		512-608 BROADCASTING NG128 NG149	Broadcast Radio (TV) (73) Auxiliary Broadcasting (74)
	608-614 RADIO ASTRONOMY Mobile-satellite except aeronautical mobile-satellite (Earth-to-space)		608-614 RADIO ASTRONOMY US74 LAND MOBILE US350 US246		Personal (95)
	614-806 BROADCASTING Fixed Mobile	610-890 FIXED MOBILE 5.317A BROADCASTING	614-890	614-698 BROADCASTING NG128 NG149	Broadcast Radio (TV) (73) Auxiliary Broadcast. (74)
				698-746 BROADCASTING NG128 NG159 FIXED MOBILE	Wireless Communications (27) Broadcast Radio (TV) (73) Auxiliary Broadcast. (74)
				746-764 FIXED MOBILE BROADCASTING NG128 NG159	Wireless Communications (27) Broadcast Radio (TV) (73) Auxiliary Broadcasting (74) Private Land Mobile (90)

5.149 5.291A 5.294 5.296 5.300 5.302 5.304 5.306 5.311 5.312				764-776 FIXED MOBILE NG128 NG158 NG159	Auxiliary Broadcasting (74) Private Land Mobile (90)
790-862 FIXED BROADCASTING				776-794 FIXED MOBILE BROADCASTING NG128 NG159	Wireless Communications (27) Broadcast Radio (TV) (73) Auxiliary Broadcast. (74) Private Land Mobile (90)
	5.293 5.309 5.311			794-806 FIXED MOBILE NG128 NG158 NG159	Auxiliary Broadcasting (74) Private Land Mobile (90)
	806-890 FIXED MOBILE BROADCASTING			806-821 FIXED LAND MOBILE NG31	Public Mobile (22) Private Land Mobile (90)
				821-824 LAND MOBILE	Private Land Mobile (90)
5.312 5.314 5.315 5.316 5.319 5.321				824-849 FIXED LAND MOBILE NG151	Public Mobile (22)
See next page for 862-890 MHz	5.317 5.318	5.149 5.305 5.306 5.307 5.311 5.320		See next page for 849-894 MHz	See next page for 866-896 MHz

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous pages for 470-862 MHz	See previous pages for 614-890 MHz	See previous pages for 585-890 MHz	See previous pages for 614-890 MHz	See previous pages for 614-849 MHz	See previous pages for 614-849 MHz
				849-851 AERONAUTICAL MOBILE	Public Mobile (22)
				851-866 FIXED LAND MOBILE NG31	Public Mobile (22) Private Land Mobile (90)
862-890 FIXED MOBILE except aeronautical mobile BROADCASTING 5.322 5.319 5.323				866-869 LAND MOBILE	Private Land Mobile (90)
				869-894 FIXED LAND MOBILE US116 US268 NG151	Public Mobile (22)
890-942 FIXED MOBILE except aeronautical mobile 5.317A BROADCASTING 5.322 Radiolocation	890-902 FIXED MOBILE except aeronautical mobile 5.317A Radiolocation 5.318 5.325	890-942 FIXED MOBILE 5.317A BROADCASTING Radiolocation	890-902 US116 US268 G2	894-896 AERONAUTICAL MOBILE US116 US268	
				896-901 FIXED LAND MOBILE US116 US268	Private Land Mobile (90)
				901-902 FIXED MOBILE US116 US268	Personal Communications (24)

	902-928 FIXED Amateur Mobile except aeronautical mobile 5.325A Radiolocation 5.150 5.325 5.326		902-928 RADIOLOCATION G59 5.150 US215 US218 US267 US275 G11	902-928 5.150 US215 US218 US267 US275	ISM Equipment (18) Private Land Mobile (90) Amateur (97)
	928-942 FIXED MOBILE except aeronautical mobile 5.317A Radiolocation		928-932 US116 US215 US268 G2	928-929 FIXED US116 US215 US268 NG120	Public Mobile (22) Private Land Mobile (90) Fixed Microwave (101)
				929-930 FIXED LAND MOBILE US116 US215 US268	Private Land Mobile (90)
				930-931 FIXED MOBILE US116 US215 US268	Personal Communications (24)
				931-932 FIXED LAND MOBILE US116 US215 US268	Public Mobile (22)
			932-935 FIXED US215 US268 G2	932-935 FIXED US215 US268 NG120	Public Mobile (22) Fixed Microwave (101)
			935-940 US116 US215 US268 G2	935-940 FIXED LAND MOBILE US116 US215 US268	Private Land Mobile (90)
			940-941 US116 US268 G2	940-941 FIXED MOBILE US116 US268	Personal Communications (24)
5.323	5.325	5.327	See next page for 941-944 MHz		See next page for 941-944 MHz

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 890-942 MHz	See previous page for 928-942 MHz	See previous page for 890-942 MHz	941-944 FIXED US268 US301 US302 G2	941-944 FIXED US268 US301 US302 NG120	Public Mobile (22) Fixed Microwave (101)
942-960 FIXED MOBILE except aeronautical mobile 5.317A BROADCASTING 5.322 5.323	942-960 FIXED MOBILE 5.317A	942-960 FIXED MOBILE 5.317A BROADCASTING 5.320	944-960	944-960 FIXED NG120	Public Mobile (22) Auxiliary Broadcast. (74) Fixed Microwave (101)
960-1215 AERONAUTICAL RADIONAVIGATION 5.328 5.328A			960-1215 AERONAUTICAL RADIONAVIGATION 5.328 US224 USyyy		Aviation (87)
1215-1240 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION RADIONAVIGATION-SATELLITE (space-to-Earth) (space-to-space) 5.329 5.329A SPACE RESEARCH (active) 5.330 5.331 5.332			1215-1240 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G56 RADIONAVIGATION-SATELLITE (space-to-Earth) (space-to-space) SPACE RESEARCH (active) 5.332	1215-1240 Earth exploration-satellite (active) Space research (active)	
1240-1260 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION RADIONAVIGATION-SATELLITE (space-to-Earth) (space-to-space) 5.329 5.329A SPACE RESEARCH (active) Amateur 5.330 5.331 5.332 5.334 5.335			1240-1300 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G56 SPACE RESEARCH (active)	1240-1300 Earth exploration-satellite (active) Space research (active) Amateur	Amateur (97)
1260-1300 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION RADIONAVIGATION-SATELLITE (space-to-Earth) (space-to-space) 5.329 5.329A SPACE RESEARCH (active) Amateur 5.282 5.330 5.331 5.334 5.335 5.335A			5.332 5.334 5.335	5.282 5.334	

1300-1350 AERONAUTICAL RADIONAVIGATION 5.337 RADIOLOCATION RADIONAVIGATION-SATELLITE (Earth-to-space) 5.149 S5337A		1300-1350 AERONAUTICAL RADIO-NAVIGATION 5.337 Radiolocation G2 US342	1300-1350 AERONAUTICAL RADIO-NAVIGATION 5.337 US342	Aviation (87)
1350-1400 FIXED MOBILE RADIOLOCATION	1350-1400 RADIOLOCATION	1350-1390 FIXED MOBILE RADIOLOCATION G2 5.334 5.339 US311 US342 G27 G114	1350-1390 5.334 5.339 US311 US342	
		1390-1395	1390-1392 FIXED MOBILE except aeronautical mobile FIXED-SATELLITE (Earth-to-space) US368 5.339 US311 US342 US351	Wireless Communications (27)
			1392-1395 FIXED MOBILE except aeronautical mobile	
		5.339 US311 US342 US351	5.339 US311 US342 US351	
		1395-1400 LAND MOBILE US350		Personal (95)
5.149 5.338 5.339	5.149 5.334 5.339	5.339 US311 US342 US351		
1400-1427 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340 5.341		1400-1427 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) 5.341 US246		

1427-1610 MHz (UHF)					Page 43
International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
1427-1429 SPACE OPERATION (Earth-to-space) FIXED MOBILE except aeronautical mobile 5.341			1427-1429.5 LAND MOBILE US350 5.341 US352	1427-1429.5 LAND MOBILE Fixed (telemetry) 5.341 US350 US352	Private Land Mobile (90) Personal (95)
1429-1452 FIXED MOBILE except aeronautical mobile 5.341 5.342	1429-1452 FIXED MOBILE 5.343 5.341		1429.5-1432 5.341 US350 US352	1429.5-1430 FIXED (telemetry) LAND MOBILE (telemetry) 5.341 US350 US352 1430-1432 FIXED (telemetry) LAND MOBILE (telemetry) FIXED-SATELLITE (space-to-Earth) US368 5.341 US350 US352	
			1432-1435 5.341 US361	1432-1435 FIXED MOBILE except aeronautical mobile 5.341 US361	Wireless Communications (27)
1452-1492 FIXED MOBILE except aeronautical mobile BROADCASTING 5.345 5.347 BROADCASTING-SATELLITE 5.345 5.347 5.341 5.342	1452-1492 FIXED MOBILE 5.343 BROADCASTING 5.345 5.347 BROADCASTING-SATELLITE 5.345 5.347 5.341 5.344		1435-1525 MOBILE (aeronautical telemetry)		Aviation (87)
1492-1525 FIXED MOBILE except aeronautical mobile 5.341 5.342	1492-1525 FIXED MOBILE 5.343 MOBILE-SATELLITE (space-to-Earth) 5.348A 5.341 5.344 5.348	1492-1525 FIXED MOBILE 5.341 5.348A	5.341 US78		

1525-1530 SPACE OPERATION (space-to-Earth) FIXED MOBILE-SATELLITE (space-to-Earth) 5.351A Earth exploration-satellite Mobile except aeronautical mobile 5.349 5.341 5.342 5.350 5.351 5.352A 5.354	1525-1530 SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 5.351A Earth exploration-satellite Fixed Mobile 5.343 5.341 5.351 5.354	1525-1530 SPACE OPERATION (space-to-Earth) FIXED MOBILE-SATELLITE (space-to-Earth) 5.351A Earth exploration-satellite Mobile 5.349 5.341 5.351 5.352A 5.354	1525-1535 MOBILE-SATELLITE (space-to-Earth) US315 Mobile (aeronautical telemetry) US78 5.341 5.351	Satellite Communications (25) Maritime (80) Aviation (87)
1530-1535 SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 5.351A 5.353A Earth exploration-satellite Fixed Mobile except aeronautical mobile 5.341 5.342 5.351 5.354	1530-1535 SPACE OPERATION (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 5.351A 5.353A Earth exploration-satellite Fixed Mobile 5.343 5.341 5.351 5.354			
1535-1559 MOBILE-SATELLITE (space-to-Earth) 5.351A 5.341 5.351 5.353A 5.354 5.355 5.356 5.357 5.357A 5.359 5.362A			1535-1559 MOBILE-SATELLITE (space-to-Earth) US308 US309 5.341 5.351 5.356	Satellite Communications (25) Maritime (80) Aviation (87)
1559-1610 AERONAUTICAL RADIONAVIGATION RADIONAVIGATION-SATELLITE (space-to-Earth) (space-to-space) 5.329A 5.341 5.362B 5.362C 5.363			1559-1610 AERONAUTICAL RADIONAVIGATION RADIONAVIGATION-SATELLITE (space-to-Earth) (space-to-space) 5.341 US208 US260 US343	Aviation (87)

1610-1670 MHz (UHF)					Page 45
International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
1610-1610.6 MOBILE-SATELLITE (Earth-to-space) 5.351A AERONAUTICAL RADIONAVIGATION 5.341 5.355 5.359 5.363 5.364 5.366 5.367 5.368 5.369 5.371 5.372	1610-1610.6 MOBILE-SATELLITE (Earth-to-space) 5.351A AERONAUTICAL RADIONAVIGATION RADIODETERMINATION- SATELLITE (Earth-to- space) 5.341 5.364 5.366 5.367 5.368 5.370 5.372	1610-1610.6 MOBILE-SATELLITE (Earth-to-space) 5.351A AERONAUTICAL RADIONAVIGATION Radiodetermination-Satellite (Earth-to-space) 5.341 5.355 5.359 5.364 5.366 5.367 5.368 5.369 5.372	1610-1610.6 MOBILE-SATELLITE (Earth-to-space) US319 AERONAUTICAL RADIONAVIGATION US260 RADIODETERMINATION-SATELLITE(Earth-to-space) 5.341 5.364 5.366 5.367 5.368 5.372 US208		Satellite Communications (25) Aviation (87)
1610.6-1613.8 MOBILE-SATELLITE (Earth-to-space) 5.351A RADIO ASTRONOMY AERONAUTICAL RADIONAVIGATION 5.149 5.341 5.355 5.359 5.363 5.364 5.366 5.367 5.368 5.369 5.371 5.372	1610.6-1613.8 MOBILE-SATELLITE (Earth-to-space) 5.351A RADIO ASTRONOMY AERONAUTICAL RADIONAVIGATION RADIODETERMINATION- SATELLITE (Earth-to- space) 5.149 5.341 5.364 5.366 5.367 5.368 5.370 5.372	1610.6-1613.8 MOBILE-SATELLITE (Earth-to-space) 5.351A RADIO ASTRONOMY AERONAUTICAL RADIONAVIGATION Radiodetermination-satellite (Earth-to-space) 5.149 5.341 5.355 5.359 5.364 5.366 5.367 5.368 5.369 5.372	1610.6-1613.8 MOBILE-SATELLITE (Earth-to-space) US319 RADIO ASTRONOMY AERONAUTICAL RADIONAVIGATION US260 RADIODETERMINATION-SATELLITE (Earth-to-space) 5.341 5.364 5.366 5.367 5.368 5.372 US208 US342		
1613.8-1626.5 MOBILE-SATELLITE (Earth-to-space) 5.351A AERONAUTICAL RADIONAVIGATION Mobile-satellite (space-to-Earth) 5.341 5.355 5.359 5.363 5.364 5.365 5.366 5.367 5.368 5.369 5.371 5.372	1613.8-1626.5 MOBILE-SATELLITE (Earth-to-space) 5.351A AERONAUTICAL RADIONAVIGATION RADIODETERMINATION- SATELLITE (Earth-to- space) Mobile-satellite (space-to- Earth) 5.341 5.364 5.365 5.366 5.367 5.368 5.370 5.372	1613.8-1626.5 MOBILE-SATELLITE (Earth-to-space) 5.351A AERONAUTICAL RADIONAVIGATION Mobile-satellite (space-to- Earth) Radiodetermination- satellite (Earth-to-space) 5.341 5.355 5.359 5.364 5.365 5.366 5.367 5.368 5.369 5.372	1613.8-1626.5 MOBILE-SATELLITE (Earth-to-space) US319 AERONAUTICAL RADIONAVIGATION US260 RADIODETERMINATION-SATELLITE (Earth-to-space) Mobile-satellite (space-to-Earth) 5.341 5.364 5.365 5.366 5.367 5.368 5.372 US208		

1626.5-1660 MOBILE-SATELLITE (Earth-to-space) 5.351A 5.341 5.351 5.353A 5.354 5.355 5.357A 5.359 5.362A 5.374 5.375 5.376	1626.5-1660 MOBILE-SATELLITE (Earth-to-space) US308 US309 US315 5.341 5.351 5.375	Satellite Communications (25) Maritime (80) Aviation (87)
1660-1660.5 MOBILE-SATELLITE (Earth-to-space) 5.351A RADIO ASTRONOMY 5.149 5.341 5.351 5.354 5.362A 5.376A	1660-1660.5 MOBILE-SATELLITE (Earth-to-space) US308 US309 RADIO ASTRONOMY 5.341 5.351 US342	Satellite Communications (25) Aviation (87)
1660.5-1668.4 RADIO ASTRONOMY SPACE RESEARCH (passive) Fixed Mobile except aeronautical mobile 5.149 5.341 5.379 5.379A	1660.5-1668.4 RADIO ASTRONOMY US74 SPACE RESEARCH (passive) 5.341 US246	
1668.4-1670 METEOROLOGICAL AIDS FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY 5.149 5.341	1668.4-1670 METEOROLOGICAL AIDS (radiosonde) RADIO ASTRONOMY US74 5.341 US99 US342	

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
1670-1675 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE 5.380 5.341			1670-1675 5.341 US211 US362	1670-1675 FIXED MOBILE except aeronautical mobile 5.341 US211 US362	Wireless Communications (27)
1675-1690 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.341	1675-1690 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile MOBILE-SATELLITE (Earth-to-space) 5.341 5.377	1675-1690 METEOROLOGICAL AIDS FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.341	1675-1700 METEOROLOGICAL AIDS (radiosonde) METEOROLOGICAL-SATELLITE (space-to-Earth)		
1690-1700 METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth) Fixed Mobile except aeronautical mobile 5.289 5.341 5.382	1690-1700 METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE-SATELLITE (Earth-to-space) 5.289 5.341 5.377 5.381	1690-1700 METEOROLOGICAL AIDS METEOROLOGICAL-SATELLITE (space-to-Earth) 5.289 5.341 5.381	 5.289 5.341 US211		
1700-1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.289 5.341	1700-1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile MOBILE-SATELLITE (Earth-to-space) 5.289 5.341 5.377	1700-1710 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.289 5.341 5.384	1700-1710 FIXED G118 METEOROLOGICAL-SATELLITE (space-to-Earth) 5.289 5.341	1700-1710 METEOROLOGICAL-SATELLITE (space-to-Earth) Fixed 5.289 5.341	
1710-1930 FIXED MOBILE 5.380 5.384A 5.388A			1710-1755 FIXED MOBILE 5.341 US311	1710-1755 5.341 US311	

			1755-1850 FIXED MOBILE G42	1755-1850	
5.149 5.341 5.385 5.386 5.387 5.388			1850-2025	1850-1990 FIXED MOBILE	RF Devices (15) Personal Communications (24) Fixed Microwave (101)
1930-1970 FIXED MOBILE 5.388A 5.388	1930-1970 FIXED MOBILE 5.388A Mobile-satellite (Earth-to-space) 5.388	1930-1970 FIXED MOBILE 5.388A 5.388			
1970-1980 FIXED MOBILE 5.388A 5.388					
1980-2010 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.351A 5.388 5.389A 5.389B 5.389F				1990-2025 MOBILE-SATELLITE (Earth-to-space)	Satellite Communications (25)
2010-2025 FIXED MOBILE 5.388A 5.388	2010-2025 FIXED MOBILE MOBILE-SATELLITE (Earth-to-space) 5.388 5.389C 5.389D 5.389E 5.390	2010-2025 FIXED MOBILE 5.388A 5.388		NG156	
2025-2110 SPACE OPERATION (Earth-to-space) (space-to-space) EARTH EXPLORATION-SATELLITE (Earth-to-space) (space-to-space) FIXED MOBILE 5.391 SPACE RESEARCH (Earth-to-space) (space-to-space) 5.392			2025-2110 SPACE OPERATION (Earth-to-space) (space-to-space) EARTH EXPLORATION-SATELLITE (Earth-to-space) (space-to-space) SPACE RESEARCH (Earth-to-space) (space-to-space) 5.391 5.392 US90 US222 US346 US347	2025-2110 FIXED NG118 MOBILE 5.391 5.392 US90 US222 US346 US347	TV Auxiliary Broadcasting (74F) Cable TV Relay (78) Local TV Transmission (101J)

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
2110-2120 FIXED MOBILE 5.388A SPACE RESEARCH (deep space) (Earth-to-space) 5.388			2110-2120 US252	2110-2150 FIXED MOBILE US252 NG153	Public Mobile (22) Fixed Microwave (101)
2120-2160 FIXED MOBILE 5.388A 5.388	2120-2160 FIXED MOBILE 5.388A Mobile-satellite (space-to-Earth) 5.388	2120-2160 FIXED MOBILE 5.388A 5.388	2120-2200	2150-2160 FIXED	Domestic Public Fixed (21) Fixed Microwave (101)
2160-2170 FIXED MOBILE 5.388A 5.388 5.392A	2160-2170 FIXED MOBILE 5.388A MOBILE-SATELLITE (space-to-Earth) 5.388 5.389C 5.389D 5.389E 5.390	2160-2170 FIXED MOBILE 5.388A 5.388		2160-2165 FIXED MOBILE NG153	Domestic Public Fixed (21) Public Mobile (22) Fixed Microwave (101)
2170-2200 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A 5.388 5.389A 5.389F 5.392A				2165-2200 MOBILE-SATELLITE (space-to-Earth) NG168	Satellite Communications (25)
2200-2290 SPACE OPERATION (space-to-Earth) (space-to-space) EARTH EXPLORATION-SATELLITE (space-to-Earth) (space-to-space) FIXED MOBILE 5.391 SPACE RESEARCH (space-to-Earth) (space-to-space)			2200-2290 SPACE OPERATION (space-to-Earth) (space-to-space) EARTH EXPLORATION- SATELLITE (space-to- Earth) (space-to-space) FIXED (line-of-sight only)	2200-2290	

		MOBILE (line-of-sight only including aeronautical telemetry, but excluding flight testing of manned aircraft) SPACE RESEARCH (space-to-Earth) (space-to-space)		
5.392		5.392 US303	US303	
2290-2300 FIXED MOBILE except aeronautical mobile SPACE RESEARCH (deep space) (space-to-Earth)		2290-2300 FIXED MOBILE except aeronautical mobile SPACE RESEARCH (deep space) (space-to-Earth)	2290-2300 SPACE RESEARCH (deep space) (space-to-Earth)	
2300-2450 FIXED MOBILE Amateur Radiolocation	2300-2450 FIXED MOBILE RADIOLOCATION Amateur	2300-2305 G123	2300-2305 Amateur	Amateur (97) Note: 2300-2305 MHz became non-Federal Government exclusive spectrum in August 1995
		2305-2310 US338 G123	2305-2310 FIXED MOBILE except aeronautical mobile RADIOLOCATION Amateur US338	Wireless Communications (27) Amateur (97)
		2310-2345 Fixed Mobile US328 US339 Radiolocation G2 G120 US327	2310-2320 FIXED MOBILE US339 RADIOLOCATION BROADCASTING-SATELLITE 5.396 US327 2320-2345 BROADCASTING-SATELLITE 5.396 US327 US328	Wireless Communications (27) Aviation (87) Satellite Communications (25) Aviation (87)
5.150 5.282 5.395	5.150 5.282 5.393 5.394 5.396	See next page for 2345-2450 MHz		See next page for 2345-2450 MHz

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 2300-2450 MHz			2345-2360 Fixed Mobile US339 Radiolocation G2 G120 US327	2345-2360 FIXED MOBILE US339 RADIOLOCATION BROADCASTING- SATELLITE 5.396 US327	Wireless Communications (27) Aviation (87)
			2360-2385 MOBILE US276 RADIOLOCATION G2 G120 Fixed	2360-2385 MOBILE US276	Aviation (87)
			2385-2390 US363	2385-2390 FIXED MOBILE NG174 US363	Wireless Communications (27)
			2390-2400 G122	2390-2400 AMATEUR	RF Devices (15) Amateur (97)
			2400-2402 5.150 G123	2400-2402 Amateur 5.150 5.282	ISM Equipment (18) Amateur (97)
			2402-2417 5.150 G122	2402-2417 AMATEUR 5.150 5.282	RF Devices (15) ISM Equipment (18) Amateur (97)
			2417-2450 Radiolocation G2 5.150 G124	2417-2450 Amateur 5.150 5.282	ISM Equipment (18) Amateur (97)
2450-2483.5 FIXED MOBILE Radiolocation 5.150 5.397	2450-2483.5 FIXED MOBILE RADIOLOCATION 5.150 5.394		2450-2483.5 5.150 US41	2450-2483.5 FIXED MOBILE Radiolocation 5.150 US41	ISM Equipment (18) Private Land Mobile (90) Fixed Microwave (101)

2483.5-2500 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A Radiolocation 5.150 5.371 5.397 5.398 5.399 5.400 5.402	2483.5-2500 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A RADIOLOCATION RADIODETERMINATION-SATELLITE (space-to-Earth) 5.398 5.150 5.402	2483.5-2500 FIXED MOBILE MOBILE-SATELLITE (space-to-Earth) 5.351A RADIOLOCATION Radiodetermination-satellite (space-to-Earth) 5.398 5.150 5.400 5.402	2483.5-2500 MOBILE-SATELLITE (space-to-Earth) US319 RADIODETERMINATION-SATELLITE (space-to-Earth) 5.398 5.150 5.402 US41	2483.5-2500 MOBILE-SATELLITE (space-to-Earth) US319 RADIODETERMINATION-SATELLITE (space-to-Earth) 5.398 5.150 5.402 US41 NG147	ISM Equipment (18) Satellite Communications (25) Private Land Mobile (90) Fixed Microwave (101)
2500-2520 FIXED 5.409 5.410 5.411 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (space-to-Earth) 5.403 5.351A 5.405 5.407 5.412 5.414	2500-2520 FIXED 5.409 5.411 FIXED-SATELLITE (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (space-to-Earth) 5.403 5.351A 5.404 5.407 5.414 5.415A		2500-2655	2500-2655 FIXED US205 MOBILE except aeronautical mobile	Domestic Public Fixed (21) Auxiliary Broadcasting (74)
2520-2655 FIXED 5.409 5.410 5.411 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 5.339 5.403 5.405 5.412 5.418 5.418B 5.418C	2520-2655 FIXED 5.409 5.411 FIXED-SATELLITE (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 5.339 5.403 5.418B 5.418C	2520-2535 FIXED 5.409 5.411 FIXED-SATELLITE (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 5.403 5.415A 2535-2655 FIXED 5.409 5.411 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 5.339 5.418 5.418A 5.418B 5.418C	5.339 US205 US269	5.339 US269	

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
2655-2670 FIXED 5.409 5.410 5.411 MOBILE except aeronautical mobile 5.384A BROADCASTING SATELLITE 5.413 5.416 Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.412 5.420	2655-2670 FIXED 5.409 5.411 FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.420	2655-2670 FIXED 5.409 5.411 FIXED-SATELLITE (Earth-to-space) 5.415 MOBILE except aeronautical mobile 5.384A BROADCASTING-SATELLITE 5.413 5.416 Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.420	2655-2690 Earth exploration-satellite (passive) Radio astronomy Space research (passive)	2655-2690 FIXED US205 MOBILE except aeronautical mobile Earth exploration-satellite (passive) Radio astronomy Space research (passive)	Domestic Public Fixed (21) Auxiliary Broadcasting (74)
2670-2690 FIXED 5.409 5.410 5.411 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.419 5.420	2670-2690 FIXED 5.409 5.411 FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.415 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.419 5.420	2670-2690 FIXED 5.409 5.411 FIXED-SATELLITE (Earth-to-space) 5.415 MOBILE except aeronautical mobile 5.384A MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (passive) Radio astronomy Space research (passive) 5.149 5.419 5.420 5.420A	US205 US269	US269	
2690-2700 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340 5.421 5.422			2690-2700 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) US246		
2700-2900 AERONAUTICAL RADIONAVIGATION 5.337 Radiolocation 5.423 5.424			2700-2900 AERONAUTICAL RADIO-NAVIGATION 5.337 METEOROLOGICAL AIDS Radiolocation G2 5.423 US18 G15	2700-2900 5.423 US18	

2900-3100 RADIONAVIGATION 5.426 Radiolocation 5.425 5.427			2900-3100 MARITIME RADIONAVIGATION Radiolocation G56 5.427 US44 US316	2900-3100 MARITIME RADIONAVIGATION Radiolocation US44 5.5427 US316	Maritime (80) Private Land Mobile (90)
3100-3300 RADIOLOCATION Earth exploration-satellite (active) Space research (active) 5.149 5.428			3100-3300 RADIOLOCATION G59 Earth exploration-satellite (active) Space research (active) US342	3100-3300 Radiolocation Earth exploration-satellite (active) Space research (active) US342	Private Land Mobile (90)
3300-3400 RADIOLOCATION 5.149 5.429 5.430	3300-3400 RADIOLOCATION Amateur Fixed Mobile 5.149 5.430	3300-3400 RADIOLOCATION Amateur 5.149 5.429	3300-3500 RADIOLOCATION US108 G31 US342	3300-3500 Amateur Radiolocation US108 US342 5.282	Private Land Mobile (90) Amateur (97)
3400-3600 FIXED FIXED-SATELLITE (space-to-Earth) Mobile Radiolocation 5.431	3400-3500 FIXED FIXED-SATELLITE (space-to-Earth) Amateur Mobile Radiolocation 5.433 5.282 5.432				
3600-4200 FIXED FIXED-SATELLITE (space-to-Earth) Mobile	3500-3700 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile Radiolocation 5.433 5.435		3500-3650 RADIOLOCATION G59 AERONAUTICAL RADIONAVIGATION (ground-based) G110 US245	3500-3600 Radiolocation 3600-3650 FIXED-SATELLITE (space-to-Earth) US245 Radiolocation	Private Land Mobile (90)
			3650-3700 US245 US348 US349	3650-3700 FIXED FIXED-SATELLITE (space-to-Earth) NG169 MOBILE except aeronautical mobile NG170 US245 US348 US349	
	See next page for 3700-4200 MHz		See next page for 3700-4200 MHz	See next page for 3700-4200 MHz	See next page for 3700-4200 MHz

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 3600-4200 MHz	3700-4200 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile		3700-4200	3700-4200 FIXED NG41 FIXED-SATELLITE (space-to-Earth)	International Fixed (23) Satellite Communications (25) Fixed Microwave (101)
4200-4400 AERONAUTICAL RADIONAVIGATION 5.438 5.437 5.439 5.440			4200-4400 AERONAUTICAL RADIONAVIGATION 5.440 US261		Aviation (87)
4400-4500 FIXED MOBILE			4400-4500 FIXED MOBILE	4400-4500	
4500-4800 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 MOBILE			4500-4800 FIXED MOBILE US245	4500-4800 FIXED-SATELLITE (space-to-Earth) 5.441 US245	
4800-4990 FIXED MOBILE 5.442 Radio astronomy			4800-4940 FIXED MOBILE US203 US342	4800-4940 US203 US342	
5.149 5.339 5.443			4940-4990 5.339 US311 US342 G122	4940-4990 FIXED MOBILE except aeronautical mobile 5.339 US311 US342	Private Land Mobile (90) Fixed Microwave (101)
4990-5000 FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY Space research (passive) 5.149			4990-5000 RADIO ASTRONOMY US74 Space research (passive) US246		
5000-5150 AERONAUTICAL RADIONAVIGATION 5.367 5.443A 5.443B 5.444 5.444A			5000-5250 AERONAUTICAL RADIO-NAVIGATION US260	5000-5150 AERONAUTICAL RADIO-NAVIGATION US260 5.367 5.444A US211 US344 US370	Satellite Communications (25) Aviation (87)

5150-5250 AERONAUTICAL RADIONAVIGATION FIXED-SATELLITE (Earth-to-space) 5.447A 5.446 5.447 5.447B 5.447C		5150-5250 AERONAUTICAL RADIO-NAVIGATION US260 FIXED-SATELLITE (Earth-to-space) 5.447A US344 5.447C US211 US307	
	5.367 US211 US307 US344 US370		
5250-5255 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH 5.447D 5.448 5.448A	5250-5255 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G59 SPACE RESEARCH 5.447D	5250-5255 Earth exploration-satellite (active) Radiolocation Space research	
5255-5350 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active) 5.448 5.448A	5255-5350 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G59 SPACE RESEARCH (active)	5255-5350 Earth exploration-satellite (active) Radiolocation Space research (active)	
5350-5460 EARTH EXPLORATION-SATELLITE (active) 5.448B AERONAUTICAL RADIONAVIGATION 5.449 Radiolocation	5350-5460 EARTH EXPLORATION-SATELLITE (active) 5.448B AERONAUTICAL RADIO-NAVIGATION 5.449 RADIOLOCATION G56	5350-5460 AERONAUTICAL RADIO-NAVIGATION 5.449 Earth exploration-satellite (active) Radiolocation	Aviation (87)
5460-5470 RADIONAVIGATION 5.449 Radiolocation	5460-5470 RADIONAVIGATION 5.449 Radiolocation G56 US49 US65	5460-5470 RADIONAVIGATION 5.449 Radiolocation US49 US65	
5470-5650 MARITIME RADIONAVIGATION Radiolocation	5470-5600 MARITIME RADIONAVIGATION Radiolocation G56 US50 US65	5470-5600 MARITIME RADIONAVIGATION Radiolocation US50 US65	Maritime (80)
	5600-5650 MARITIME RADIONAVIGATION METEOROLOGICAL AIDS Radiolocation US51 G56	5600-5650 MARITIME RADIONAVIGATION METEOROLOGICAL AIDS Radiolocation US51	
5.450 5.451 5.452	5.452 US65	5.452 US65	

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
5650-5725 RADIOLOCATION Amateur Space research (deep space) 5.282 5.451 5.453 5.454 5.455			5650-5925 RADIOLOCATION G2	5650-5830 Amateur	ISM Equipment (18) Amateur (97)
5725-5830 FIXED-SATELLITE (Earth-to-space) RADIOLOCATION Amateur 5.150 5.451 5.453 5.455 5.456	5725-5830 RADIOLOCATION Amateur 5.150 5.453 5.455			5.150 5.282	
5830-5850 FIXED-SATELLITE (Earth-to-space) RADIOLOCATION Amateur Amateur-satellite (space-to-Earth) 5.150 5.451 5.453 5.455 5.456	5830-5850 RADIOLOCATION Amateur Amateur-satellite (space-to-Earth) 5.150 5.453 5.455			5830-5850 Amateur Amateur-satellite (space-to-Earth) 5.150	
5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE 5.150	5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE Amateur Radiolocation 5.150	5850-5925 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE Radiolocation 5.150	5.150 US245	5850-5925 FIXED-SATELLITE (Earth-to-space) US245 MOBILE NG160 Amateur 5.150	ISM Equipment (18) Private Land Mobile (90) Amateur (97)
5925-6700 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE			5925-6425	5925-6425 FIXED NG41 FIXED-SATELLITE (Earth-to-space)	International Fixed (23) Satellite Communications (25) Fixed Microwave (101)
			6425-6525 5.440 5.458	6425-6525 FIXED-SATELLITE (Earth-to-space) MOBILE 5.440 5.458	Auxiliary Broadcasting (74) Cable TV Relay (78) Fixed Microwave (101)

	6525-6700	6525-6700 FIXED FIXED-SATELLITE (Earth-to-space)	Satellite Communications (25) Fixed Microwave (101)
5.149 5.440 5.458	5.458 US342	5.458 US342	
6700-7075 FIXED FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.441 MOBILE	6700-7125	6700-6875 FIXED FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.441 5.458 5.458A 5.458B	
		6875-7025 FIXED NG118 FIXED-SATELLITE (Earth-to-space) (space-to-Earth) 5.441 MOBILE NG171 5.458 5.458A 5.458B	Satellite Communications (25) Auxiliary Broadcasting (74) Cable TV Relay (78)
5.458 5.458A 5.458B 5.458C		7025-7075 FIXED NG118 FIXED-SATELLITE (Earth-to-space) NG172 MOBILE NG171 5.458 5.458A 5.458B	
7075-7250 FIXED MOBILE	5.458	7075-7125 FIXED NG118 MOBILE NG171 5.458	Auxiliary Broadcasting (74) Cable TV Relay (78)
	7125-7190 FIXED 5.458 US252 G116	7125-7190 5.458 US252	
	7190-7235 FIXED SPACE RESEARCH (Earth-to-space) 5.458	7190-7250	
	7235-7250 FIXED		
5.458 5.459 5.460	5.458	5.458	

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
7250-7300 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE 5.461			7250-7300 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Fixed G117	7250-8025	
7300-7450 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.461			7300-7450 FIXED FIXED-SATELLITE (space-to-Earth) Mobile-satellite (space-to-Earth) G117		
7450-7550 FIXED FIXED-SATELLITE (space-to-Earth) METEOROLOGICAL-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile 5.461A			7450-7550 FIXED FIXED-SATELLITE (space-to-Earth) METEOROLOGICAL-SAT- ELLITE (space-to-Earth) Mobile-satellite (space-to-Earth) G104 G117		
7550-7750 FIXED FIXED-SATELLITE (space-to-Earth) MOBILE except aeronautical mobile			7550-7750 FIXED FIXED-SATELLITE (space-to-Earth) Mobile-satellite (space-to-Earth) G117		
7750-7850 FIXED METEOROLOGICAL-SATELLITE (space-to-Earth) 5.461B MOBILE except aeronautical mobile			7750-7850 FIXED METEOROLOGICAL-SAT- ELLITE (space-to-Earth) 5.461B		
7850-7900 FIXED MOBILE except aeronautical mobile			7850-7900 FIXED		

7900-8025 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE 5.461	7900-8025 FIXED-SATELLITE (Earth-to-space) MOBILE-SATELLITE (Earth-to-space) Fixed G117		
8025-8175 EARTH EXPLORATION-SATELLITE (space-to-Earth) FIXED FIXED-SATELLITE (Earth-to-space) MOBILE 5.463 5.462A	8025-8175 EARTH EXPLORATION-SATELLITE (space-to-Earth) FIXED FIXED-SATELLITE (Earth-to-space) Mobile-satellite (Earth-to-space) (no airborne transmissions) US258 G117	8025-8215	
8175-8215 EARTH EXPLORATION-SATELLITE (space-to-Earth) FIXED FIXED-SATELLITE (Earth-to-space) METEOROLOGICAL-SATELLITE (Earth-to-space) MOBILE 5.463 5.462A	8175-8215 EARTH EXPLORATION-SATELLITE (space-to-Earth) FIXED FIXED-SATELLITE (Earth-to-space) METEOROLOGICAL-SATELLITE (Earth-to-space) Mobile-satellite (Earth-to-space) (no airborne transmissions) US258 G104 G117	US258	

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
8215-8400 EARTH EXPLORATION-SATELLITE (space-to-Earth) FIXED FIXED-SATELLITE (Earth-to-space) MOBILE 5.463 5.462A			8215-8400 EARTH EXPLORATION-SATELLITE (space-to-Earth) FIXED FIXED-SATELLITE (Earth-to-space) Mobile-satellite (Earth-to-space) (no airborne transmissions) US258 G117	8215-8400 US258	
8400-8500 FIXED MOBILE except aeronautical mobile SPACE RESEARCH (space-to-Earth) 5.465 5.466			8400-8450 FIXED SPACE RESEARCH (space-to-Earth) (deep space only)	8400-8450 Space research (space-to-Earth) (deep space only)	
5.467			8450-8500 FIXED SPACE RESEARCH (space-to-Earth)	8450-8500 SPACE RESEARCH (space-to-Earth)	
8500-8550 RADIOLOCATION 5.468 5.469			8500-8550 RADIOLOCATION G59	8500-8550 Radiolocation	
8550-8650 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active) 5.468 5.469 5.469A			8550-8650 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G59 SPACE RESEARCH (active)	8550-8650 Earth exploration-satellite (active) Radiolocation Space research (active)	
8650-8750 RADIOLOCATION 5.468 5.469			8650-9000 RADIOLOCATION G59	8650-9000 Radiolocation	
8750-8850 RADIOLOCATION AERONAUTICAL RADIONAVIGATION 5.470 5.471					

8850-9000 RADIOLOCATION MARITIME RADIONAVIGATION 5.472 5.473	US53	US53	
9000-9200 AERONAUTICAL RADIONAVIGATION 5.337 Radiolocation 5.471	9000-9200 AERONAUTICAL RADIO-NAVIGATION 5.337 Radiolocation G2 US48 G19	9000-9200 AERONAUTICAL RADIO-NAVIGATION 5.337 Radiolocation US48	Aviation (87)
9200-9300 RADIOLOCATION MARITIME RADIONAVIGATION 5.472 5.473 5.474	9200-9300 MARITIME RADIO-NAVIGATION 5.472 Radiolocation US110 G59 5.474	9200-9300 MARITIME RADIO-NAVIGATION 5.472 Radiolocation US110 5.474	
9300-9500 RADIONAVIGATION 5.476 Radiolocation 5.427 5.474 5.475	9300-9500 RADIONAVIGATION 5.476 US66 Radiolocation US51 G56 Meteorological aids 5.427 5.474 US67 US71	9300-9500 RADIONAVIGATION 5.476 US66 Radiolocation US51 Meteorological aids 5.427 5.474 US67 US71	
9500-9800 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION RADIONAVIGATION SPACE RESEARCH (active) 5.476A	9500-9800 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active)	9500-9800 Earth exploration-satellite (active) Radiolocation Space research (active)	
9800-10000 RADIOLOCATION Fixed 5.477 5.478 5.479	9800-10000 RADIOLOCATION 5.479	9800-10000 Radiolocation 5.479	

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
10-10.45 FIXED MOBILE RADIOLOCATION Amateur 5.479	10-10.45 RADIOLOCATION Amateur 5.479 5.480	10-10.45 FIXED MOBILE RADIOLOCATION Amateur 5.479	10-10.45 RADIOLOCATION 5.479 US58 US108 G32	10-10.45 Radiolocation Amateur 5.479 US58 US108 NG42	Private Land Mobile (90) Amateur (97)
10.45-10.5 RADIOLOCATION Amateur Amateur-satellite 5.481			10.45-10.5 RADIOLOCATION US58 US108 G32	10.45-10.5 Radiolocation Amateur Amateur-satellite US58 US108 NG42 NG134	
10.5-10.55 FIXED MOBILE Radiolocation	10.5-10.55 FIXED MOBILE RADIOLOCATION		10.5-10.55 RADIOLOCATION US59		Private Land Mobile (90)
10.55-10.6 FIXED MOBILE except aeronautical mobile Radiolocation			10.55-10.6	10.55-10.6 FIXED	Fixed Microwave (101)
10.6-10.68 EARTH EXPLORATION-SATELLITE (passive) FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY SPACE RESEARCH (passive) Radiolocation 5.149 5.482			10.6-10.68 EARTH EXPLORATION-SATELLITE (passive) SPACE RESEARCH (passive) US265 US277	10.6-10.68 EARTH EXPLORATION-SATELLITE (passive) FIXED SPACE RESEARCH (passive) US265 US277	
10.68-10.7 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340 5.483			10.68-10.7 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) US246 US355		

10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 5.484A (Earth-to-space) 5.484 MOBILE except aeronautical mobile	10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 5.484A MOBILE except aeronautical mobile		10.7-11.7 US211	10.7-11.7 FIXED FIXED-SATELLITE (space-to-Earth) 5.441 US211 NG104 US355	Satellite Communications (25) Fixed Microwave (101)
11.7-12.5 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE	11.7-12.1 FIXED 5.486 FIXED-SATELLITE (space-to-Earth) 5.484A Mobile except aeronautical mobile 5.485 5.488	11.7-12.2 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE	11.7-12.1 5.486	11.7-12.2 FIXED-SATELLITE (space-to-Earth) NG143 NG145 Mobile except aeronautical mobile	
	12.1-12.2 FIXED-SATELLITE (space-to-Earth) 5.484A 5.485 5.488 5.489	5.487 5.487A 5.492	12.1-12.2	5.486 5.488	
5.487 5.487A 5.492	12.2-12.7 FIXED MOBILE except aeronautical mobile BROADCASTING BROADCASTING-SATELLITE	12.2-12.5 FIXED MOBILE except aeronautical mobile BROADCASTING 5.484A 5.487 5.491	12.2-12.7	12.2-12.7 FIXED BROADCASTING-SATELLITE	Satellite Communications (25) Fixed Microwave (101)
12.5-12.75 FIXED-SATELLITE (space-to-Earth) 5.484A (Earth-to-space)		12.5-12.75 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A MOBILE except aeronautical mobile BROADCASTING-SATELLITE 5.493	5.490	5.487A 5.488 5.490	
5.494 5.495 5.496	See next page for 12.7-12.75 GHz		See next page for 12.7-12.75 GHz		See next page for 12.7-12.75 GHz

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 12.5-12.75 GHz	12.7-12.75 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE except aeronautical mobile	See previous page for 12.5-12.75 GHz	12.7-12.75	12.7-12.75 FIXED NG118 FIXED-SATELLITE (Earth-to-space) MOBILE NG53	Satellite Communications (25) Auxiliary Broadcasting (74) Cable TV Relay (78) Fixed Microwave (101)
12.75-13.25 FIXED FIXED-SATELLITE (Earth-to-space) 5.441 MOBILE Space research (deep space) (space-to-Earth) US251			12.75-13.25 US251	12.75-13.25 FIXED NG118 FIXED-SATELLITE (Earth-to-space) 5.441 NG104 MOBILE US251 NG53	
13.25-13.4 EARTH EXPLORATION-SATELLITE (active) AERONAUTICAL RADIONAVIGATION 5.497 SPACE RESEARCH (active) 5.498A 5.499			13.25-13.4 EARTH EXPLORATION-SATELLITE (active) AERONAUTICAL RADIO-NAVIGATION 5.497 SPACE RESEARCH (active) 5.498A	13.25-13.4 AERONAUTICAL RADIO-NAVIGATION 5.497 Earth exploration-satellite (active) Space research (active)	Aviation (87)
13.4-13.75 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH 5.501A Standard frequency and time signal-satellite (Earth-to-space) 5.499 5.500 5.501 5.501B			13.4-13.75 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G59 SPACE RESEARCH 5.501A Standard frequency and time signal-satellite (Earth-to-space) 5.501B	13.4-13.75 Earth exploration-satellite (active) Radiolocation Space research Standard frequency and time signal-satellite (Earth-to-space)	Private Land Mobile (90)
13.75-14 FIXED-SATELLITE (Earth-to-space) 5.484A RADIOLOCATION Standard frequency and time signal-satellite (Earth-to-space) Space research 5.499 5.500 5.501 5.502 5.503 5.503A			13.75-14 RADIOLOCATION G59 Standard frequency and time signal-satellite (Earth-to-space) Space research US337 5.503A US356 US357	13.75-14 FIXED-SATELLITE (Earth-to-space) US337 Radiolocation Standard frequency and time signal-satellite (Earth-to-space) Space research 5.503A US356 US357	Satellite Communications (25) Private Land Mobile (90)

14-14.25 FIXED-SATELLITE (Earth-to-space) 5.484A 5.506 RADIONAVIGATION 5.504 Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Space research 5.505			14-14.2 RADIONAVIGATION US292 Space research	14-14.2 FIXED-SATELLITE (Earth-to-space) RADIONAVIGATION US292 Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Space research	Satellite Communications (25) Maritime (80) Aviation (87)
14.25-14.3 FIXED-SATELLITE (Earth-to-space) 5.484A 5.506 RADIONAVIGATION 5.504 Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Space research 5.505 5.508 5.509			14.2-14.4	14.2-14.4 FIXED-SATELLITE (Earth-to-space) Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Mobile except aeronautical mobile	Satellite Communications (25) Fixed Microwave (101)
14.3-14.4 FIXED FIXED-SATELLITE (Earth-to-space) 5.484A 5.506 MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Radionavigation-satellite	14.3-14.4 FIXED-SATELLITE (Earth-to-space) 5.484A 5.506 Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Radionavigation-satellite	14.3-14.4 FIXED FIXED-SATELLITE (Earth-to-space) 5.484A 5.506 MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Radionavigation-satellite			
14.4-14.47 FIXED FIXED-SATELLITE (Earth-to-space) 5.484A 5.506 MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Space research (space-to-Earth)			14.4-14.47 Fixed Mobile	14.4-14.47 FIXED-SATELLITE (Earth-to-space) Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite	Satellite Communications (25)
14.47-14.5 FIXED FIXED-SATELLITE (Earth-to-space) 5.484A 5.506 MOBILE except aeronautical mobile Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite Radio astronomy 5.149			14.47-14.5 Fixed Mobile US203 US342	14.47-14.5 FIXED-SATELLITE (Earth-to-space) Mobile-satellite (Earth-to-space) except aeronautical mobile-satellite US203 US342	

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
14.5-14.8 FIXED FIXED-SATELLITE (Earth-to-space) 5.510 MOBILE Space research			14.5-14.7145 FIXED Mobile Space research	14.5-14.7145	
14.8-15.35 FIXED MOBILE Space research			14.7145-15.1365 MOBILE Fixed Space research US310	14.7145-15.1365 US310	
5.339			15.1365-15.35 FIXED Mobile Space research 5.339 US211	15.1365-15.35 5.339 US211	
15.35-15.4 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340 5.511			15.35-15.4 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) US246		
15.4-15.43 AERONAUTICAL RADIONAVIGATION 5.511D			15.4-15.43 AERONAUTICAL RADIONAVIGATION US260 US211		Aviation (87)
15.43-15.63 FIXED SATELLITE (Earth-to-space) 5.511A AERONAUTICAL RADIONAVIGATION 5.511C			15.43-15.63 AERONAUTICAL RADIO-NAVIGATION US260 5.511C US211 US359	15.43-15.63 FIXED SATELLITE (Earth-to-space) AERONAUTICAL RADIO-NAVIGATION US260 5.511C US211 US359	Satellite Communications (25) Aviation (87)
15.63-15.7 AERONAUTICAL RADIONAVIGATION 5.511D			15.63-15.7 AERONAUTICAL RADIONAVIGATION US260 US211		Aviation (87)
15.7-16.6 RADIOLOCATION 5.512 5.513			15.7-16.6 RADIOLOCATION G59	15.7-17.2 Radiolocation	Private Land Mobile (90)

16.6-17.1 RADIOLOCATION Space research (deep space) (Earth-to-space) 5.512 5.513			16.6-17.1 RADIOLOCATION G59 Space research (deep space) (Earth-to-space)		
17.1-17.2 RADIOLOCATION 5.512 5.513			17.1-17.2 RADIOLOCATION G59		
17.2-17.3 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active) 5.512 5.513 5.513A			17.2-17.3 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION G59 SPACE RESEARCH (active)	17.2-17.3 Radiolocation Earth exploration-satellite (active) Space research (active)	
17.3-17.7 FIXED-SATELLITE (Earth-to-space) 5.516 Radiolocation 5.514	17.3-17.7 FIXED-SATELLITE (Earth-to-space) 5.516 BROADCASTING-SATELLITE Radiolocation 5.514 5.515 5.517	17.3-17.7 FIXED-SATELLITE (Earth-to-space) 5.516 Radiolocation 5.514	17.3-17.7 Radiolocation US259 G59	17.3-17.7 FIXED-SATELLITE (Earth-to-space) US271 BROADCASTING-SATELLITE NG163 NG167 US259	Satellite Communications (25)
17.7-18.1 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A (Earth-to-space) 5.516 MOBILE	17.7-17.8 FIXED FIXED-SATELLITE (space-to-Earth) (Earth-to-space) 5.516 BROADCASTING-SATELLITE Mobile 5.518 5.515 5.517	17.7-18.1 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A (Earth-to-space) 5.516 MOBILE	17.7-17.8	17.7-17.8 FIXED FIXED-SATELLITE (Earth-to-space) US271 NG144	Satellite Communications (25) Auxiliary Broadcasting (74) Cable TV Relay (78) Fixed Microwave (101)
	17.8-18.1 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A (Earth-to-space) 5.516 MOBILE		17.8-18.3 FIXED-SATELLITE (space-to-Earth) G117 5.519 US334	17.8-18.3 FIXED 5.519 US334 NG144	Auxiliary Broadcasting (74) Cable TV Relay (78) Fixed Microwave (101)
18.1-18.4 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A (Earth-to-space) 5.520 MOBILE 5.519 5.521			See next page for 18.3-18.6 GHz	See next page for 18.3-18.58 GHz	See next page for 18.3-18.58 GHz

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
See previous page for 18.1-18.4 GHz			18.3-18.6 FIXED-SATELLITE (space-to-Earth) G117	18.3-18.58 FIXED FIXED-SATELLITE (space-to-Earth) NG164 US334 NG144	Satellite Communications (25) Auxiliary Broadcast. (74) Cable TV Relay (78) Fixed Microwave (101)
18.4-18.6 FIXED FIXED-SATELLITE (space-to-Earth) 5.484A MOBILE			US334	18.58-18.6 FIXED-SATELLITE (space-to-Earth) NG164 US334 NG144	Satellite Communications (25)
18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED FIXED-SATELLITE (space-to-Earth) 5.522B MOBILE except aeronautical mobile Space research (passive) 5.522A 5.522C	18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED FIXED-SATELLITE (space-to-Earth) 5.522B MOBILE except aeronautical mobile SPACE RESEARCH (passive) 5.222A	18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED FIXED-SATELLITE (space-to-Earth) 5.522B MOBILE except aeronautical mobile Space research (passive) 5.522A 5.522C	18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED-SATELLITE (space-to-Earth) US255 G117 SPACE RESEARCH (passive) US254 US334	18.6-18.8 EARTH EXPLORATION-SATELLITE (passive) FIXED-SATELLITE (space-to-Earth) US255 NG164 SPACE RESEARCH (passive) US254 US334 NG144	
18.8-19.3 FIXED FIXED-SATELLITE (space-to-Earth) 5.523A MOBILE			18.8-20.2 FIXED-SATELLITE (space-to-Earth) G117	18.8-19.3 FIXED-SATELLITE (space-to-Earth) NG165 US334 NG144	
19.3-19.7 FIXED FIXED-SATELLITE (space-to-Earth) (Earth-space) 5.523B 5.523C 5.523D 5.523E MOBILE				19.3-19.7 FIXED FIXED-SATELLITE (space-to-Earth) NG166 US334 NG144	Satellite Communications (25) Auxiliary Broadcast. (74) Cable TV Relay (78) Fixed Microwave (101)
19.7-20.1 FIXED-SATELLITE (space-to-Earth) 5.484A Mobile-satellite (space-to-Earth) 5.524	19.7-20.1 FIXED-SATELLITE (space-to-Earth) 5.484A MOBILE-SATELLITE (space-to-Earth) 5.524 5.525 5.526 5.527 5.528 5.529	19.7-20.1 FIXED-SATELLITE (space-to-Earth) 5.484A Mobile-satellite (space-to-Earth) 5.524		19.7-20.1 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 5.525 5.526 5.527 5.528 5.529 US334	Satellite Communications (25)

20.1-20.2 FIXED-SATELLITE (space-to-Earth) 5.484A MOBILE-SATELLITE (space-to-Earth) 5.524 5.525 5.526 5.527 5.528			US334	20.1-20.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) 5.525 5.526 5.527 5.528 US334	
20.2-21.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Standard frequency and time signal-satellite (space-to-Earth) 5.524			20.2-21.2 FIXED-SATELLITE (space-to-Earth) MOBILE-SATELLITE (space-to-Earth) Standard frequency and time signal-satellite (space-to-Earth) G117	20.2-21.2 Standard frequency and time signal-satellite (space-to-Earth)	
21.2-21.4 EARTH EXPLORATION-SATELLITE (passive) FIXED MOBILE SPACE RESEARCH (passive)			21.2-21.4 EARTH EXPLORATION-SATELLITE (passive) FIXED MOBILE SPACE RESEARCH (passive) US263		Fixed Microwave (101)
21.4-22 FIXED MOBILE BROADCASTING-SATELLITE 5.530	21.4-22 FIXED MOBILE	21.4-22 FIXED MOBILE BROADCASTING-SATELLITE 5.530 5.531	21.4-22 FIXED MOBILE		
22-22.21 FIXED MOBILE except aeronautical mobile 5.149			22-22.21 FIXED MOBILE except aeronautical mobile US342		
22.21-22.5 EARTH EXPLORATION-SATELLITE (passive) FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY SPACE RESEARCH (passive) 5.149 5.532			22.21-22.5 EARTH EXPLORATION-SATELLITE (passive) FIXED MOBILE except aeronautical mobile RADIO ASTRONOMY SPACE RESEARCH (passive) US342 US263		

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
22.5-22.55 FIXED MOBILE			22.5-22.55 FIXED MOBILE US211		Fixed Microwave (101)
22.55-23.55 FIXED INTER-SATELLITE MOBILE 5.149			22.55-23.55 FIXED INTER-SATELLITE US278 MOBILE US342		Satellite Communications (25) Fixed Microwave (101)
23.55-23.6 FIXED MOBILE			23.55-23.6 FIXED MOBILE		Fixed Microwave (101)
23.6-24 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340			23.6-24 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive) US246		
24-24.05 AMATEUR AMATEUR-SATELLITE 5.150			24-24.05 5.150 US211	24-24.05 AMATEUR AMATEUR-SATELLITE 5.150 US211	ISM Equipment (18) Amateur (97)
24.05-24.25 RADIOLOCATION Amateur Earth exploration-satellite (active) 5.150			24.05-24.25 RADIOLOCATION G59 Earth exploration-satellite (active) 5.150	24.05-24.25 Radiolocation Amateur Earth exploration-satellite (active) 5.150	ISM Equipment (18) Private Land Mobile (90) Amateur (97)
24.25-24.45 FIXED	24.25-24.45 RADIONAVIGATION	24.25-24.45 RADIONAVIGATION FIXED MOBILE	24.25-24.45	24.25-24.45 FIXED	Fixed Microwave (101)

24.45-24.75 FIXED INTER-SATELLITE	24.45-24.65 INTER-SATELLITE RADIONAVIGATION 5.533	24.45-24.65 FIXED INTER-SATELLITE MOBILE RADIONAVIGATION 5.533	24.45-24.65 INTER-SATELLITE RADIONAVIGATION 5.533		Satellite Communications (25)
	24.65-24.75 INTER-SATELLITE RADIOLOCATION-SATELLITE (Earth-to-space)	24.65-24.75 FIXED INTER-SATELLITE MOBILE 5.533 5.534	24.65-24.75 INTER-SATELLITE RADIOLOCATION-SATELLITE (Earth-to-space)		
24.75-25.25 FIXED	24.75-25.25 FIXED-SATELLITE (Earth-to-space) 5.535	24.75-25.25 FIXED FIXED-SATELLITE (Earth-to-space) 5.535 MOBILE 5.534	24.75-25.05 RADIONAVIGATION	24.75-25.05 FIXED-SATELLITE (Earth-to-space) NG167 RADIONAVIGATION	Satellite Communications (25) Aviation (87)
			25.05-25.25	25.05-25.25 FIXED-SATELLITE (Earth-to-space) NG167 FIXED	Satellite Communications (25) Fixed Microwave (101)
25.25-25.5 FIXED INTER-SATELLITE 5.536 MOBILE Standard frequency and time signal-satellite (Earth-to-space)			25.25-25.5 FIXED INTER-SATELLITE 5.536 MOBILE Standard frequency and time signal-satellite (Earth-to-space)	25.25-25.5 Standard frequency and time signal-satellite (Earth-to-space)	
25.5-27 EARTH EXPLORATION-SATELLITE (space-to-Earth) 5.536A 5.536B FIXED INTER-SATELLITE 5.536 MOBILE Standard frequency and time signal-satellite (Earth-to-space)			25.5-27 EARTH EXPLORATION-SATELLITE (space-to-Earth) 5.536A FIXED INTER-SATELLITE 5.536 MOBILE Standard frequency and time signal-satellite (Earth-to-space)	25.5-27 Earth exploration-satellite (space-to-Earth) 5.536A Standard frequency and time signal-satellite (Earth-to-space)	
27-27.5 FIXED INTER-SATELLITE 5.536 MOBILE	27-27.5 FIXED FIXED-SATELLITE (Earth-to-space) INTER-SATELLITE 5.536 5.537 MOBILE		27-27.5 FIXED INTER-SATELLITE 5.536 MOBILE	27-27.5	

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International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
27.5-28.5 FIXED 5.537A FIXED-SATELLITE (Earth-to-space) 5.484A 5.539 MOBILE 5.538 5.540			27.5-30	27.5-29.5 FIXED FIXED-SATELLITE (Earth-to-space) MOBILE	Satellite Communications (25) Fixed Microwave (101)
28.5-29.1 FIXED FIXED-SATELLITE (Earth-to-space) 5.484A 5.523A 5.539 MOBILE Earth exploration-satellite (Earth-to-space) 5.541 5.540					
29.1-29.5 FIXED FIXED-SATELLITE (Earth-to-space) 5.523C 5.523E 5.535A 5.539 5.541A MOBILE Earth exploration-satellite (Earth-to-space) 5.541 5.540					
29.5-29.9 FIXED-SATELLITE (Earth-to-space) 5.484A 5.539 Earth exploration-satellite (Earth-to-space) 5.541 Mobile-satellite (Earth-to-space) 5.540 5.542	29.5-29.9 FIXED-SATELLITE (Earth-to-space) 5.484A 5.539 MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (Earth-to-space) 5.541 5.525 5.526 5.527 5.529 5.540 5.542	29.5-29.9 FIXED-SATELLITE (Earth-to-space) 5.484A 5.539 Earth exploration-satellite (Earth-to-space) 5.541 Mobile-satellite (Earth-to-space) 5.540 5.542		29.5-29.9 FIXED-SATELLITE (Earth-to-space) MOBILE-SATELLITE (Earth-to-space) 5.525 5.526 5.527 5.529	Satellite Communications (25)
29.9-30 FIXED-SATELLITE (Earth-to-space) 5.484A 5.539 MOBILE-SATELLITE (Earth-to-space) Earth exploration-satellite (Earth-to-space) 5.541 5.543 5.525 5.526 5.527 5.538 5.540 5.542				29.9-30 FIXED-SATELLITE (Earth-to-space) MOBILE-SATELLITE (Earth-to-space) 5.525 5.526 5.527 5.543	

30-31 FIXED-SATELLITE (Earth-to-space) MOBILE-SATELLITE (Earth-to-space) Standard frequency and time signal-satellite (space-to-Earth) 5.542			30-31 FIXED-SATELLITE (Earth-to-space) MOBILE-SATELLITE (Earth-to-space) Standard frequency and time signal-satellite (space-to-Earth) G117	30-31 Standard frequency and time signal-satellite (space-to-Earth)	
31-31.3 FIXED 5.543A MOBILE Standard frequency and time signal-satellite (space-to-Earth) Space research 5.544 5.545 5.149			31-31.3 Standard frequency and time signal-satellite (space-to-Earth) US211 US342	31-31.3 FIXED MOBILE Standard frequency and time signal-satellite (space-to-Earth) US211 US342	Fixed Microwave (101)
31.3-31.5 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340			31.3-31.8 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY US74 SPACE RESEARCH (passive)		
31.5-31.8 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) Fixed Mobile except aeronautical mobile 5.149 5.546	31.5-31.8 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) 5.340	31.5-31.8 EARTH EXPLORATION-SATELLITE (passive) RADIO ASTRONOMY SPACE RESEARCH (passive) Fixed Mobile except aeronautical mobile 5.149	US246		
31.8-32 FIXED 5.547A RADIONAVIGATION SPACE RESEARCH (deep space) (space-to-Earth) 5.547 5.547B 5.548			31.8-32 RADIONAVIGATION US69 SPACE RESEARCH (deep space) (space-to-Earth) US262 5.548 US211 USzzz	31.8-32 SPACE RESEARCH (deep space) (space-to-Earth) US262 5.548 US211 USzzz	

International Table			United States Table		FCC Rule Part(s)
Region 1	Region 2	Region 3	Federal Government	Non-Federal Government	
32-32.3 FIXED 5.547A INTER-SATELLITE RADIONAVIGATION SPACE RESEARCH (deep space) (space-to-Earth) 5.547 5.547C 5.548			32-32.3 RADIONAVIGATION US69 SPACE RESEARCH (deep space) (space-to-Earth) US262 USzzz	32-32.3 SPACE RESEARCH (deep space) (space-to-Earth) US262 USzzz	
32.3-33 FIXED 5.547A INTER-SATELLITE RADIONAVIGATION 5.547 5.547D 5.548			32.3-33 INTER-SATELLITE US278 RADIONAVIGATION US69 USzzz		Aviation (87)
33-33.4 FIXED 5.547A RADIONAVIGATION 5.547 5.547E			33-33.4 RADIONAVIGATION US69 US360 G117		
33.4-34.2 RADIOLOCATION 5.549			33.4-34.2 RADIOLOCATION US360 G117	33.4-35.5 Radiolocation US360	Private Land Mobile (90)
34.2-34.7 RADIOLOCATION SPACE RESEARCH (deep space) (Earth-to-space) 5.549			34.2-34.7 RADIOLOCATION SPACE RESEARCH (deep space) (Earth-to-space) US262 US360 G34 G117	34.2-34.7 Radiolocation Space research (deep space) (Earth-to-space) US262 US360	
34.7-35.2 RADIOLOCATION Space research 5.550 5.549			34.7-35.5 RADIOLOCATION	34.7-35.5 Radiolocation	
35.2-35.5 METEOROLOGICAL AIDS RADIOLOCATION 5.549			US360 G117	US360	
35.5-36 METEOROLOGICAL AIDS EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active) 5.549 5.551A			35.5-36 EARTH EXPLORATION-SATELLITE (active) RADIOLOCATION SPACE RESEARCH (active) US360 G117	35.5-36 Earth exploration-satellite (active) Radiolocation Space research (active) US360	

BILLING CODE 6712-01-C

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United States (US) Footnotes

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US7 In the band 420–450 MHz and within the following areas, the peak envelope power output of a transmitter employed in the amateur service shall not exceed 50 watts, unless expressly authorized by the Commission after mutual agreement, on a case-by-case basis, between the Federal Communications Commission Engineer in Charge at the applicable district office and the military area frequency coordinator at the applicable military base. For areas (e) through (j), the appropriate military coordinator is located at Peterson AFB, CO.

(a) The entire State of New Mexico and Texas west of longitude 104°00′ West;

(b) The entire State of Florida including the Key West area and the areas enclosed within a 322-kilometer (200-mile) radius of Patrick Air Force Base, Florida (latitude 28°21′ North, longitude 80°43′ West), and within a 322-kilometer (200-mile) radius of Eglin Air Force Base, Florida (latitude 30°30′ North, longitude 86°30′ West);

(c) The entire State of Arizona;

(d) Those portions of California and Nevada south of latitude 37o 10' North, and the areas enclosed within a 322-kilometer (200-mile) radius of the Pacific Missile Test Center, Point Mugu, California (latitude 34°09′ North, longitude 119°11′ West).

(e) In the State of Massachusetts within a 160-kilometer (100-mile) radius around locations at Otis Air Force Base, Massachusetts (latitude 41°45′ North, longitude 70°32′ West).

(f) In the State of California within a 240-kilometer (150-mile) radius around locations at Beale Air Force Base, California (latitude 39°08′ North, longitude 121°26′ West).

(g) In the State of Alaska within a 160-kilometer (100-mile) radius of Clear, Alaska (latitude 64°17′ North, longitude 149°10′ West).

(h) In the State of North Dakota within a 160-kilometer (100-mile) radius of Concrete, North Dakota (latitude 48°43′ North, longitude 97°54′ West).

(i) In the States of Alabama, Georgia and South Carolina within a 200-kilometer (124-mile) radius of Warner Robins Air Force Base, Georgia (latitude 32°38′ North, longitude 83°35′ West).

(j) In the State of Texas within a 200-kilometer (124-mile) radius of Goodfellow Air Force Base, Texas (latitude 31°25′ North, longitude 100°24′ West).

* * * * *

US48 In the band 9000–9200 MHz, the use of the radiolocation service by non-Federal Government licensees may be authorized on the condition that harmful interference is not caused to the aeronautical radionavigation service or to the Federal Government radiolocation service.

* * * * *

US110 In the band 9200–9300 MHz, the use of the radiolocation service by non-Federal Government licensees may be authorized on the condition that harmful interference is not caused to the maritime radionavigation service or to the Federal Government radiolocation service.

* * * * *

US217 In the band 420–450 MHz, pulse-ranging radiolocation systems may be authorized for Federal and non-Federal Government use along the shorelines of the contiguous 48 States and Alaska. In the sub-band 420–435 MHz, spread spectrum radiolocation systems may be authorized for Federal and non-Federal Government use within the contiguous 48 States and Alaska. All stations operating in accordance with this provision shall be secondary to stations operating in accordance with the Table of Frequency Allocations. Authorizations shall be granted on a case-by-case basis; however, operations proposed to be located within the following geographic areas should not expect to be accommodated:

(a) The entire State of New Mexico and Texas west of longitude 104°00′ West;

(b) The entire State of Florida including the Key West area and the areas enclosed within a 322-kilometer (200-mile) radius of Patrick Air Force Base, Florida (latitude 28°21′ North, longitude 80°43′ West), and within a 322-kilometer (200-mile) radius of Eglin Air Force Base, Florida (latitude 30°30′ North, longitude 86°30′ West);

(c) The entire State of Arizona;

(d) Those portions of California and Nevada south of latitude 37°10′ North, and the areas enclosed within a 322-kilometer (200-mile) radius of the Pacific Missile Test Center, Point Mugu, California (latitude 34°09′ North, longitude 119°11′ West).

(e) In the State of Massachusetts within a 160-kilometer (100-mile) radius around locations at Otis Air Force Base, Massachusetts (latitude 41°45′ North, longitude 70°32′ West).

(f) In the State of California within a 240-kilometer (150-mile) radius around locations at Beale Air Force Base, California (latitude 39°08′ North, longitude 121°26′ West).

(g) In the State of Alaska within a 160-kilometer (100-mile) radius of Clear, Alaska (latitude 64°17′ North, longitude 149°10′ West).

(h) In the State of North Dakota within a 160-kilometer (100-mile) radius of Concrete, North Dakota (latitude 48°43′ North, longitude 97°54′ West).

(i) In the States of Alabama, Georgia and South Carolina within a 200-kilometer (124-mile) radius of Warner Robins Air Force Base, Georgia (latitude 32°38′ North, longitude 83°35′ West).

(j) In the State of Texas within a 200-kilometer (124-mile) radius of Goodfellow Air Force Base, Texas (latitude 31°25′ North, longitude 100°24′ West).

All stations operating in accordance with this provision will be secondary to stations operating in accordance with the Table of Frequency Allocations.

* * * * *

US244 The band 136–137 MHz is allocated to the non-Federal Government aeronautical mobile (R) service on a primary basis, and is subject to pertinent international treaties and agreements. The frequencies 136, 136.025, 136.05, 136.075, 136.1, 136.125, 136.15, 136.175, 136.2, 136.225, 136.25, 136.275, 136.3, 136.325, 136.35, 136.375, 136.4, 136.425, 136.45, and 136.475 MHz are available on a shared basis to the Federal Aviation Administration for air traffic control purposes, such as automatic weather observation stations (AWOS), automatic terminal information services (ATIS), flight information services-broadcast (FIS–B), and airport control tower communications.

* * * * *

US246 No station shall be authorized to transmit in the following bands: 73–74.6 MHz, 608–614 MHz, except for medical telemetry equipment[1], 1400–1427 MHz, 1660.5–1668.4 MHz, 2690–2700 MHz, 4990–5000 MHz, 10.68–10.7 GHz, 15.35–15.4 GHz, 23.6–24 GHz, 31.3–31.8 GHz, 50.2–50.4 GHz, 52.6–54.25 GHz, 86–92 GHz, 100–102 GHz, 105–116 GHz, 164–168 GHz, 182–185 GHz, 217–231 GHz.

* * * * *

US262 The use of the band 31.8–32.3 GHz by the space research service (deep space) (space-to-Earth) and of the band 34.2–34.7 GHz by the space research service (deep space) (Earth-to-space) are limited to Goldstone, California.

* * * * *

US276 Except as otherwise provided for herein, use of the band 2360–2385

[1] Medical telemetry equipment shall not cause harmful interference to radio astronomy operations in the band 608–614 MHz and shall be coordinated under the requirements found in 47 CFR 95.1119.

MHz by the mobile service is limited to aeronautical telemetering and associated telecommand operations for flight testing of manned or unmanned aircraft, missiles or major components thereof. The following three frequencies are shared on a co-equal basis by Government and non-Government stations for telemetering and associated telecommand operations of expendable and reusable launch vehicles whether or not such operations involve flight testing: 2364.5 MHz, 2370.5 MHz, and 2382.5 MHz. All other mobile telemetering uses shall be secondary to the above uses.

US277 The band 10.6–10.68 GHz is also allocated on a primary basis to the radio astronomy service. However, the radio astronomy service shall not receive protection from stations in the fixed service which are licensed to operate in the one hundred most populous urbanized areas as defined by the 1990 U.S. Census.

US278 In the bands 22.55–23.55 GHz and 32.3–33 GHz, non-geostationary inter-satellite links may operate on a secondary basis to geostationary inter-satellite links.

* * * * *

US310 In the band 14.896–15.121 GHz, non-Federal Government space stations in the space research service may be authorized on a secondary basis to transmit to Tracking and Data Relay Satellites subject to such conditions as may be applied on a case-by-case basis. Such transmissions shall not cause harmful interference to authorized Federal Government stations. The power flux-density produced by such non-Federal Government stations at the Earth's surface in any 4 kHz band for all conditions and methods of modulation shall not exceed:

-148 dB(W/m^2) for $0° < * \leq 5°$

$-148 + (* - 5)/2$ dB(W/m^2) for $5° < * \leq 25°$

-138 dB(W/m^2) for $25° < * \leq 90°$

where * is the angle of arrival of the radio-frequency wave (degrees above the horizontal). These limits relate to the power flux-density and angles of arrival which would be obtained under free-space propagation conditions.

* * * * *

US316 The band 2900–3000 MHz is also allocated on a primary basis to the meteorological aids service. Operations in this service are limited to Federal Government Next Generation Weather Radar (NEXRAD) systems where accommodation in the 2700–2900 MHz band is not technically practical and are subject to coordination with existing authorized stations.

* * * * *

US320 The use of the bands 137–138 MHz, 148–150.05 MHz, and 400.15–401 MHz by the mobile-satellite service is limited to non-voice, non-geostationary satellite systems and may include satellite links between land earth stations at fixed locations.

* * * * *

US328 The band 2320–2345 MHz is also available for aeronautical telemetering and associated telecommand operations for flight testing of manned or unmanned aircraft, missiles or major components thereof on a secondary basis to the Satellite Digital Audio Radio Service.

* * * * *

US342 In making assignments to stations of other services to which the bands:

13360–13410 kHz,
37.5–38.25 MHz,
322–328.6 MHz,
1330–1400 MHz,
1610.6–1613.8 MHz,
1660–1660.5 MHz,
1668.4–1670 MHz,
3260–3267 MHz,
3332–3339 MHz,
3345.8–3352.5 MHz,
4825–4835 MHz,
4950–4990 MHz,
6650–6675.2 MHz,
14.47–14.5 GHz,
22.01–22.21 GHz,
22.21–22.5 GHz,
22.81–22.86 GHz,
23.07–23.12 GHz,
31.2–31.3 GHz,
36.43–36.5 GHz,
42.5–43.5 GHz,
48.94–49.04 GHz,
93.07–93.27 GHz,
97.88–98.08 GHz,
140.69–140.98 GHz,
144.68–144.98 GHz,
145.45–145.75 GHz,
146.82–147.12 GHz,
150–151 GHz,
174.42–175.02 GHz,
177–177.4 GHz,
178.2–178.6 GHz,
181–181.46 GHz,
186.2–186.6 GHz,
250–251 GHz,
257.5–258 GHz,
261–265 GHz,
262.24–262.76 GHz,
265–275 GHz

are allocated, all practicable steps shall be taken to protect the radio astronomy service from harmful interference. Emissions from spaceborne or airborne stations can be particularly serious sources of interference to the radio astronomy service (see Nos. 4.5 and 4.6 and Article 29 of the ITU Radio Regulations).

* * * * *

USxxx In the band 401–403 MHz, the non-Federal Government Earth exploration-satellite (Earth-to-space) and meteorological-satellite (Earth-to-space) services are limited to earth stations transmitting to Federal Government space stations.

USyyy The band 1164–1189 MHz is also allocated to the radionavigation-satellite service (space-to-Earth, space-to-space) on a primary basis. In this band, stations in the radionavigation-satellite service shall not cause harmful interference to, nor claim protection from, stations of the aeronautical radionavigation service.

USzzz In designing systems for the inter-satellite service in the band 32.3–33 GHz, for the radionavigation service in the band 32–33 GHz, and for the space research service (deep space) (space-to-Earth) in the band 31.8–32.3 GHz, all necessary measures shall be taken to prevent harmful interference between these services, bearing in mind the safety aspects of the radionavigation service.

* * * * *

Non-Federal Government (NG) Footnotes

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NG41 Frequencies in the bands 3700–4200 MHz and 5925–6425 MHz, may also be assigned to stations in the international fixed public and international control services located in Puerto Rico, the U.S. Virgin Islands, and Navassa Island.

* * * * *

Federal Government (G) Footnotes

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G2 In the bands 216–225, 420–450 (except as provided by US217 and G129) 890–902, 928–942, 1300–1400, 2310–2385, 2417–2450, 2700–2900, 5650–5925 and 9000–9200 MHz, the Government radiolocation service is limited to the military services.

* * * * *

G129 Government wind profilers are authorized to operate on a primary basis in the radiolocation service in the frequency band 448–450 MHz with an authorized bandwidth of no more than 2 MHz centered on 449 MHz, subject to the following conditions: (1) Wind profiler locations must be pre-coordinated with the military services to protect fixed military radars; and (2) wind profiler operations shall not cause harmful interference to, nor claim protection from, military mobile radiolocation stations that are engaged in critical national defense operations.

PART 25—SATELLITE COMMUNICATIONS

4. The authority citation for part 25 continues to read as follows:

Authority: 47 U.S.C. 701–744. Interprets or applies Sections 4, 301, 302, 303, 307, 309 and 332 of the Communications Act, as amended, 47 U.S.C. Sections 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

5. Section 25.202 is amended by revising paragraph (a)(3) and adding paragraph (a)(4)(iii) to read as follows:

§ 25.202 Frequencies, frequency tolerance and emission limitations.

(a)(1) * * *

* * * * *

(3) The following frequencies are available for use by the non-voice, non-geostationary mobile-satellite service:

137–138 MHz: space-to-Earth
148–150.05 MHz: Earth-to-space
399.9–400.05 MHz: Earth-to-space
400.15–401 MHz: space-to-Earth

(4) * * *

(iii) The following frequencies are available for use by the L-band Mobile-Satellite Service:

1525–1559 MHz: space-to-Earth
1626.5–1660.5 MHz: Earth-to-space

The use of the frequencies 1544–1545 MHz and 1645.5–1646.5 MHz is limited to distress and safety communications.

* * * * *

PART 87—AVIATION SERVICES

6. The authority citation for part 87 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, 307(e) unless otherwise noted. Interpret or apply 48 Stat. 1064–1068, 1081–1105, as amended; 47 U.S.C. 151–156, 301–609.

7. Section 87.303 is amended by revising paragraph (d)(1) to read as follows:

§ 87.303 Frequencies.

* * * * *

(d)(1) Frequencies in the bands 1435–1525 MHz and 2360–2385 MHz are assigned primarily for telemetry and telecommand operations associated with the flight testing of manned or unmanned aircraft and missiles, or their major components. The bands 1525–1535 MHz and 2310–2360 MHz are also available for these purposes on a secondary basis. Until January 1, 2007, flight test operations in the band 2385–2390 MHz may continue on a primary basis within 160 km of the nine sites listed in 47 CFR 2.106, footnote US363. Permissible uses of these bands include telemetry and telecommand transmissions associated with the launching and reentry into the Earth's atmosphere, as well as any incidental orbiting prior to reentry, of manned or unmanned objects undergoing flight tests. In the band 1435–1530 MHz, the following frequencies are shared with flight telemetry mobile stations: 1444.5, 1453.5, 1501.5, 1515.5, 1524.5, and 1525.5 MHz. In the band 2360–2390 MHz, the following frequencies may be assigned on a co-equal basis for telemetry and associated telecommand operations in fully operational or expendable and re-usable launch vehicles, whether or not such operations involve flight testing: 2364.5, 2370.5 and 2382.5 MHz. In the band 2360–2390 MHz, all other mobile telemetry uses are secondary to the above stated launch vehicle uses.

* * * * *

[FR Doc. 02–30898 Filed 12–9–02; 8:45 am]

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Federal Register

Tuesday,

December 10, 2002

Part VI

Department of the Interior

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Deinandra conjugens (Otay tarplant); Final Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

RIN 1018–AH00

Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Deinandra conjugens* (Otay tarplant)

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), designate critical habitat for *Deinandra conjugens* [= *Hemizonia conjugens*] (Otay tarplant) pursuant to the Endangered Species Act of 1973, as amended (Act). *Deinandra conjugens* was federally listed as threatened (under the name *Hemizonia conjugens*) throughout its range in southwestern California and northwestern Estado de Baja California, Mexico in 1998. The designation includes approximately 2,560 hectares (ha) (6,330 acres (ac)) in San Diego County, California, as critical habitat for *Deinandra conjugens*.

DATES: The effective date of this rule is January 9, 2003.

ADDRESSES: You may inspect the supporting record for this rule at the Carlsbad Fish and Wildlife Office, U.S. Fish and Wildlife Service, 6010 Hidden Valley Road, Carlsbad, CA 92009, by appointment during normal business hours.

FOR FURTHER INFORMATION CONTACT: Jim Bartel, Field Supervisor, Carlsbad Fish and Wildlife Office, at the above address; telephone 760/431–9440, facsimile 760/431–5902. Information regarding this designation is available in alternate formats upon request.

SUPPLEMENTARY INFORMATION:

Background

Deinandra conjugens (Otay tarplant) was known as *Hemizonia conjugens* when it was listed on October 13, 1998 (63 FR 54938). Since then, studies analyzing plant and floral morphology and genetic information prompted Baldwin (1999) to revise the Madiinae (tarplants), a tribe in the Asteraceae (sunflower family), and reclassify several taxa into new or different genera. As a result, *Deinandra conjugens* is now the accepted scientific name for *Hemizonia conjugens*. This taxonomic change does not alter the limits or definition of *Deinandra conjugens*. Because this taxonomic change was published and is generally accepted by the scientific community, we are changing the name of *Hemizonia conjugens* to *Deinandra conjugens* in 50 CFR 17.12 (h), and will use *Deinandra conjugens* in this final rule.

Deinandra conjugens was first described by David D. Keck (1958) as *Hemizonia conjugens* based on a specimen collected by L.R. Abrams in 1903 from river bottom land in the Otay Valley area of San Diego County, California. *Deinandra conjugens* is a glandular, aromatic annual plant in the Asteraceae. It has a branching stem that generally ranges from 5 to 25 centimeters (2 to 10 inches) in height with deep green or gray-green leaves covered with soft, shaggy hairs. The yellow flower heads are composed of 8 to 10 ray flowers and 13 to 21 disk flowers with hairless or sparingly downy corollas (fused petals). The phyllaries (small bracts associated with the flower heads) are ridged and have short-stalked glands and large, stalkless, flat glands near the margins. *Deinandra conjugens* occurs within the range of *Deinandra fasciculata* [=*H. fasciculata*] (fasciculated tarplant) and *Deinandra paniculata* [=*H. paniculata*] (San Diego tarplant). *Deinandra conjugens* can be distinguished from other members of the genus by its ridged phyllaries, black anthers (part of flower that produces pollen), and by the number of disk and ray flowers. The disk and ray flowers each produce different types of seeds (heterocarpy), which has been correlated to differential germination responses (Tanowitz *et al.* 1987).

Most known *Deinandra conjugens* occurrences are closely associated with particular soils, vegetation types, and elevation range. The majority of *Deinandra conjugens* occurrences are associated with clay soils and with grasslands, coastal sage scrub, or maritime succulent scrub. Information from herbarium records at the San Diego Natural History Museum (SDNHM) and data from the California Natural Diversity Database (CNDDB 2002) records indicates that *Deinandra conjugens* has a narrow geographic and elevation range.

The distribution of *Deinandra conjugens* is strongly correlated with clayey soils, subsoils, or lenses (isolated area of clay soil) (Bauder *et al.* 2002). Such soils typically support grasslands, but may support some woody vegetation. Much of the area with clay soils and subsoils within the historical range of *Deinandra conjugens* likely was once vegetated with native grassland, open coastal sage scrub and maritime succulent scrub, which provided suitable habitat for *Deinandra conjugens*. Based on Geographic Information Systems (GIS) analysis, most current and historical *Deinandra conjugens* occurrences are found on clay soils or lenses in one of the following soil series: Diablo; Olivenhain; Linne; Salinas; Huerhuero; Auld; Bosanko; Friant; and San Miguel-Exchequer rocky silt loams (Bauder *et al.* 2002).

The occurrence of *Deinandra conjugens* is also strongly associated with particular vegetation types. The species is found in vegetation communities classified as, but not limited to, grasslands, open coastal sage scrub, maritime succulent scrub, and the margins of some disturbed sites and cultivated fields (CNDDB 2002; Keck 1959; Keil 1993; CNPS 2001; David Hogan, San Diego Biodiversity Project, in litt. 1990; Bruce Baldwin, Jepson Herbarium, pers. comm., 2001; Mark Dodero, RECON, pers. comm., 2001; Scott McMillan, McMillan Biological Consulting, pers. comm., 2001). Plant species common to these vegetation communities include Nassella spp. (needlegrass), *Bloomeria crocea* (common goldenstar), *Dichelostemma pulchella* (blue dicks), *Chlorogalum* spp. (soap plant), *Bromus* spp. (brome grass), *Avena* spp. (oats), *Deinandra fasciculata* (fasciculated tarweed), *Lasthenia californica* (common goldfields), *Artemisia californica* (California sagebrush), *Eriogonum fasciculatum* (flat-top buckwheat), Lotus scoparius (deer weed), *Salvia* spp. (sage), *Mimulus aurantiacus* (bush monkeyflower), *Malacothamnus fasciculatum* (bushmallow), *Malosma laurina* (laurel sumac), *Rhus ovata* (sugar bush), *R. integrifolia* (lemonade berry), *Lycium spp.* (boxthorn), *Euphorbia misera* (cliff spurge), *Simmondsia chinensis* (jojoba), *Opuntia* spp. (prickly pear and cholla cactuses), *Ferocactus viridescens* (coastal barrel cactus), *Ambrosia chenopodiifolia* (San Diego bur sage), and *Dudleya spp.* (live-forevers).

Information acquired since the listing indicates that the historical range for *Deinandra conjugens* in San Diego County, California, is extended from the Mexican border north to Spring Valley and Paradise Valley, a distance of about 24 kilometers (km) (15 miles (mi)), and from Interstate 805 east to Otay Lakes Reservoir, a distance of about 13 km (8 mi) (herbarium records at the SDNHM and CNDDB 2002). Further, based on museum specimens and database records, the elevational range for *Deinandra conjugens* appears to be between 25 and 300 meters (m) (80 and 1,000 feet (ft)).

Typically, *Deinandra conjugens* and other tarplants cannot produce viable seeds without cross pollinating with

other individuals (*i.e.*, are essentially self-incompatible) (Keck 1959; Tanowitz 1982; B. Baldwin, in litt. 2001). Gene flow among plant populations through pollination is important for the long-term survival of self-incompatible species (Ellstrand 1992). Gene flow in *Deinandra conjugens* is essentially achieved through pollen movement among occurrences. Because small occurrences of *Deinandra conjugens* may facilitate greater gene flow, conservation of these may be critical to maintaining genetic diversity in *Deinandra conjugens*. Likely pollinators of *Deinandra conjugens* include, but are not limited to, bee flies (Bombylliidae); hover flies (Syrphidae); digger bees (Apidae); carpenter and cuckoo bees (Anthophoridae); leaf mason and leaf cutting bees (Megachilidae); and metallic bees (Halictidae) (Krombein *et al.* 1979; Bauder *et al.* 2002; M. Dodero, pers. comm., 2001). The following bee species have been documented visiting *Deinandra* species: *Nomia melanderi; Colletes angelicus; Nomadopsis helianthi; Ventralis claypolei ausralior; Anthidiellum notatum robertsoni; Heriades occidentalis; Anthocopa hemizoniae; Ashmeadiella californica californica; Svastra sabinensis nubila; Melissodes tessellata; M. moorei; M. personatella; M. robustior; M. semilupina; M. lupina; M. stearnsi; Anthophora urbana urbana*; and *A. curta curta* (Krombein *et al.* 1979).

Deinandra conjugens fruits are each one-seeded and are likely to be dispersed by small to large-sized mammals and birds based on the sticky nature of the remaining flower parts that are attached to the fruits and the discontinuous distribution of other tarplants (B. Baldwin, *in litt.* 2001; M. Dodero, pers. comm., 2001; Elizabeth Friar, Claremont Graduate University, pers. comm., 2001; Gjon Hazard, (Service), pers. comm., 2001). Potential seed/fruit dispersal organisms known to occur in the region include, but are not limited to, mule deer (*Odocoileus hemionus*), gray fox (*Urocyon cinereoargenteus*), coyote (*Canis latrans*), black-tailed jackrabbit (*Lepus californicus bennettii*), bobcat (*Felis rufus*), striped skunk (*Mephitis mephitis*), opossum (*Didelphis virginiana*), racoon (*Procyon lotor*), and various small land birds.

A seed bank (a reserve of dormant seeds, generally found in the soil) is important for year-to-year and long-term survival (Given 1994, Rice 1989). A seed bank includes all of the seeds in a population and generally covers a larger area than the extent of observable plants seen in a given year. The number and location of standing plants in a population varies annually due to a number of factors, including the amount and timing of rainfall, temperature, soil conditions, and the extent and nature of the seed bank. Large annual fluctuations in the number of standing plants in a given population have been documented. Population size has ranged from 1 to over 5,400 standing plants at a site on northwest Otay Mesa (CNDDB 2002; City of San Diego, *in litt.* 1999), from approximately 100 to 50,000 at a site in Rice Canyon (CNDDB 2002), and from approximately 280,000 to 1.9 million at San Miguel Ranch South (CNDDB 2002; Merkel & Associates, *in litt.* 1999). In any given year, the observable plants in a population are only the portion of the individuals from the seed bank that germinated that year. These annual fluctuations make it look as though a population of annual plants ''moves'' from year to year, when in actuality, a different portion of a population germinates and flowers each year. The spatial distribution of a standing population of annual plants is generally the result of the spatial distribution of the micro-environmental conditions conducive to seed germination and growth of the plants.

Determining the size or magnitude of a given *Deinandra conjugens* population is difficult due to the major fluctuations that have been documented in known populations (CNDDB 2002; Merkel & Associates, in *litt.* 1999). Conditions during some years are better for growth and reproduction of *Deinandra conjugens* in some populations (and even some portions of a population) than during other years. Because the number of standing plants in a given population can vary by orders of magnitude from one year to the next, the number of standing plants observed in a population in any one year does not necessarily indicate the potential magnitude of that population.

Deinandra conjugens has a limited distribution consisting of at least 25 historical populations near Otay Mesa in southern San Diego County and one population in Estado de Baja California, Mexico, near the United States border (CDFG 1994; Roberts 1997; CNDDB 2002; Reiser 1996; herbarium records at the SDNHM; S. Morey, *in litt.* 1994). Three of the 25 historic populations of *Deinandra conjugens* in the United States are considered to be extirpated (CNDDB 2002; D. Hogan, *in litt.* 1990; S. Morey, *in litt.* 1994).

The largest number of *Deinandra conjugens* plants were recorded in 1998 when it was estimated that there were over 2 million individuals for the species as a whole (CNDDB 2002; Merkel & Associates, *in litt.* 1999). However, the number of standing plants from year to year can be highly variable. As testament to this variability, the species was thought to be extinct within its range until its rediscovery in Estado de Baja California, Mexico in 1977 (Tanowitz 1978). Conversely, the largest population (Rancho San Miguel) supported about 1.9 million plants during 1998 when southern California experienced El Nino weather conditions, which resulted in a particularly wet and prolonged growing season (Merkel & Associates, *in litt.* 1999).

By 1998, the five largest populations of *Deinandra conjugens* (Rancho San Miguel, Rice Canyon, Dennery Canyon, Poggi Canyon, and Proctor Valley) were known to support about 98 percent of all reported standing plants (CNDDB 2002; San Diego Gas and Electric 1995; Roberts 1997; Merkel & Associates, *in litt.* 1999; Morey, *in litt.* 1994; City of Chula Vista 1992; Brenda Stone, California Department of Transportation, *in litt.* 1994) with each reportedly containing more than 10,000 standing plants. In 2000, surveys for *Deinandra conjugens* conducted in Johnson Canyon (Helix Environmental Planning, Inc. 2001b) and Rolling Hills Ranch (Helix Environmental Planning, Inc. 2001a), identified new populations estimated to include approximately 480,000 and 28,000 standing plants, respectively. Of the remaining populations, 8 are reported to support from 1,000 to 8,000 plants each; 9 are reported to support fewer than 1,000 plants each; and 3 are considered to be extirpated (CNDDB 2002). All of the above referenced populations occur on Federal, local, and private lands (CNDDB 2002).

Some of the smaller populations of *Deinandra conjugens* are believed to be essential to the survival and conservation of the species because they are strategically located between larger populations and likely facilitate gene flow among them. Gene flow among populations has been demonstrated to reduce local and global extinctions in a number of species (Hanski 1998; Baldwin, *in litt.* 2001). Processes such as mutation, genetic migration, and random genetic drift are known to adversely affect small populations (Barrett and Kohn 1991). Adverse effects from these processes on *Deinandra conjugens* would likely be magnified by its self-incompatibility (Keck 1959; Tanowitz 1982; Baldwin, *in litt.* 2001). Maintaining gene flow among occurrences and between populations is essential to counter the adverse effects from the processes mentioned above,

and to ensure the long-term survival and conservation of this species.

At the time the species was listed in 1998, we estimated that 70 percent of the suitable habitat for this species within its known range had been lost to development or agriculture (63 FR 54938). Since the listing, additional habitat has been lost to development (*e.g.*, urban, commercial, industrial, residential) and agriculture (*e.g.*, grazing, farming).

Deinandra conjugens appears to tolerate mild levels of disturbance such as light grazing (Hogan, *in litt.* 1990; Tanowitz, *in litt.* 1977). Such mild disturbances may result in habitat conducive to germination (Tanowitz, *in litt.* 1977). However, the species is otherwise threatened by urbanization and related activities, intensive agriculture, and the invasion of non-native species, which may result in significant disturbance to populations (63 FR 54938). Because of these threats, we anticipate that intensive long-term monitoring and management may be needed to protect and conserve this species.

At the time the species was listed in 1998, we estimated that about 11,930 ha (30,310 ac) of land with clay soils or clay subsoils were within the general range of *Deinandra conjugens* in San Diego County, California (63 FR 54938). Also at that time, about 4,200 ha (10,600 ac) (about 37 percent) of this area had been urbanized and about 4,155 ha (10,555 ac) (about 37 percent) had been heavily cultivated and grazed (63 FR 54938). Additional areas have been lost to urbanization since this time. New information from herbarium records at the SDNHM indicates that the historical range of *Deinandra conjugens* extended further to the north and northwest. Most of the habitat in this additional area has already been lost to development. Much of the cultivated and grazed lands in this range could be restored to support *Deinandra conjugens,* which can grow in the margins of cultivated fields (S. McMillan, pers. comm., 2001; M. Dodero, pers. comm., 2001). However, most of these lands will likely be unavailable for the species because of proposed urban and agricultural land use (Carlsbad Fish and Wildlife Office GIS database 2002 which includes coverages from San Diego Association of Governments).

Previous Federal Action

On December 15, 1980, we published a Notice of Review (NOR) of plants which included *Deinandra conjugens* as a category 1 candidate taxon (45 FR 82480). Category 1 taxa were those taxa for which substantial information on biological vulnerability and threats are available to support preparation of listing proposals. On November 28, 1983, we published a supplement to the 1980 NOR that treated *Deinandra conjugens* as category 2 candidate taxa (48 FR 53640). Category 2 candidates were taxa for which data in our possession indicated listing was ''possibly appropriate but for which substantial information on biological vulnerability and threats were not known or on file to support preparation of proposed rules'' (48 FR 53640).

On December 14, 1990, we received a petition dated December 5, 1990, from Mr. David Hogan of the San Diego Biodiversity Project, to list *Deinandra conjugens* as endangered. The petition also requested designation of critical habitat. Because *Deinandra conjugens* was included in the Smithsonian Institution's Report of 1975, designated as House Document No. 94–51, that had been accepted as a petition, we regarded Mr. Hogan's petition to list this taxon as a second petition. We responded to the petition by publishing a proposed rule to list *Deinandra conjugens* as endangered on August 9, 1995 (60 FR 40549). On October 13, 1998, we published a final rule listing *Deinandra conjugens* as threatened (63 FR 54938). At that time, we indicated that designation of critical habitat was not prudent.

On July 15, 1999, the California Native Plant Society (CNPS) and Southwest Center for Biological Diversity (SWCBD) filed a lawsuit in U.S. District Court for the Southern District of California, in part, challenging our decision not to designate critical habitat for *Deinandra conjugens* (*California Native Plant Society; et al.* v. *Babbitt, et al.*, 99CV1454 L (S.D.Cal.). On December 21, 2000, we entered into a stipulated settlement agreement with the plaintiffs under which we agreed to reevaluate the prudency determination for *Deinandra conjugens* by May 30, 2001. If we determined that critical habitat was prudent, we were to publish a proposed rule to designate critical habitat by June 5, 2000, with a final determination to be completed by May 30, 2002. On June 1, 2001, we determined that designation of critical habitat was prudent, and on June 13, 2001, we published in the **Federal Register** a proposed rule to designate approximately 2,685 ha (6,630 ac) of land as critical habitat for *Deinandra conjugens* (66 FR 32052). We requested a 6-month extension (until November 30, 2002) to complete the final designation to allow us adequate time to complete an economic analysis, obtain public comment on the economic analysis, and complete the final designation. This extension was agreed to by the plaintiffs and approved by the court on June 2, 2002. On July 10, 2002, we published a notice reopening the public comment period on the proposed rule for an additional 30 days and announcing the availability of the draft economic analysis (67 FR 45696). This final critical habitat designation is consistent with the settlement agreement.

Summary of Comments and Recommendations

In the June 13, 2001, proposed critical habitat designation (66 FR 32052), we requested all interested parties to submit comments on the specifics of the proposal including information related to biological justification, policy, economics, and proposed critical habitat boundaries. The initial 60-day comment period closed on August 13, 2001. The comment period was reopened from July 10, 2002, to August 9, 2002 (67 FR 45969), to allow for additional comments on the proposed designation, and comments on the draft economic analysis of the proposed critical habitat.

We contacted all appropriate State and Federal agencies, county governments, elected officials, and other interested parties and invited them to comment. In addition, on June 13, 2001, we invited public comment through the publication of a legal notice in the San Diego Union-Tribune newspaper in southern California. We provided notification of the draft economic analysis to all interested parties. This was accomplished through telephone calls, letters, and news releases faxed and/or mailed to affected elected officials, media outlets, local jurisdictions, and interest groups. We also posted the proposed rule and draft economic analysis and associated material on our Carlsbad Fish and Wildlife Office internet site following their release on June 13, 2001, and July 10, 2002, respectively.

We received a total of 11 comment letters, from 8 separate parties during the two public comment periods. Comments were received from Federal and local agencies, and private organizations and individuals. No response was received from State agencies. Of these 11 comment letters, 4 were in favor of the designation, and 7 against it. We reviewed all comments received for substantive issues and comments, and new information regarding *Deinandra conjugens.* Similar comments were grouped into three general issues relating specifically to the proposed critical habitat determination

and draft economic analysis on the proposed determination.

Peer Review

We requested four biologists, who have knowledge of *Deinandra conjugens,* to provide peer review of the proposed designation of critical habitat for *Deinandra conjugens.* Two of the four peer reviewers submitted comments on the proposed designation. Both reviewers strongly endorsed the proposal, citing the importance of genetic diversity to the survival of *Deinandra conjugens.* One reviewer supported our inclusion of living seed banks, in areas where plants are not evident every year, and concurred that we fully considered in the proposal the importance of genetic diversity found in major and minor populations.

Comments were either incorporated directly into the final rule or final addendum to the economic analysis or addressed in the following summary.

Issue 1: Biological Justification and Methodology

Comment 1: One commenter expressed concern over eliminating areas with negative survey results from analysis where there may be primary constituent elements and thereby eliminating them from potential inclusion in critical habitat.

Our Response: The definition of critical habitat in section 3(5)(A) of the Act includes ''(i) specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.'' The term ''conservation,'' as defined in section 3(3) of the Act, means ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the Act are no longer necessary'' (*i.e.*, the species is recovered and removed from the List of Endangered and Threatened Species).

As we discussed in our proposed critical habitat for the *Deinandra conjugens*, we identified those areas that currently contain populations or provide habitat components essential to the conservation of *Deinandra conjugens.* We excluded some areas where *Deinandra conjugens* has not been observed historically or recently because we cannot document that these areas are essential for the conservation of the species. However, we proposed for designation those areas that we believe to be essential, that possess core populations, and have unique ecological characteristics.

Comment 2: One commenter expressed concern that the most current and therefore, the best scientific data available for the Rolling Hills Ranch project was not used. The commenter further suggests that the proposed rule underestimates the number of *Deinandra conjugens* individuals located on Rolling Hills Ranch, specifically, that 2000 survey data submitted to the Service in April and July of 2001 should be used to redefine the critical habitat boundaries at Rolling Hills Ranch.

Our Response: As discussed in the proposed rule, we did rely on the most recent data from the 2000 survey season at Rolling Hills Ranch to develop the Unit 1 boundaries of proposed critical habitat for *Deinandra conjugens.* The subject 2000 survey data was provided to the Service in April 2001, prior to the proposal. This data for the most part, corroborated decisions made during the development of the proposed critical habitat rule, and identified new areas of occupancy at Rolling Hills Ranch. Some of these areas within the proposed critical habitat, in which *Deinandra conjugens* was documented for the first time in 2000, have not been included in the final designation for reasons discussed in this rulemaking. The occurrence data and supporting documentation used in the rulemaking are available for inspection at the Carlsbad Fish and Wildlife Office by appointment (please *see* **ADDRESSES** section of this rule).

Comment 3: One commenter questioned the biological justification for proposing critical habitat for *Deinandra conjugens* using a landscape-scale approach when they believed that more precise information is available for use by the Service.

Our Response: We recognize that not every parcel of land within the external boundaries of the critical habitat designation will contain the habitat components essential to the conservation of *Deinandra conjugens.* In the absence of more detailed map information during the preparation of the proposed and final designations, we used a 100–m UTM grid and hardline reserve boundaries to delineate critical habitat.

In developing the proposed rule and this final designation, we made an effort to minimize the inclusion of areas that do not contain the primary constituent elements for *Deinandra conjugens.* However, due to our mapping scale, some areas not essential to the conservation of *Deinandra conjugens* are included within the boundaries of proposed and final critical habitat. These areas, such as existing housing developments, roads, or other developed lands do not provide habitat for *Deinandra conjugens.* Because they do not contain one or more of the primary constituent elements for the species, Federal actions limited to those areas will not trigger a section 7 consultation of the Act, unless they affect the species or primary constituent elements in adjacent critical habitat.

Comment 4: One commenter expressed concern that the proposed critical habitat does not encompass all areas needed to provide for genetic exchange between occurrences of *Deinandra conjugens.* For instance, Map Units 2 and 3 result in genetically isolated areas of critical habitat; pollinators and seed dispersers would not be capable of maintaining genetic exchange among these and other critical habitat areas. Also, Unit 2F, 2G, and 2H, and Unit 3A should be one interconnected unit; there is no scientific justification for segregating these areas into separate polygons.

Our Response: In developing the proposed critical habitat, we evaluated those areas essential to the conservation of *Deinandra conjugens* and that are covered by a legally operative Habitat Conservation Plan (HCP). Those areas believed to be biologically essential, but already covered by a legally operative HCP, were excluded from this designation pursuant to section 4(b)(2) of the Act. Consequently, those areas within the subject critical habitat units containing essential *Deinandra conjugens* habitat within the San Diego County Subarea Plan of the San Diego County Multiple Species Conservation Plan (MSCP) are excluded. These exclusions create the appearance of habitat gaps that could limit genetic exchange. Though some of these gap areas do not contain primary constituent elements, most gap areas include lands conserved under existing HCPs. After evaluating the relative locations of populations, and evaluating their genetic exchange potential, we only designated areas determined to be essential that require special management. Because areas conserved in reserves under existing HCPs receive special management pursuant to those plans, they were not included in proposed or final critical habitat.

Issue 2: Policy and Regulations

Comment 5: One commenter suggested that designating critical habitat for *Deinandra conjugens* on San Miguel Ranch project lands that will become part of the San Diego National Wildlife Refuge (SDNWR) is not adequate to provide the necessary and appropriate levels of assurance to San Miguel Ranch. The commenter explained that San Miguel Ranch, as a third party beneficiary to the MSCP Implementing Agreement, is covered by an existing legally operative HCP that addresses *Deinandra conjugens.* Finally, the commenter suggests that, due to the conservation protections and management measures assured for *Deinandra conjugens* through the SDNWR Annexation Agreement, the benefits of excluding San Miguel Ranch outweigh the benefits of including of San Miguel Ranch in the designation.

Our Response: Pursuant to section 4(b)(2) of the Act, we may exclude any area from designated critical habitat if we believe that the benefits of excluding such lands outweigh the benefits of including those lands in critical habitat, providing that the exclusion would not result in the extinction of the species. We have generally excluded from critical habitat areas within legally operative HCPs that ''cover'' the subject species by protecting, and providing management for, the essential habitat of the species within the plan area. We have used the provisions of section 4(b)(2) of the Act for the exclusion of lands covered by approved HCPs, because we believe that the benefits of excluding them outweigh the benefits of including them.

Prior to annexation by the City of Chula Vista, the San Miguel Ranch project was covered under the County of San Diego's approved and legally operative Subarea HCP. In 2000, that portion of the County of San Diego's incidental take permit that covers San Miguel Ranch was transferred to the City of Chula Vista. Under the County of San Diego Subarea Plan Implementing Agreement, the County and third party beneficiaries, as that term is defined in the Implementing Agreement, are assured that if the critical habitat is designated, they will not be required to provide additional mitigation beyond that imposed on their project in accordance with the Subarea Plan without their consent. Those assurances continue to extend to San Miguel Ranch, to the extent it maintains third party beneficiary status, with the transfer of that portion of the County of San Diego's incidental take permit that covers San Miguel Ranch to the City of Chula Vista in year 2000. The assurance is not affected or diminished by the designation.

Under the Annexation Agreement, Trimark (the project proponent) has limited rights to encroach on certain SDNWR lands and the right to request an encroachment easement on other SDNWR lands. If the Service approves such encroachment, Trimark is required to provide mitigation as described in the Annexation Agreement. The inclusion of SDNWR lands in critical habitat does not conflict with the Annexation Agreement or interfere with any assurances provided to the San Miguel Ranch project under the transferred County permit. While San Miguel Ranch is covered by a legally operative HCP, those lands identified for transfer to the SDNWR under the Annexation Agreement will become federal lands conserved and managed by the Service in accordance with Annexation Agreement and the laws and regulations governing the National Wildlife Refuge System. Therefore the considerations underlying out exclusion of lands within approved HCPs under 4(b)(2) of the Act do not apply here. The Service has not completed a Comprehensive Management Plan and Step-down Refuge Management Plan that adequately addresses management and monitoring of *Deinandra conjugens.* Thus the refuge lands, which we have determined are essential for the conservation of *Deinandra conjugens*, continue to require special management and thus meet the definition of critical habitat under section 3(5)(A) of the Act. Finally, because the SDNWR lands are federal lands, Section 7, which is the primary regulatory benefit of designating lands as critical habitat, will apply to activities carried out on the lands. We are not aware of any facts that indicate that the benefits of excluding the SDNWR lands from critical habitat under section 4(b)(2) of the Act would outweigh the benefits of including them as critical habitat.

Comment 6: Several commenters suggested that the final critical habitat boundary should be consistent with boundaries of the reserves being established under the Chula Vista Subarea Plan of the San Diego County MSCP (*e.g.*, Rolling Hills Ranch and Bella Lago).

Our Response: As previously discussed in this rulemaking, we proposed to designate as critical habitat for *Deinandra conjugens* those lands believed to be essential to the conservation of the species. During the development of the proposal, we took into consideration the most current and best commercial and scientific data available. This information included the conservation management and protections afforded *Deinandra conjugens* under the San Diego County MSCP and the Chula Vista Subarea Plan currently being developed. The boundaries of our proposed critical habitat designation in some areas matched those of the proposed reserve for the Chula Vista Subarea Plan, because in our analysis of the subarea plan, we concluded that these boundaries incorporated areas essential to the conservation of *Deinandra conjugens.* For reasons discussed in the Critical Habitat section of this rulemaking, we reevaluated and ultimately modified the critical habitat boundaries at Rolling Hills Ranch and Bella Lago. The modifications reflect the results of additional analysis of *Deinandra conjugens* habitat within the projects' boundaries and discussions regarding conservation of essential habitat with the project proponents and the outcome of a Section 7 conference opinions on Bella Lago and Rolling Hills Ranch. The reserve boundaries for the Chula Vista subarea plan currently out for review, including Bella Lago and Rolling Hills Ranch, are consistent with this final rule.

Comment 7: One commenter requested that we conduct the analysis necessary to conclude that the City of Chula Vista's proposed MSCP Subarea Plan should be excluded from the critical habitat designation pursuant to section 4(b)(2) of the Act. The commenter asserts that we should withdraw and revise the proposed critical habitat designation to include an analysis and finding that the benefits of excluding the City's plan outweigh the benefits of inclusion.

Our Response: Section 4(b)(2) of the Act allows us to exclude from critical habitat designation areas where the benefits of exclusion outweigh the benefits of designation, provided the exclusion will not result in the extinction of the species. We believe that in most instances the benefits of excluding legally operative HCPs from critical habitat designations will outweigh the benefits of including them. *Deinandra conjugens* is a covered species in the proposed Chula Vista Subarea Plan; however, the Subarea Plan is not yet approved or legally operative. The plan has been released to the public for review and may be revised as a result of comments received by the public. The Service has not conducted a review of the plan under section 7 or section 10 of the Act to determine whether it meets the criteria for issuance of an incidental take permit. Nor has the Service completed

its review of the plan under NEPA. Exclusion of the plan area under section 4(b)(2) of the Act based on a proposed plan that may change and that has not been approved by the Service would be inappropriate.

We anticipate that the Chula Vista Subarea Plan and other future HCPs in the range of *Deinandra conjugens* will include it as a covered species and provide for its long-term conservation. If the Chula Vista Subarea Plan or other HC056that address Deinandra conjugens as a covered species are ultimately approved and legally operative, we may reassess the critical habitat boundaries in light of the approved HCP.

Comment 8: One commenter expressed concern that we did not sufficiently support our decision to reverse our determination that designation of critical habitat for *Deinandra conjugens* is not ''prudent.'' Finally, the commenter requests that we withdraw and reconsider our determination that designation of critical habitat is now prudent.

Our Response: In our final rule listing *Deinandra (= Hemizonia) conjugens* as threatened under the Act (63 FR 549384), we found that designation of critical habitat was not prudent because it occurs primarily on private lands with little or no Federal involvement. As we discuss in the Previous Federal Action section of this final rule, we were challenged on our original ''not prudent'' finding. On December 21, 2000, we agreed to a stipulated settlement that required us to publish a proposal to withdraw the existing ''not prudent'' critical habitat determination and make a new prudency determination. In the Prudency Determination section of the proposed rule, we detailed our reasoning for determining that critical habitat is, in fact, prudent for *Deinandra conjugens.* In general, we concluded that there may be some additional benefits to designating critical habitat, including instances where section 7 consultation would be triggered only if critical habitat is designated, educational or informational benefits to designating critical habitat, and significant occurrences of *Deinandra conjugens* that have come under Federal lands jurisdiction since the time of listing. The publication of our June 13, 2001, proposal and this final rule are in compliance with that determination and the stipulated settlement agreement and subsequent court orders.

Comment 9: One commenter suggested that lands covered by the MSCP (or other HCPs) do not provide adequate protection for long-term conservation of *Deinandra conjugens*; as such, the small disjunct critical habitat areas as currently proposed are inadequate to support the long-term survival of *Deinandra conjugens.*

Our Response: Deinaindra conjugens is a covered species under the City and County of San Diego subarea plans of the MSCP. As discussed later in this rule, Section 10(a)(1)(B) of the Act authorizes the Service to issue to non-Federal entities a permit for the take of endangered and threatened animal species incidental to otherwise lawful activities. An incidental take permit must be supported by an HCP that identifies conservation measures that minimize and mitigate the impacts of take of covered animal species to the maximum extent practicable and that we believe necessary to reduce project-related effects to the extent that they do not appreciably reduce the likelihood of the survival and recovery of the species in the wild. Where an HCP includes sufficient conservation measures to preclude jeopardy for listed plant species, we will also include such species on the incidental take permit in recognition of those conservation benefits even though take of listed plant species is not prohibited under Section 9 of the Act.

In the proposed rule we discussed at length the relative benefits of including or excluding from critical habitat lands covered by a legally operative HCP that includes *Deinandra conjugens* as a covered species (*see* 66 FR 32060–61). In particular we noted that the benefits of including HCP lands in critical habitat are normally small to non-existent because approved HCPs are already designed to ensure the long-term survival of covered species. HCPs typically protect essential habitat in reserves that are managed to protect, restore, and enhance their value as habitat for the species. Moreover, before approving an HCP or issuing an incidental take permit, we complete a section 7 of the Act consultation on the proposed permit and must conclude that the permit will not result in jeopardy to any covered species in the plan area.

The reserves established under the approved MSCP subarea plans include essential populations of *Deinandra.* Those areas we are designating as critical habitat include essential habitat for *Deinandra conjugens* within HCPs that are currently under development, but have not yet been approved, and other essential habitat outside of approved HCPs. The critical habitat designation provides connectivity among *Deinandra conjugens* populations protected within reserves established under approved subarea plans.

Comment 10: One commenter concluded that all lands containing the species' primary constituent elements are essential to the conservation of the species.

Our Response: By definition (see sections 3(5)(A) and 3(5)(C) of the Act), essential critical habitat generally describes a subset of the area potentially containing primary constituent elements for a species. As discussed in the methods section of the proposed and this final rule, to determine areas essential for the conservation of *Deinandra conjugens*, we used the best scientific and commercial data available pertaining to known habitat requirements of the species. Areas designated as critical habitat for *Deinandra conjugens* are within the current known range of the species and contain one or more primary constituent elements essential for the conservation of the species. In our proposed and final designation of critical habitat, we selected essential habitat areas based on occurrence data, soils, vegetation, elevation, topography, and current land uses. During this analysis, it was determined that some areas containing one or more primary constituent elements did not represent suitable habitat or were otherwise not essential for the conservation of the species.

Issue 3: Economic Issues

Comment 11: One commenter expressed concern that the deferral of economic and other relevant impacts in preparing the proposed rule violates the requirements of the Act. The commenter acknowledges our position from previous critical habitat designations pursuant to the specific implementing regulations (50 CFR 424.19) that it is not required by law to conduct an economic analysis at the time critical habitat is initially proposed. The commenter asserts, however, that the implementing regulations contradict the Act (16 U.S.C. 1533(b)(2)) (*i.e.*, section 4(b)(2) of the Act), whereas the statute calls for designation of critical habitat after taking into consideration economic impacts of specifying any particular area as critical habitat. The commenter suggests that we ignored economic effects and other related effects until after critical habitat boundaries are established. Conversely, the commenter asks how the proposed rule text can suggest that ''the designation of critical habitat is not likely to result in a significant regulatory burden above that already in place due to the presence of listed species,'' if an economic analysis has not yet been conducted.

Our Response: Pursuant to section 4(b)(2) of the Act, we designate critical habitat and make revisions thereto on the basis of the best available scientific data and after taking into consideration economic impacts and other relevant impacts associated with the designation. We published our proposed designation in the **Federal Register** on June 13, 2001 (66 FR 32052). At that time, our Division of Economics and their consultants, Industrial Economics, Inc., initiated the draft economic analysis. The draft economic analysis was made available for public comment and review beginning on July 10, 2002 (67 FR 45696). Following a 30-day public comment period on the proposal and draft economic analysis, a final addendum to the economic analysis was completed which takes into consideration public comments. Both the draft economic analysis and the addendum were used in the development of this final designation of critical habitat for *Deinandra conjugens.* Please refer to the Economic Analysis section of this final rule for a more detailed discussion of these documents. Therefore, our designation of critical habitat does take into consideration economic and other impacts considered during the rulemaking process.

As stated earlier in this final rule, Federal agencies already consult with us on activities in areas currently occupied by *Deinandra conjugens*, or if the species may be affected by the action, to ensure that their actions do not jeopardize the continued existence of the species. Since *Deinandra conjugens* critical habitat is considered occupied by either standing plants or seed bank, and we already consult on other listed species, including the coastal California gnatcatcher (*Polioptila californica californica*) and the Quino checkerspot butterfly (*Euphydryas editha quino*), that have designated critical habitats that overlap with *Deinandra conjugens*, we do not anticipate a significant additional regulatory burden will result from the designation of critical habitat for Deinandra conjugens. We made our anticipatory statement that the designation of critical habitat was not likely to result in a significantly higher regulatory burden based on the information available at the time. The economic analysis has demonstrated that our initial assumption was correct.

Comment 12: One commenter suggested that the Service failed to take into account the cumulative economic impacts of all the existing and proposed critical habitat designations. The commenter believes that the Act and relevant Federal cases (*New Mexico Cattle Growers* v. *U.S. Fish and Wildlife Service*, 248 F.3d 1277, 1281–1285) require this type of analysis and requests that the Service explain the factual and legal basis for its decision that other pending and final critical habitat designations can be considered separately.

Our Response: The commenter appears to be using the term ''cumulative impacts'' in the context of the National Environmental Policy Act (NEPA), which does not apply to this rulemaking. See the National Environmental Policy Act section of this rule. We are required to consider only the effect of the proposed government action, which in this case is the designation of critical habitat for *Deinandra conjugens.* The appropriate baseline for use in this analysis is the regulatory environment without this regulation. While, consistent with *New Mexico Cattlegrowers* v. *U.S. Fish and Wildlife Service*, we considered the costs and benefits of both the listing of Deinandra conjugens and the designation of critical habitat for this species in establishing an upward estimate of economic effects, and then attempted to identify and measure the additional costs and benefits associated with this designation of critical habitat, when critical habitat for other species has already been designated, it is properly considered part of the baseline for this analysis. Proposed and future critical habitat designations for other species in the area will be part of separate rulemakings, and consequently, their economic effects will be considered separately.

Comment 13: One commenter suggested that the critical habitat designation triggers ''No Surprises'' regulations due to *Deinandra conjugens*'' coverage in the MSCP, and that we should pay all the costs associated with the designation.

Our Response: Permittees and third party beneficiaries, as the term is defined under various MSCP Subarea Plan Implementing Agreements, are assured that in the event critical habitat is designated for a covered species, such as *Deinandra conjugens*, within the boundaries of approved subarea plans, they will not be required to provide additional mitigation consisting of money, land or restrictions on land, beyond the level of mitigation imposed on their projects in accordance with the subarea plans without their consent. The designation of critical habitat for *Deinandra conjugens* does not undermine, compromise or affect that assurance or trigger the No Surprises regulation.

Comment 14: One commenter expressed concern that the critical habitat methodology fails to meet the standards of the Act as held by the 10th Circuit Court [*New Mexico Cattle Growers Ass'n* v. *U.S.F.W.S.*, 248 F.3rd 1277 (10th Cir. 2001)] in that the economic analysis cannot be separated from the action listing the species.

Our Response: In *New Mexico Cattle Growers Ass'n* v. *U.S.F.W.S.*, 248 F.3d 1277 (10th Cir. 2001) the 10th Circuit recently held that the baseline approach to economic analysis of critical habitat designations that was used by the Service for the southwestern willow flycatcher designation was ''not in accord with the language or intent of the ESA.'' In particular, the court was concerned that the Service had failed to analyze any economic impact that would result from the designation, because it took the position in the economic analysis that there was no economic impact from critical habitat that was incremental to, rather than merely co-extensive with, the economic impact of listing the species. The Service had therefore assigned all of the possible impacts of designation to the listing of the species, without acknowledging any uncertainty in this conclusion or considering such potential impacts as transaction costs, reinitiations, or indirect costs. The court rejected the baseline approach incorporated in that designation, concluding that, by obviating the need to perform any analysis of economic impacts, such an approach rendered the economic analysis requirement meaningless.

In this analysis, the Service addresses the 10th Circuit's concern that we give meaning to the ESA's requirement of considering the economic impacts of designation by acknowledging the uncertainty of assigning certain post-designation economic impacts (particularly section 7 consultations) as having resulted from either the listing or the designation. We also understand that the public wants to know more about the kinds of costs consultations impose and frequently believe that designation could require additional project modifications.

Therefore, this analysis incorporates two baselines. One addresses the impacts of critical habitat designation that may be attributable co-extensively to the listing of the species. Because of the potential uncertainty about the benefits and economic costs resulting from critical habitat designations, we believe it is reasonable to estimate the upper bounds of the cost of project modifications based on the benefits and economic costs of project modifications that would be required due to consultation under the jeopardy

standard. It is important to note that the inclusion of impacts attributable co-extensively to the listing does not convert the economic analysis into a tool to be considered in the context of a listing decision. As the court reaffirmed in the southwestern willow flycatcher decision, ''the ESA clearly bars economic considerations from having a seat at the table when the listing determination is being made.''

The other baseline, the lower boundary baseline, will be a more traditional rulemaking baseline. It will attempt to provide the Service's best analysis of which of the effects of future consultations actually result from the regulatory action under review—*i.e.*, the critical habitat designation. These costs will in most cases be the costs of additional consultations, reinitiated consultations, and additional project modifications that would not have been required under the jeopardy standard alone as well as costs resulting from uncertainty and perception impacts on markets. The final addendum to this analysis provides further information concerning the baseline and potential incremental effects of the designation of critical habitat for *Deinandra conjugens.*

Comment 15: One commenter suggested that the economic analysis cannot rely on overlap between Federal laws and State and local regulations. The analysis of State-induced impacts is inappropriate since they are independent of Federal action, and could be nullified by actions of the State legislature or voters.

Our Response: In the case of the MSCP, an analysis of State-induced impacts is appropriate since the NCCP program is directly tied to the HCP through the terms of the MSCP Implementing Agreement. Though economic impacts associated with State and local actions were addressed in the draft economic analysis, the document clearly states that all impacts are assumed to be solely attributable to the Federal listing. Please refer to the draft economic analysis for further discussion of this issue.

Comment 16: One commenter expressed concern that the preface of the economic analysis acknowledges that the public believes that critical habitat designation could require additional project modifications, while the document later suggests in several instances that further modifications are not expected. The commenter suggests that the economic analysis provide further defense of this position and discuss specific regulation and policy in making the case.

Our Response: The statement in the preface of the economic analysis addresses public perception (also see the Stigma Effects section of the economic analysis) that critical habitat designation will present additional regulatory burden. The economic analysis effectively addresses these concerns by addressing the likelihood of an economic effect from the designation above and beyond the listing. The analysis correctly asserts that *Deinandra conjugens* critical habitat is occupied by either standing plants or seed bank, and correctly concludes that no additional project modifications are likely from the designation that would not have already been recommended to address the listed species and its habitat.

Comment 17: One commenter indicated that *Dudleya variegata* (variegated Dudleya) is not a State-listed species, as stated in the draft economic analysis. The commenter suggested that this statement leads to significant adjustments in the cost impacts within the economic analysis that should be corrected.

Our Response: Dudleya variegata is not a State-listed species. The species status has been addressed in the final addendum of the economic analysis. However, in this case, *Dudleya variegata* is a covered species under the MSCP Plan, and as such is treated similarly to both federally and State-listed species under the MSCP Plan. Therefore, adjustments in costs were correctly made to recognize the cost of measures intended to mitigate the effects of covered activities on *Dudleya variegata* under the MSCP Plan.

Comment 18: One commenter suggests that our ''additional benefits'' and ''education/informational benefits'' determinations were not substantiated, are arbitrary and capricious, and are based on litigation.

Our Response: In the Prudency Determination section of the proposed rule, we detailed our reasoning for determining that critical habitat is, in fact, prudent for *Deinandra conjugens*. In general, we concluded that there may be some additional benefits to designating critical habitat, including instances where section 7 consultation would be triggered only if critical habitat is designated, educational or informational benefits to designating critical habitat, and significant occurrences of *Deinandra conjugens* on Federal lands recorded since the time of listing.

Although we cannot substantiate in the present something that may occur in the future, critical habitat may provide some educational benefit by formally identifying areas within the range of *Deinandra conjugens* essential for the conservation of the species. The public and the Service would, therefore, benefit from the designation while planning any future recovery efforts for the species. Furthermore, three significant occurrences of *Deinandra conjugens* now occur on Federal lands, which were not known at the time of listing, substantiating the need to designate critical habitat on those lands. The benefit of the designation, in this case, is the added protections afforded by the relatively higher threshold of responsibility required of Federal agencies under section 7 the Act.

While we have acknowledged the potential for society to experience such benefits in our economic analyses for critical habitat rulemakings, our ability to actually measure these benefits in any meaningful way is difficult and imprecise at best. However, we will continue to explore ways that will allow us to provide more quantitative descriptions of the potential benefits associated with a critical habitat designation.

Summary of Changes From the Proposed Rule

In the development of our final designation of critical habitat for *Deinandra conjugens*, we considered new information provided to our office after the proposed designation was published. We made changes from our proposal based on a review of public comments received on the proposed designation and the draft economic analysis on the proposed designation and a re-evaluation of lands proposed as critical habitat. The refinements to the amount of land determined to be essential for *Deinandra conjugens* and incorporated into this final designation resulted in a net reduction of approximately 120 ha (300 ac) of lands. The primary changes for this final designation include the removal of 120 ha (300 ac) of lands from the development areas of the Eastlake Woods, Bella Lago and Rolling Hills Ranch residential developments, Sweetwater County Park Summit Site, and Sweetwater Authority lands, because these lands were determined not to be essential for the conservation of *Deinandra conjugens*.

In our proposed rule we identified certain lands within the proposed development projects of Bella Lago, Eastlake Woods, and Rolling Hills Ranch (all in the City of Chula Vista) that we believed contained primary constituent elements and standing plants or seed bank for *Deinandra conjugens* and included these as proposed critical habitat. Since the time of our proposal, we have reevaluated these areas and conclude that some of

these lands do not contain the primary constituent elements for *Deinandra conjugens* and standing plants or seed bank, and are not essential for the long-term conservation of this species.

At the time of our proposed rule, rare plant surveys had not yet been completed on portions of the Bella Lago project site. Consequently, our boundaries for proposed critical habitat were based on general information concerning soils and vegetation. Surveys have since been completed and we have more current and definitive information relating to the location of *Deinandra conjugens* and the primary constituent elements essential to its conservation on the proposed project site. We have refined the boundaries of critical habitat in the southern portion of the project site to exclude approximately 5 ha (10 ac) that we now know do not contain the plant or its primary constituent elements. The remaining patches of land within the southern portion of the project site that contain occupied habitat and primary constituent elements are considered to be essential to the conservation of the species and are being designated as critical habitat.

Approximately 20 ha (55 ac) of the Eastlake Woods project site have also been deleted from the final critical habitat rule. Following the publication of the proposed rule, we completed a consultation with regard to *Dienandra conjugens* (and a conference with respect its proposed critical habitat) pursuant to section 7 of the Act with the U.S. Army Corps of Engineers (Corps) for the Eastlake Woods project, a residential development (1–6–02–FW–1989.2) in which we closely examined and evaluated the tarplant and its habitat on the project site. Based on the more thorough review of proposed critical habitat under the section 7 consultation for the Eastlake Woods neighborhood project, most of the areas being excluded as critical habitat for *Deinandra conjugens* are not habitat for this species, do not contain any known occurrences for this plant based on two years of surveys during the flowering season, and do not contain the primary constituent elements for this plant because of the extensive history of agricultural use. As a result of the consultation and conference opinion, an area of approximately 5 ha (10 ac) that had been proposed as critical habitat has been preserved, is being restored, and will receive long-term monitoring and management. This area is being retained as critical habitat. As a result of the consultation, 5 ha (10 ac) (an area that contained approximately 2,160 individual *Deinandra conjugens* in 2001) will be preserved onsite. The preserved area has broader conservation value because it adjoins areas conserved under the San Diego MSCP and the proposed Chula Vista Subarea Plan. Within the preservation area, approximately 2 ha (5 ac) will be restored to support approximately 870 plants. The entire area will be preserved and managed in perpetuity. These lands contain the plant and its primary constituent elements, are contiguous with critical habitat designated for the species on adjacent lands, and are considered to be essential to the conservation of the species. In our conference opinion we determined that development of the remaining 20 ha (55 acres) proposed as critical habitat for *Dienandra conjugens* would not result in adverse modification of this critical habitat unit. Approximately 20 ha (55 acres) were determined upon closer analysis not to be occupied by *Dienandra conjugens* nor contain primary constituent elements of its habitat. The inclusion of such areas in the proposed rule resulted from use of the 100-m UTM grid system which, as explained later in the rule, is not a fine enough scale to eliminate all areas that are not occupied or that do not contain primary constituent elements, and therefore do not meet the definition of critical habitat under 3(5)(A). Use of the 100-m grid resulted in the inclusion of lands under agricultural use for many years that were not known to be occupied by this species and that do not contain the primary constituent elements. Through the consultation and conference opinion we were able to identify these lands, and we concluded that development of the lands would not result in the adverse modification of proposed critical habitat. Thus, the areas excluded from critical habitat were not essential for the conservation for the species because the majority of these lands were not habitat for *Deinandra conjugens*, do not contain long-term conservation value, and/or do not contain primary constituent elements. The approximately 1 ha (2 ac) of remaining lands within the Eastlake Woods project did contain *Dienandra conjugens* and primary constituent elements. However, because the distribution of *Dienandra conjugens* in those areas was limited and restricted by active agricultural activity, we concluded they were not necessary for the conservation of this species and development of the lands would not result in adverse modification of proposed critical habitat. Upon the completion of the Section 7 consultation and conference opinions, the project proponent graded the 20 ha (55 acres) described above in preparation for development.

Portions of the Rolling Hills Ranch project site also have been excluded from final critical habitat. In April of 2001, prior to the publication of the proposed critical habitat rule, we were provided with current survey information for the Rolling Hills Ranch development project that indicated the presence of approximately 28,000 standing *Deinandra conjugens* plants scattered throughout the site. Following the publication of the proposed rule, we further evaluated this new occurrence information in the context of: (1) Other known occurrences throughout the range of the species; (2) the consultation on the Rolling Hills Ranch development project; and (3) the protections and conservation measures currently established in the approved San Diego MSCP and those measures proposed in the draft Chula Vista Subarea Plan for *Deinandra conjugens*.

Following this evaluation, we concluded that approximately 85 ha (215 ac) within the Rolling Hills project site are not essential to the conservation of *Deinandra conjugens*. At the time of the proposed rule, we used the 100-m UTM grid to identify critical habitat on portions of Rolling Hills Ranch, which resulted in designation of some areas that are not occupied by the species or that do not contain primary constituent. For the final rule, we have used the approved boundaries specific to the Rolling Hills Ranch project, thereby eliminating some areas that do not contain the plants or primary constituent elements for the species.

Furthermore, approximately 70 percent of the lands on Rolling Hills Ranch that have been deleted from the final rule on Rolling Hills Ranch are not known to contain standing occurrences of *Deinandra conjugens*. These lands may contain primary constituent elements and it is possible that they contain seed bank; however, the excluded areas are not known to support standing occurences of the species. Without better information that would substantiate the importance of these lands to the species, their conservation value cannot be determined. These lands are, therefore, not considered essential for the conservation of the species, and have been deleted from the final critical habitat rule.

Approximately 30 percent of the lands deleted from the final rule are considered to be occupied. We recently completed a consultation pursuant to section 7 of the Act with the Corps (1–6–01–F–1071.4), following an agreement

reached among the Service, the California Department of Fish and Game, and the project proponent to modify the boundaries of proposed development, MSCP reserve, and MSCP Neutral areas on the project site. MSCP Neutral areas are those lands being conserved within the MSCP planning area, in this case by Rolling Hills Ranch, that are not covered lands under the MSCP. Pursuant to that agreement, project lands containing the most important occurrences of *Deinandra conjugens* and its primary constituent elements are designated as MSCP reserve and MSCP Neutral areas and will be protected, monitored, and managed for *Deinandra conjugens*. When identifying the areas set aside for conservation, we focused on conserving those occurrences that we believed to have the greatest chance of persistence within the project area. We concluded in our biological opinion that the loss of approximately 5 ha (10 ac) of occupied habitat would not result in the destruction or adverse modification of proposed critical habitat for the following reasons. First, the areas conserved would receive a higher level of management (*e.g.*, invasive species control, monitoring and adaptive management of populations, etc.) compared to the no-project scenario. Without the project, the site was being used for agriculture and grazing, activities that would not be subject to regulations under the Act because of the absence of a federal nexus. As a result, there was a higher chance that the plant occurrences onsite would be degraded. The higher level of management within the conserved lands would ensure the long-term viability of the population in the area, thereby reducing the extent of land necessary to provide for the conservation of the species onsite. Second, the preserve design for Rolling Hills Ranch compliments regional conservation for *Deinandra conjugens* under the MSCP. As a result of this regional conservation planning, lands essential to the conservation of this species are being conserved and managed or are targeted for conservation and management. Finally, from a regional perspective, protection of all occupied habitat on the Rolling Hills Ranch project is not essential for the conservation of *Deinandra conjugens*; the limited loss of occupied habitat for this species at Rolling Hills Ranch will not preclude the recovery of this plant. We were able to utilize digital map data provided by Rolling Hills Ranch to refine critical habitat on the project site based on the modified boundary agreement. These lands to be protected on site contain the plant and its primary constituent elements, are contiguous with critical habitat designated for the species on adjacent lands, and are essential to the conservation of the species.

In addition, we refined the critical habitat boundaries for the final rule to exclude 5 ha (10 ac) of developed areas within the Sweetwater County Park Summit Site, and 5 ha (10 ac) of developed areas within Sweetwater Authority lands. These lands do not contain primary constituent elements for *Deinandra conjugens*, and are, therefore, not considered essential to the conservation of the species.

Also, the proposed rule indicated that 27,000 standing plants were located on Rolling Hills Ranch in year 2000. This number has been changed to 28,000 to correct a rounding error. Finally, the proposed rule indicated that critical habitat unit 2 encompasses approximately 521 acres, which we rounded to 520 acres for the final rule. No change in actual acreage for unit 2 was made in the final rule.

Finally, minor changes to the definition of primary constituent elements for *Deinandra conjugens* were also made to eliminate redundancy.

Critical Habitat

Critical habitat is defined in section 3 of the Endangered Species Act (Act), as amended, as—(i) the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species. ''Conservation'' means the use of all methods and procedures that are necessary to bring an endangered species or a threatened species to the point at which listing under the Act is no longer necessary.

Critical habitat receives protection under section 7 of the Act through the prohibition against destruction or adverse modification of habitat with regard to actions carried out, funded, permitted, or authorized by a Federal agency. Section 7 of the Act also requires conference opinions on Federal actions that are likely to result in the destruction or adverse modification of proposed critical habitat. Aside from the added protection that may be provided under section 7, including adverse modification of habitat, the Act does not provide other forms of regulatory protection to lands designated as critical habitat. Further, consultation under section 7 of the Act does apply to activities on private or other non-Federal lands whenever a Federal nexus occurs.

In order to be included in a critical habitat designation, the habitat must be ''essential to the conservation of the species.'' Critical habitat designations identify, to the extent known and using the best scientific and commercial data available, habitat areas that are essential to the conservation of the species. Our regulations (50 CFR 424.12(e)) also state that, ''The Secretary shall designate as critical habitat areas outside the geographic area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species.''

Section 4(b)(2) of the Act requires that we take into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. We may exclude areas from critical habitat designation when the benefits of exclusion outweigh the benefits of including the areas within critical habitat, provided the exclusion will not result in extinction of the species.

Within the geographic area occupied by the species, we will designate only areas currently known to be essential. Essential areas should already have the features and habitat characteristics that are necessary to sustain the species. We will not speculate about what areas might be found to be essential if better information became available, or what areas may become essential over time. Within the geographic area occupied by the species, we will not designate areas that do not now have the primary constituent elements, as defined at 50 CFR 424.12(b), that provide essential life-cycle needs of the species.

Our Policy on Information Standards Under the Endangered Species Act, published in the **Federal Register** on July 1, 1994 (59 FR 34271), provides criteria, establishes procedures, and provides guidance to ensure that our decisions represent the best scientific and commercial data available. It requires us, to the extent consistent with the Act, and with the use of the best scientific and commercial data available, to use primary and original sources of information as the basis for recommendations to designate critical habitat. When determining which areas are critical habitat, a primary source of information should, at a minimum, be the listing package for the species.

Additional information may be obtained from a recovery plan, articles in peer-reviewed journals, conservation plans developed by States and counties, scientific status surveys and studies, biological assessments, unpublished materials, and expert opinion.

Section 4 of the Act requires that we designate critical habitat based on what we know at the time of the designation. Habitat is often dynamic, and species may move from one area to another over time. Furthermore, we recognize that designation of critical habitat may not include all of the habitat areas that may eventually be determined to be necessary for the recovery of the species. For these reasons, all should understand that critical habitat designations do not signal that habitat outside the designation is unimportant or may not be required for recovery. Areas outside the critical habitat designation will continue to be subject to conservation actions that may be implemented under section 7(a)(1) and to the regulatory protections afforded by the section 7(a)(2) jeopardy standard and the applicable prohibitions of section 9 of the Act, as determined on the basis of the best available information at the time of the action. Federally funded or assisted projects affecting listed species outside their designated critical habitat areas may still result in jeopardy findings in some cases. Similarly, critical habitat designations made on the basis of the best available information at the time of designation should not control the direction and substance of future recovery plans, habitat conservation plans, or other species conservation planning efforts if new information available to these planning efforts calls for a different outcome.

Methods

In determining areas that are essential to conserve *Deinandra conjugens*, we used the best scientific and commercial data available. We reviewed available information that pertains to the habitat requirements of this species, including data from research and survey observations published in peer-reviewed articles; regional GIS coverages (*e.g.*, soils, known locations, vegetation, land ownership, and HCP boundaries); information from herbarium collections such as those from SDNHM; data from the CNDDB (2002); data collected from project-specific and other miscellaneous reports submitted to us; additional data from the San Diego County Multiple Species Conservation Program (MSCP), such as information from Subarea or draft Subarea HCPs (Subarea Plans) (*e.g.*, City of San Diego, County of San Diego, City of La Mesa, and City of Chula Vista); information in the San Diego Gas and Electric HCP (1995); and a habitat evaluation model for the Otay Mesa Generating Project.

Primary Constituent Elements

In accordance with section 3(5)(A)(i) of the Act and regulations at 50 CFR 424.12, in determining which areas to designate as critical habitat, we must consider those physical and biological features (primary constituent elements) that are essential to the conservation of the species, and that may require special management considerations or protection. These include, but are not limited to: space for individual and population growth, and for normal behavior; food, water, air, light, minerals, or other nutritional or physiological requirements; cover or shelter; sites for pollination and germination or seed dispersal; and habitats that are protected from disturbance or are representative of the historical geographical and ecological distributions of a species. All areas designated as critical habitat for *Deinandra conjugens* are within the currently known range and contain one or more of these physical or biological features (primary constituent elements) essential for the conservation of the species.

The designated critical habitat is designed to provide sufficient habitat to maintain self-sustaining populations of *Deinandra conjugens* throughout its range, and provide those habitat components essential for the conservation of the species. Habitat components that are essential for *Deinandra conjugens* are found in vegetation communities classified as, but not limited to, grasslands, coastal sage scrub, or maritime succulent scrub in southwestern San Diego County, California. These habitat components provide for: (1) Individual and population growth, including habitat for germination, pollination, reproduction, pollen and seed dispersal, and seed dormancy; (2) areas that allow gene flow and provide connectivity or linkage between or within larger populations, including open spaces and disturbed areas that in some instances may also contain introduced plant species; (3) areas that provide basic requirements for growth such as water, light, and minerals; and (4) areas that support pollinators and seed dispersal organisms.

The long-term survival and conservation of *Deinandra conjugens* is dependent upon a number of factors, including the protection and management of existing populations, the protection of inter-population occurrences, the maintenance of normal ecological functions within populations, the preservation of the connectivity between populations to allow natural gene flow through pollinator activity and seed dispersal mechanisms, the protection and maintenance of habitat for the survival of pollinators and seed dispersal agents, and the preservation of suitable micro-habitat that could be recolonized and allow a population to survive a catastrophic event. The small, fragmented range of this species, coupled with its breeding system (*i.e.*, its self-incompatibility and annual habit), makes it especially vulnerable to natural and anthropogenic effects including disturbance from human and agricultural activities; spread of non-native species; and nearby use of herbicides, pesticides, and other contaminants (63 FR 54938; B. Baldwin, pers. comm., 2001; S. McMillan, pers. comm., 2001).

Based on our current knowledge of this species, the primary constituent elements of *Deinandra conjugens* critical habitat consist of, but are not limited to, soils with a high clay content (generally greater than 25 percent) (or clay intrusions or lenses) that are associated with grasslands, open coastal sage scrub, or maritime succulent scrub communities between 25 m (80 ft) and 300 m (1000 ft) elevation (Bauder *et al.* 2002, CNDDB 2002). These plant communities contain natural openings that provide habitat for the *Deinandra conjugens* life-cycle, and pollen and seed dispersal agents (M. Elvin, pers. obs., 2001).

Criteria Used To Identify Critical Habitat

In our final delineation of critical habitat for *Deinandra conjugens*, we selected areas essential to the conservation of the species from within its known historical range. We used data from documented occurrences, various GIS layers, and recent aerial photography. These data include *Deinandra conjugens* locations, soils, vegetation, elevation, topography, and current land uses.

We began by using the GIS layers to identify areas of suitable habitat within the geographic distribution of this species. We selected areas with appropriate soils and vegetation that are limited to the elevational range of the species within its known distribution. We then selected soils and plant communities that overlapped known *Deinandra conjugens* occurrences. Areas occupied by *Deinandra conjugens* cannot be determined accurately either

by cursory field examination or by the limited data from historical observations. The entire population of an annual plant (which includes all of the seeds in the subterranean seed bank and the observable plants above ground) is not visible at any one time. The entire seed bank does not germinate at once, and the visible population of plants rarely reflects the size or distribution of the seed bank. There may be no standing plants in an area occupied by the species for a year or even a span of several years, until local climatic and other conditions are suitable for seed germination. The size and distribution of the standing plant population may move, shrink, or grow as conditions change, without a similar change in the distribution of the seed bank. Consequently, the results of *Deinandra conjugens* population mapping efforts have been variable, depending both on the scale of the mapping and the year in which the surveys were conducted (documented examples include estimated records of standing plants ranging from one to more than 5,400 plants for one population (CNDDB 2002; City of San Diego, *in litt.* 1999), from about 100 to 50,000 in another (CNDDB 2002), and from 280,000 to 1.9 million plants in another population (CNDDB 2002)). In the case of the related *Holocarpha macradenia* (Santa Cruz tarplant), seemingly unoccupied habitat has been determined to contain a viable seed bank where standing plants have not been seen in over 7 years (Bainbridge, *in litt.* 1999). By overlapping known occurences of *Deinandra conjugens* with appropriate soil types, elevations, and other habitat characteristics, we have included what we believe is the likely distribution of the seed bank around these occurences of *Deinandra conjugens*.

We then eliminated areas that did not contain both appropriate soils and appropriate vegetation such as, but not limited to, currently used agriculture fields, housing developments, and open water. Next, we eliminated all areas above 300 m (1,000 ft) elevation, the upper limit of the known distribution of *Deinandra conjugens*, based on herbarium records. We also compared the remaining areas of suitable *Deinandra conjugens* habitat with recent project information and aerial photography so as not to include areas that have recently been developed.

We conducted this analysis to facilitate delineation of suitable habitat containing the primary constituent elements. The long-term survival and conservation of *Deinandra conjugens* is dependent upon the protection and management of existing essential populations, and the associated seed bank, and the maintenance of ecological functions within and between these populations, including connectivity within and among populations to allow effective pollinator activity and seed dispersal.

The boundaries of designated critical habitat for *Deinandra conjugens*, shown on the attached maps and defined in the legal description, are based on a 100-meter Universal Transverse Mercator (UTM) grid, boundaries that have been legally described for the City of Chula Vista's draft preserve design for their draft MSCP Subarea Plan and the County of San Diego's major and minor amendment areas for their MSCP Subarea Plan, Sweetwater Authority lands (a water district in San Diego County), Otay Water District lands, Federal lands (*e.g.*, Immigration and Naturalization Service (INS), San Diego National Wildlife Refuge lands (SDNWR)), and Trust for Public Lands property. This grid was overlaid on those areas determined to be essential and indicated by the *Deinandra conjugens* habitat analysis where we did not have legal descriptions for boundaries.

As we discuss in detail below (*see* ''Relationship To Habitat Conservation Plans and Other Planning Efforts''), lands that are covered by an existing, legally operative, HCP with an operative implementing agreement (IA) in which *Deinandra conjugens* is a covered species were not included in the proposed critical habitat rule because we determined that the benefits of exclusion outweigh the benefits of inclusion pursuant to section 4(b)(2) of the Act. Areas excluded based on this criterion consist of lands within the County of San Diego and City of San Diego subarea plans, with the exception of those lands within the major and minor amendment areas addressed within the subarea plans, where the impacts to and conservation of *Deinandra conjugens* have not been addressed. Apart from the lands with operative HCPs, the majority of the remaining occupied habitat for *Deinandra conjugens* falls within designated or draft preserve areas within the MSCP.

In defining critical habitat boundaries, we made an effort to exclude all developed areas, such as towns or housing developments, and lands unlikely to contain the primary constituent elements essential for conservation of *Deinandra conjugens*. Our 100-m UTM grid minimum mapping unit was designed to minimize the amount of development along the urban edge included in our designation. Lands containing existing features and structures, such as buildings, roads, railroads, urban development, and other similar developed features are not likely to contain primary constituent elements. Federal actions limited to those areas would not trigger a section 7 consultation, unless they affect the species or the primary constituent elements in adjacent critical habitat.

The designated critical habitat units described below constitute our best assessment of areas that are essential for the species' conservation. As anticipated in the proposed rule, based upon the additional information received during the public comment period and field surveys after the proposed rule was published, the boundaries of the mapping units have been refined.

Critical Habitat Designation

The approximate area encompassing the designated critical habitat broken down by land ownership is shown in Table 1. All of the designated critical habitat is in San Diego County, CA.

TABLE 1.—APPROXIMATE DESIGNATED CRITICAL HABITAT IN HECTARES (HA) (ACRES (AC)) LAND OWNERSHIP [1]

Federal [2]	State/local	Private	Total
715 ha (1,765 ac)	580 ha (1,440 ac)	1,265 ha (3,125 ac)	2,560 ha (6,330 ac)

[1] Hectares have been converted to acres (1 ha = 2.47 ac). Based on the level of imprecision of mapping at this scale, hectares and acres have been rounded to the nearest 5.

[2] Federal lands include the Service and INS lands.

Critical habitat includes habitat throughout the species' current range in the United States (San Diego County, California). Lands designated are under Federal, State, local, and private ownership. Federal lands include areas owned or managed by the Service and INS. Lands designated as critical habitat have been divided into three critical habitat units. We have designated critical habitat on lands that are considered essential to the conservation of *Deinandra conjugens*. Each of these critical habitat units is considered to be occupied by either the seed bank or standing plants of *Deinandra conjugens*. A brief description of each unit, and reasons for designating it as critical habitat, are presented below.

Unit 1: Sweetwater/Proctor Valley Unit

The Sweetwater/Proctor Valley Unit encompasses approximately 1,440 ha (3,560 ac) at the northeastern limit of this species' distribution. This unit is south and east of State Route 54, south and west of State Route 94, and north of Upper Otay Reservoir. It includes portions of the Otay/Sweetwater Unit of SDNWR; lands belonging to the Sweetwater Authority around the Sweetwater Reservoir; lands belonging to the Otay Water District; lands that are proposed as preserve under the draft City of Chula Vista Subarea Plan; portions of two project areas within the draft City of Chula Vista Subarea Plan, but outside of the proposed preserve lands; and lands that are within major and minor amendment areas within the County of San Diego Subarea Plan. Two areas in this unit have not been designated as critical habitat, including the alignment for State Route 125 South and the San Diego County Park campground realignment and expansion, because these areas have been analyzed and determined not to be essential to the conservation of *Deinandra conjugens*.

This unit contains several large populations of *Deinandra conjugens*, including a portion of the Rancho San Miguel population estimated to contain approximately 855,000 standing *Deinandra conjugens* plants during the 1995 and 1998 growing seasons (CNDDB 2002; Merkel & Associates, *in litt.* 1999). A portion of the Proctor Valley population not covered under the approved San Diego County MSCP, which had approximately 10,000 standing plants in the 1990 growing season (CNDDB 2002), is also included. This unit also contains an area on the north side of the Sweetwater Reservoir where reports indicate there are approximately 2,000 standing plants (Roberts 1997), and an area on the north portion of the SDNWR that had approximately 2,000 standing plants in 1993 (CNDDB 2002).

As discussed in the Changes From the Proposed Rule section of this final rule, portions of lands containing the approximately 28,000 plants in the Rolling Hills Ranch population (*i.e.*, the MSCP Neutral areas and proposed Chula Vista Subarea Plan reserve within the Rolling Hills Ranch project), and portions of other project lands (*e.g.*, Bella Lago, Eastlake Woods) have been retained in the final rule while other areas were excluded.

This unit contains multiple large *Deinandra conjugens* populations that are capable of producing large numbers of individuals in good years, which is important for this species to survive through a variety of natural and environmental changes, as well as stochastic (random) events. This unit contains populations in the northern and eastern extent of this species' historicaldistribution, which is essential for its conservation. Peripheral populations may have genetic characteristics essential to overall long-term conservation of the species (*i.e.*, they may be genetically different than more central populations) (Lesica and Allendorf 1995). The populations in this unit can likely maintain genetic connectivity within and among themselves, and they may maintain genetic connectivity with the Otay Valley/Big Murphy's Unit. Therefore, the populations in this unit are essential to the conservation of the species.

Unit 2: Chula Vista Unit

The Chula Vista Unit encompasses approximately 210 ha (520 ac) at the western portion of this plant's range. Most of the populations in this unit are found in the remaining habitat patches along canyon edges that were not developed. This unit contains lands that are proposed as preserve under the draft City of Chula Vista Subarea Plan, lands that are in a minor amendment area under the County of San Diego's Subarea Plan, and lands that are in a minor amendment area under the draft City of Chula Vista Subarea Plan.

This unit contains the Rice Canyon population, which had more than 50,000 standing plants in 1994 (CNDDB 2002), and the Poggi Canyon population that had a reported 10,000 standing plants in 1990 (CNDDB 2002). This unit contains populations in the western extent of this species' distribution, which although currently isolated from each other, may contain significant amounts of genetic diversity and are, therefore, essential to the conservation of the species.

Unit 3: Otay Valley/Big Murphy's Unit

The Otay Valley/Big Murphy's Unit encompasses approximately 910 ha (2,250 ac). It is east of Interstate 805, north of the International Boundary between the United States and Mexico on the east side, north of State Route 905 on the west side, west of Otay Mountain, and along the north rim of Otay Valley including Salt Creek and Wolf Canyon. This unit includes lands owned by INS, lands that are proposed as preserve under the draft City of Chula Vista Subarea Plan, and lands that are in major and minor amendment areas in the County of San Diego Subarea Plan. Areas in this unit that are within the alignment for State Route 125 South have not been designated as critical habitat because these areas have been analyzed and determined not to be essential.

This unit contains several large populations of *Deinandra conjugens*, such as the Johnson Canyon population, estimated at approximately 480,000 individuals (Helix Environmental Planning, Inc. 2001), capable of producing large numbers of individuals in good years. These large populations are essential for this plant to survive through a variety of natural and environmental changes as well as stochastic events. The unit also contains the Otay River Valley population, which was reported to have approximately 4,000 standing plants (Roberts 1997), the Wolf Canyon population, which was reported to have approximately 4,000 standing plants (Roberts 1997), the Brown Field population, which had a reported 5,600 individuals in 1998 (U.S. Army Corps of Engineers 2000), and the upper Salt Creek population, which was reported to have over 1,000 standing plants (Roberts 1997).

Unit 3 contains populations in the southern and eastern portions of this species' distribution that are essential to the conservation of the species. One population in this unit is located at the southwestern edge of this species' range in the United States. This population may have connectivity with *Deinandra conjugens* populations in northwestern Baja California, Mexico. Because of its connectivity, this population is essential to the conservation of the species.

Based on the proposed preserve design for the draft City of Chula Vista Subarea Plan, and the designated preserve designs for the City and County of San Diego HCPs, these populations may all retain connectivity among themselves because the habitat mosaic does not have large gaps. The populations in this unit may also provide and receive pollen or seed from

Deinandra conjugens populations in the Sweetwater/Proctor Valley Unit.

This connectivity will facilitate gene flow within this unit and among other units which, in turn, may allow evolutionary processes that affect *Deinandra conjugens* to continue relatively unimpeded. Maintaining the *Deinandra conjugens* populations and their genetic connectivity (both within and among units) is essential to the conservation of this species. A *Deinandra conjugens* population north of Otay Valley and west of Otay Lakes is located within designated critical habitat. This population may provide important genetic connectivity between the Salt Creek and Otay Valley populations.

Because this unit contains a number of large *Deinandra conjugens* populations, these populations will maintain genetic connectivity within and among themselves, they will maintain genetic connectivity with the Sweetwater/Proctor Valley Unit and possibly with plants in Mexico, therefore, the populations in this unit are essential to the conservation of the species.

Effects of Critical Habitat Designation

Section 7 Consultation

The regulatory effects of a critical habitat designation under the Act are triggered through the provisions of section 7, which applies only to activities conducted, authorized, or funded by a Federal agency (Federal actions). Regulations implementing this interagency cooperation provision of the Act are codified at 50 CFR 402. Individuals, organizations, States, local governments, and other non-Federal entities are affected by the designation of critical habitat if their actions occur on Federal lands, require Federal authorization, or involve Federal funding.

Section 7(a)(2) of the Act requires Federal agencies, including us, to insure that their actions are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. This requirement is met through section 7 consultation under the Act. Our regulations define ''jeopardize the continued existence'' as to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species (50 CFR 402.02). ''Destruction or adverse modification of designated critical habitat'' is defined as a direct or indirect alteration that appreciably diminishes the value of the critical habitat for both the survival and recovery of the species (50 CFR 402.02). Such alterations include, but are not limited to, adverse changes to the physical or biological features, *i.e.*, the primary constituent elements, that were the basis for determining the habitat to be critical (50 CFR 402.02).

Section 7(a)(4) requires Federal agencies to confer with us on any action that is likely to jeopardize the continued existence of a species proposed for listing or result in destruction or adverse modification of proposed critical habitat. Conference reports provide conservation recommendations to assist the agency in eliminating conflicts that may be caused by the proposed action. The conservation recommendations in a conference report are advisory.

We may issue a formal conference report, if requested by the Federal action agency. Formal conference reports include an opinion that is prepared according to 50 CFR 402.14, as if the species was listed or critical habitat designated. We may adopt the formal conference report as the biological opinion when the species is listed or critical habitat designated, if no substantial new information or changes in the action alter the content of the opinion (see 50 CFR 402.10(d)).

If a species is listed or critical habitat is designated, section 7(a)(2) requires Federal agencies to ensure that activities they authorize, fund, or carry out are not likely to jeopardize the continued existence of such a species or to destroy or adversely modify its critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency (action agency) must enter into consultation with us. Through this consultation, we would ensure that the permitted actions do not destroy or adversely modify critical habitat.

If we issue a biological opinion concluding that a project is likely to result in the destruction or adverse modification of critical habitat, we would also provide reasonable and prudent alternatives to the project, if any are identifiable. Reasonable and prudent alternatives are defined at 50 CFR 402.02 as alternative actions identified during consultation that can be implemented in a manner consistent with the intended purpose of the action, that are consistent with the scope of the Federal agency's legal authority and jurisdiction, that are economically and technologically feasible, and that the Fish and Wildlife Service Regional Director believes would avoid the destruction or adverse modification of critical habitat. Reasonable and prudent alternatives can vary from slight project modifications to extensive redesign or relocation of the project.

Regulations at 50 CFR 402.16 require Federal agencies to reinitiate consultation on previously reviewed actions in instances where critical habitat is subsequently designated, and the Federal agency has retained discretionary involvement or control over the action or such discretionary involvement or control is authorized by law. Consequently, some Federal agencies may request reinitiation of consultation or conference with us on actions for which formal consultation has been completed, if those actions may affect designated critical habitat.

Activities on Federal lands that may affect *Deinandra conjugens* or its critical habitat will require section 7 consultation. Activities on private or State lands requiring a permit from a Federal agency, such as a permit from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act, a section 10(a)(1)(B) permit from the Service, or some other Federal action, including funding (*e.g.*, from the Federal Highway Administration, Federal Aviation Administration (FAA), or Federal Emergency Management Agency (FEMA)); permits from the Department of Housing and Urban Development (HUD); activities by INS on land under their jurisdiction; activities funded by the U.S. Environmental Protection Agency (EPA), Department of Energy (DOE), or any other Federal agency; regulation of airport improvement activities by FAA; and construction of communication sites licensed by the Federal Communications Commission (FCC) will also continue to be subject to the section 7 consultation process. Federal actions not affecting listed species or critical habitat and actions on non-Federal lands that are not federally funded, authorized, or permitted do not require section 7 consultation.

Section 4(b)(8) of the Act requires us to briefly evaluate and describe in any proposed or final regulation that designates critical habitat those activities involving a Federal action that may adversely modify such habitat, or that may be affected by such designation. Activities that may result in the destruction or adverse modification of critical habitat include those that alter the primary constituent elements to an extent that the value of critical habitat for the conservation of *Deinandra conjugens* is appreciably reduced. We note that such activities

may also jeopardize the continued existence of the species. Activities that, when carried out, funded or authorized by a Federal agency, may directly or indirectly destroy or adversely modify critical habitat include, but are not limited to:

(1) Removing, thinning, or destroying *Deinandra conjugens* habitat (as defined in the primary constituent elements discussion), whether by burning, mechanical, chemical, or other means (*e.g.*, plowing, grubbing, grading, grazing, woodcutting, construction, road building, mining, herbicide application, etc.);

(2) Activities that appreciably degrade or destroy *Deinandra conjugens* habitat (and its primary constituent elements) that could include, but not limited to, livestock grazing, clearing, discing, farming, residential or commercial development, introducing or encouraging the spread of nonnative species, off-road vehicle use, and heavy recreational use;

(3) Appreciably diminish habitat value or quality through indirect effects (*e.g.*, edge effects, invasion of exotic plants or animals, or fragmentation); and

(4) Activities that alter watershed characteristics in ways that would appreciably alter or reduce the quality or quantity of surface and subsurface flow of water needed to maintain grassland, scrub, and chaparral communities. These activities could include, but are not limited to, altering the natural fire regime either through fire suppression or prescribed fires that are too frequent or poorly-timed; residential and commercial development, including road building and golf course installations; agricultural activities, including row crops and livestock grazing; and vegetation manipulation such as clearing or grubbing in the watershed upslope from *Deinandra conjugens*.

If you have questions regarding whether specific activities will constitute adverse modification of critical habitat, contact the Field Supervisor, Carlsbad Fish and Wildlife Office (see **ADDRESSES** section). Requests for copies of the regulations on listed wildlife, and inquiries about prohibitions and permits may be addressed to the U.S. Fish and Wildlife Service, Branch of Endangered Species, 911 NE., 11th Ave., Portland, OR 97232 (telephone 503/231–2063; facsimile 503/231–6243).

Relationship to Habitat Conservation Plans and Other Planning Efforts

Section 10(a)(1)(B) of the Act authorizes the Service to issue to non-Federal entities a permit for the incidental take of endangered and threatened animal species incidental to otherwise lawful activities. An incidental take permit must be supported by an HCP that identifies conservation measures that the permittee agrees to implement to minimize and mitigate the impacts of the permitted take of the species. Although the Act does not prohibit ''take'' of listed plant species, many HCPs include plant species as ''covered species'' and provide conservation measures to protect the species and their habitats. We include plant species on the incidental take permit in recognition of the conservation of habitats under the HCP provided we determine that the permit will not appreciably reduce the likelihood of the survival and recovery of the plant species in the wild.

In the proposed rule we discussed the relative benefits of including or excluding from critical habitat lands covered by a legally operative HCP that includes *Deinandra conjugens* as a covered species (*See* 66 FR 32060) under section 4(b)(2) of the Act. In particular we noted that the benefits of including HCP lands in critical habitat are normally small to non-existent because approved HCPs are already designed to ensure the survival of covered species. HCPs typically protect essential habitat in reserves that are managed to protect, restore, and enhance their value as habitat for the species. Moreover, before approving an HCP or issuing an incidental take permit, we complete a section 7 of the Act consultation on the proposed permit and must conclude that the permit will not result in jeopardy to any covered species in the plan area. HCPs protect and manage essential habitat for covered species, and typically provide greater conservation benefit to a species than would result from a section 7 consultation.

In contrast to negligible benefits of including HCP lands in critical habitat, we noted in the proposed rule that the benefits of excluding such lands are typically significant. They include relieving landowners, communities, and counties of any additional regulatory review that might be imposed by critical habitat. We expressed concern that imposing as additional regulatory review after HCP completion could jeopardize conservation efforts and be viewed as a disincentive to those developing HCPs, while excluding approved HCPs would encourage the continued development of partnerships with HCP participants, including States, local governments, conservation organizations, and private landowners. We concluded that the benefits of excluding lands covered by a legally operative HCP would normally outweigh the benefits of including such lands, but that each HCP which includes *Deinandra conjugens* as a covered species must be evaluated individually to determine whether the benefits of excluding lands containing essential habitat within the plan area outweighed the benefits of including such lands.

We identified three approved HCPs in the San Diego County that include *Deinandra conjugens* as a covered species. These HCPs are the San Diego Gas and Electric Company HCP, and two subarea plans under the MSCP, a framework conservation plan that encompasses approximately 236,000 ha (582,000 ac) of land in southwestern San Diego County and multiple jurisdictions. Those subarea plans are the City of San Diego Subarea Plan and the County of San Diego Subarea Plan, with the exception of lands within the County's major and minor amendment areas that do not address or provide protection for *Deinandra conjugens.* Each of the three HCPs protects the essential habitat of *Deinandra conjugens* within their respective plan areas. We also completed section 7 consultations on each of the plans and determined that the approved HCPs would not jeopardize the continued existence of the species in the wild. For the reasons stated in the proposed rule, we did not include in the proposed critical habitat rule lands that encompass essential habitat of *Deinandra conjugens* within the boundaries of the three approved HCPs, with the exception of lands in the major and minor amendment areas under the County of San Diego Subarea Plan. Consequently, those lands are included in this final critical habitat determination.

We recently received a revised draft of the Sweetwater Authority HCP for our review, and are in the process of reviewing the plan's proposed reserve design. The City of Chula Vista is expected to complete their MSCP Subarea planning process in the near future. We have worked closely with the City of Chula Vista on the design of their preserve, specifically in relation to the conservation of *Deinandra conjugens.* The City of Chula Vista's draft Subarea Plan would conserve several large *Deinandra conjugens* populations areas in a configuration that will maintain connectivity within and among these populations. The draft plan also includes criteria for conservation of *Deinandra conjugens* within certain areas that have not yet been surveyed.

The majority of the lands proposed for conservation under the Chula Vista Subarea Plan contain clay soils and the appropriate vegetation types for *Deinandra conjugens.* Because the City of Chula Vista and Sweetwater Authority HCPs are not yet completed, the areas within those plans essential for the conservation of *Deinandra conjugens* are included in the designation of critical habitat.

In the event that future HCPs, such as those under development by the City of Chula Vista and Sweetwater Authority, covering *Deinandra conjugens* are developed within the boundaries of designated critical habitat, we will work with applicants to ensure that the HCPs provide for protection and management of habitat areas essential for the conservation of *Deinandra conjugens* by either directing development and habitat modification to nonessential areas or appropriately modifying activities within essential habitat areas so that such activities will not destroy or adversely modify the primary constituent elements. The HCP development process provides an opportunity for more intensive data collection and analysis regarding the use of particular habitat areas by *Deinandra conjugens*. The process also enables us to conduct detailed evaluations of the importance of such lands to the long-term survival of the species in the context of constructing a biologically configured system of interlinked habitat blocks. We expect that HCPs developed by local jurisdictions (*e.g.*, counties, cities) and other parties will identify, protect, and provide appropriate management for those specific lands within the boundaries of the plans that are essential for the long-term conservation of the species. We expect that our analyses of these proposed HCPs and proposed permits under section 7 of the Act will show that covered activities carried out in accordance with the provisions of the HCPs and biological opinions will not result in destruction or adverse modification of critical habitat.

We will provide technical assistance and work closely with applicants with respect to HCPs currently under development and future HCPs to identify lands essential for the long-term conservation of *Deinandra conjugens* and appropriate management for those lands. The minimization and mitigation measures provided under these HCPs are expected to protect the essential habitat lands designated as critical habitat in this rule. If an HCP that address *Deinandra conjugens* as a covered species is ultimately approved, we may reassess the critical habitat boundaries in light of the HCP.

Should additional information become available that changes our analysis of the benefits of excluding any of these (or other) areas compared to the benefits of including them in the critical habitat designation, we may revise this final determination accordingly. Similarly, if new information indicates any of these areas should not be included in the critical habitat designation because they no longer meet the definition of critical habitat, we may revise this final critical habitat designation.

Economic Analysis

Section 4(b)(2) of the Act requires us to designate critical habitat on the basis of the best scientific and commercial information available, and to consider the economic and other relevant impacts of designating a particular area as critical habitat. We may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of specifying such areas as critical habitat. We cannot exclude such areas from critical habitat when such exclusion will result in the extinction of the species.

Following the publication of the proposed critical habitat designation, a draft economic analysis was conducted to estimate the potential economic effect of the proposed designation. The draft analysis was made publically available for review on July 13, 2002. We accepted comments on the draft analysis until August 9, 2002.

Our draft economic analysis evaluated potential future effects associated with the listing of *Deinandra conjugens* as a threatened species under the Act, as well as any potential effect of the critical habitat designation above and beyond those regulatory and economic impacts associated with listing. To quantify the proportion of total potential economic impacts attributable to the proposed critical habitat designation, the analysis evaluated a ''without critical habitat'' baseline and compared it to a ''with critical habitat'' scenario. The ''without critical habitat'' baseline represented the current and expected economic activity under all modifications prior to the critical habitat designation, including protections afforded the species under Federal and State laws. The difference between the two scenarios measured the net change in economic activity attributable to the designation of critical habitat. The categories of potential costs considered in the analysis included the costs associated with (1) Conducting section 7 consultations associated with the listing or with the critical habitat, including incremental consultations and technical assistance; (2) modifications to projects, activities, or land uses resulting from the section 7 consultations; (3) uncertainty and public perceptions resulting from the designation of critical habitat; and (4) potential offsetting beneficial costs associated with critical habitat including educational benefits.

The majority of consultations resulting from the critical habitat designation for *Deinandra conjugens* are likely to address land development, road construction or road expansion activities, and National Wildlife Refuge management activities. As described in the draft economic analysis, *Deinandra conjugens* surveys have been conducted over a broad area, and many occupied areas have been mapped. As a result, all of the parcels where impacts are expected are occupied by *Deinandra conjugens*. As a result, the costs attributable solely to critical habitat are much smaller than the total section 7 costs.

Following the close of the comment period on the draft economic analysis, a final addendum was completed which incorporated public comments on the draft analysis and a re-evaluation of the analysis of potential economic effects of the designation. Based on this new analysis, the cost of consultations to third parties was revised. Subsequently, the addendum concluded that the designation may result in approximately $370,000 to $466,000 per year in potential economic effects due to the total effects of critical habitat, including those effects coextensive with listing. These changes from the draft economic analysis are due to adjustments made to the third party cost estimates. As discussed in the final addendum to the economic analysis, a comment letter from McMillin Land Development suggested that costs associated with ''extraordinary design measures'' for the Salt Creek sewer line should be considered as part of the economic costs of critical habitat designation as many of these costs are directly attributable to *Deinandra conjugens*. However, project modifications associated with the Salt Creek sewer line were primarily due to substantial avoidance of habitat occupied by the Quino checkerspot butterfly, coastal California gnatcatcher, and least Bell's vireo, along with other species covered under the MSCP in the Salt Creek/Otay River area. Therefore, as one of the covered species, *Deinandra conjugens* played a minor role in the recommended project modifications. Further, because of the linear nature of

the pipeline project, direct impacts to sanding plants were avoided. Nevertheless, specific project modifications (*i.e.*, flagging of additional 200 feet of habitat) would not be required absent critical habitat designation. Therefore, the final addendum to the economic analysis conservatively estimates that all administrative costs of the formal Section 7 consultation, and the costs of the relevant project modifications, are attributable to the critical habitat designation for *Deinandra conjugens*.

A more detailed discussion of our analyses are contained in the July 13, 2002, Draft Economic Analysis of Proposed Critical Habitat Designation for the Otay Tarplant (Industrial Economics, Inc. 2002a) and the Addendum to Economic Analysis of Critical Habitat Designation for the Otay Tarplant (Industrial Economics, Inc. 2002b). Both documents are included in the supporting documentation for this rulemaking and available for inspection at the Carlsbad Fish and Wildlife Office (refer to **ADDRESSES** section).

Required Determinations

Regulatory Planning and Review

In accordance with Executive Order 12866, this document is a significant rule and was reviewed by the Office of Management and Budget (OMB), as OMB determined that this rule may raise novel legal or policy issues. As required by E.O. 12866, we have provided a copy of the rule, which describes the need for this action and how the designation meets that need, and the economic analysis, which assess the costs and benefits of this critical habitat designation, to OMB for review.

Regulatory Flexibility Act (5 U.S.C. 601 et seq.)

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996), whenever an agency is required to publish a notice of rulemaking for any proposed or final rule, it must prepare and make available for public comment a regulatory flexibility analysis that describes the effects of the rule on small entities (*i.e.*, small businesses, small organizations, and small government jurisdictions). However, no regulatory flexibility analysis is required if the head of the agency certifies the rule will not have a significant economic impact on a substantial number of small entities. SBREFA amended the Regulatory Flexibility Act (RFA) to require Federal agencies to provide a statement of the factual basis for certifying that a rule will not have a significant economic impact on a substantial number of small entities. SBREFA also amended the RFA to require a certification statement. We are hereby certifying that this rule designating critical habitat for *Deinandra conjugens* will not have a significant economic impact on a substantial number of small entities. The following discussion explains our rationale for this certification.

Small entities include small organizations, such as independent non-profit organizations, small governmental jurisdictions, including school boards and city and town governments that serve fewer than 50,000 residents, as well as small businesses (13 CFR 121.201). Small businesses include manufacturing and mining concerns with fewer than 500 employees, wholesale trade entities with fewer than 100 employees, retail and service businesses with less than $5 million in annual sales, general and heavy construction businesses with less than $27.5 million in annual business, special trade contractors doing less than $11.5 million in annual business, and agricultural businesses with annual sales less than $750,000. To determine if potential economic impacts to these small entities are significant, we consider the types of activities that might trigger regulatory impacts under this rule as well as the types of project modifications that may result. In general, the term ''significant economic impact'' is meant to apply to a typical small business firm's business operations.

To determine if the rule would affect a substantial number of small entities, we consider the number of small entities affected within particular types of economic activities (*e.g.*, housing development, grazing, oil and gas production, timber harvesting, *etc.*). We apply the ''substantial number'' test individually to each industry to determine if certification is appropriate. A ''substantial number'' of small entities is more than 20 percent of those small entities affected by the regulation, out of the total universe of small entities in the industry or, if appropriate, industry segment. In some circumstances, especially with proposed critical habitat designations of very limited extent, we may aggregate across all industries and consider whether the total number of small entities affected is substantial. In estimating the numbers of small entities potentially affected, we also consider whether their activities have any Federal involvement; some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation.

In estimating the numbers of small entities potentially affected, we also considered whether their activities have any Federal involvement. Designation of critical habitat only has the potential to affect activities conducted, funded, or permitted by Federal agencies. In areas where the species is present, Federal agencies are already required to consult with us under section 7 of the Act on activities that they fund, permit, or implement that may affect *Deinandra conjugens.* Federal agencies must also consult with us if their activities may affect designated critical habitat. Some kinds of activities are unlikely to have any Federal involvement and so will not be affected by critical habitat designation. Activities with Federal involvement that may require consultation regarding *Deinandra conjugens* and its critical habitat include: Regulation of activities affecting waters of the United States by the U.S. Army Corps of Engineers under section 404 of the Clean Water Act; management activities carried out by the Service on National Wildlife Refuge lands; and, road construction, maintenance, and right of way designations that are authorized, funded, or carried out by a Federal agency. As required under section 4(b)(2) of the Act, we conducted an analysis of the potential economic impacts of this critical habitat designation. In the analysis, we found that the future section 7 consultations resulting from the listing of *Deinandra conjugens* and the proposed designation of critical habitat could potentially impose total economic costs for consultations and modifications to projects to range between approximately $2.8 million to $2.9 million over the next 10-year period. Public comment on the draft economic analysis led to a revision of third party cost estimates that would result from section 7 consultations. The changes in cost estimates are discussed and reflected in the Addendum to the Draft Economic Impact Analysis of Critical Habitat Designation for the Otay Tarplant (Industrial Economics, Inc. 2002), where we found that the future section 7 consultations resulting from the listing of *Deinandra conjugens* and the proposed designation of critical habitat could potentially impose total economic costs for consultations and modifications to projects in the range of between approximately $3.2 million to $4.0 million over the next 10-year period.

As stated in the Addendum, income from construction, transportation and

public utilities, and real estate in San Diego County for 2000 was about $8.8 billion. Assuming that each of the anticipated section 7 consultations occurs in the same year, as opposed to occurring throughout the 10-year timeframe used in the draft economic analysis, the estimated section 7 costs associated with the listing of *Deinandra conjugens* and proposed designation of critical habitat represent approximately 0.03 percent of the total value of these economic activities annually. Further, the section 7 costs attributable solely to critical habitat represent 0.0 percent of the annual total value of the economic activities.

Based on the past consultation history of *Deinandra conjugens,* the economic analysis anticipated that future section 7 consultations could potentially affect small businesses associated with residential development. To be conservative (*i.e.*, more likely to overstate impacts than understate them), the economic analysis assumed that a unique company will undertake each of the consultations forecasted in a given year, and so the number of businesses affected is equal to the total annual number of consultations projected in the economic analysis. There are approximately 478 residential development companies in San Diego County, 414 of which are small businesses. One developer, McMillin-Rolling Hills Ranch, LLC was identified as having a Federal nexus and having the potential of being affected by section 7 implementation for *Deinandra conjugens.* McMillin-Rolling Hills Ranch, LLC, owner of the Rolling Hills Ranch property, has completed a section 7 consultation with regard to its application to the U.S. Army Corps of Engineers for a permit under section 404 of the Clean Water Act and has experienced costs associated with project modifications. Because it is anticipated that only one developer will be impacted by the *Deinandra conjugens* critical habitat designation, less than one percent of small development companies are potentially affected. Because this is less than the 20 percent threshold that would be considered ''substantial,'' the analysis confirms that this designation will not affect a substantial number of small entities. The draft economic analysis and final addendum contain the factual bases for this certification and contain an analysis of the potential economic effects of this designation. Copies of these documents are in the supporting record for the rulemaking and are available at the Service's Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

In summary, we have considered whether this rule could result in significant economic effects on a substantial number of small entities. We have determined, for the above reasons, that it will not affect a substantial number of small entities. Therefore, we are certifying that the designation of critical habitat for *Deinandra conjugens* will not have a significant economic impact on a substantial number of small entities. Accordingly, a regulatory flexibility analysis is not required.

Small Business Regulatory Enforcement Fairness Act (5 U.S.C. 804(2))

OMB's Office of Information and Regulatory Affairs has determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. In the economic analysis, we determined whether designation of critical habitat would cause (a) Any effect on the economy of $100 million or more, (b) any increases in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions, or (c) any significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises. Refer to the final economic analysis for a discussion of the effects of this determination.

Executive Order 13211

On May 18, 2001, the President issued Executive Order 13211, which applies to regulations that significantly affect energy supply, distribution, and use. Executive Order 13211 requires agencies to prepare Statements of Energy Effects when undertaking certain actions. The primary land uses within designated critical habitat for *Deinandra conjugens* include residential development, road construction activities, and National Wildlife Refuge operations. No significant energy production, supply, and distribution facilities are included within designated critical habitat. Therefore, this action is not a significant action affecting energy production, supply, and distribution facilities, and no Statement of Energy Effects is required.

Unfunded Mandates Reform Act (2 U.S.C. 1501 et seq.)

In accordance with the Unfunded Mandates Reform Act (2 U.S.C. 1501 *et seq.*):

(a) This rule will not ''significantly or uniquely'' affect small governments. A Small Government Agency Plan is not required. Small governments will be affected only to the extent that Federal agencies funding, permitting, or authorizing other activities must ensure that their actions will not adversely affect the critical habitat. However, as discussed above, these actions are currently subject to equivalent restrictions through the listing protections of the species, and no further restrictions are anticipated in areas of occupied designated critical habitat.

(b) For the reasons described in the economic analysis and this final rule, this rule will not produce a Federal mandate on State, local, or Tribal governments of $100 million or greater in any year. The designation of critical habitat imposes no obligations on State or local governments. Therefore, it is not a ''significant regulatory action'' under the Unfunded Mandates Reform Act.

Takings

In accordance with Executive Order 12630 (''Government Actions and Interference with Constitutionally Protected Private Property Rights''), we have analyzed the potential takings implications of designating approximately 2,560 ha (6,330 ac) of land in San Diego County, California, in three units of critical habitat for *Deinandra conjugens*. The takings implications assessment concludes that this rule does not pose significant takings implications.

Federalism

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A Federalism Assessment is not required. In keeping with Department of the Interior policy, we requested information from, and coordinated the development of this critical habitat designation with, appropriate State natural resources agencies in California. We will continue to coordinate any future changes in the designation of critical habitat for *Deinandra conjugens* with the appropriate State agencies. The designation of critical habitat for *Deinandra conjugens* imposes few, if any, additional restrictions to those currently in place and therefore has little incremental impact on State and local governments and their activities. The designation may provide some benefit to these governments in that the areas essential to the conservation of the species are more clearly defined and the primary constituent elements of the habitat necessary to the conservation of the species are specifically identified. While this definition and identification

does not alter where and what federally sponsored activities may occur, it may assist these local governments in long-range planning, rather than waiting for case-by-case section 7 consultations to occur.

Civil Justice Reform

In accordance with Executive Order 12988, the Department of the Interior's Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of sections 3(a) and 3(b)(2) of the Order. We are designating critical habitat in accordance with the provisions of the Act, as amended. The rule uses standard property descriptions and identifies the primary constituent elements within the designated areas to assist the public in understanding the habitat needs that are essential for the conservation of *Deinandra conjugens*. We have made every effort to ensure that the final determination contains no drafting errors, provides clear standards, simplifies procedures, reduces burdens, and is clearly written, such that the risk of litigation is minimized.

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.)

This rule does not contain any new collections of information that require approval by the OMB under the Paperwork Reduction Act. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

National Environmental Policy Act

We have determined that we do not need to prepare an Environmental Assessment or an Environmental Impact Statement as defined by the National Environmental Policy Act of 1969, in connection with regulations adopted pursuant to section 4(a) of the Act, as amended. We published a notice outlining our reasons for this determination in the **Federal Register** on October 25, 1983 (48 FR 49244). This determination does not constitute a major Federal action significantly affecting the quality of the human environment.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175, and the Department of the Interior's manual at 512 DM 2, we readily acknowledge our responsibility to communicate meaningfully with federally recognized Tribes on a government-to-government basis. We are not aware of any Tribal lands essential for the conservation of *Deinandra conjugens*. Therefore, the designated critical habitat for *Deinandra conjugens* does not contain any Tribal lands or lands that we have identified as impacting Tribal trust resources.

References Cited

A complete list of all references cited in this final rule is available upon request from the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

Author

The primary authors of this final rule are staff at the Carlsbad Fish and Wildlife Office (see **ADDRESSES** section).

List of Subjects in 50 CFR Part 17

Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Regulation Promulgation

Accordingly, we amend part 17, subchapter B of chapter I, title 50 of the Code of Federal Regulations as set forth below:

PART 17—[AMENDED]

1. The authority citation for part 17 continues to read as follows:

Authority: 16 U.S.C. 1361–1407; 16 U.S.C. 1531–1544; 16 U.S.C. 4201–4245; Pub. L. 99–625, 100 Stat. 3500; unless otherwise noted.

2. In § 17.12(h), remove the entry for *Hemizonia conjugens* and add the following in alphabetical order under ''FLOWERING PLANTS'' to the List of Endangered and Threatened Plants to read as follows:

§ 17.12 Endangered and threatened plants.

* * * * *

(h) * * *

Species		Historic range	Family	Status	When listed	Critical habitat	Special rules
Scientific name	Common name						
FLOWERING PLANTS							
*	*	*	*	*	*		*
Deinandra (=*Hemizonia*) *conjugens*.	Otay tarplant	U.S.A. (CA), Mexico	Asteraceae—Sunflower.	T	649	17.96(a)	NA
*	*	*	*	*	*		*

3. In § 17.96, amend paragraph (a) by adding an entry for *Deinandra conjugens* (Otay tarplant) in alphabetical order under Asteraceae to read as follows:

§ 17.96 Critical habitat—plants.

(a) Flowering plants.

* * * * *

Family Asteraceae: *Deinandra conjugens* (Otay tarplant)

(1) Critical habitat units are depicted for San Diego County, California, on the maps below.

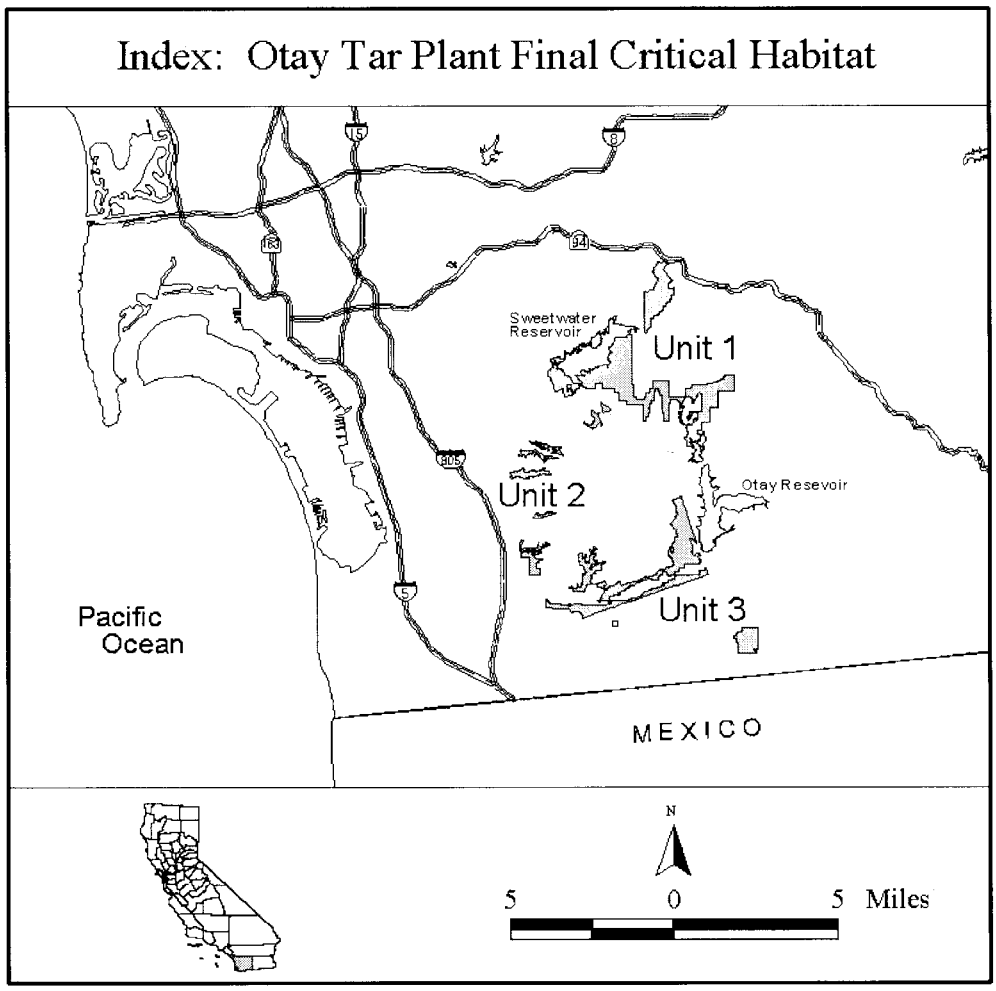
(2) The primary constituent elements of critical habitat for *Deinandra conjugens* are those habitat components that are essential for the primary biological needs of the species. Based on our current knowledge of this species, the primary constituent elements for *Deinandra conjugens* consist of, but are not limited to, soils with a high clay content (generally greater than 25 percent) (or clay intrusions or lenses) that are associated with grasslands, open coastal sage scrub, or maritime succulent scrub communities between 25 m (80 ft) and 300 m (1,000 ft) elevation. These plant communities contain natural openings that provide habitat for *Deinandra conjugens* life-cycle, and pollen and seed dispersal agents.

(3) Critical habitat does not include non-Federal lands covered by a legally

operative Habitat Conservation Plan issued under section 10(a)(1)(B) of the Act in which *Deinandra conjugens* is a covered species on or before the publication of this final rule.

(4) Existing features and structures, such as buildings, paved or unpaved roads, and other landscaped areas not containing primary constituent elements, are not likely to contain the primary constituent elements for *Deinandra conjugens*. Federal actions limited to those areas, therefore, would not trigger a section 7 consultation, unless they affect the species or primary constituent elements in adjacent critical habitat.

(i) **Note:** Index map follows:



(5) *Unit 1:* Sweetwater/Proctor Valley, San Diego County, California.

(i) *Unit 1a:* From USGS 1:24,000 quadrangle map Jamul Mountains, beginning at the SDNWR boundary at UTM NAD27 x-coordinate 505100; thence south following UTM NAD27 coordinates (E, N): 505100, 3620400; 505000, 3620400; 505000, 3620200; 504900, 3620200; 504900, 3620100; 504800, 3620100; 504800, 3620000; 504700, 3620000; 504700, 3619900; 504600, 3619900; 504600, 3619700; 504500, 3619700; 504500, 3619600; 504400, 3619600; 504400, 3619500; 504300, 3619500; 504300, 3619400; 504100, 3619400; 504100, 3619300; 504000, 3619300; thence south to the SDNWR boundary at UTM x-coordinate 504000; thence south following the SDNWR boundary returning to the point of beginning on the SDNWR boundary at UTM x-coordinate 505100.

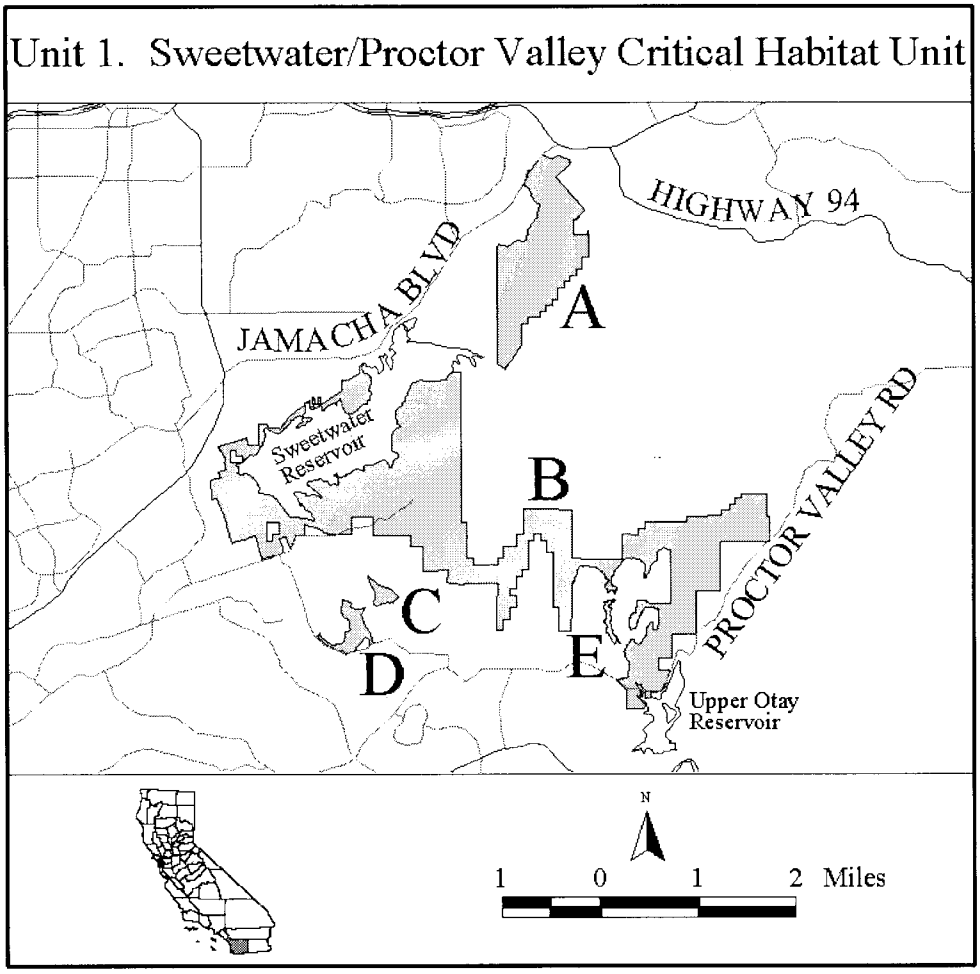
(ii) *Unit 1b:* From USGS 1:24,000 quadrangle maps National City and Jamul Mountains, beginning at the Sweetwater Reservoir at UTM NAD27 y-coordinate 3618500; thence east and following UTM NAD27 coordinates 503000, 3618500; 503000, 3616000; 503100, 3616000; 503100, 3615400; 503200, 3615400; 503200, 3615300; 503600, 3615300; 503600, 3615400; 503700, 3615400; 503700, 3615600; 503900, 3615600; 503900, 3615800; thence east to the Otay Water District (OWD) boundary at UTM NAD27 y-coordinate 3615800; thence north following the OWD boundary to the City of Chula Vista Preserve Design (CCVPD) boundary; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 505900; thence north following UTM NAD27 coordinates 505900, 3615900; 506000, 3615900; 506000, 3616000; 506700, 3616000, 506700, 3616100; thence east to the SDNWR boundary at UTM NAD27 y-coordinate 3616100; thence east following the SDNWR boundary to UTM NAD27 x-coordinate 507200; thence north following UTM NAD27 coordinates 507200, 3616200; 507400, 3616200; 507400, 3616300; 507500, 3616300; 507500, 3616400; 507600, 3616400; thence north to the County of San Diego Major Amendment (CSDMjA) boundary at UTM NAD27 x-coordinate 507600; thence east following the CSDMjA boundary to the SDNWR

boundary; thence south following the SDNWR boundary to the CSDMjA boundary; thence south following the CSDMjA boundary to UTM NAD27 x-coordinate 506100; thence south following UTM NAD27 coordinates 506100, 3613100; 506000, 3613100; thence north to the City of Chula Vista (CCV) boundary at UTM NAD27 x-coordinate 506000; thence northwest following the CCV boundary south to UTM NAD27 x-coordinate 505700; thence north to the CCVPD boundary at UTM x-coordinate 505700: thence northwest along the CCVPD boundary to the City of Chula Vista Major Amendment boundary (CCVMjA); thence north along the CCVMjA boundary to the CCVPD boundary; thence north and east along the CCVPD boundary to the CCVMjA boundary; thence east along the CCVMjA boundary to the CCVPD boundary; thence north and west along the CCVPD boundary to the MSCP Neutral Area boundary (MNA); thence south and back north along the MNA boundary to UTM NAD27 y-coordinate 3614700; thence east along UTM NAD27 y-coordinate to the MNA boundary; thence south along the MNA boundary to the CCVPD boundary; thence following the CCVPD boundary to the MNA boundary; thence south along the MNA boundary to the CCVPD boundary; thence west along the CCVPD boundary to UTM NAD27 y-coordinate 3621500; thence west along UTM y-coordinate to the OWD boundary; thence south following the OWD boundary to UTM NAD27 x-coordinate 504600; thence north following UTM NAD27 coordinates 504600, 3614600; 504500, 3614600; 504500, 3615500; 504400, 3615500; 504400, 3615700; 504300, 3615700; 504300, 3615800; 504200, 3615800; 504200, 3615700; 504100, 3615700; 504100, 3615200; 504000, 3615200; 504000, 3615100; 503900, 3615100; 503900, 3614900; 503800, 3614900; 503800, 3614800; 503900, 3614800; 503900, 3614600; 503800, 3614600; 503800, 3614400; 503700, 3614400; thence south to the OWD boundary at UTM NAD27 x-coordinate 503700; thence west following the OWD boundary to the Multiple Habitat Planning Area (MHPA) boundary; thence west following the MHPA to the SDNWR boundary; thence south following the SDNWR boundary to UTM NAD27 y-coordinate 3616100; thence west following UTM NAD27 coordinates 501200, 3616100; 501200, 3615800; 500800, 3615800; thence north to the Sweetwater Authority Water District (SWAWD) boundary at UTM NAD27 x-coordinate 500800; thence west following the SWAWD boundary to the County of San Diego Minor Amendment (CSDMnA) boundary; thence west following the CSDMnA boundary to the SWAWD boundary; thence west following the SWAWD boundary to approximately UTM NAD27 coordinates 5014000, 3618650 where the SWAWD meets the Sweetwater Reservoir shoreline; thence south following the Sweetwater Reservoir shoreline (SRS) to UTM NAD27 x-coordinate 499400; thence north following UTM NAD27 coordinates 499400, 3617000; 499400, 3617100; 499300, 3617100; 499300, 3617200; 499200, 3617200; 499200, 3617000; thence east to the SRS at UTM NAD27 y-coordinate 3617000; thence south following the SRS back to the point of beginning at UTM NAD27 y-coordinate 3618500; excluding lands bounded by the CCVPD boundary at UTM NAD27 x-coordinate 505800; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 506100; thence north and following UTM NAD27 coordinates 506100, 3614700; 505700, 3614700; 505700, 3615300; 505800, 3615300; thence north returning to the point of beginning on the CCVPD boundary at UTM NAD27 x-coordinate 505800; excluding lands bounded by the following UTM NAD27 coordinates 499800, 3616000; 500000, 3616000; 500000, 3615800; 499900, 3615800; 499900, 3615700; 499800, 3615700; 499800, 3616000; excluding the proposed State Route 125 easement.

(iii) *Unit 1c and d:* From USGS 1:24,000 quadrangle map Jamul Mountains, the lands bounded by the CCVPD boundary at Horseshoe Bend and Gobblers Knob.

(iv) *Unit 1e:* From USGS 1:24,000 quadrangle map Jamul Mountains, the lands bounded by the MNA boundary at Rolling Hills Ranch.

(v) **Note:** Unit 1 map follows:



(6) *Unit 2:* Chula Vista, San Diego County, California.

(i) *Unit 2a:* From USGS 1:24,000 quadrangle maps National City, the lands bounded by the CCVPD boundary in Long Canyon and between UTM NAD27 coordinates 497900 and 499700.

(ii) *Unit 2b and c:* From USGS 1:24,000 quadrangle map National City, the lands bounded by the CCVPD boundary south of Otay Lakes Road and between UTM NAD27 x-coordinates 497300 and 499500.

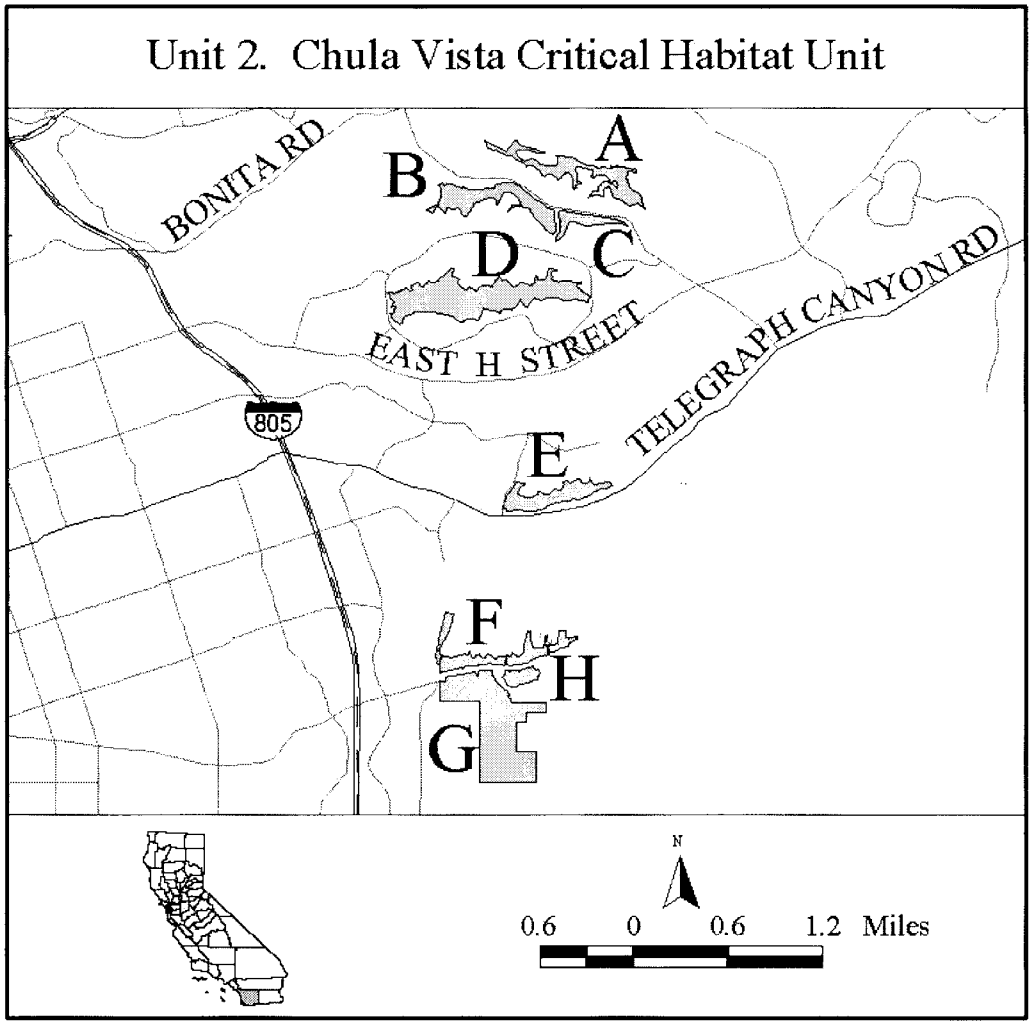
(iii) *Unit 2d:* From USGS 1:24,000 quadrangle map National City, the lands bounded by the CCVPD boundary in Rice Canyon and between UTM NAD27 x-coordinates 496900 and 499100.

(iv) *Unit 2e:* From USGS 1:24,000 quadrangle maps National City and Imperial Beach, the lands bounded by the CCVPD boundary in Telegraph Canyon and between UTM NAD27 x-coordinates 498100 and 499300.

(v) *Unit 2f:* and h: From USGS 1:24,000 quadrangle map Imperial Beach, the lands bounded by the CCVPD boundary in Poggi Canyon and between UTM NAD27 x-coordinates 497400 and 499000.

(vi) *Unit 2g:* From USGS 1:24,000 quadrangle map Imperial Beach, beginning at the CCV boundary at UTM NAD27 x-coordinate 498600; thence south following UTM NAD27 coordinates 498600, 3607300; 498400, 3607300; 498400, 3607200; 498300, 3607200; 498300, 3606900; 498500, 3606900; thence south to the CCV boundary at UTM NAD27 x-coordinate 498500; thence west following the CCV boundary to the CCVPD boundary; thence west following the CCVPD boundary to the CCV boundary; thence east returning to the point of beginning on the CCV boundary at UTM NAD27 x-coordinate 498600.

(vii) **Note:** Unit 2 map follows:



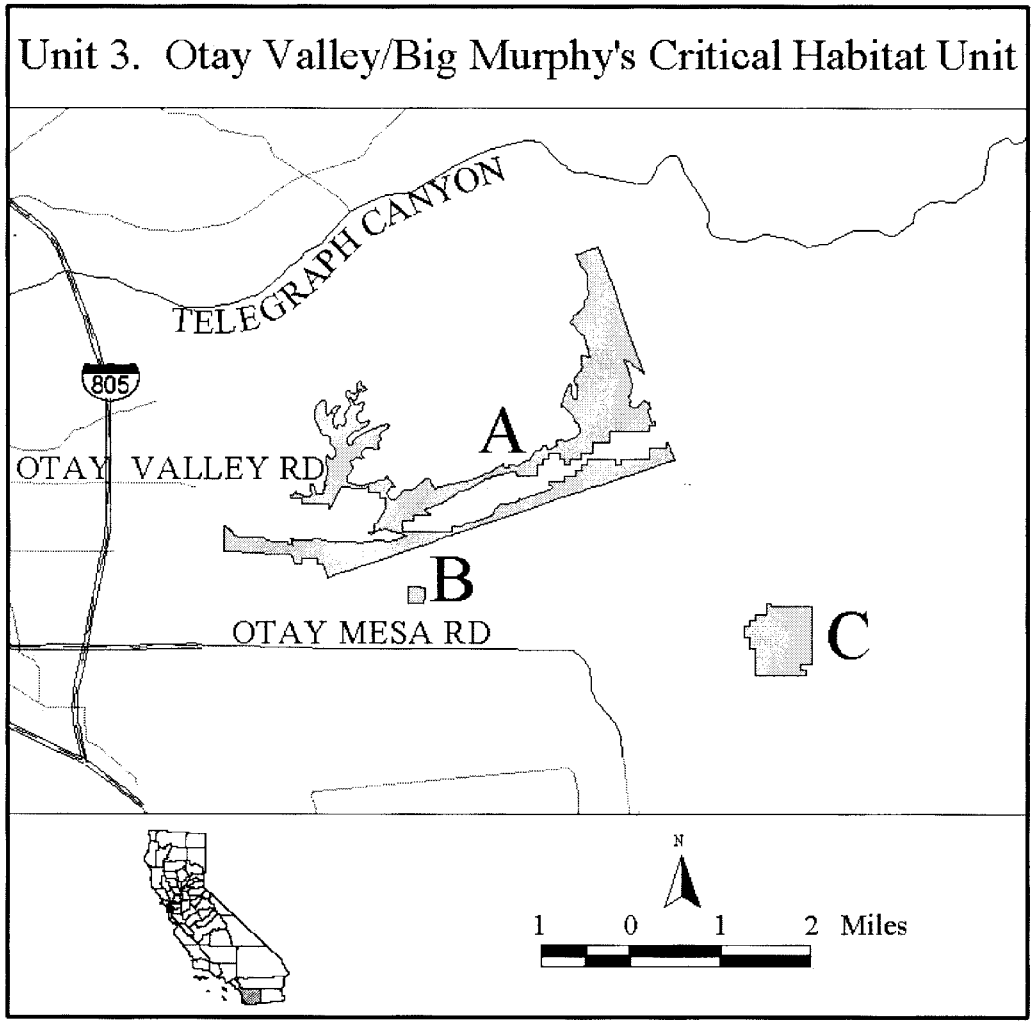
(7) *Unit 3:* Otay Valley/Big Murphy's, San Diego County, California.

(i) *Unit 3a:* From USGS 1:24,000 quadrangle maps Imperial Beach, Otay Mesa, and Jamul Mountains beginning on the CCVPD boundary at UTM NAD27 x-coordinate 499900; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 506400; thence south following the UTM NAD27 coordinates 506400, 3607200; 506300, 3607200; 506300, 3607100; 505600, 3607100; 505600, 3606900; 505300, 3606900; 505300, 3606700; 505100, 3606700; 505100, 3606600; 504900, 3606600; 504900, 3606500; 504800, 3606500; 504800, 3606600; 504700, 3606600; 504700, 3606700; 504500, 3606700; 504500, 3606600; 504400, 3606600; 504400, 3606500; 504300, 3606500; 504300, 3606300; thence west to the CCVPD boundary at UTM y-coordinate 3606300; thence north following the CCVPD boundary to UTM NAD27 x-coordinate 502400; thence south following UTM NAD27 coordinates 502100, 3605600; 502100, 3605500; 501900, 3605500; 501900, 3605300; 502800, 3605300; 502800, 3605400; thence east to the CCVPD boundary at UTM NAD27 y-coordinate 3605400; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 504500; thence north following UTM NAD27 coordinates 504500, 3606200; 504800, 3606200; 504800, 3606300; 505000, 3606300; 505000, 3606400; 505100, 3606400; 505100, 3606500; 505200, 3606500; 505200, 3606600; 505700, 3606600; 505700, 3606500; 505800, 3606500; 505800, 3606600; 506300, 3606600; 506300, 3606800; 506600, 3606800; 506600, 3606900; thence east to the CCVPD boundary at UTM NAD27 y-coordinate 3606900; thence south following the CCVPD boundary to the CCV boundary; thence west following the CCV boundary to the CCVPD boundary; thence north following the CCVPD boundary to the UTM NAD27 y-coordinate 3604700; thence west following UTM NAD27 coordinates 500400, 3604700; 500400, 3604800; 500100, 3604800; 500100, 3604700; thence west to the CCV boundary at UTM NAD27 y-coordinate 3604700; thence north along the CCV boundary to the CCVPD boundary; thence east following the CCVPD boundary to UTM NAD27 x-coordinate 501300; thence north following UTM NAD27 coordinates 501300, 3605300; 501400, 3605300; thence north to the CCVPD boundary at UTM NAD27 x-coordinate 501400; thence north following the CCVPD boundary to UTM NAD27 x-coordinate 501600; thence north following UTM NAD27 coordinates 501600, 3605900; 501500, 3605900; 501500, 3606000; 501300, 3606000; 501300, 3606100; thence north to the CCVPD boundary at UTM NAD27 x-coordinate 501300; thence east following the CCVPD boundary to UTM NAD27 y-coordinate 3605700; thence east following UTM NAD27 coordinates 500600, 3605700; 500600, 3605800; 500100, 3605800; 500100, 3605900; 499900, 3605900; thence north returning to the point of beginning on the CCVPD boundary at UTM NAD27 x-coordinate 499900; excluding the proposed State Route 125 easement.

(ii) *Unit 3b:* From USGS 1:24,000 quadrangle map Otay Mesa, the southern half of the Immigration and Nationalization Service land at Brown Field.

(iii) *Unit 3c:* From USGS 1:24,000 quadrangle map Otay Mesa, beginning on the CSDMjA boundary at UTM NAD27 y-coordinate 3604000; thence south following the CSDMjA boundary to UTM NAD27 x-coordinate 509200; thence south following UTM NAD27 coordinates 509200, 3602900; 509000, 3602900; 509000, 3602800; 509100, 3602800; 509100, 3602700; 508200, 3602700; 508200, 3603200; 508100, 3603200; 508100, 3603400; 508000, 3603400; 508000, 3603600; 508100, 3603600; 508100, 3603700; 508200, 3603700; 508200, 3603800; 508400, 3603800; 508400, 3604000; returning to the point of beginning on the CSDMjA boundary at UTM NAD27 y-coordinate 3604000.

(iv) **Note:** Unit 3 map follows:



* * * * *

Dated: November 29, 2002.

Craig Manson,

Assistant Secretary for Fish and Wildlife and Parks.

[FR Doc. 02–30890 Filed 12–9–02; 8:45 am]

BILLING CODE 4310–55–P

Federal Register

Tuesday,

December 10, 2002

Part VII

Department of Health and Human Services

Food and Drug Administration

21 CFR Part 1020

Electronic Products; Performance Standard for Diagnostic X-Ray Systems and Their Major Components; Proposed Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 1020

[Docket No. 01N–0275]

RIN 0910–AC34

Electronic Products; Performance Standard for Diagnostic X-Ray Systems and Their Major Components

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule.

SUMMARY: The Food and Drug Administration (FDA) is proposing to amend the performance standard for diagnostic x-ray systems and their major components. The agency is taking this action to update the standard to account for changes in technology and use of radiographic and fluoroscopic systems as well as to fully utilize the currently accepted metric system of units in the standard. For clarity and ease of understanding, FDA is republishing the complete contents of the affected regulations. This action is being taken under the Federal Food, Drug, and Cosmetic Act (the act), as amended by the Safe Medical Devices Act of 1990 (SMDA).

DATES: Submit written or electronic comments by April 9, 2003. See section III of this document for the proposed effective date of a final rule based on this document. Submit written comments on the information collection requirements by January 9, 2003.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, 5630 Fishers Lane, rm. 1061, Rockville, MD 20852. Submit electronic comments to http://www.fda.gov/dockets/ecomments. Submit written comments regarding the information collection requirements to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), New Executive Office Bldg., 725 17th St., NW. rm. 10235, Washington, DC 20503, Attn: Desk Officer for FDA.

FOR FURTHER INFORMATION CONTACT: Thomas B. Shope, Center for Devices and Radiological Health (HFZ–140), Food and Drug Administration, 9200 Corporate Blvd., Rockville, MD 20850, 301–443–3314, ext. 132.

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I. Background

The SMDA (Public Law 101–629) transferred the provisions of the Radiation Control for Health and Safety Act of 1968 (RCHSA) (Public Law 90–602) from title III of the Public Health Service Act (PHS Act) (42 U.S.C. 201 *et seq.*) to chapter V of the act (21 U.S.C. 301 *et seq.*). Under the act, FDA administers an electronic product radiation control program to protect the public health and safety. FDA also develops and administers radiation safety performance standards for electronic products.

The purpose of the performance standard and these proposed amendments is to improve the public health by reducing exposure to and the detriment associated with unnecessary ionizing radiation from diagnostic x-ray systems while assuring the clinical utility of the images.

In order for mandatory performance standards to provide the intended public health protection, the standards must be modified when appropriate to reflect changes in technology or product usage. A number of technological developments have been or will soon be implemented for radiographic and fluoroscopic x-ray systems. Such developments, however, are not addressed in the current standard, but have presented problems in the application of the current performance standard.

FDA thus is proposing to amend the performance standard for diagnostic x-ray systems and their major components in §§ 1020.30, 1020.31, 1020.32, and 1020.33(h) (21 CFR 1020.30, 1020.31, 1020.32, and 1020.33(h)).

These proposed amendments will require additional features on newly manufactured x-ray systems that physicians may use to minimize x-ray exposures to patients. Advances in technology have made several of these newly required features possible or feasible at minimal cost.

In the **Federal Register** of August 15, 1972 (37 FR 16461), FDA issued a final rule for the performance standard, which became effective on August 1, 1974. Since then, FDA has made several

amendments to the performance standard to incorporate new technology, to clarify misinterpreted provisions, or to incorporate additional requirements necessary to provide for adequate radiation safety of diagnostic x-ray systems. (See, e.g., amendments published on October 7, 1974 (39 FR 36008); February 25, 1977 (42 FR 10983); September 2, 1977 (42 FR 44230); November 8, 1977 (42 FR 58167); May 22, 1979 (44 FR 29653); August 24, 1979 (44 FR 49667); November 30, 1979 (44 FR 68822); April 25, 1980 (45 FR 27927); August 31, 1984 (49 FR 34698); May 3, 1993 (58 FR 26386); May 19, 1994 (59 FR 26402); and July 2, 1999 (64 FR 35924)).

In the **Federal Register** of December 11, 1997 (62 FR 65235), FDA issued an advance notice of proposed rulemaking requesting comments on the proposed conceptual changes to the performance standard. The agency received 12 comments from State and local radiation control agencies, manufacturers, and a manufacturer organization. FDA considered these comments in developing this proposal. In addition, the concepts embodied in these proposed amendments were discussed on April 8, 1997, during a public meeting of the Technical Electronic Product Radiation Safety Standards Committee (TEPRSSC). TEPRSSC is a statutory advisory committee (21 U.S.C. 360kk(f)(1)(A)) that FDA is required to consult before it may prescribe any electronic product performance standard under the act. The proposed amendments themselves were discussed in detail with the TEPRSSC during its meeting on September 23 and 24, 1998. TEPRSSC approved the content of the proposed amendments and concurred with their publication for public comment.

The proposed amendments described in section II of this document may be considered as nine significant amendments to the current standard and several other minor supporting changes, corrections, or clarifications. The nine principal amendments fall into the following three categories:

1. Amendments requiring changes to equipment design and performance;
2. Amendments designed to improve use of fluoroscopic systems by requiring enhanced information to users; and
3. Amendments applying the standard to new features and technologies associated with fluoroscopic systems.

II. Proposed Amendments to the Performance Standard for Diagnostic X-Ray Systems and Their Major Components

A. Change in the Quantity Used to Describe X-Radiation From Exposure to Air Kerma

FDA proposes to change the quantity and the associated unit used to describe the radiation emitted by the x-ray tube or absorbed in air. The radiation quantity ''exposure'' would be replaced by the quantity ''air kerma.'' The units used to describe these quantities would be changed accordingly throughout the standard, wherever appropriate.

The International System of Units (SI) was named and adopted at the 11th General Conference on Weights and Measures (GCWM) in 1960 as an extension of the earlier metric systems. The SI, also referred to as the metric system, is the approved system of units for use in the United States. The U.S. Department of Commerce published an ''Interpretation and Modification of the International System of Units for the United States'' in the **Federal Register** on December 10, 1976, which set forth the interpretation of the SI system for the United States. The Omnibus Trade and Competitiveness Act of 1998 amended the Metric Conversion Act of 1975 to require each Federal agency to use the metric SI system in its activities. The FDA policy for use of metric measurements is described in a March 19, 1990, memorandum. This policy calls for use of the metric units followed by a parenthetic ''inch-pound'' declaration unless there is a cogent reason not to utilize dual metric and ''inch-pound'' measurements. The policy notes that there should be few such exceptions.

One of the objectives of the International Commission on Radiation Units and Measurements (ICRU) is to develop internationally accepted recommendations regarding quantities and units of radiation and radioactivity. The ICRU recommendations often form the basis of GCWM actions. In 1998, the ICRU published its Report 60, ''Fundamental Quantities and Units for Ionizing Radiation,'' superseding its previous Report 33. Report 60 uses the SI units and special names for some radiation units (Ref. 1). The ICRU had suggested phasing out by 1985 the use of certain special quantities and units that were not part of the SI system, including the special unit of exposure, the roentgen (R).

The current Federal performance standard for diagnostic x-ray equipment uses the special quantity exposure to describe the radiation emitted from an x-ray system. In the **Federal Register** of May 3, 1993 (59 FR 26386), FDA published a final rule which made a partial transition to the SI units by changing the unit for exposure from ''roentgen'' (R) to ''coulomb per kilogram'' (C/kg). This change required using an awkward conversion factor of 2.58×10^{-4} C/kg per R.

In view of current trends, scientific practice, the U.S. policy, and FDA directives, FDA proposes that a complete conversion be made to the SI quantities and units by amending the standard to require using the quantity air kerma in place of the quantity exposure. Additionally, the agency proposes that, in making this conversion, the absolute magnitude of the limits on radiation contained in the standard not be changed. This requires that the limits, when expressed in the new quantity air kerma and its unit, the gray, be expressed with numerical values different from the current limits that use the quantity exposure.

In its recent reports, the National Council on Radiation Protection and Measurement (NCRP) adopted the use of the SI quantity kerma, in particular air kerma, to describe the radiation emitted from an x-ray system. This change in the NCRP recommendations was made without significant concern that previous limits in the voluntary recommendations were slightly increased by this change when numerical values for the limits were not changed but were expressed in the new units. This change in the NCRP recommendations resulted in an increase in the limits, compared to previous recommendations, of about 15 percent.

FDA is not proposing such an increase in this proposal. Instead, FDA is proposing that the numerical values for limits in the standard relating to radiation, when expressed in the new quantity, be changed as well so the new limits will be equivalent to the current limits, thereby making no change to the level of radiation protection provided by the standard. FDA has dropped earlier draft proposals to change the numerical values in a manner similar to the changes made to the voluntary recommendations by the NCRP because of several comments that were received. The comments objected to any changes to the level of radiation protection provided by the limits in the current mandatory standard.

This proposed approach to the numerical limits results in numerical values that are not integer numbers or multiples of 5 or 10, as is the case in the current standard, when limits are expressed in the non-SI unit for

exposure, roentgen. For example, the current limit for an exposure rate of 10 R/minute (R/min), 2.58 x 10^{-3} C/kg per min, becomes an air kerma rate (AKR) limit of 88 milligray per minute (mGy/min) under the proposed approach.

FDA is proposing new definitions of the quantities kerma, as used by the ICRU, and air kerma in § 1020.30(b). Because the quantity air kerma is a different quantity from exposure and not numerically equivalent, FDA is proposing in the amended standard to express the limits in terms of air kerma and indicate the equivalent limit in terms of exposure using the word ''vice'' to indicate this equivalence. Thus, the change described above would be given in the proposed amendments as a limit expressed as ''88 mGy/min (vice 10 R/min)'' indicating that the new limit of 88 mGy/min air kerma is equivalent to the previous limit 10 R/min exposure.

Current International Electrotechnical Commission (IEC) standards for diagnostic x-ray systems use the quantity air kerma to describe the radiation emitted by the x-ray system. The current limits on maximum fluoroscopic exposure rates in the performance standard were established to be consistent with the recommendation of the NCRP. The proposed amendment maintains agreement between the performance standard and the voluntary standards in terms of the quantities and units used. But in order to maintain the current level of radiation protection and in response to the comments received, the change results in numerical limits for some of the requirements different from those used in the current recommendations of the NCRP.

The term ''exposure'' is also used with a second meaning in the performance standard that does not refer to a quantity of radiation as defined here. The second meaning of ''exposure'' refers to the process or condition during which the x-ray tube is activated by a flow of current to the anode and radiation is produced. The second meaning of exposure will continue to be used where appropriate. FDA is proposing to revise the definition of the quantity exposure in § 1020.30(b) to match the current ICRU definition.

FDA also proposes in § 1020.30(b) to amend the definitions of ''half-value layer'' (HVL) and ''x-ray field'' to reflect the change from the quantity exposure to air kerma.

B. Clarification of Applicability of Requirements to Account for Technological Developments in Fluoroscopic X-Ray Systems Such as Digital Imaging, Digital Recording, and New Types of Solid-State X-Ray Imaging Devices

When the performance standard was originally developed, the only means for producing a fluoroscopic image was either a screen of fluorescent material or an x-ray image intensifier tube. Thus, the standard was originally written with these two types of image receptors in mind. The advent of new types of image receptors, such as solid-state x-ray imaging (SSXI) devices, and new modes of image recording, such as digital recording to computer memory or other media, has made the application of the current standard to systems incorporating these new technologies cumbersome and awkward. These new aspects of fluoroscopic system design have required a series of interpretations to apply the standard appropriately. With this in mind, FDA proposes to amend the performance standard to recognize these new types of image receptors and modes of image recording and to clarify how the requirements of the standard apply in each case. This amendment would result in replacing the terms ''x-ray image intensifier'' or ''image intensifier'' with the more general term ''fluoroscopic image receptor'' in numerous sections.

Although the basic radiation protection and safety requirements for fluoroscopic equipment in the performance standard are based on the presence of an x-ray image intensifier, these requirements are also appropriate for newer imaging systems that do not use an x-ray image intensifier. The newer imaging systems may incorporate an image receptor consisting of an absorbing material and an array of solid state transducers that intercepts x-ray photons and directly converts the photon energy into a modulated electrical signal. The signal often goes through analog-to-digital conversion as part of the image formation process to perform both fluoroscopy and radiography. FDA proposes to modify the structure and organization of the standard to address this new type of x-ray imaging equipment. The specific changes proposed are described below in section II.C of this document.

For SSXI, new performance considerations are relevant because of the different construction and the use of solid-state materials such as silicon and selenium. These new considerations include: Changes in spatial resolution, as quantified in the modulation transfer function (MTF), dynamic range, and detective quantum efficiency; the introduction of aliasing artifacts; reduced geometrical efficiency (fill factor); and differences in the range of quantum-limited operation when compared to the older vacuum-tube-based fluoroscopic equipment. Because consensus is not available on some aspects of the performance for these new devices, the agency has relied on premarket review and associated guidance documents to provide the necessary radiation safety control for these devices. (See, e.g., the ''Guidance for the Submission of 510(k)s for Solid State X-Ray Imaging Devices '' (Ref. 2).)

An example of a new performance consideration for the SSXI is the active detector area. Because of the need for electrical separation/insulation between individual detector elements, the detector area has both active and inactive regions, in terms of detecting image information. The relative areas of the active and inactive detector areas are usually described in terms of the fill factor. The fill factor, to a first approximation, is the pixel area (active area in terms of image formation) times the number of pixels divided by the total detector area exposed to the input image flux.

The fill factor and other characteristics can have significant effects on imaging performance. The imaging performance must also be considered when obtaining a complete picture of the effectiveness of these devices. Although FDA is not offering specific proposals for imaging performance at this time, FDA is inviting comment on possible approaches to ensuring radiation protection and safety in the application of these SSXI devices.

C. Changes and Additions to Definitions and Applicability Statements

To address the changes in technology and the new types of image receptors and to allow these items to be appropriately integrated into the standard, FDA proposes the following changes in definitions and applicability sections of the standard. The changes in definitions described here are in addition to those described above in section II.A of this document.

First, in § 1020.30(b), FDA proposes to amend the definition of ''fluoroscopic imaging assembly,'' ''image receptor,'' ''spot-film device,'' and ''x-ray table'' by removing the reference to an x-ray image intensifier as the descriptor of the image receptor or by replacing image intensifier with the more general term fluoroscopic image receptor.

Second, FDA also proposes in § 1020.30(b) to amend the definition of the term ''recording'' by removing the word ''permanent'' and replacing it with the word ''retrievable,'' and to remove the examples of ''recording,'' to clarify the definition of the term ''recording'' in the context of images stored on recording media other than film.

Third, in § 1020.30(b), FDA proposes to clarify the applicability of the standard or to bring precision to the meaning of specific requirements by adding definitions for the terms solid state x-ray imaging device, fluoroscopy, radiography, non-image intensified fluoroscopy, automatic exposure rate control, isocenter, last image hold (LIH) radiograph, mode of operation, and source-skin distance (SSD).

Last, under § 1020.30(b), FDA proposes to add a definition of ''lateral fluoroscope'' to clarify the distinction between a lateral fluoroscope and what is commonly referred to as a C-arm fluoroscope. In an August 29, 1977, Compliance Policy Guide, FDA described the geometry for measuring, during a compliance test, the entrance exposure rate for lateral fluoroscopes. The standard does not define a system by the way it is used but allows the manufacturer to specify the use for which the equipment is designed. The design of the system determines whether the system is a C-arm or a lateral fluoroscope. If the system is a C-arm, it is tested using the test geometry for a C-arm system, even if it is used with a lateral beam direction. If the system is a dedicated lateral fluoroscope used with a biplane system, the more restrictive measurement geometry, as described for a lateral fluoroscope in the current § 1020.32(d)(4)(iv) and (e)(3)(iv), will be used. This test geometry is described in proposed § 1020.32(d)(3)(v).

The lateral fluoroscope consists of a support structure holding a tube housing assembly and a fluoroscopic imaging assembly with the x-ray beam in a lateral projection parallel to the plane of the tabletop. Thus, the geometry of the source and image receptor is fixed relative to the patient or x-ray table. The entrance air kerma would be measured with the radiation measurement instrument detector placed 15 centimeters (cm) from the center of the table in the direction toward the x-ray source. (This position is considered to be typical of the entrance skin surface of the patient.) During the measurement, the tube housing assembly is positioned as close to this location as allowed by the system. For C-arm system measurement geometry, the patient is assumed to be as close to the image receptor as possible and, therefore, the detector is placed 30 cm from the entrance surface of the image receptor. In a lateral fluoroscope, the patient cannot be placed against the image receptor, and the measurement point is referenced to the center of the table. The standard does not require that the table have the centerline indicated. Testing is performed relative to the centerline and the center is located by measurement if necessary.

Additionally, FDA proposes to correct two minor typographical errors that were introduced into the definitions of ''leakage technique factors'' and ''spot-film device'' in the May 3, 1993, **Federal Register**.

FDA proposes in §§ 1020.31 and 1020.32 to amend the applicability statements by removing the reference to an x-ray image intensifier as the descriptor of the image receptor used to distinguish between radiography and fluoroscopy. FDA proposes to further modify the applicability statements to clearly identify the type of x-ray imaging equipment to which each section applies and to distinguish between radiographic and fluoroscopic imaging.

Additionally, to complete the transition to the use of the terminology ''fluoroscopic image receptor,'' FDA proposes in § 1020.32(a)(1) and (a)(2), to replace the term ''image intensifier'' with the more inclusive term ''fluoroscopic image receptor'' to reflect the changes in fluoroscopic image receptor technology and design. This change will, therefore, include SSXI devices, x-ray image intensifiers, and other fluoroscopic image receptors within the transmission limit and measurement criteria of paragraphs (a)(1) and (a)(2).

Similarly, FDA proposes in § 1020.32(g) to remove ''image-intensified fluoroscope'' and add in its place the generic term ''fluoroscope'' in the description of the requirement for minimum SSD for systems intended for specific surgical applications.

Finally, in § 1020.32(i), FDA proposes to remove the term ''intensified imaging'' and add in its place ''image receptor incorporating more than a simple fluorescent screen.'' This removes the reference to a specific type of fluoroscopic image receptor, the image intensifier, and includes all types of receptors other than a simple fluorescent screen as meeting the requirement of § 1020.32(i).

D. Information to be Provided to Users (§ 1020.30(h))

FDA proposes to add two paragraphs to § 1020.30(h). Proposed § 1020.30(h)(5) and (h)(6) would require manufacturers to provide in the instructions for users additional information regarding fluoroscopic x-ray systems.

Recent developments in the technology of fluoroscopic systems have resulted in equipment being increasingly provided with a variety of special modes of operation and methods of recording fluoroscopic images. Some of these modes of operation may significantly increase the entrance AKR to the patient compared to conventional fluoroscopy. There is concern that the operating instructions provided with the fluoroscopic system lack sufficient information concerning the characteristics of these special modes of operation to permit the operator to adequately evaluate the increased radiation output and consequent increased exposure to the patient and operator from these modes of operation. There is typically little information provided to users on the clinical procedure(s) for which each mode was designed, resulting in potential inappropriate application of the mode by a user who is not fully aware of the intended application of the particular mode of operation.

Proposed § 1020.30(h)(5) would require that the information provided to users contain a detailed description of each mode of operation and specific instructions on the manner in which the mode is engaged or disengaged. The manufacturer would also be required to provide information on the specific types of clinical procedures or imaging tasks for which the mode is intended and instructions on how each mode should be used. This information is to be provided in a special section of the user's instruction manual or in a separate manual devoted to this purpose.

Section 1020.30(h)(1)(i) of the performance standard states that the information to users shall contain ''Adequate instructions concerning any radiological safety procedures and precautions which may be necessary because of unique features of the equipment * * *.'' FDA considers any mode of operation that yields an entrance AKR above 88 mGy/min to be a unique feature of the specific fluoroscopic equipment and thus must have a full and complete description in the instructions for its use.

FDA is also of the opinion that, for modes of operation where the entrance

AKR exceeds 88 mGy/min, the manufacturer should provide detailed information to permit the user to assess the exposure to the patient relative to that delivered in the normal mode of operation. Such information would give operators important radiation safety data with which to make better judgments on the possible hazards involved with a particular procedure. FDA has learned that, because of the multiple number of modes and options available with many of the systems, many users are not aware of when or how such modes are engaged and disengaged or the radiation output consequences of such modes. FDA had originally considered requiring the manufacturer to provide data on the entrance AKRs for each mode of operation of the fluoroscopic system. However, the large number of possible combinations of modes and options for operation available with many of the systems makes this impractical. The proposed amendment described in section II.J of this document would require the manufacturer to provide a display of the AKR and cumulative air kerma. With this information, the user is made aware of the relative changes in the AKR when changing from one mode of operation to another. Awareness of such changes will inform the user of the relative output changes of the system as a function of mode of operation, patient size, and system geometry.

FDA believes that manufacturers are already providing much of the information proposed in this requirement. However, the information may not be displayed in a separate section of the manual where users can readily find it, and the information may not contain enough detailed information on the intended use of the various modes of operation to assure proper use of the system.

Proposed § 1020.30(h)(6) would require manufacturers to provide users with information regarding the new features of fluoroscopic systems described in proposed § 1020.32(k). Proposed § 1020.30(h)(6) would also require manufacturers to provide information regarding the display of values of AKR and cumulative air kerma. This information will include a statement of the maximum deviation of the actual values of AKR and cumulative air kerma from their displayed values, maintenance and instrumentation calibration information, and a description of the spatial coordinates of the reference location for which the displayed values are given.

E. Increase in Minimum Half-Value Layer (§ 1020.30(m)(1))

FDA proposes to modify the requirement for minimum HVL to recognize changes in x-ray tube and x-ray generator technology over the last few decades.

The use of x-ray filtration to increase the quality or homogeneity of an x-ray beam through selective absorption of the low energy photons has been a recommended practice for a long time. A 1968 report published by NCRP (appendix B, table 3, in Ref. 3) provides the beam quality in terms of HVL, as a function of tube potential, that would result from specified values of total x-ray filtration in the x-ray beam. However, the values of HVL in the table would only result if one used the NCRP suggested values of total filtration in diagnostic x-ray equipment of that era (i.e., the 1960s to early 1970s). It should be noted that diagnostic x-ray equipment of that era was characterized by x-ray tubes with a large x-ray target angle and x-ray generators with significant ripple in the high voltage waveform (e.g., an x-ray target angle of 22° and a high voltage ripple of 25 percent).

The requirements on beam quality in the current IEC international standard (Ref. 4) are also expressed in a similar manner as the NCRP Report No. 33 (i.e., a total filtration requirement plus a set of minimum HVL values). The Institute of Physical Sciences in Medicine has recently published a report which can be used to estimate the total filtration from HVL data as a function of x-ray target angle and high voltage ripple (Ref. 5). These data point out the lack of correspondence between a total filtration of 2.5 millimeters (mm) of aluminum and the minimum HVL requirements in the performance standard for state-of-the-art x-ray equipment (e.g., an x-ray target angle of 12° and a high voltage ripple of 10 percent). For these types of equipment, the minimum HVL requirements in the performance standard can be met with about 1.8 mm of total filtration versus the required 2.5 mm of total filtration as specified in the IEC standard (Ref. 4). Only equipment with large x-ray target angles (22°) and a great deal of high voltage ripple (25 percent) need a total filtration of 2.5 mm of aluminum to meet the minimum HVL requirements in the performance standard. In terms of skin-sparing effect, the performance-oriented set of minimum HVL values in the performance standard have not kept up with changes in x-ray equipment when compared to the design-oriented requirement of a total filtration of 2.5 mm of aluminum.

For these reasons, FDA proposes to increase the minimum HVL values for radiographic and fluoroscopic equipment excluding mammography equipment and dental equipment designed for use with intraoral image receptors. The proposed minimum HVL values represent the values obtained with a total filtration of 2.5 mm of aluminum on state-of-the-art diagnostic x-ray equipment (i.e., an x-ray target angle of 12° and a high voltage ripple of 10 percent). FDA used the data in the Institute of Physical Sciences in Medicine report to arrive at the proposed minimum HVL values.

As a separate x-ray filtration issue, there has been a substantial increase over the past 20 years in the use of x-ray fluoroscopy as a visualization tool for a wide range of diagnostic and therapeutic procedures. Because of the long catheter manipulation times and the need, in some cases, for a stationary x-ray field, these procedures have the potential, sometimes realized, for high radiation dose to patients and clinical personnel (Ref. 6). In fact, the agency has been actively involved in promoting recommendations for the avoidance of serious, x-ray-induced, skin injuries to patients during fluoroscopically-guided interventional procedures. As a result, there continues to be an interest in dose reduction techniques for these procedures.

In general, the addition of either beam-hardening or K-edge x-ray filters can provide a significant reduction in the exposure, particularly skin exposure, to the patient. However, this reduction in exposure is accompanied by an attendant increase in tube load (Ref. 7). It should be noted that one of the recommendations of the work group on the technical aspects of fluoroscopy at the 1992 American College of Radiology (ACR)/FDA workshop on fluoroscopy (Ref. 8) was to increase the minimum HVL. Therefore, FDA is also proposing an additional requirement for fluoroscopic x-ray systems incorporating x-ray tubes of high heat-load capacity. Manufacturers of these systems would be required to provide a means, at the user's option, for adding additional x-ray filtration over and above the amount needed to meet the proposed new minimum HVL values. This requirement is based on the assumption that x-ray tubes with high heat-load capacity are typically required or provided on equipment designed for use in interventional procedures due to the imaging task requirements and the extended exposure times associated with interventional procedures. The

method of implementation and the actual values of additional filtration to realize the reduction in skin exposure will be left to the discretion of the manufacturer.

F. Change in the Requirement for Fluoroscopic X-Ray Field Limitation and Alignment (§ 1020.32(b))

FDA proposes to reorganize and add new paragraphs to § 1020.32(b) to require improved x-ray field limitation for fluoroscopic x-ray systems. Section 1020.32(b) would be reorganized to retain the current requirements applicable to systems manufactured before the effective date of these amendments. For systems manufactured after the effective date, new requirements are proposed in § 1020.32(b)(4) and (b)(5) respectively, for systems with inherently circular or rectangular image receptors. These proposed new requirements will result in increased geometric efficiency or more efficient use of radiation as described below.

The proposed reorganization and retention of the existing requirements in § 1020.32(b) will be accomplished in the following manner: Section 1020.32(b)(1)(i) will be redesignated as § 1020.32(b)(3); § 1020.32(b)(1)(ii) and (b)(2)(iii) will be combined and redesignated as § 1020.32(b)(1) with appropriate revisions to paragraph references to reflect the reorganization of § 1020.32(b); § 1020.32(b)(2)(iv) will be redesignated as § 1020.32(b)(2) with a minor clarification; and § 1020.32(b)(3) will be moved and redesignated as new § 1020.32(b)(6). Additionally, § 1020.32(b)(2)(i) and (b)(2)(ii) will be moved to §1020.32(b)(4)(i) as § 1020.32(b)(4)(i)(A) and (b)(4)(i)(B).

New requirements of improved efficiency for systems manufactured after the effective date of the amendments are proposed in § 1020.32(b)(4)(ii) for systems with inherently circular image receptors. Section 1020.32(b)(5) would contain the field limitation requirements for systems with inherently rectangular image receptors. The requirements proposed for systems with rectangular image receptors are the same as those currently applicable to radiographic systems provided with positive beam limitation or to spot-film devices that utilize rectangular image receptors. As such, the proposed tolerances for x-ray field limitation are considered technically feasible.

A reduction in unnecessary patient exposure is the basis for all of the x-ray field limitation and alignment requirements in the performance standard. For example, any radiation falling outside the visible area of the image receptor provides no useful diagnostic or visualization information and, therefore, represents unnecessary patient exposure. Once it is recognized that restricting the size of the x-ray field provides an effective control of unnecessary radiation exposure, the question shifts to what is the tolerance technically achievable by the manufacturer for the matching of the x-ray field and the visible area of the image receptor.

The current performance standard (§ 1020.32(b)(2)(i)), states ''neither the length nor the width of the x-ray field in the plane of the image receptor shall exceed that of the visible area of the image receptor by more than 3 percent of the SID. The sum of the excess length and the excess width shall be no greater than 4 percent of the SID.'' These requirements result in worst-case values of geometrical efficiency enumerated in table 1 of this document for what are typical geometrical and operating conditions on fluoroscopic systems. Geometrical efficiency is defined as the ratio of the visible area divided by the area of the x-ray field. It should be noted that the requirements in the existing IEC international standard with respect to x-ray field limitation are more stringent than in the performance standard (Ref. 4). When the x-ray field is rectangular and the visible area is circular, the IEC standard requires that the length and width of the x-ray field be less than the diameter of the maximum visible area of the image intensifier. Thus, if the x-ray field is centered on the visible area of the image intensifier, the x-ray field would exceed the visible area of the image intensifier only in the corners of a rectangular x-ray field, unlike what could result from following the current performance standard.

TABLE 1.—WORST-CASE GEOMETRICAL EFFICIENCY IN PERCENTAGE FOR A FLUOROSCOPIC SYSTEM[1]

Visible Area (circular, cm^2)	X-Ray Field (worst case, square, cm^2)	Efficiency (%)
113	196	57
177	289	61
415	625	66
707	1,024	69

[1] Worst-Case Geometrical Efficiency in Percentage for a Fluoroscopic System With a Source-Image Receptor Distance (SID) of 100 cm, a Square X-Ray Field Size at the Limits Allowed by § 1020.32(b)(2)(i), and Image Intensifiers With 12-, 15-, 23-, and 30-cm Diameter Visible Areas.

As can be seen from table 1 above, the current performance standard allows the possibility of relatively low geometrical efficiency, particularly in modes of operation corresponding to small visible areas on the image intensifier. It should be noted that many fluoroscopically-guided interventional procedures involve the use of small visible areas on the image intensifier (Ref. 9). These low values of geometrical efficiency are a direct result of using a square collimator for the x-ray field when faced with an inherently circular visible area for the image receptor. The use of a continuously adjustable, circular collimator and/or circular apertures along with adjustable rectangular collimation would increase the geometrical efficiency.

Many currently marketed x-ray systems suitable for fluoroscopically-guided interventional procedures provide continuously adjustable, circular collimators as a basic and/or optional capability (Ref. 10). Thus, a continuously adjustable, circular collimator is technically feasible, albeit at some additional cost to the user community. Fluoroscopic x-ray systems with this feature can provide a substantial increase in geometrical efficiency that is important for all types of radiological procedures but particularly important for interventional procedures resulting in high skin exposure.

It is for these reasons that FDA proposes to require geometrical efficiencies of 80 percent or more for all fluoroscopic x-ray systems. When the visible area of the image receptor is

greater than 34 cm in any direction, a geometrical efficiency of 80 percent is no longer sufficiently stringent. FDA proposes to change the requirement to a sizing tolerance at that point (i.e., the x-ray field measured along the direction of greatest misalignment with the visible area of the image receptor shall not extend beyond the visible area of the image receptor by more than 2 cm). This oversizing tolerance will ensure geometrical efficiencies of better than 80 percent for large image receptors. In those unusual cases where the x-ray field is not uniformly intense over its cross-section, the proposed field limitation and alignment requirement provides for measurement of efficiency in terms of air kerma integrated over the x-ray field incident on the visible area of the image receptor (Ref. 11).

The intent is to promote the incorporation of continuously adjustable, circular collimators into all types of fluoroscopic x-ray systems with circular image receptors. FDA acknowledges that the new requirements could be met through the use of less complex, currently available, rectangular collimation and underframing. For example, the amount of underframing (defined as the difference in the width of the x-ray field versus the diameter of the visible area) of a rectangular x-ray field needed to meet the new requirements is enumerated in table 2 of this document for the same geometrical and operating conditions of fluoroscopic systems described in table 1 of this document. The agency is soliciting comments on the ramifications of this amount of underframing. These proposed requirements for increased x-ray utilization efficiency would appear in proposed § 1020.32(b)(4)(ii) for systems manufactured after the effective date of the amendments.

TABLE 2.—UNDERFRAMING OF A RECTANGULAR X-RAY FIELD[1]

Visible Area Diameter (cm)	X-Ray Field Width (cm)	Underframing (cm)
12	11.9	-0.1
15	14.9	-0.1
23	22.8	-0.2
30	29.7	-0.3

[1] Amount of Underframing of a Rectangular X-Ray Field Needed to Meet the New Field Limitation Requirements for a Fluoroscopic System With an SID of 100 cm and Image Intensifiers With 12-, 15-, 23-, and 30-cm Diameter Visible Areas.

Although the field limitation requirements for fluoroscopic equipment in the performance standard are predicated on the presence of an x-ray image intensifier, the requirements are also appropriate for newer imaging systems that do not use an x-ray image intensifier. As mentioned previously, the newer imaging systems may incorporate an image receptor consisting of an absorbing material backed by an array of solid state transducers that intercepts x-ray photons and converts the photon energy into a modulated electrical signal with eventual analog-to-digital conversion. These image receptors are inherently rectangular. As is the case for image intensifier based systems, magnification modes are available through the use of a ''digital zoom'' where only a selected portion of the digital array is visible to the operator. FDA is proposing to apply the current requirements of the standard for x-ray field limitation that are used for spot-film devices or radiographic systems equipped with positive beam limitation, and which also use rectangular fields, to this new type of image receptor. These requirements result in worst-case values of geometrical efficiency (defined as the square visible area divided by the area of a square x-ray field) enumerated in table 3 of this document for what are typical geometrical and operating conditions of fluoroscopic systems.

TABLE 3.—WORST-CASE GEOMETRICAL EFFICIENCY IN PERCENTAGE FOR A FLUOROSCOPIC SYSTEM[1]

Visible Area Diameter (square, cm^2)	X-Ray Field (square, cm^2)	Efficiency (%)
144	196	73
225	289	78
529	625	85
900	1,024	88

[1] Worst-Case Geometrical Efficiency in Percentage for a Fluoroscopic System With an SID of 100 cm, a Square X-Ray Field Size at the Limits Allowed by § 1020.32(b)(2)(i), and Solid-State X-Ray Images with 12 cm x 12 cm, 15 cm x 15 cm, 23 cm x 23 cm, and 30 cm x 30 cm Visible Areas.

As can be seen from table 3 above, the current standard provides relatively high geometrical efficiency. In this case, the high values of geometrical efficiency are a direct result of using a rectangular collimator for the x-ray field when faced with an inherently rectangular visible area for the image receptor. Proposed § 1020.32(b)(5) would explicitly state the field limitation requirements for systems with inherently rectangular image receptors.

G. Revisions and Change in the Limits to Maximum Air Kerma Rate (§ 1020.32(d) and (e))

In § 1020.32, FDA proposes to revise and reorganize § 1020.32(d) and (e) to clarify and simplify the requirements on maximum AKR for fluoroscopic x-ray systems. In § 1020.32(d), FDA proposes to incorporate all of the requirements for AKR limits regardless of the date of manufacture of the x-ray system. The revised paragraph would also incorporate the new quantity kerma and the corresponding limits on entrance

AKRs. FDA proposes to move the current requirements of § 1020.32(e) that are applicable to equipment manufactured on or after May 19, 1995, to the revised § 1020.32(d). This would consolidate all of the requirements for limits on the maximum AKR in a single section (i.e., revised § 1020.32(d)). Section 1020.32(e) would be reserved.

The requirements applicable to fluoroscopic systems manufactured before May 19, 1995, currently contained in § 1020.32(d)(1) through (d)(3), would be contained in revised § 1020.32(d)(1). No change in the limit on maximum AKR for previously manufactured fluoroscopic systems is introduced by the reorganization and simplification of current § 1020.32(d). This simplification is obtained by describing the exceptions to the maximum AKR only one time in proposed § 1020.32(d)(1)(v) rather than three times as in current § 1020.32(d)(1) through (d)(3).

Proposed § 1020.32(d)(1) also includes § 1020.32(d)(1)(iv) that makes explicit the fact that systems manufactured before May 19, 1995, may be modified to comply with new requirements contained in proposed § 1020.32(d)(2). The rationale for this addition is described in section II.M of this document.

Proposed § 1020.32(d)(2) would include the requirements applicable to fluoroscopic systems manufactured on or after May 19, 1995. Section 1020.32(d)(2)(i) would contain the language currently in § 1020.32(e)(1) that requires systems with the capability for AKR greater than 44 mGy/min to be provided with automatic exposure rate control.

Section 1020.32(d)(2)(ii) would contain the requirements of current § 1020.32(e)(2) that became effective on May 19, 1995, and establish an upper limit on the AKR during high-level control mode of operation. Section 1020.32(d)(2)(iii) would incorporate the exceptions to the maximum AKR limit given in § 1020.32(d)(2)(ii). Section 1020.32(d)(2)(ii)(A) would contain the exception currently found in § 1020.32(e)(2)(i) that addresses the recording of images using a pulsed mode applicable to equipment manufactured prior to the effective date of these amendments. For equipment manufactured after the effective date of these amendments, § 1020.32(d)(2)(ii)(B) would add an additional new exception described below in section II.H of this document. Finally, the exception currently found in § 1020.32(e)(2)(ii) addressing high-level control mode of operation would be moved to § 1020.32(d)(2)(ii)(C).

The conditions under which compliance is determined are currently found in § 1020.32(d)(4) and (e)(3). These conditions would be moved to § 1020.32(d)(3). Section 1020.32(d)(3)(vi) would be added to specifically address the measurement conditions for systems with SIDs less than 45 cm. For these systems, FDA is proposing that compliance be determined by measurement at the minimum SSD.

The exemption for radiation therapy simulation systems currently found in § 1020.32(d)(5) and (e)(4) would be incorporated into a proposed revision of § 1020.32(d)(4).

H. New Modes of Image Recording

New requirements would be established in a § 1020.32(d)(2)(iii)(B) to further limit the conditions under which the limit on the maximum AKR rate would not apply. In May 1994, the agency amended the requirements in the standard pertaining to the limit on entrance exposure rate (EER) during fluoroscopy. (For convenience in discussing the current standard and proposed changes, reference will be made to the limits on EER rather than to entrance AKR which will be the quantity used in the amended standard.)

These 1994 amendments prescribed an exception to the limit on EER during the recording of images ''from an x-ray image intensifier tube using photographic film or a video camera when the x-ray source is operated in a pulsed mode.'' (Pulsed mode is defined as operation of the x-ray system such that the x-ray tube current is pulsed by the x-ray control to produce one or more exposure intervals of duration less than one-half second.) These amendments also prescribed a limit on EER of 20 R/min when an optional high-level control was activated during fluoroscopy.

The basic premise of these amendments was to provide for a set of limits on the maximum EER during fluoroscopy, and for an exception during radiographic modes of operation such as cine-radiography. The defining terms for determining whether the equipment was in fluoroscopy versus radiography mode of operation were ''recording of images'' and ''pulsed mode.'' In retrospect, these terms were not explicit enough for making a determination of the mode of operation. For example, the current wording would allow adding a recording device such as a video tape recorder to the imaging chain in a pulsed mode of operation. This would, thereby, circumvent the intent of the regulation and allow the limit on maximum EER during fluoroscopy to be exceeded, even though the recorded images are never used in the radiological examination and are used only for archiving purposes, if used at all.

As mentioned in the earlier discussion on new types of image receptors, FDA is proposing new definitions for fluoroscopy and radiography. These definitions are needed to make a clearer distinction between fluoroscopy and radiography, regardless of the type of image receptor being used. A key element in the new definitions is that radiographic images recorded from the fluoroscopic image receptor must be available for viewing after the acquisition of the images and during or after the procedure, whereas fluoroscopic images are viewed in real time, or near-real time during the procedure. Thus, the definitions of the two modes of operation, i.e., radiography and fluoroscopy, are tied to the intended use, and not to an arbitrary interval of time, as under the current ''pulsed mode'' definition.

In addition to the proposed new definitions, FDA proposes to change the description of the conditions under which exceptions to the limit on maximum AKR are allowed. Section 1020.32(d)(2(iii) would contain two exemptions. The exemption currently in § 1020.32(e)(2)(i) would be moved to § 1020.32(d)(2)(iii)(A) and would apply to fluoroscopic systems manufactured on or after May 19, 1995, but before the effective date of the proposed amendment. A new exception would be added in § 1020.32(d)(2)(iii)(B). This exception would recognize that image receptors other than x-ray image intensifiers tubes are now used in fluoroscopy and would remove the reference to operation in a pulsed mode. Instead, the exception to the limit on maximum AKR would apply to any recording of images from the fluoroscopic image receptor except when the recording of images is accomplished using a video tape recorder or a video disk recorder. This would prevent the simple addition of an analog image-recording device to the fluoroscopic system as a means to overcome the limit on maximum AKR during normal fluoroscopy.

As discussed in the preamble of the proposed 1993 amendments (58 FR 26407, May 3, 1993), the agency is still interested in receiving information on any clinical situations that could require higher AKR than currently permitted. Such situations have been suggested to arise due to the necessity of momentarily viewing the patient or the state of a device in a patient as best as can be done or with the highest image quality obtainable during fluoroscopy

mode of operation. Some anecdotal evidence seems to argue for an increase in the EER above the current 20 R/min limit under high-level control. The 1994 change in the regulations underwent an extensive review and comment period. The consensus of that review, although not unanimous at the time of issuance of the regulations, was that 20 R/min would be sufficiently high for most clinical fluoroscopy situations. The agency was and is still sensitive to the concern that the limits on EER may in some cases compromise the clinical utility of the fluoroscopic equipment.

Because of these concerns regarding the appropriate upper limit AKR, FDA is encouraging further comment on the topic of limits on AKR under normal and high-level fluoroscopy modes. For example, some members of the radiological community have proposed that fluoroscopic equipment allow a momentary viewing of the state of an intervention at an increased but unspecified AKR. This momentary view would have a maximum duration of 10 to 15 seconds. This proposal was accompanied with the comment that if physicians are not allowed to use such a mode, they will continue the practice of using cineradiography bursts at high AKRs to accomplish the clinical task.

I. Entrance Air Kerma Rate at the Fluoroscopic Image Receptor

Comments received by the agency suggest that an alternative approach in place of or in addition to limits on AKR during fluoroscopy would be more useful and effective in limiting unnecessary radiation and assuring optimum system performance. The suggestion is that the limits on AKR to the patient (represented by a measurement made according to the compliance geometry described in current § 1020.32(e)(3)) be replaced by limits on the entrance AKR at the input surface of the image receptor (EAKIR). Different EAKIR limits could be established for different modes of fluoroscopic imaging, depending on the image performance required for the clinical task.

There is a precedent for this approach in other consensus documents such as the NCRP Report No. 99 and NCRP Report No. 102 (Refs. 12 and 13). For example, the NCRP Report No. 99 states that during fluoroscopy ''typical image intensifier entrance exposure should be in the range of 13 to 52 nC/kg/image (50 to 200 μR/image) depending on image intensifier size * * *.'' (Note that, in the opinion of FDA, there is an error in the NCRP Report No. 99: these numbers reflect exposure per second, not exposure per image.) In the same manner, the NCRP Report No. 102 provides a table with ''air kerma rate values to produce acceptable fluoroscopy images'' and ''air kerma to produce static images equivalent to that produced by a par speed screen-film system.'' FDA invites comments on the feasibility and desirability of this approach to limit unnecessary radiation from fluoroscopic systems.

J. Requirement for Minimum Source-Skin Distance for Small C-Arm Fluoroscopic Systems (§ 1020.32(g))

FDA proposes in § 1020.32(g) to add § 1020.32(g)(2) to establish a minimum source-skin distance (MSSD) for ''C-arm'' type x-ray systems having source-to-image-receptor distances of 45 cm or less and intended for imaging extremities. This amendment would incorporate into the performance standard the content of variances from the performance standard granted according to § 1010.4.

FDA has granted variances from the requirement set out in §1020.32(g) for a limit on the MSSD for fluoroscopic x-ray systems that were designed as small portable C-arm systems. These are fluoroscopic systems that were originally designed to be hand-held and were used at sporting events for a quick examination/diagnosis of orthopedic injuries. In fact, some of the early systems used a radioisotope instead of an x-ray tube as the source of the radiation and were, therefore, outside the purview of FDA under the RCHSA (although they are regulated as medical devices). Over time, manufacturers of these devices enlarged the distance or opening between the x-ray source and the image receptor to allow examination of larger extremities. The argument was that some athletes had larger extremities and a larger opening was needed to permit the use of the systems on them. The systems were marketed under a variance from § 1020.32(g) and were labeled for extremity use only. As the size of the opening on systems for which variances have been requested has increased from about 20 cm to 35 cm, and manufacturers have increased the radiation output of these systems, the agency has become concerned about the loss of the skin-dose sparing properties of the MSSD requirement. In addition, because a variance is granted for a finite time period, renewal of the variances and the reviewing of new conditions for use present resource implications for FDA and the manufacturers.

The justification for a variance from § 1020.32(g) used by many manufacturers of these small C-arm systems is geometrical scaling. Manufacturers have stated in their variance applications that the MSSD is proportional to the source-image receptor distance in comparison to full-sized C-arm systems. Although extremities can be considered to scale geometrically in a similar manner compared to the trunk or large body parts, other body parts do not scale in such a manner as to maintain a similar skin dose. For the source-image receptor distances used in these systems, evaluation of this geometrical relationship shows that the factor, by which the entrance AKR to the body part increases over that for thinner parts, increases significantly as the thickness of the body part being imaged reaches over 15 or 16 cm. This increase reaches a factor of two for a thickness of 26 cm and increases rapidly for thicker parts. In their original configuration, these devices had a very small opening and could not accommodate anything other than a limb. The latest configurations can easily accommodate the whole body of a neonate or a pediatric patient.

At some point, these systems no longer represent small C-arms for extremity use alone but are simply slightly smaller versions of conventional C-arms for whole-body, general-purpose examinations. If the system can be used for whole-body examination purposes, it should meet the minimum radiation safety standards applicable to conventional C-arm systems. Through the variance petition process, FDA has limited the small C-arm systems to extremity use only.

To incorporate the protection provided by the conditions imposed by the variances and to incorporate this requirement in the performance standard, FDA proposes to limit the source-skin distance to not less than 19 cm for fluoroscopic systems having source-image receptor distances of 45 cm or less. Provision would be allowed for systems designed for specific surgical applications to be operated with a source-skin distance of not less than 10 cm. Systems subject to this requirement would be required to be labeled for use for imaging extremities only. Manufacturers would be required to include appropriate precautions in the information provided to users under § 1020.30(h).

K. Requirements for Display of Fluoroscopic Irradiation Time, Air Kerma Rate, and Cumulative Air Kerma (§ 1020.32(h) and Proposed (k))

FDA is proposing that newly manufactured fluoroscopic systems display directly to the fluoroscopist information related to three

fundamental aspects of patient irradiation—the duration, rate, and amount of x-ray emissions. Generally, fluoroscopic systems do not currently provide such information at all. Irradiation time, AKR, and cumulative air kerma are basic radiological variables important for medical radiation protection. Their values may be applied to the process of optimization (i.e., obtaining radiological images with the least amount of radiation required), to the assessment of radiation detriment as a factor affecting patient-outcome efficacy, and to the development of reference levels representative of normal clinical practice. Optimization, efficacy, and reference levels currently comprise a conceptual vanguard of radiation protection in medicine at the international level (Refs. 14 to 17). When monitored in the clinic, irradiation time, AKR, and cumulative air kerma may be used to indicate risk of acute skin injury arising from potentially prolonged irradiation associated with some interventional procedures (Refs. 18 to 20). Values displayed directly to practitioners as an examination or procedure progresses can feed back to them indices of radiation burden, and practitioners can respond promptly by adjusting protocols and techniques to minimize dose to patients and practitioners as practitioners optimize radiation levels necessary for medical imaging. Moreover, for fluoroscopy and radiography in general, knowledge of irradiation levels at patient skin entrance is an essential starting place for evaluation of absorbed dose to internal tissues (Refs. 9 and 21). Such doses are stochastically linked to cancer morbidity, mortality, and to genetically transmissible defects (Refs. 14 and 22). Estimates of cumulative doses absorbed in tissues foster risk communication between medical staff and patients and, when tracked over time, are effective indicators of practice consistency, variability, or anomaly in the quality assurance activities associated with assuring the safety of clinical procedures.

The need for displays of irradiation variables was recognized at the 1992 national workshop on safety issues in fluoroscopy organized by the ACR and FDA (Ref. 8). In October 1995, the need was also recognized internationally by the workshop on efficacy and radiation safety in interventional radiology, sponsored jointly by the World Health Organization and the Institute of Radiation Hygiene, Radiation Protection Ministry, Federal Republic of Germany (Ref. 23). Recently, requirements for displays of irradiation parameters have been incorporated into an international standard for x-ray systems for interventional radiology (Ref. 24). With the advent of commercially available and relatively inexpensive means to measure and display real-time AKR and cumulative air kerma produced by fluoroscopic systems (Ref. 25), it is feasible as well as desirable to require that this information be directly observable by fluoroscopists at their working positions.

The proposed display requirements would apply to all types of newly manufactured fluoroscopic equipment (i.e., from systems found in cardiac catheterization suites, to equipment used for upper gastrointestinal fluoroscopy, to ''mini'' C-arms, and also to each fluoroscopic x-ray tube as part of any system). FDA invites comments about whether these requirements would be suitable to all types, or to a limited set of fluoroscopic equipment, namely, to stationary C-arm fluoroscopes that are typically used in interventional procedures.

1. Fluoroscopic Irradiation Time, Display, and Signal

Fluoroscopic irradiation time is profoundly tied to patient dose in a complex way that involves many other factors (e.g., see Ref. 26). FDA believes it advantageous to require that cumulative irradiation-time values be treated in their own right, in addition to the other variables cited in the proposed § 1020.32(k), as radiological parameters whose control would facilitate radiation-protection optimization. Physician members of TEPRSSC pointed out at its September 1998 meeting that irradiation time is the single fundamental variable over which a physician using fluoroscopy has the most direct and easiest control through activating or deactivating x-ray production, typically by means of a pedal switch (Ref. 27).

FDA proposes to add § 1020.32(h)(2) to the regulations to change the current fluoroscopic timer requirement in two ways. First, § 1020.32(h)(2)(i) would require that the values of the cumulative irradiation times associated with each of the fluoroscopic tubes of a system used in an examination or procedure be displayed to the fluoroscopist at his or her working position. The displayed values would be indicated from the beginning, throughout, and after an examination ends, available until the cumulative irradiation timer is reset to zero prior to a new examination. Second, § 1020.32(h)(2)(ii) would require an audible signal cycle different from that of current equipment for each x-ray tube used during an examination or procedure. Contrary to the current provision that allows the timing device to be preset to any interval up until a maximum cumulative irradiation time of 5 minutes, FDA proposes that a signal audible to the fluoroscopist sound at each fixed interval of 5 minutes of irradiation time. Also contrary to the current requirement, instead of sounding until reset, the audible signal would sound (while x-rays are produced) for a minimum of only 1 second, after which the signal could stop until a subsequent 5 minutes of irradiation elapses. The audible signal would not affect the production of x-rays, the display of cumulative irradiation-time values required by § 1020.32(h)(2)(i), or any of the other displays proposed in § 1020.32(k).

Considering advice offered at the 1998 TEPRSSC meeting (Ref. 27), FDA now believes that a fixed, standard (5 minute) period for an alert signal would avoid potential confusion that could ensue with a fluoroscopic timer that is variably preset. For example, such confusion could arise in a busy clinical facility with many different users, where fluoroscopists might not be aware of the need to readjust alert intervals that had been changed previously by other fluoroscopists to accommodate the individual protocol requirements associated with particular patient examinations. Furthermore, FDA believes that an audible signal of short duration would be a more effective and useful alert than a signal that sounds continuously, requires a reset, and therefore, could pose a distraction to users. FDA seeks comments about the audible signal cycle in proposed § 1020.32(h)(2)(ii), particularly in comparison to the suggested alternative below that is not currently in the proposal.

As an alternative approach, the selection of the time period until the alarm sounds could be at the discretion of the fluoroscopist. The timer could be preset to any period (less than, equal to, or greater than 5 minutes), or preset even to not sound at all. Under this approach, before an examination or procedure, the fluoroscopist could select a period beyond which an audible signal would sound until the timer could be reset (or else sound briefly then remain silent until the preset fluoroscopic period elapses again). Presuming clinicians maintain personal cognizance of fluoroscopic timer options and adaptability, such alternatives would offer them flexibility and opportunity to apply standard features of equipment operation to their

own individual clinical protocols and practices.

FDA also seeks comment on whether the display of the cumulative irradiation time should be visible to the fluoroscopist at his or her working position or whether it is sufficient to display the cumulative time at the control console. It has been suggested that this display should be available to the fluoroscopist to permit constant monitoring by the fluoroscopist. Other opinions are that such a display at the working position would only add confusion to an already complex visual environment, and display of the cumulative irradiation time at the x-ray control would make the information available in any case. Display at the fluoroscopist's working position may be slightly more complex or costly than display at the x-ray control.

2. Displays of Air Kerma Rate and Cumulative Air Kerma

FDA believes that a requirement for displays of AKR and cumulative air kerma values would significantly advance the optimization of radiation safety, in consideration of recent developments in clinical practice and technology (Refs. 23, 25, and 26), an evolving consensus for a radiation-protection framework (Refs. 14 to 17), and specific guidance (Refs. 18 to 20). Air kerma and AKR are fundamental radiological quantities of the amount and rate of charged-particle kinetic energy liberated per mass of air traversed by incident x-rays (Ref. 1). For this reason, FDA proposes to add § 1020.32(k) to require that all new fluoroscopic systems be capable of displaying real-time values of the AKR and cumulative air kerma delivered by each x-ray tube at reference locations representative of x-ray beam entry to the patient skin surface. These displays would be directly discernible at the fluoroscopist's working position, and the displayed values would deviate by no more than ±25 percent from actual values. To elucidate these requirements and those of the other proposed amendments, the definitions of the terms ''fluoroscopy,'' ''mode of operation,'' ''and radiography'' are proposed in § 1020.30(b). The utility of the display requirements could be broadly leveraged among practitioners in a variety of clinical settings through familiarization with relatively standardized display formats. Such standardization is proposed in § 1020.32(k)(1) through (k)(7), where the particular requirements proposed conform generally to those of the recently published IEC standard (Ref. 24).

During fluoroscopy or while recording images during a fluoroscopic procedure, the displayed value of the AKR would represent in real time the magnitude of air kerma per unit time being delivered at any geometrical point within a specified reference locus. The displayed value of the cumulative air kerma would represent a sum of two parts: (1) The fluoroscopic AKR integrated over an interval until update, and (2) all contributions to the air kerma (at any point in the same reference locus) from radiography occurring in that interval. The cumulative air kerma would be updated throughout the examination or procedure, and the integration interval would be the time between the start of an examination or procedure and the end of the most recent episode of either fluoroscopy or radiography during that same examination or procedure.

For each x-ray tube used during fluoroscopy or during recording of fluoroscopy, the value of the AKR will be displayed. After the cessation of fluoroscopy, the cumulative air kerma will be displayed and will remain displayed until the resumption of fluoroscopy or a radiographic mode is activated or the display is reset for a new patient or procedure. Thus, the cumulative air kerma will be displayed after x-ray production ceases from either fluoroscopy or radiography.

Values of the AKR are displayed at times other than those for the cumulative air kerma in order to underscore the distinction between these two variables and also to reduce the potential for overwhelming the fluoroscopist with too much information presented at once. At any particular moment during an examination or procedure, only values of the irradiation time and AKR (or cumulative air kerma) would be on display for each tube used. If, for example, a biplane fluoroscopic system were used in some cardiac catheterization procedure, two separate sets of values—one set for each of the x-ray tubes of the biplane—would be displayed. Under such circumstances of multiple presentations of related information, it is important that the values displayed be distinguishable enough from each other to be easily recognized and associated with the different radiological variables they represent. For this reason, FDA proposes in § 1020.32(h)(2)(i) and (k)(3) to require that the units of measurement be displayed as well as the values per se. FDA also proposes in § 1020.32(k)(1) and (k)(2) to require that the measurement units mGy/min and mGy be displayed respectively alongside the values for AKR and cumulative air kerma. These values would serve as a labeling distinction to preclude potential confusion of the quantities.

As measures of fundamental radiological quantities, the displayed values of AKR and cumulative air kerma would refer to free-in-air irradiation conditions (i.e., their evaluations would be made minus any contributions of scatter radiation, particularly contributions backscattered from a patient (or from a measurement phantom)). Also, the displayed values would refer to irradiation conditions at a reference location (i.e., at any geometrical point contained within a specific reference locus defined according to the type of fluoroscopic system). Each reference location is intended to represent, at least nominally, a place of x-ray beam entry to the patient skin. For fluoroscopes with the x-ray source below or above the table, or of the lateral type, § 1020.32(k)(5)(i) would have skin-entrance reference locations correspond identically and respectively to those specified in § 1020.32(d)(3)(i), (d)(3)(ii), or (d)(3)(v). These locations define the geometry for measuring compliance with the regulatory maxima of the AKR.

For C-arm type fluoroscopes, however, in many cases the locations proposed for measuring compliance with the regulatory maxima of the AKR, given in § 1020.32(d)(3)(iii) and (d)(3)(iv), would not suitably represent where the x-ray field enters the patient skin. This is especially true for oblique angulations and extended distances between the x-ray source and image receptor. Therefore, in § 1020.32(k)(5)(ii), for C-arm systems, FDA is proposing a skin-entrance reference location for display quantities that is different from the location for measuring compliance with regulatory AKR limits. For evaluation of displayed values, the skin-entrance reference location would be either 15 cm from the isocenter toward the x-ray source along the beam axis (irrespective of angulation) or, alternatively, along the beam axis at a point deemed by the manufacturer to represent the intersection of the x-ray beam and the entrance surface of the patient skin. A definition of ''isocenter'' is proposed in § 1020.30(b). Proposed § 1020.32(k)(5)(ii) would allow manufacturers to choose either the 15-cm locus or specify the alternative. The alternative locus would offer manufacturers flexibility to provide systems that could evaluate AKR and cumulative air kerma in closer proximity to actual places of x-ray beam entry to patients than could systems with reference skin entrance defined

generically at a 15-cm locus from the isocenter. An alternative skin-entrance reference location may be particularly appropriate for mini C-arm fluoroscopes (i.e., those with SID less than 45 cm, for which the 15-cm locus from the isocenter may be physically unrealizable). In any case, new paragraphs § 1020.30(h)(6)(iii) and (h)(6)(iv) would require that manufacturers identify to the user the spatial coordinates of the irradiation location to which displayed values refer and also provide a rationale justifying any reference location identified as an alternative to the 15-cm locus.

In patient examinations or procedures with C-arm systems, one possible result of having reference locations of x-ray beam skin-entry different from the measurement sites for AKR compliance is that displayed values could actually exceed the regulatory maxima even though the system is fully compliant. Such a situation could arise for some irradiation geometry when the reference skin-entrance location is closer to the x-ray source than is the site for measuring compliance. Displayed values of the AKR and cumulative air kerma are intended to inform the fluoroscopist of radiation burden to the patient. Conversely, the AKR regulatory maxima, practicably measured 30 cm from the imaging-assembly input, according to § 1020.32(d)(3)(iii) or at the minimum SSD according to § 1020.32(d)(3)(iv), are intended to impose upper limits on radiation output that are compatible with the levels needed by the imaging chain for adequate fluoroscopic visualization.

Reset of the displays to zero would occur between sessions with successive patients. Before reset, a final value of the cumulative air kerma may serve to reinforce an association between the culmination of a radiological examination or procedure and the radiation burden incurred by the patient. FDA believes that the availability of this value would greatly facilitate the implementation of previously published recommendations (Refs. 18 to 20) on recording information in the patient's medical record to identify the potential for serious x-ray-induced skin injuries in order to avoid them.

L. ''Last-Image Hold'' Feature on Fluoroscopic Systems (Proposed § 1020.32(j))

FDA proposes to add a paragraph to require that all fluoroscopic x-ray systems be provided with a means to continuously display the last image acquired prior to termination of exposure.

The wide availability of electronic methods for the recording and displaying of video images makes possible the provision of a ''last-image hold'' or ''freeze-frame'' capability on fluoroscopic x-ray systems. This feature allows the fluoroscopic x-ray system to continuously present a static image of the last fluoroscopic scene captured or presented at termination of the fluoroscopic exposure. This feature also provides the user with the ability to conveniently view fluoroscopic images without continuously irradiating the patient.

This feature is especially useful in procedures such as fluoroscopically-guided needle placement for biopsy or drainage, catheter or tube placement, and other diagnostic or therapeutic interventional procedures. Systems provided with this feature reduce fluoroscopic exposure times while enabling extended examination and planning during fluoroscopically-guided procedures.

This capability is provided as a basic or optional feature on many currently marketed fluoroscopic systems. Many individuals have expressed the opinion that because of the radiation dose reduction afforded by such a feature, it should be provided on all new fluoroscopic systems. Such a recommendation was strongly endorsed at the workshop on fluoroscopy in 1992 (Ref. 8). In addition, a requirement for this capability is included in the recently published IEC standard for the safety of x-ray equipment for interventional radiology (Ref. 24). Establishing this requirement would assure that all new fluoroscopic systems have this patient radiation dose reduction feature and that it is available when its use is appropriate. Without such a requirement, some systems may for economic reasons continue to be purchased without this feature, thereby denying dose reduction benefits to patients.

Proposed § 1020.32(j) would permit the displayed image to be obtained from the last or a combination of the last few fluoroscopic video frames obtained just prior to termination of fluoroscopic exposure or by an alternative implementation via a radiographic exposure automatically produced at termination of the fluoroscopic exposure. Comments are solicited as to whether these approaches to implementation of last image-hold are appropriate and needed.

M. Modification of Previously Manufactured and Certified Equipment

FDA proposes to add language to § 1020.32(d)(1)(iv) and (h) to make explicit the opportunity under § 1020.30(q) for modifications to be made to existing certified x-ray systems. Modifications are currently permitted as long as the modification does not result in a failure to comply with the requirements of the performance standard. Changes in performance resulting from amendments to the performance standard often result in enhanced radiation safety or features not available on previously manufactured and certified systems.

The existing performance standard requires manufacturers to certify that their products meet the applicable performance requirements in effect at the time of manufacture. Therefore, amendments to the performance standard are generally not retroactive and effective dates implementing the standard are specified in the regulations. Usually, a 1-year effective date is provided in order to allow manufacturers time to adjust manufacturing and assembly of their products under the new or amended regulations. Indeed, it would be unreasonable to require the manufacturer to retrofit or to remanufacture previously produced products because of a change in the standard for equipment that could have a useful life of 20 or more years.

In particular, the performance requirements regarding maximum exposure rate limits (proposed to become maximum AKR limits), established in 1994 (59 FR 26402), and the proposed requirements in § 1020.32(h) for fluoroscopic timers are requirements or performance features that users of older fluoroscopic equipment may wish to implement on their systems. The earlier amendment in 1994 and the current proposal apply to new equipment manufactured after the effective date of the amendment. The language proposed for inclusion in § 1020.32(d) and (h) would provide a mechanism for users of older equipment to obtain the performance required under the proposed amendments. These changes would allow older systems to be modified to meet the maximum AKR limit and fluoroscopic timer performance that will be required under the proposed requirements.

The owner of the fluoroscopic system modified under § 1020.30(q) is responsible for assuring that the modified x-ray system complies with the applicable requirements of the performance standard following the modification. The modification to the system may be accomplished by a third party or by the original equipment manufacturer. The system owner, however, is responsible for assuring,

through contract requirements with the party performing the modification or through testing, that the modified system complies with the standard following the modification.

N. Modification of Warning Label (§ 1020.30(j))

FDA proposes to modify the language of the warning label required by § 1020.30(j). The current statement warns that safe exposure factors and operating instructions must be followed. FDA proposes to modify the warning label statement by adding the phrase ''maintenance schedules.'' This addition incorporates the suggestion of the TEPRSSC and further emphasizes the need for diagnostic x-ray systems to be properly maintained and calibrated. Manufacturers of diagnostic x-ray systems are required under § 1020.30(h)(1)(ii) to provide a schedule of the maintenance necessary to keep the equipment in compliance with the performance standard. The standard places no requirement on owners or users of diagnostic systems to properly maintain these systems. However, the revised wording of the warning label is intended to alert users and facility administrators of the need to properly maintain the systems.

O. Corrections of § 1020.31(f)(3) and (m)

FDA proposes to correct oversights in § 1020.31(f)(3) and (m) that occurred when the July 2, 1999, amendment was published. Section 1020.31(f)(3) addresses the x-ray field limitation requirement for mammographic x-ray systems and § 1020.31(m) addresses the primary barrier required for mammographic x-ray systems. Prior to September 30, 1999 (the effective date of the final rule), the heading to § 1020.31(m) was ''Transmission limit for image receptor supporting devices used for mammography.''

When an existing radiation safety performance standard is amended, the new or modified requirement applies only to products that are manufactured after the effective date of the amendment. Normally, the requirement that existed prior to the amendment is retained in the Code of Federal Regulations (CFR) to provide a record of the requirements of the standard applicable to products on their date of manufacture. When the final rule amending § 1020.31(f)(3) and (m) was published on July 2, 1999, the provisions describing the requirements for equipment manufactured prior to September were inadvertently omitted. Thus, the CFR (21 CFR part 1020) has no record of the requirements imposed by § 1020.31(f)(3) and (m) for equipment manufactured between the initial effective dates for § 1020.31(f)(3) and (m) and September 30, 1999. To correct this oversight, FDA proposes to reinstate the provisions describing the requirements that apply to equipment manufactured prior to September 30, 1999, under the earlier versions of § 1020.31(f)(3) and (m). This correction will provide a record of the requirements applicable before September 30, 1999, and close the gap that exists as a result of the oversight in the publication of the final rule.

Additionally, further review of this issue revealed that the original publication of § 1020.31(f)(3) in 1977 (42 FR 44230) did not indicate an effective date for this paragraph, which was November 1, 1977. FDA proposes to insert the omitted effective date. The omission was of little consequence because the original requirement reflected the then current designs of mammographic systems. FDA proposes to insert the date to provide an accurate record of the applicable x-ray field limitation requirements as a function of the date of manufacture of mammographic x-ray systems.

No changes in the previously applicable or current requirements are proposed or intended by these corrections to § 1020.31(f)(3) and (m). The corrections are only intended to make explicit the current or previously applicable requirements that existed on the date of manufacture.

FDA proposes to revise § 1020.31(f) by adding § 1020.31(f)(3)(i), the requirement applicable to equipment manufactured on or after November 1, 1977, and before September 30, 1999. The current requirement, applicable to equipment manufactured after September 30, 1999, would be § 1020.31(f)(3)(ii). Section 1020.31(f)(3)(iii) would contain the requirement for permanent markings that are applicable to all equipment manufactured after November 1, 1977.

FDA proposes to amend § 1020.31(m). Section 1020.31(m)(1) would be revised to contain the requirement applicable to systems manufactured on or after September 5, 1978, and before September 30, 1999; such requirement was previously omitted. Section 1020.31(m)(2) would be revised to contain the current requirements applicable to equipment manufactured after September 30, 1999, in § 1020.31(m)(2)(i), (m)(2)(ii), (m)(2)(iii), and (m)(2)(iv). Section 1020.31(m)(3) would be revised to contain the description of the method for measuring compliance; such description is common to both § 1020.31(m)(1) and (m)(2). A minor technical clarification is also proposed in § 1020.31(m)(2)(ii) where the term ''x-ray tube'' found in current § 1020.31(m)(2) is replaced by the term ''x-ray system'' to reflect the fact that it is the x-ray system, not the x-ray tube, that controls initiation of x-ray exposure. This change does not change the intent or effect of the requirement.

P. Corrections to Reflect Changes in Organizational Name, Address, and Law (§ 1020.30(c), (d), and (q))

FDA proposes to amend §1020.30(c) to reflect the current organizational title of the Office of Compliance of the Center for Devices and Radiological Health. FDA also proposes in § 1020.30(d) to remove the specific address that is subject to change from time to time. Additionally, FDA proposes to amend paragraph § 1020.30(q) to reflect the transfer of sections 358(a)(5) and 360B(b) of the PHS Act to the act by the SMDA.

Q. Removal of Reference to Special Attachments for Mammography

FDA proposes to remove reference to ''special attachments for mammography'' in § 1020.31(d) and (e). The Mammography Quality Standards established in part 900 (21 CFR part 900), particularly § 900.12(b)(1), require that only diagnostic x-ray systems designed specifically for mammography be used to perform mammography in the United States. Therefore, the use of special attachments intended for use with general-purpose diagnostic x-ray systems to perform mammography is inappropriate. No such devices may continue to be used, and retaining this reference in the standard would imply that such devices or components were acceptable.

R. Change to the Applicability Statement for § 1020.32

FDA proposes in the applicability statement of § 1020.32 to remove the reference to ''fluoroscopy'' and replace it with ''fluoroscopic imaging'' and to remove ''recording of images through an image intensifier tube'' and replace this reference with ''radiographic imaging when the radiographic images are recorded from the fluoroscopic image receptor.'' This change is necessary to clarify the applicability of this section and to incorporate the proposed requirements addressing the production of radiographic images for the last image hold feature.

S. Republication of §§ 1020.30, 1020.31, and 1020.32

Because of the large number of proposed changes in §§ 1020.30,

1020.31, and 1020.32, FDA is republishing these entire sections, including the proposed amendments, rather than publishing only the proposed individual changes to these sections. Although some of the paragraphs in these sections are not changed by this proposal, republication of the entire sections will result in a more reader-friendly version when the final regulation is published.

III. Proposed Effective Date

FDA proposes that any final rule based on this proposal become effective 1 year after the date of publication of the final rule in the **Federal Register**.

IV. Environmental Impact

The agency has determined under 21 CFR 25.30(i) and 25.34(c) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

V. Paperwork Reduction Act of 1995

A. Summary

This proposed rule contains information collection provisions that are subject to review by OMB under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501–3502). A description of these provisions is given in the following paragraphs with an estimate of the annual reporting and recordkeeping burden. Included in the estimate is the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing each collection of information.

The information collection burden of the current performance standard is covered by an existing information collection clearance, OMB control number 0190–0025. FDA is seeking new information collection clearance for proposed §§ 1020.30(h)(5) and (6), and 1020.32(j)(4).

FDA invites comments on: (1) Whether the proposed collection of information is necessary for the proper performance of FDA's functions, including whether the information will have practical utility; (2) the accuracy of FDA's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility, and clarity of the information to be collected; and (4) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques, when appropriate, and other forms of information technology.

Performance Standard for Diagnostic X-Ray Systems and their Major Components (21 CFR 1020.30 and 1020.32 amended)

Description: FDA is proposing to amend the performance standard for diagnostic x-ray systems by establishing, among other things, requirements for several new equipment features on all new fluoroscopic x-ray systems. In the current performance standard, § 1020.30(h) requires that manufacturers provide to purchasers of x-ray equipment, and to others upon request, manuals or instruction sheets that contain technical and safety information. This required information is necessary for all purchasers (users of the equipment) to have in order to safely operate the equipment. Section 1020.30(h) currently describes the information that must be provided.

The proposed rule would add to § 1020.30(h) paragraphs (5) and (6) describing additional information that would need to be included in these manuals or instructions. In addition, proposed § 1020.32(j)(4) would specify additional descriptive information to be included in the user manuals for fluoroscopic x-ray systems required by § 1020.30(h). This additional information would be descriptions of features of the x-ray equipment required by the proposed amendments and information determined to be appropriate and necessary for safe operation of the equipment.

Description of Respondents: Manufacturers of fluoroscopic x-ray systems that introduce fluoroscopic x-ray systems into commerce following the effective date of the proposed amendments. FDA estimates the burden of this collection of information as follows:

TABLE 4.—ESTIMATED AVERAGE ANNUAL REPORTING BURDEN FOR THE FIRST YEAR[1]

21 CFR Section	No. of Respondents	Annual Frequency per Respondent	Total Annual Responses	Hours per Response	Total Hours
1020.30(h)(5) and (h)(6) and 1020.32(j)(4)	20	10	200	180	36,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

TABLE 5.—ESTIMATED AVERAGE ANNUAL REPORTING BURDEN FOR SECOND AND FOLLOWING YEAR[1]

21 CFR Section	No. of Respondents	Annual Frequency per Respondent	Total Annual Responses	Hours per Response	Total Hours
1020.30(h)(5) and (h)(6) and 1020.32(j)(4)	20	5	100	180	18,000

[1] There are no capital costs or operating and maintenance costs associated with this collection of information.

B. Estimate of Burden

As described in the assessment of the cost impact of the proposed amendment (Ref. 33), it is estimated that there are about 20 manufacturers of fluoroscopic x-ray systems who market in the United States. Each of these manufacturers is estimated to market about 10 distinct models of fluoroscopic x-ray systems. Immediately following the effective date of the proposed amendments, for each model of fluoroscopic x-ray system that manufacturers continue to market, each manufacturer would have to supplement the user instructions to include the additional information required by the proposed amendments.

Manufacturers already develop, produce, and provide x-ray system user manuals or instructions containing the information necessary to operate the systems, as well as the specific information required to be provided by the existing standard in current § 1020.30(h). Therefore, it is assumed that no significant additional capital,

operating, or maintenance costs will occur to the manufacturers in connection with the provision of the newly required information. The manufacturers already have procedures and methods for developing and producing the user's manuals, and the additional information required by the proposed requirements is expected to only add a few printed pages to these already extensive manuals or documents.

The burden that will occur to manufacturers from the new requirements for information in the user's manuals will be the effort required to develop, draft, review, and approve the new information. The information or data to be contained within the new user instructions will already be available to the manufacturers from their design, testing, validation, or other product-development documents. The burden will consist of gathering the relevant information from these documents and preparing the additional instructions from this information.

It is estimated that about 3 weeks of professional staff time (120 hours) would be required to gather the required information for a single model of an x-ray system. It is estimated that an additional 6 weeks (240 hours) of professional staff time would be required to draft, edit, design, layout, review, and approve the new portions of the user's manual or information required by the proposed amendments. Hence FDA estimates a total of 360 hours to prepare the new user information that would be required for each model.

For a given manufacturer, FDA anticipates that every distinct model of fluoroscopic system will not require a separate development of this additional information. Because it is thought highly likely that several models of fluoroscopic x-ray systems from a given manufacturer will share common design aspects, it is anticipated that similar means for meeting the proposed requirement for display of exposure time, air kerma rate, and cumulative air kerma and the requirement for the last-image-hold feature will exist on multiple models of a single manufacturer's products. Such common design aspects for multiple models will reduce the burden on manufacturers to develop new user information. Hence the average time required to prepare new user information for all of a manufacturer's models will be correspondingly reduced. It is assumed that the applicability of the new user information developed to multiple models will reduce the average burden from the 360 hours to about 180 hours per model under the assumption that each set of user information for a given equipment feature design will be a applicable to at least two different models of a manufacturer's fluoroscopic systems. Under this assumption, the total estimated time for preparing the new user information that would be required is 36,000 hours, as shown in table 4 of this document.

In each succeeding year the burden will be less, as the reporting requirement will apply only to the new models developed and introduced by the manufacturers in that specific year. FDA assumes that every two years each manufacturer will replace each of its models with a newer model requiring new user information. The multiple system applicability of this information is accounted for by also assuming that each new model only requires 180 hours of effort to develop the required information. These assumptions result in an estimated burden of 18,000 hours for each of the years following the initial year of applicability of the proposed amendments, as shown in table 5 of this document.

In compliance with the PRA (44 U.S.C. 3507(d)), the agency has submitted the information collection provisions of this proposed rule to OMB for review. Interested persons are requested to send comments regarding information collection to the Office of Information and Regulatory Affairs, OMB (see **ADDRESSES**).

VI. Analysis of Impacts

A. Introduction

FDA has examined the impacts of this proposed rule under Executive Order 12866, the Regulatory Flexibility Act (5 U.S.C. 601–612), and the Unfunded Mandates Reform Act of 1995 (Public Law 104–4) (UMRA). Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The agency believes that this proposed rule is consistent with the regulatory philosophy and principles identified in the Executive order. In addition the proposed rule is economically significant under Executive Order 12866 and is major under the Congressional Review Act. Therefore the proposal is subject to review under the Executive order.

The Regulatory Flexibility Act requires agencies to analyze regulatory options that would minimize any significant impact on small entities. An analysis of available information suggests that costs to small entities are likely to be significant, as described in the following analysis. FDA believes that this proposed regulation will likely have a significant impact on a substantial number of small entities, and it conducted an initial regulatory flexibility analysis (IRFA) to ensure that any such impacts were assessed and to alert any potentially impacted entities of the opportunity to submit comments.

Section 202(a) of the UMRA requires that agencies prepare a written statement of anticipated costs and benefits before proposing any rule that may result in an expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million in any one year (adjusted annually for inflation). The UMRA does not require FDA to prepare a statement of costs and benefits for the proposed rule because the proposed rule is not expected to result in any 1-year expenditure that would exceed $100 million adjusted for inflation. The current inflation-adjusted statutory threshold is about $110 million.

The agency has conducted preliminary analyses of the proposed rule, including a consideration of alternatives, and has determined that the proposed rule is consistent with the principles set forth in the Executive order and in these statutes. The costs and benefits of the proposed rule have been assessed in two separate preliminary analyses that are described in section VI of this document and that are available at the Dockets Management Branch (see **ADDRESSES**) for review. As reviewed below, these preliminary analyses have an estimated upper limit to the annual cost of $30.8 million during the first 10 years after the effective date of the proposed amendments. The analysis of benefits projects an average annual amortized pecuniary savings in the first 10 years after the effective date of at least $320 million, with an estimated 90 percent confidence interval spanning a range between $88.35 million and $1.160 billion. FDA believes this analysis of impacts complies with Executive Order 12866, and that the proposed rule is a significant regulatory action as defined by the Executive order. Because of the preliminary nature of these cost and benefit analyses and estimates, FDA requests comments on any aspect of their methodologies, assumptions, and projections. Comments may be

submitted to the Dockets Management Branch (see **ADDRESSES**).

B. Objective of the Proposed Rule

The primary objective of the proposed rule is to improve the public health by reducing exposure to and detriment associated with unnecessary ionizing radiation from diagnostic x-ray systems, while maintaining the diagnostic quality of the images. The proposed rule would meet this objective by requiring features on newly manufactured x-ray systems that physicians may use to minimize unnecessary or unnecessarily large doses of radiation that could result in adverse health effects to patients and health care personnel. Such adverse effects from x-ray exposure can include acute skin injury and an increased potential for cancer or genetic damage. The secondary objectives of this proposed rule are to bring the performance standard up to date with recent and emerging technological advances in the design of fluoroscopic x-ray systems and to assure appropriate radiation safety for these designs. The proposed amendments would also align the performance standard with performance requirements in current international standards that were developed since the original publication of the performance standard in 1972. In several instances, the international standards contain more stringent requirements on aspects of system performance than the current U.S. performance standard. The proposed changes would ensure that the different safety standards are harmonized to the extent that systems meeting one standard will not be in conflict with the other. Such harmonization of standards lessens the regulatory burdens on manufacturers desiring to market systems in the global market.

The proposed amendments would require particular x-ray equipment features reducing unnecessary radiation exposure and thereby yielding net benefits. The amendments are necessary because the market will not ensure that these equipment features will be adopted without a government mandate for such features. Purchasers in health care organizations have no incentive to demand the more expensive x-ray equipment that would be required by these new amendments because they perceive no institutional economic advantage in doing so as benefits accrue mainly to patients. Furthermore, purchasers are more responsive to physician attention to an immediate need for diagnostic and interventional efficacy from the equipment than to a prospective capability to reduce radiation-associated risk to patients many years in the future. Patients, also focused on their immediate medical needs, will not demand this equipment because they lack information and knowledge about long-term radiation risk and about the highly technical nature of x-ray equipment. Hence these proposed amendments are necessary to realize the net benefits described in the following analysis.

C. Risk Assessment

The risks to health that will be addressed by these amendments are the adverse effects of exposure to ionizing radiation that can result from procedures utilizing diagnostic x-ray equipment. These adverse effects are well known and have been extensively studied and documented. They are generally categorized into two types—''deterministic'' and ''stochastic.'' Deterministic effects are those that occur with certainty in days or weeks or months following irradiation whose cumulative dose exceeds a threshold characteristic of the effect. Above the threshold, the severity of the resulting injury increases as the radiation dose increases. Examples of such effects are the development of cataracts in the lens of the eye and skin ''burns.'' Skin is the tissue that often receives the highest dose from external radiation sources such as diagnostic or therapeutic x-ray exposure. Depending on the magnitude of the dose, skin injuries from radiation can range in severity from reddening of the skin and hair loss to more serious burn-like effects including localized tissue death that may require skin grafts for treatment or may result in permanent impairment. Stochastic effects are those that do not occur with certainty, but if they appear, they generally appear as leukemia or cancer one or several decades after the radiation exposure. The probability of the effect occurring is proportional to the magnitude of the radiation dose in the tissue.

The primary risk associated with radiation is the possibility of patients developing cancer years after exposure, and the magnitude of this cancer risk is generally regarded to increase with increasing radiation dose. Consistent with the conservative approach to risk assessment described by the National Council on Radiation Protection and Measurements (Ref. 32), we assume a linear relationship between cancer risk and dose. The slope of this relationship depends on age at exposure and on gender. Our benefits analysis presented in section VI.H is based on linear interpolations of cancer-mortality risk per dose derived from BEIR V table 4–3 (Ref. 22) values reduced by a dose-rate effectiveness factor of 2 for solid cancers (Ref. 30). The values used in our analysis are represented in the following graph in figure 1 of the excess lifetime-probability for death per dose associated with radiation exposure.

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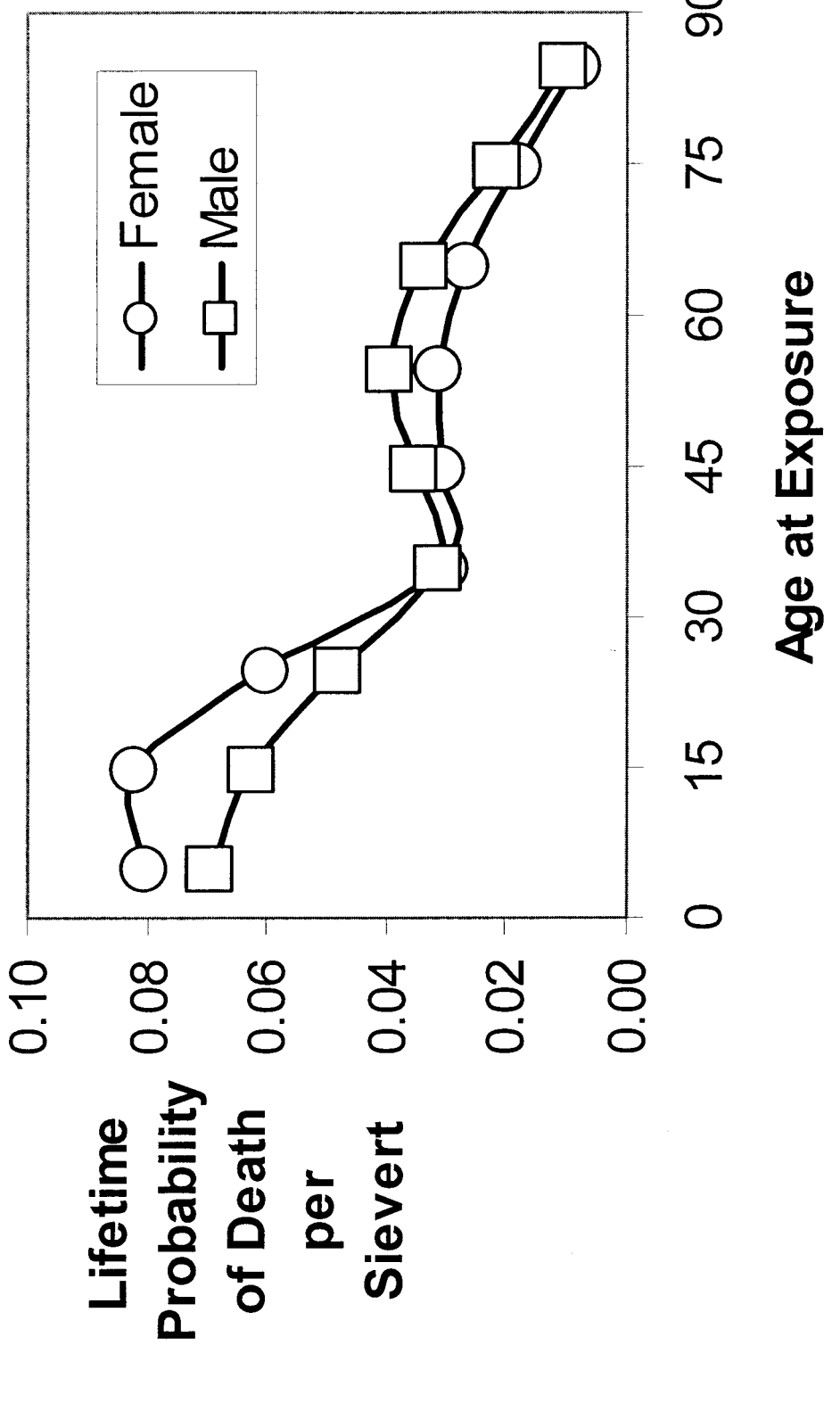

Figure 1. Mortality Risk per Sievert versus Age at Exposure

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FDA underscores the overarching uncertainty in these projections with the following statement adopted from CIRRPC Science Panel Report No. 9 (Ref. 30):

> The estimations of radiation-associated cancer deaths were derived from linear extrapolation of nominal risk estimates for lifetime total cancer mortality from doses of 0.1 Sv. Other methods of extrapolation to the low-dose region could yield higher or lower numerical estimates of cancer deaths. At this time studies of human populations exposed at low doses are inadequate to demonstrate the actual level of risk. There is scientific uncertainty about cancer risk in the low-dose region below the range of epidemiologic observation, and the possibility of no risk cannot be excluded.

We project that the equipment features that would be required by three of the proposed amendments will promote the bulk of radiation dose reduction and hence cancer risk reduction: (1) Displays of radiation time, rate, and dose values; (2) more filtration of lower-energy x rays; and (3) improved geometrical efficiency of the x-ray field achieved through tighter collimation. We assume that the display amendment would reduce dose on the order of 16 percent. This assumed value is one-half of a 32 percent dose reduction observed for several x-ray modalities in the United Kingdom (UK) between 1985 and 1995. We assume that one-half of the UK dose reduction was due to technology improvements alone, whereas the other half stemmed from the quality assurance use of reference dose levels and patient dose evaluation. The 16 percent dose reduction that we project for the display amendment thus presumes facility implementation of a quality assurance program making use of the displayed values. This analysis and other assumptions—6 percent dose reduction for the filtration amendment, 1 to 3 percent dose reduction for the collimation amendment—are detailed in Ref. 29. We invite comment on these assumptions.

Until recently, the principle radiation detriment for patients undergoing x-ray procedures was the risk of inducing cancer and, to a lesser extent, heritable genetic malformations. Since 1992, however, approximately 80 reports of serious radiation-induced skin injury associated with fluoroscopically-guided interventional therapeutic procedures have been published in the medical literature or reported to FDA. Many of these injuries involved significant morbidity for the affected patients. FDA's experience with reports of such adverse events leads the agency to believe that the number of these injuries is very likely underreported, given the total number of interventional procedures currently performed. Additionally, there is the lack of any clearly understood requirement or incentive for health care facilities to report such injuries. With the advance of fluoroscopic technology and the proliferating use of interventional procedures by practitioners not traditionally specializing in the field, and therefore not completely familiar with dose-sparing techniques, FDA expects an increasing risk of radiation burns that warrants the changes to the x-ray equipment performance standard through the proposed amendments.

D. Constraints on the Impact Analysis

It is FDA's opinion that the proposed amendments would offer public health benefits that warrant their costs. However, the agency has had difficulty thus far accessing pertinent information from stakeholders to help quantify the impact of the proposal and alternatives. In view of the limited information available with which to develop estimates of the costs and benefits, FDA solicits comments, data, and opinions as to whether the potential health benefits of the proposed amendments would justify their costs. FDA will use all information and comments received to revise the impact assessment in reaching a final determination as to the appropriateness of the proposed amendments.

The principal costs associated with the proposed amendments would be the increased costs to manufacturers to produce equipment that will have the features required by the amendments. FDA has made an estimate of potential cost. The cost estimate is based on a number of assumptions designed to assure that the potential cost is not underestimated. FDA anticipates that the actual costs of these amendments to be significantly less than the upper-limit estimate developed. Manufacturers of diagnostic x-ray systems are urged to provide detailed comments on the anticipated costs of these amendments that will enable refinement of these cost estimates.

The benefits that are expected to result from these amendments are reductions in acute skin injuries and radiation-induced cancers. The proposed amendments would have two types of impact that reduce patient dose and associated radiation detriment without compromising image quality.

The first type of change involves several newly required equipment features that would directly affect the intensity or size of the x-ray field. These are the requirements addressing x-ray beam quality, x-ray field limitation, limits on maximum radiation exposure rate, and MSSD for mini C-arm fluoroscopic systems. Almost all of the changes that directly affect x-ray field size or intensity would bring the performance standard requirements into agreement with existing international voluntary standards. To the extent that these requirements are included in voluntary standards that have a growing influence in the international marketplace, the radiological community has already recognized their benefit and appropriateness. Moreover, harmonization within a single international framework would obviate the expense for manufacturers to produce more than one line of products for a single global marketplace.

The second type of change that would be required by these amendments involves the information to be provided by the manufacturer or directly by the system itself that may be utilized by the operator to more efficiently use the x-ray system and thereby reduce patient dose. There is wide support for and anticipation of these new features by many knowledgeable users of fluoroscopic systems. Similar requirements were recently included in a new international voluntary standard.

E. Baseline Conditions

The cost of the proposed amendments to the x-ray equipment performance standard would be borne primarily by manufacturers of fluoroscopic systems. The cost for one of the nine proposed amendments would also affect manufacturers of radiographic equipment and is discussed in detail in Ref. 28. Therefore, this discussion will focus primarily on fluoroscopy (i.e., the process of obtaining dynamic, real-time images of patient anatomy).

X-ray imaging is used in medicine to obtain diagnostic information on patient anatomy and disease processes or to visualize the delivery of therapeutic interventions. X-ray imaging almost always involves a tradeoff between the quality of the images needed to do the imaging task and the magnitude of the radiation exposure required to produce the image. Difficult imaging tasks may require increased radiation exposure to produce the images unless some significant technological change provides the needed image quality. Therefore, it is important that users of x-ray systems have information regarding the radiation exposures required for the images that are being produced in order to make the appropriate risk-benefit decisions.

Equipment meeting the new standards in the proposed amendments would provide image quality and diagnostic information identical to equipment

meeting current standards. Therefore, the clinical usefulness of the images provided would not change. The amendments would not affect the delivery of x-ray imaging services because the reasons for performing procedures, the number of patients having procedures, and the manner in which procedures are scheduled and conducted would not be changed as a result of the amendments. In addition, nothing in these amendments would adversely affect the clinical information or results obtained from these procedures. These amendments would result in x-ray systems having features that automatically provide for more efficient use of radiation or features that provide the physicians using the equipment with immediate information related to patient dose, thus enabling more informed and efficient use of radiation. These amendments would provide physicians using fluoroscopic equipment with the means to actively monitor patient radiation doses and minimize unnecessary exposure or avoid doses that could result in radiation injury.

Estimates of the annual numbers of certain fluoroscopic procedures performed in the United States during the years 1996 or 1997 were developed, as described in Ref. 29, using data from several sources. These estimates of the annual numbers of specific procedures were used in the estimates of benefit from the proposed amendments. No attempt was made to account for changes in the annual numbers of procedures in future years, due to the large uncertainties in making such projections. FDA also estimates that over 3 million fluoroscopically guided interventional procedures are performed each year in the United States. These procedures are described as ''interventional procedures'' because they accomplish some form of therapy for patients, often as an alternative to more invasive and risky surgical procedures. Interventional procedures may result in patient radiation doses in some patients that approach or exceed the threshold doses known to cause adverse health effects. The high doses occur because physicians utilize the fluoroscopic images throughout the entire procedure, and such procedures often require exposure times significantly longer than conventional diagnostic procedures to guide the therapy.

FDA records indicate that about 12,000 medical diagnostic x-ray systems are installed in the United States each year. Of these, 4,200 are fluoroscopic system installations. The proposed amendments would apply only to those new systems manufactured after the effective date, therefore affecting the 4,200 new fluoroscopic systems installed annually and a small fraction of radiographic systems that do not currently meet the proposed standard for x-ray beam quality.

In modeling the x-ray equipment market in the United States for the purpose of developing estimates of the cost of these amendments, FDA estimates that there are approximately a total of 40 manufacturers of diagnostic x-ray systems in the United States and half of these (20) market fluoroscopic systems and radiographic systems. It is assumed that manufacturers of radiographic systems typically market 20 models of radiographic systems, while manufacturers of fluoroscopic systems market 10 different models of fluoroscopic systems.

F. The Proposed Amendments

As described in section II of this document, the proposed regulations may be considered as nine significant amendments to the current performance standard for diagnostic x-ray systems and other minor supporting changes to the standard. The nine principal amendments may be grouped into three major impact areas: (1) Amendments requiring changes to equipment design and performance that would facilitate more efficient use of radiation and provide means for reducing patient exposure, (2) amendments improving the use of fluoroscopic systems through enhanced information to users, and (3) amendments facilitating the application of the standard to new features and technologies associated with fluoroscopic systems.

Amendments requiring equipment changes include changes in x-ray beam quality; provision of a means to add additional filtration; changes in the x-ray field limitation requirements; provision of displays of values of irradiation time, AKR, and cumulative air kerma; the display of the last fluoroscopic image acquired (LIH feature); specification of the MSSD for mini C-arm systems; and changes to the requirement concerning maximum limits on entrance AKR. Amendments that would result in improved information for users are those requiring additional information to be provided in user instruction manuals. Amendments facilitating the application of the standard to new technologies include the recognition of SSXI devices, revisions of the applicability sections, and establishment of additional definitions.

G. Benefits of the Proposed Amendments

The proposed amendments would benefit patients by enabling physicians to reduce fluoroscopic radiation doses and associated detriment and, hence, to use the radiation more efficiently to achieve medical objectives. The health benefits of lowering doses are reductions in the potential for radiation-induced cancers and in the numbers of skin burns associated with higher levels of x-ray exposure during fluoroscopically-guided therapeutic procedures. FDA believes that the proposed amendments would not degrade the quality of fluoroscopic images produced while reducing the radiation doses.

There is widespread agreement in the radiological community that radiation doses to patients and staff should be kept ''as low as reasonably achievable'' (ALARA) as a general principle of radiation protection. In particular, moreover, recent experience has demonstrated that in some few cases of fluoroscopically-guided interventional procedures with especially long irradiation times, the magnitudes of the radiation doses are large enough to cause serious injury to the skin. A growing number of patients that are potentially at risk for acute and long-term radiation injury makes it important to provide fluoroscopic systems with features that will assist in reducing the radiation to patients while continuing to accomplish the medical objectives of the needed procedures.

The proposed amendments would require that fluoroscopic x-ray systems provide equipment features that directly enable the user to reduce radiation doses and maintain them ALARA. Furthermore, the amendments would require provision of information to the user of the equipment in the form of additional information in the user's manual or instructions to enable improved use in a manner that minimizes patient exposures and, by extension, occupational exposures to medical staff.

There is wide agreement that radiation exposures during fluoroscopy are not optimized. For example, data from the 1991 Nationwide Evaluation of X-ray Trends (NEXT) surveys of fluoroscopic x-ray systems used for upper gastrointestinal tract examinations (upper GI exam) indicate that the mean entrance AKR is typically 5 cGy/min for an adult patient (Ref. 28). Properly maintained and adjusted fluoroscopic systems are expected to be able to perform the imaging tasks associated with the upper GI exam with

an entrance AKR of 2 cGy/min or less (Ref. 8). The NEXT survey data indicate significant room for improvement in this aspect of fluoroscopic system performance. The total patient dose could be significantly reduced were the entrance AKR lowered to what is currently reasonably achievable, and the features required by the proposed amendments would facilitate this reduction.

The proposed features of LIH and real-time display of entrance AKR and cumulative entrance air kerma values are intended to provide fluoroscopists with means to better limit the patient radiation exposure. The LIH feature would permit decision-making regarding the procedure underway while visualizing the anatomy without continuing to expose the patient. The air kerma- and AKR-value displays would provide real-time feedback to the fluoroscopists and are anticipated to result in improved fluoroscopist performance to limit radiation dose based on the immediate availability of information regarding that dose. Realization of the potential dose-reduction benefits would require fluoroscopists to take advantage of these proposed features and optimize the way they use fluoroscopic systems.

The potential impact of the change in the beam quality requirement, which would apply to most radiographic and all fluoroscopic systems, can be seen from the data on beam quality obtained from the FDA Compliance Testing Program for the current standard. Since January 1, 1996, FDA has conducted 4,832 tests of beam quality, that is, measurement of the HVL of the beam for newly installed x-ray systems. Of these tests, only 15 systems did not meet the current HVL or beam quality requirement. If the requirements for HVL contained in these proposed amendments were used as the criteria for compliance, only 698 systems or 14.4 percent of the systems tested would have been found not to have complied. This result suggests that at a minimum approximately 15 percent of recently installed medical x-ray systems would have their beam quality improved and patient exposures reduced were the new requirement in place and applicable to them.

Numerous examples are available in the literature that illustrate the potential reduction in patient dose, while preserving image quality, that can result from increased x-ray beam filtration. Reference 7 demonstrates that the addition of 1.5 to 2.0 mm of aluminum (Al) as additional filtration, which is the change required to enable systems that just meet the current requirement to meet the proposed HVL requirement, would result in about a 30 percent reduction in entrance air kerma and about a 15 percent reduction in the integral dose for the fluoroscopic examination modeled in the paper at 80 kVp tube potential. Reduction in entrance skin dose (entrance air kerma) is relevant to reducing the risk of deterministic injuries to the skin, while a reduction in the integral dose is directly related to a reduction in the risk of stochastic effects such as cancer induction. Other authors have described dose reductions of a similar magnitude from increasing filtration for radiographic systems.

The requirements proposed in these amendments implement many of the suggestions and recommendations developed by members of the radiological community at the 1992 Workshop on Fluoroscopy sponsored by the American College of Radiology and FDA (Ref. 8). The recommendations from this workshop stressed the need to provide users of fluoroscopy with improved features enabling more informed use of this increasingly complex equipment. In addition, three radiological professional organizations indicated their opinions to FDA that radiologists would use the new features to better manage patient radiation exposure.

H. Estimation of Benefits

Projected benefits are quantified below in terms of: (1) Collective dose savings, (2) numbers of lives spared premature death associated with radiation-induced cancer, (3) collective years of life spared premature death, (4) numbers of reports of fluoroscopic skin burns precluded, and (5) pecuniary estimates associated with the preceding four items. The estimates represent average annual benefits projected to ramp up during a 10-year interval in which new fluoroscopic systems conforming to the proposed rules are phased into use in the United States. (FDA assumes that 10 years after the effective date of the proposed rules all fluoroscopic systems then in use would conform to those rules and that associated recurring benefits would continue to accrue at constant rates.) Annual pecuniary estimates that are averaged over the 10-year ramp-up interval and that are associated with prevention of cancer incidence, preclusion of premature mortality, and obviation of cancer treatment are based on the projected numbers of lives spared premature death. These pecuniary estimates are valued in current dollars using a 7 percent discount rate covering the identical 10-year evaluation period used in the cost analysis (see section VI.I). Based on an economic model of society's willingness to pay a premium for high-risk jobs, we associate a value of $5 million for each statistical death avoided, $25,000 for preclusion of each cancer treatment, and $5,000 for preclusion of cancer's psychological impact. Life benefits would be realized 20 years following exposure (after a period of 10 years of cancer latency followed by a period of 10 years of survival). Details, notes, and references for this analysis are provided in Ref. 29. The low, middle, and high estimates in table 6 of this document correspond respectively to the 5th, median, and 95th percentile points of nominal probability distributions. Estimation of the confidence intervals associated with these distributions is explained in the following paragraphs.

TABLE 6.—PROJECTIONS OF ANNUAL BENEFITS IN UNITED STATES FOR DISPLAY, COLLIMATION, AND FILTRATION RULES APPLIED TO PTCA, CA, AND UGI PROCEDURES[1]

	5th Percentile	Median	95th Percentile
Average Annual Dose and Life Savings in the First 10 Years After Effective Date of Proposed Rules			
Collective dose savings (person-sievert)	3,202	7,231	16,330
Number of lives spared premature death from cancer	62	223	808
Years of life spared premature death from cancer	1,131	4,094	14,818

TABLE 6.—PROJECTIONS OF ANNUAL BENEFITS IN UNITED STATES—Continued
FOR DISPLAY, COLLIMATION, AND FILTRATION RULES APPLIED TO PTCA, CA, AND UGI PROCEDURES[1]

	5th Percentile	Median	95th Percentile
Number of reported skin burns precluded	0.5	1.1	2.4
Average Annual Amortized Pecuniary Savings in the First 10 Years After Effective Date of Proposed Rules			
Prevention of premature death from cancer ($ millions)	78.61	285.03	1,032.75
Obviation of cancer treatment ($ millions)	9.71	35.21	127.56
Obviation of radiation burn treatment and loss ($ millions)	0.03	0.07	0.16
Total ($ millions)	88.35	320.31	1,160.48

[1] PTCA: percutaneous transluminal coronary angioplasty; CA: cardiac catheterization with coronary arterlography or angiography; UGI: upper gastrointestinal fluoroscopy

For the most part, these projections are based on a benefits analysis (Ref. 29, available at http://www.fda.gov/cdrh/radhlth/021501_xray.html) whose domain is intended to be representative but not exhaustive of prospective savings. To keep the analysis finite and manageable, it is limited to the three proposed amendments (sections II.E, II.F, and II.K of this document) that would most reduce radiation dose in several of the most common fluoroscopic procedures. The procedures considered are those of PTCA, CA, and UGI. There are other very highly utilized fluoroscopic procedures, for example, the barium enema examination, whose dose savings might be of comparable magnitude to those of UGI, that are not included at all in this analysis. The three amendments considered would require new fluoroscopic x-ray systems to: (1) Display the rate, time and cumulative total of radiation emission; (2) collimate the x-ray beam more efficiently; and (3) filter out more of the low energy x-ray photons from the x-ray beam. Proposed requirements for the source-skin distance for small c-arm fluoroscopes (section II.J of this document) and for provision of the last-image hold feature on all fluoroscopic systems (section II.L of this document) will also directly reduce dose, but their dose reductions are expected to be much smaller than those associated with the preceding proposed changes. The remaining amendments can be characterized as clarifications of the applicability of the standard, changes in definitions, corrections of errors, and other changes that contribute generally to the effectiveness of implementation of the standard.

Most of the assumptions, rationales, and data sources underlying the benefit projections are explicitly detailed in Ref. 29 and its notes and references. That analysis, however, is incomplete insofar as it refers only to a single set of point estimates. In order to develop a range of projections with a nominally high level of confidence, several additional assumptions are needed. Among the most important of the underpinnings of the analysis are: (1) The projected percentage dose reductions corresponding to the three amendments considered and (2) the dependence on the risk estimates for cancer mortality from the U.S. National Research Council Committee on the Biological Effects of Ionizing Radiation (BEIR V) (Ref. 22). For the former, FDA assumes a relative uncertainty of a factor of 2 (lower or higher) to represent the range in projected dose reductions consistent with a range of confidence of about 90 percent in the findings and assumptions (Ref. 29).

With respect to the dependence on the BEIR V estimates, FDA follows two recommendations of the Office of Science and Technology Policy (OSTP) Committee on Interagency Radiation Research and Policy Coordination (CIRRPC) Science Panel Report No. 9 (Ref. 30) that represent the Federal consensus position for radiation risk-benefit evaluation: First, we apply a value of 2 as the dose-rate effectiveness factor (DREF) in the projections of numbers of solid, non-leukemia cancers. Adopting a DREF value of 2 in the analysis nearly halves the Ref. 29 modal point projections of the numbers of lives and years of life spared premature death from cancer. A DREF value of 2 implies that diagnostic or interventional fluoroscopy is a relatively low dose-rate modality. There are ambiguous assessments of that proposition: Although BEIR V (Ref. 22, pp. 171, 220) considers most medical x-ray exposures to correspond to high-dose rates (for which the DREF is assumed to equal 1 for solid cancers), ICRP Publication 73 (Ref. 16, p. 6) states just as unequivocally that risk factors reduced by a DREF larger than 1 (i.e., for low dose-rate modalities) ''are appropriate for all diagnostic doses and to most of the doses in tissues remote from the target tissues in radiotherapy.'' Recognizing these contrary views of the detrimental biological effectiveness associated with the rates of delivery of fluoroscopic radiation, we assume a factor of 2 uncertainty in the DREF to span a 90 percent range of confidence. The second recommendation that FDA adopts from CIRPPC Panel Report No. 9 (Ref. 30) is the interpretation that a factor of 2 relative uncertainty represents the BEIR V Committee's estimation of the 90 percent confidence interval for mortality risk estimates (Ref. 22). The latter value also agrees with that in the recent review of the United Nations Scientific Committee on the Effects of Atomic Radiation in the ''UNSCEAR 2000 Report'' (Ref. 31).

All of the contributions of relative uncertainty appropriate for the projections of collective dose savings, lives and years of life spared premature death associated with radiation-induced cancer, numbers of reports of fluoroscopic skin burns precluded, and associated pecuniary estimates are summed in quadrature. For the projected collective dose savings, the root quadrature sum yields an overall relative uncertainty of a factor of 2.3 lower and higher than the modal point estimates and corresponding respectively to the 5th and 95th percentiles of a nominal distribution of confidence; for the projected numbers of lives and years of life spared premature death, the overall relative uncertainty is a factor of 3.6 lower and higher.

I. Costs of Implementing the Proposed Regulations

Costs to manufacturers of fluoroscopic and radiographic systems would increase due to these proposals. FDA would also experience costs for increased compliance activities. Some costs represent one-time expenditures to develop new designs or manufacturing processes to incorporate the regulatory changes. Other costs are the ongoing costs of providing improved equipment performance and features with each installed unit. FDA developed unit cost estimates for each required activity and multiplied the respective unit cost by the relevant variables in the affected industry segment. One-time costs are amortized over the estimated useful life of a fluoroscopy system (10 years) using a 7 percent discount rate. This allows costs to be analyzed as average annualized costs as well as first year expenditures.

FDA developed these cost estimates based on its experience with the industry and its knowledge regarding design and manufacturing practices of the industry. Initially, gross, upper-bound estimates were selected to ensure that expected costs were adequately addressed. The initial assumptions and estimates were posted on FDA's Web site and circulated to the affected industry for comment in July 2000. FDA received no comments on these initial, upper-bound estimates and therefore believes that they were generally in line with industry expectations. Since then, in order to refine the estimates to provide a more accurate representation of the upper-bound costs of the proposed amendments, FDA re-examined its estimating assumptions and reduced some unit cost figures based on the expectation that future economies of scale would reduce the expense of some required features. This section presents a brief discussion of the cost estimates. A detailed description of this analysis is given in Ref. 33.

FDA has no information, indication, or economic presumption that costs estimated to be borne by manufacturers would be passed on to purchasers. The cost analysis therefore is limited to those parties who would be directly affected by the adoption of the proposed amendments, namely, manufacturers and FDA itself. FDA requests any information on the costs that would be imposed by these new requirements that would aid in refining the cost estimates.

1. Costs Associated With Requirements Affecting Equipment Design

The agency estimates that approximately one-half (20) of the manufacturers of x-ray systems will have to make design and manufacturing changes to comply with the revised beam quality requirements. It is estimated that a total of 200 x-ray models would be affected, with a one-time cost of at most $20,000 per model. These numbers result in an estimated first year expenditure of $4.0 million to redesign systems to meet the new beam quality requirement.

It will be necessary for manufacturers of fluoroscopic systems equipped with x-ray tubes with high heat capacity to redesign some systems to provide a means to add additional beam filtration. FDA estimates a design cost of $50,000 per model. A total of 100 models are likely to be affected for a one-time cost of $5.0 million to fluoroscopic system manufacturers. In addition, each system would cost more to manufacture because of the increased costs for components to provide the added feature. The increased cost of this added feature is estimated at $1,000 per fluoroscopic system. A total of 650 fluoroscopic systems are estimated to be installed annually with high heat capacity x-ray tubes, resulting in a total of $0.65 million in increased annual costs.

Modification of x-ray systems to meet the revised requirement for field limitation will entail either changes in installation and adjustment procedures, or redesign of systems. Each fluoroscopic system would need either modification in the adjustment procedure for the collimators (for which new installation and adjustment procedures would be developed at an estimated one-time cost of $20,000 per model) or collimators would need to be redesigned at an estimated cost of $50,000 per model. FDA has assumed that one-half of all flouroscopic x-ray system models (5 models each for 20 manufacturers) would need modifications to meet the new requirement, while the remainder would either meet the new requirement or could meet it through very minor modifications in the collimator adjustment procedure. For those system models not meeting the new requirement, it is assumed that a redesign of the collimator system is required at a cost of about $50,000 per model, leading to an upper-bound estimate of the total redesign cost of $5.0 million (20 manufacturers x 5 models x $50,000). All stationary fluoroscopic systems would most likely need redesigned collimators that would add an additional $2,000 per new system due to increased complexity of the collimator. An annual industry cost increase of $5.0 million accounts for all 2,500 annual installations of systems with these more expensive collimators.

The proposals to modify the requirement limiting the maximum entrance AKR and to remove the exception to the limit during recording of images in analog format using a video recorder will only affect the adjustment of newly installed systems having such recording capability. This requirement is not expected to impose significant costs.

FDA is proposing that all fluoroscopic systems include displays of irradiation time, AKR, and cumulative air kerma to assist operators in keeping track of patient exposures and avoiding overexposures. Each model of fluoroscopic system would need to be redesigned (at a maximum estimated cost of $50,000 per model) for a one-time estimated cost of $10.0 million (200 models x $50,000). Accessory or add-on equipment for existing fluoroscopic systems that provide similar information are currently available for an additional cost of over $10,000 per system. However, FDA expects the average manufacturing cost of including such a feature as an integral feature of a fluoroscopic system to be less than $4,000 per system, due to achievable economies of scale and integration with other system computer capabilities. This assumption results in annual cost increases of $16.8 million (4,200 annual installations x $4,000).

The proposed amendments would require that all newly manufactured fluoroscopic systems be provided with LIH capability. FDA expects that 10 fluoroscopic system manufacturers would need to redesign their systems to include this technology at a maximum cost of $100,000 per manufacturer. Total one-time design costs would equal $1.0 million for the industry (10 manufacturers x $100,000). It is estimated that about half of the new systems installed would already be equipped with this feature. Thus, about half of the newly installed systems that currently do not provide this feature would need it. FDA estimates that the cost would be an additional $2,000 for each system required to have this feature. Thus, annual costs would increase by $4.2 million (2,100 annual systems x $2,000).

The amendment clarifying the requirement for MSSD for small C-arm systems is anticipated to require redesign of several of these systems. As there are only three manufacturers of these systems, and the redesign costs are estimated to be no more than $50,000 per system, the total one-time cost for this change would be $0.2 million. The

average annualized cost of this proposed change would be negligible.

In summary, total industry costs for compliance with the amendments in the area of equipment design include one-time costs of $25.2 million. This total equals an average annualized cost (7 percent discount rate over 10 years) of $3.6 million. In addition, annual recurring costs for new equipment features associated with these proposed provisions are expected to equal $26.7 million.

2. Costs Associated With Additional Information for Users

The proposed amendments would require that additional information be provided in the user instructions regarding fluoroscopic systems. FDA has estimated that each model of fluoroscopic system would need a revised and augmented instruction manual at a cost of less than $5,000 per model. This is equal to a maximum one-time cost of $1.0 million (200 models of fluoroscopic systems x $5,000) and implies maximum average annualized costs of $0.14 million. In addition, each newly installed system would include an improved instruction manual. FDA estimates a cost of $20 per manual for printing and distribution of the required additional information. Each of the 4,200 installed fluoroscopy systems would include a revised manual for an annual cost of approximately $0.1 million.

Related to the requirements for additional information is the proposal to change the quantity used to describe the radiation produced by the x-ray system. Because the change to use of the quantity air kerma does not require any changes or actions on the part of manufacturers or users, there is no significant cost associated with it.

3. Costs Associated With Clarifications and Adaptations to New Technologies

The new definitions and clarifications of applicability proposed for the standard do not pose any significant new or additional costs on manufacturers.

4. FDA Costs Associated With Compliance Activities

FDA costs would increase due to the increased compliance activities that would result from these proposed regulations. In addition, FDA would experience implementation costs in developing and publicizing the new requirements. FDA has estimated that approximately five full-time equivalent employees (FTEs) would be required to implement the proposed regulations and conduct training of field inspectors. Using the current estimate of $117,000 per FTE, the one-time cost of implementation to FDA is approximately $0.6 million. Amortizing this cost over a 10-year evaluation period using a 7 percent discount rate results in average annualized costs of about $0.1 million. Ongoing costs of annual compliance activities are expected to require about three FTEs, or a little more than $0.3 million per year.

5. Total Costs of the Proposed Regulation

The estimated costs of the amendments identified as having any significant cost impact are summarized in table 7 of this document. The costs are identified as non-recurring costs that must be met initially or as annual costs associated with continued production of systems meeting the proposed requirements or additional annual enforcement of the amendments. The total annualized cost of the proposed regulations (averaged over 10 years) equals $30.8 million, of which $30.4 million would be borne by manufacturers. The annualized estimate of $30.8 million represents amortization of first year costs of $53.8 million and expenditures from years 2 through 10 of $27 million annually.

TABLE 7.—SUMMARY OF COSTS OF AMENDMENTS

Amendment Described in Section	Non-recurring Costs to Manufacturers ($ millions)	Non-recurring Costs to FDA ($ millions)	Annual Costs to Manufacturers ($ millions)	Annual Costs to FDA ($ millions)
II.A	none	0.0059	none	none
II.B	none	0.0324	none	none
II.D	1.0	none	0.084	0.0117
II.E	9.0	0.0117	0.650	none
II.F	5.0	0.0468	5.0	none
II.G, II.H, and II.I	none	none	none	none
II.J	0.150	0.0234	none	none
II.K	10.0	0.4680	16.8	0.2340
II.L	1.0	0.0234	4.2	none
Total	26.150	0.6026	26.734	0.2457

Therefore, during the first 10 years after the effective date of the proposed amendments, the average annual cost is estimated to be $30.8 million, compared to a projected average annual benefits of $320 million, within a range estimated between $88 million and $1.2 billion.

J. Small Business Impacts

FDA believes that it is likely that the proposed rule will have a significant impact on a substantial number of small entities and has conducted an IRFA. This analysis is designed to assess the impact of the proposed rule on small entities and alert any impacted entities of the expected impact.

1. Description of Impact

The objective of the proposed regulation is to reduce the likelihood of adverse events due to unnecessary exposure to radiation during diagnostic x-ray procedures, primarily fluoroscopic procedures. The amendments would accomplish this by requiring performance features on all fluoroscopic

x-ray systems that would protect patients and health personnel while maintaining image quality.

Manufacturers of diagnostic x-ray systems, including fluoroscopy equipment, are grouped within the North American Industry Classification System (NAICS) industry code 334517 (Irradiation Apparatus Manufacturers)[1]. The Small Business Administration (SBA) classifies as ''small'' any entity with 500 or fewer employees within this industry. Relatively small numbers of employees typify firms within this NAICS code group. About one-half of the establishments within this industry employ fewer than 20 workers, and companies have an average of 1.2 establishments per company. The manufacturers are relatively specialized, with about 84 percent of company sales coming from within the affected industry. In addition, 97 percent of all shipments of irradiation equipment originate by manufacturers classified within this industry.

The Manufacturing Industry Series report on Irradiation Apparatus Manufacturing for NAICS code 334517 from the 1997 Economic Census indicates 136 companies having 154 establishments for this industry in the United States. This report also indicates that only 15 of these establishments have 250 or more employees, with only 5 establishments having more than 500 employees. Therefore, this industry sector is predominately composed of firms meeting the SBA description of a ''small entity.'' Of the total value of shipments of $3,797,837,000 for this industry, 73 percent are from the 15 establishments with 250 or more employees. Thus, for the purposes of the IRFA, most of the diagnostic x-ray equipment manufacturing firms that will be affected by these proposed amendments are small entities.

The impact of the proposed amendments will be similar on manufacturers of diagnostic x-ray systems, whether or not they are small entities. This impact is the increased costs to design and manufacture x-ray systems that meet the new requirements. For those manufacturers that produce smaller numbers of systems per year, the impact of the cost of system redesign to meet the new requirements will result in a greater per unit cost impact than for manufacturers with a high volume of unit sales over which the development costs may be spread. This may have a disproportionate impact on the very small firms with a low volume of sales.

FDA considered whether there were approaches that could be taken to mitigate this impact on the firms producing the smaller numbers of systems. FDA, however, identified no feasible way to do this and also accomplish the needed public health protection. The proposed radiation-safety-related requirements are appropriate for any x-ray system, independent of the circumstances of the manufacturer. FDA considers it appropriate for any firm producing x-ray systems to provide the level of radiation protection that will be afforded by the revised standard. Patients receiving x-ray examinations or procedures warrant the same degree of radiation safety regardless of the circumstances of the manufacturer of the equipment.

2. Analysis of Alternatives

FDA examined and rejected several alternatives to proposing amendments to the performance standard. One alternative was to take no actions to modify the standard. This option was rejected because it would not permit clarification of the manner in which the standard should be applied to the technological changes occurring with fluoroscopic x-ray system design and function. This option was also rejected as failing to meet the public expectation that the federal performance standard assures adequate radiation safety performance and features for fluoroscopic x-ray systems. The changes that have occurred since the standard was developed in the early 1970s necessitate modification of the standard to reflect current technology and to recognize the increased radiation hazards posed by new fluoroscopic techniques and procedures.

A portion of the concern and the unnecessary radiation exposure resulting from current fluoroscopic practices might be addressed through the establishment of controls and requirements regarding the qualifications and training of physicians permitted or allowed to use fluoroscopic systems. Such requirements could assure that, contrary to the current situation, all physicians using fluoroscopy are adequately trained regarding radiation safety practices, proper fluoroscopic system use, and methods for assuring that patient doses are maintained as low as possible. This alternative was rejected because FDA does not have the authority, under current law, to establish such requirements. To be effective, such a program would have to be established by States or medical professional societies or certification bodies. While recognizing that encouragement of such activities by FDA is worthwhile, reliance on such efforts alone would not result in the needed performance improvement of fluoroscopic x-ray systems. FDA concluded that improved use of fluoroscopy requires the dose reduction features and operator feedback mechanism regarding patient doses that would be provided by the proposed amendments.

Alternatives to the specific amendments proposed were also considered in developing these proposals. These alternatives are described in detail in the assessment report developed and filed as part of the information supporting these amendments (Ref. 33). FDA requests comments on alternatives to these proposed amendments that would accomplish the needed public health protection and, in particular, any alternatives that could mitigate the impact of the proposed amendments on small businesses.

3. Ensuring Small Entity Participation in Rulemaking

FDA believes it is possible that the proposed regulation could have a significant impact on small entities. The impact would occur due to increased design and production costs for fluoroscopy systems. FDA solicits comment on the nature of this impact and whether there are reasonable alternatives that might accomplish the intended public health goals.

The proposed regulation will be available on the Internet at http://www.fda.gov for review by all interested parties, and all comments will be considered prior to final implementation of the regulation. In addition, FDA will communicate the proposed regulation to manufacturer organizations and trade associations as well as parties that have previously indicated an interest in amendments to the diagnostic x-ray equipment performance standard. The proposed amendments will also be brought to the attention of relevant medical professional societies and organizations whose members are likely to use fluoroscopic x-ray systems. FDA will solicit the assistance of the SBA during the comment period to assure that all small manufacturers impacted by the proposed amendments are aware of the opportunity to comment on the proposal, possible alternatives and its impact.

[1]NAICS has replaced the Standard Industrial Classification (SIC) codes. NAICS Industry Group 334517 (Irradiation Apparatus) coincides with SIC Group 3844 (X-Ray Apparatus and Tubing).

K. Reporting Requirements and Duplicate Rules

FDA has concluded that the proposed rule imposes new reporting and other compliance requirements on small businesses. In addition, FDA has identified no relevant Federal rules that may duplicate, overlap, or conflict with the proposed rule. The cost in the labeling is addressed previously.

L. Conclusion of the Analysis of Impacts

FDA has examined the impacts of the proposed amendments to the performance standard. Based on this evaluation, an upper-bound estimate has been made for average annualized costs amounting to $30.8 million, of which $30.4 million would be borne by the manufacturers of this equipment. FDA believes that the reductions in acute and long-term radiation injuries to patients that would be facilitated by the proposed amendments would appreciably outweigh the upper-bound costs estimated for compliance with the rules. Finally, FDA has concluded that it is likely that this proposal would have a significant impact on a substantial number of small entities.

FDA solicits comment on all aspects of this analysis and all assumptions used.

VII. Federalism

FDA has analyzed this proposed rule in accordance with the principles set forth in Executive Order 13132. FDA has determined that the proposed rule does not contain policies that have 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. Accordingly, the agency has concluded that the rule does not contain policies that have federalism implications as defined in the Executive order and, consequently, a federalism summary impact statement is not required.

VIII. Submission of Comments

Interested persons may submit to the Dockets Management Branch (see **ADDRESSES**) written or electronic comments regarding this proposal. Two copies of any mailed comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

IX. References

The following references have been placed on display in the Dockets Management Branch (see **ADDRESSES**) and may be seen by interested persons between 9 a.m. and 4 p.m., Monday through Friday.

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33. ''Assessment of the Impact of the Proposed Amendments to the Performance Standard for Diagnostic X-Ray Equipment Addressing Fluoroscopic X-ray Systems,'' Food and Drug Administration, pp. 1–28, November 15, 2000. Also available at http://www.fda.gov/cdrh/radhealth/fluoro/amendxrad.html

List of Subjects in 21 CFR Part 1020

Electronic products, Medical devices, Radiation protection, Reporting and recordkeeping requirements, Television, X-rays.

Therefore, under the Federal Food, Drug, and Cosmetic Act, and under authority delegated to the Commissioner of Food and Drugs, it is proposed that 21 CFR part 1020 be amended as follows:

PART 1020—PERFORMANCE STANDARDS FOR IONIZING RADIATION EMITTING PRODUCTS

1. The authority citation for 21 CFR part 1020 continues to read as follows:

Authority: 21 U.S.C. 351, 352, 360e–360j, 360gg–360ss, 371, 381.

2. Revise §1020.30 to read as follows:

§ 1020.30 Diagnostic x-ray systems and their major components.

(a) *Applicability*—(1) The provisions of this section are applicable to:

(i) The following components of diagnostic x-ray systems:

(A) Tube housing assemblies, x-ray controls, x-ray high-voltage generators, x-ray tables, cradles, film changers, vertical cassette holders mounted in a fixed location and cassette holders with front panels, and beam-limiting devices manufactured after August 1, 1974.

(B) Fluoroscopic imaging assemblies manufactured after August 1, 1974, and before April 26, 1977.

(C) Spot-film devices and image intensifiers manufactured after April 26, 1977.

(D) Cephalometric devices manufactured after February 25, 1978.

(E) Image receptor support devices for mammographic x-ray systems manufactured after September 5, 1978.

(F) Image receptors which are electrically powered or connected with the x-ray system manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**].

(ii) Diagnostic x-ray systems, except computed tomography x-ray systems, incorporating one or more of such components; however, such x-ray systems shall be required to comply only with those provisions of this section and §§ 1020.31 and 1020.32, which relate to the components certified in accordance with paragraph (c) of this section and installed into the systems.

(iii) Computed tomography (CT) x-ray systems manufactured before November 29, 1984.

(iv) CT gantries manufactured after September 3, 1985.

(2) The following provisions of this section and § 1020.33 are applicable to CT x-ray systems manufactured or remanufactured on or after November 29, 1984:

(i) Section 1020.30(a);

(ii) Section 1020.30(b) ''Technique factors'';

(iii) Section 1020.30(b) ''CT,'' ''Dose,'' ''Scan,'' ''Scan time,'' and ''Tomogram'';

(iv) Section 1020.30(h)(3)(vi) through (h)(3)(viii);

(v) Section 1020.30(n);

(vi) Section 1020.33(a) and (b);

(vii) Section 1020.33(c)(1) as it affects § 1020.33(c)(2); and

(viii) Section 1020.33(c)(2).

(3) The provisions of this section and § 1020.33 in its entirety, including those provisions in paragraph (a)(2) of this section, are applicable to CT x-ray systems manufactured or remanufactured on or after September 3, 1985. The date of manufacture of the CT system is the date of manufacture of the CT gantry.

(b) *Definitions.* As used in this section and §§1020.31, 1020.32, and 1020.33, the following definitions apply:

Accessible surface means the external surface of the enclosure or housing provided by the manufacturer.

Accessory component means:

(1) A component used with diagnostic x-ray systems, such as a cradle or film changer, that is not necessary for the compliance of the system with applicable provisions of this subchapter but which requires an initial determination of compatibility with the system; or

(2) A component necessary for compliance of the system with applicable provisions of this subchapter but which may be interchanged with similar compatible components without affecting the system's compliance, such as one of a set of interchangeable beam-limiting devices; or

(3) A component compatible with all x-ray systems with which it may be used and that does not require compatibility or installation instructions, such as a tabletop cassette holder.

Air kerma means kerma in air (see kerma).

Aluminum equivalent means the thickness of aluminum (type 1100 alloy)[1] affording the same attenuation, under specified conditions as the material in question.

Articulated joint means a joint between two separate sections of a tabletop which joint provides the capacity for one of the sections to pivot on the line segment along which the sections join.

Assembler means any person engaged in the business of assembling, replacing, or installing one or more components into a diagnostic x-ray system or subsystem. The term includes the owner of an x-ray system or his or her employee or agent who assembles components into an x-ray system that is

[1]The nominal chemical composition of type 1100 aluminum alloy is 99.00 percent minimum aluminum, 0.12 percent copper, as given in ''Aluminum Standards and Data'' (1969). Copies may be obtained from The Aluminum Association, New York, NY.

subsequently used to provide professional or commercial services.

Attenuation block means a block or stack of type 1100 aluminum alloy or aluminum alloy having equivalent attenuation with dimensions 20 centimeters by 20 centimeters by 3.8 centimeters.

Automatic exposure control (AEC) means a device which automatically controls one or more technique factors in order to obtain at a preselected location(s) a required quantity of radiation.

Automatic exposure rate control (AERC) means a device which automatically controls one or more technique factors in order to obtain at a preselected location(s) a required quantity of radiation per unit time.

Beam axis means a line from the source through the centers of the x-ray fields.

Beam-limiting device means a device which provides a means to restrict the dimensions of the x-ray field.

Cantilevered tabletop means a tabletop designed such that the unsupported portion can be extended at least 100 centimeters beyond the support.

Cassette holder means a device, other than a spot-film device, that supports and/or fixes the position of an x-ray film cassette during an x-ray exposure.

Cephalometric device means a device intended for the radiographic visualization and measurement of the dimensions of the human head.

Coefficient of variation means the ratio of the standard deviation to the mean value of a population of observations. It is estimated using the following equation:

$$C = \frac{s}{\overline{X}} = \frac{1}{\overline{X}}\left[\sum_{i=1}^{n}\frac{\left(X_i - \overline{X}\right)^2}{n-1}\right]^{1/2}$$

where:

s = Estimated standard deviation of the population.

$\overline{X}$ = Mean value of observations in sample.

X_i = ith observation sampled.

n = Number of observations sampled.

Computed tomography (CT) means the production of a tomogram by the acquisition and computer processing of x-ray transmission data.

Control panel means that part of the x-ray control upon which are mounted the switches, knobs, pushbuttons, and other hardware necessary for manually setting the technique factors.

Cooling curve means the graphical relationship between heat units stored and cooling time.

Cradle means:

(1) A removable device which supports and may restrain a patient above an x-ray table; or

(2) A device;

(i) Whose patient support structure is interposed between the patient and the image receptor during normal use;

(ii) Which is equipped with means for patient restraint; and

(iii) Which is capable of rotation about its long (longitudinal) axis.

CT gantry means tube housing assemblies, beam-limiting devices, detectors, and the supporting structures, frames, and covers which hold and/or enclose these components.

Diagnostic source assembly means the tube housing assembly with a beam-limiting device attached.

Diagnostic x-ray system means an x-ray system designed for irradiation of any part of the human body for the purpose of diagnosis or visualization.

Dose means the absorbed dose as defined by the International Commission on Radiation Units and Measurements. The absorbed dose, D, is the quotient of dε by dm, where dε is the mean energy imparted to matter of mass dm; thus D=dε/dm, in units of J/kg, where the special name for the unit of absorbed dose is gray (Gy).

Equipment means x-ray equipment.

Exposure (X) means the quotient of dQ by dm where dQ is the absolute value of the total charge of the ions of one sign produced in air when all the electrons and positrons liberated or created by photons in air of mass dm are completely stopped in air; thus X=dQ/dm, in units of C/kg.

Field emission equipment means equipment which uses an x-ray tube in which electron emission from the cathode is due solely to action of an electric field.

Fluoroscopic imaging assembly means a subsystem in which x-ray photons produce a set of fluoroscopic images or radiographic images recorded from the fluoroscopic image receptor. It includes the image receptor(s), electrical interlocks, if any, and structural material providing linkage between the image receptor and diagnostic source assembly.

Fluoroscopy means a technique for generating x-ray images and presenting them instantaneously and continuously as visible images for the purpose of providing the user with a visual display of dynamic processes.

General purpose radiographic x-ray system means any radiographic x-ray system which, by design, is not limited to radiographic examination of specific anatomical regions.

Half-value layer (HVL) means the thickness of specified material which attenuates the beam of radiation to an extent such that the AKR is reduced to one-half of its original value. In this definition the contribution of all scattered radiation, other than any which might be present initially in the beam concerned, is deemed to be excluded.

Image intensifier means a device, installed in its housing, which instantaneously converts an x-ray pattern into a corresponding light image of higher energy density.

Image receptor means any device, such as a fluorescent screen, radiographic film, x-ray image intensifier tube, solid-state detector, or gaseous detector, which transforms incident x-ray photons either into a visible image or into another form which can be made into a visible image by further transformations. In those cases where means are provided to preselect a portion of the image receptor, the term ''image receptor'' shall mean the preselected portion of the device.

Image receptor support device means, for mammography x-ray systems, that part of the system designed to support the image receptor during a mammographic examination and to provide a primary protective barrier.

Isocenter means the center of the smallest sphere through which the beam axis passes for a C-arm gantry moving through a full range of rotations about a common center.

Kerma means the quantity as defined by the International Commission on Radiation Units and Measurements. The kerma, K, is the quotient of dE_{tr} by dm, where dE_{tr} is the sum of the initial kinetic energies of all the charged particles liberated by uncharged particles in a mass dm of material; thus $K=dE_{tr}/dm$, in units of J/kg, where the special name for the unit of kerma is gray (Gy). When the material is air, the quantity is referred to as ''air kerma.''

Last-image hold (LIH) radiograph means an image obtained either by retaining one or more fluoroscopic images, which may be temporally integrated, at the end of a fluoroscopic exposure or by initiating a separate and distinct radiographic exposure automatically and immediately in conjunction with termination of the fluoroscopic exposure.

Lateral fluoroscope means the x-ray tube and image receptor combination in a biplane system dedicated to the lateral projection. It consists of the lateral x-ray tube housing assembly and the lateral image receptor that are fixed in position relative to the table with the x-ray beam axis parallel to the plane of the table.

Leakage radiation means radiation emanating from the diagnostic source assembly except for:

(1) The useful beam; and

(2) Radiation produced when the exposure switch or timer is not activated.

Leakage technique factors means the technique factors associated with the diagnostic source assembly which are used in measuring leakage radiation. They are defined as follows:

(1) For diagnostic source assemblies intended for capacitor energy storage equipment, the maximum-rated peak tube potential and the maximum-rated number of exposures in an hour for operation at the maximum-rated peak tube potential with the quantity of charge per exposure being 10 millicoulombs (or 10 mAs) or the minimum obtainable from the unit, whichever is larger;

(2) For diagnostic source assemblies intended for field emission equipment rated for pulsed operation, the maximum-rated peak tube potential and the maximum-rated number of x-ray pulses in an hour for operation at the maximum-rated peak tube potential; and

(3) For all other diagnostic source assemblies, the maximum-rated peak tube potential and the maximum-rated continuous tube current for the maximum-rated peak tube potential.

Light field means that area of the intersection of the light beam from the beam-limiting device and one of the set of planes parallel to and including the plane of the image receptor, whose perimeter is the locus of points at which the illuminance is one-fourth of the maximum in the intersection.

Line-voltage regulation means the difference between the no-load and the load line potentials expressed as a percent of the load line potential; that is,

Percent line-voltage regulation = $100(V_n - V_i) / V_i$

where:

V_n = No-load line potential and

V_i = Load line potential.

Maximum line current means the root mean square current in the supply line of an x-ray machine operating at its maximum rating.

Mode of operation means, for fluoroscopic systems, a distinct method of fluoroscopy or radiography selected with a set of technique factors or other control settings uniquely associated with the mode. Examples of distinct modes of operation include normal fluoroscopy (analog or digital), high-level control fluoroscopy, cineradiography (analog), digital cineradiography, digital subtraction angiography, electronic radiography using the fluoroscopic image receptor, and photospot recording. In a specific mode of operation, certain system variables affecting air kerma, AKR, or image quality, such as image magnification, x-ray field size, pulse rate, pulse duration, number of pulses per exposure series, SID, or optical aperture, may be adjustable or may vary; their variation per se does not comprise a mode of operation different from the one that has been selected.

Movable tabletop means a tabletop which, when assembled for use, is capable of movement with respect to its supporting structure within the plane of the tabletop.

Nonimage-intensified fluoroscopy means fluoroscopy using only a fluorescent screen.

Peak tube potential means the maximum value of the potential difference across the x-ray tube during an exposure.

Primary protective barrier means the material, excluding filters, placed in the useful beam to reduce the radiation exposure for protection purposes.

Pulsed mode means operation of the x-ray system such that the x-ray tube current is pulsed by the x-ray control to produce one or more exposure intervals of duration less than one-half second.

Quick change x-ray tube means an x-ray tube designed for use in its associated tube housing such that:

(1) The tube cannot be inserted in its housing in a manner that would result in noncompliance of the system with the requirements of paragraphs (k) and (m) of this section;

(2) The focal spot position will not cause noncompliance with the provisions of this section or § 1020.31 or § 1020.32;

(3) The shielding within the tube housing cannot be displaced; and

(4) Any removal and subsequent replacement of a beam-limiting device during reloading of the tube in the tube housing will not result in noncompliance of the x-ray system with the applicable field limitation and alignment requirements of §§1020.31 and 1020.32.

Radiation therapy simulation system means a radiographic or fluoroscopic x-ray system intended for localizing the volume to be exposed during radiation therapy and confirming the position and size of the therapeutic irradiation field.

Radiography means a technique for generating and recording an x-ray pattern for the purpose of providing the user with an image(s) after termination of the exposure.

Rated line voltage means the range of potentials, in volts, of the supply line specified by the manufacturer at which the x-ray machine is designed to operate.

Rated output current means the maximum allowable load current of the x-ray high-voltage generator.

Rated output voltage means the allowable peak potential, in volts, at the output terminals of the x-ray high-voltage generator.

Rating means the operating limits specified by the manufacturer.

Recording means producing a retrievable form of an image resulting from x-ray photons.

Scan means the complete process of collecting x-ray transmission data for the production of a tomogram. Data may be collected simultaneously during a single scan for the production of one or more tomograms.

Scan time means the period of time between the beginning and end of x-ray transmission data accumulation for a single scan.

Solid state x-ray imaging device means an assembly, typically in a rectangular panel configuration, consisting of:

(1) A transducer layer that intercepts x-ray photons and through a single or multistage process converts the photon energy into a modulated signal representative of the x-ray image, and

(2) A matrix of integration and switching elements that are coupled to the transducer layer. An electrical signal representing the x-ray image is generated by a charge generation and transfer process within the integration and switching matrix. The electrical signals may undergo analog-to-digital conversion before leaving the panel to provide either a digital radiographic or fluoroscopic image.

Source means the focal spot of the x-ray tube.

Source-image receptor distance (SID) means the distance from the source to the center of the input surface of the image receptor.

Source-skin distance (SSD) means the distance from the source to the center of the entrant x-ray field in the plane tangent to the patient skin surface.

Spot-film device means a device intended to transport and/or position a radiographic image receptor between the x-ray source and fluoroscopic image receptor. It includes a device intended to hold a cassette over the input end of the fluoroscopic image receptor for the purpose of producing a radiograph.

Stationary tabletop means a tabletop which, when assembled for use, is incapable of movement with respect to

its supporting structure within the plane of the tabletop.

Technique factors means the following conditions of operation:

(1) For capacitor energy storage equipment, peak tube potential in kilovolts (kV) and quantity of charge in milliamperes-seconds (mAs);

(2) For field emission equipment rated for pulsed operation, peak tube potential in kV and number of x-ray pulses;

(3) For CT equipment designed for pulsed operation, peak tube potential in kV, scan time in seconds, and either tube current in milliamperes (mA), x-ray pulse width in seconds, and the number of x-ray pulses per scan, or the product of the tube current, x-ray pulse width, and the number of x-ray pulses in mAs;

(4) For CT equipment not designed for pulsed operation, peak tube potential in kV, and either tube current in mA and scan time in seconds, or the product of tube current and exposure time in mAs and the scan time when the scan time and exposure time are equivalent; and

(5) For all other equipment, peak tube potential in kV, and either tube current in mA and exposure time in seconds, or the product of tube current and exposure time in mAs.

Tomogram means the depiction of the x-ray attenuation properties of a section through a body.

Tube means an x-ray tube, unless otherwise specified.

Tube housing assembly means the tube housing with tube installed. It includes high-voltage and/or filament transformers and other appropriate elements when they are contained within the tube housing.

Tube rating chart means the set of curves which specify the rated limits of operation of the tube in terms of the technique factors.

Useful beam means the radiation which passes through the tube housing port and the aperture of the beam-limiting device when the exposure switch or timer is activated.

Variable-aperture beam-limiting device means a beam-limiting device which has the capacity for stepless adjustment of the x-ray field size at a given SID.

Visible area means the portion of the input surface of the image receptor over which incident x-ray photons are producing a visible image.

X-ray control means a device which controls input power to the x-ray high-voltage generator and/or the x-ray tube. It includes equipment such as timers, phototimers, automatic brightness stabilizers, and similar devices, which control the technique factors of an x-ray exposure.

X-ray equipment means an x-ray system, subsystem, or component thereof. Types of x-ray equipment are as follows:

(1) *Mobile x-ray equipment* means x-ray equipment mounted on a permanent base with wheels and/or casters for moving while completely assembled;

(2) *Portable x-ray equipment* means x-ray equipment designed to be hand-carried; and

(3) *Stationary x-ray equipment* means x-ray equipment which is installed in a fixed location.

X-ray field means that area of the intersection of the useful beam and any one of the set of planes parallel to and including the plane of the image receptor, whose perimeter is the locus of points at which the AKR is one-fourth of the maximum in the intersection.

X-ray high-voltage generator means a device which transforms electrical energy from the potential supplied by the x-ray control to the tube operating potential. The device may also include means for transforming alternating current to direct current, filament transformers for the x-ray tube(s), high-voltage switches, electrical protective devices, and other appropriate elements.

X-ray system means an assemblage of components for the controlled production of x-rays. It includes minimally an x-ray high-voltage generator, an x-ray control, a tube housing assembly, a beam-limiting device, and the necessary supporting structures. Additional components which function with the system are considered integral parts of the system.

X-ray subsystem means any combination of two or more components of an x-ray system for which there are requirements specified in this section and §§ 1020.31 and 1020.32.

X-ray table means a patient support device with its patient support structure (tabletop) interposed between the patient and the image receptor during radiography and/or fluoroscopy. This includes, but is not limited to, any stretcher equipped with a radiolucent panel and any table equipped with a cassette tray (or bucky), cassette tunnel, fluoroscopic image receptor, or spot-film device beneath the tabletop.

X-ray tube means any electron tube which is designed for the conversion of electrical energy into x-ray energy.

(c) *Manufacturers' responsibility*. Manufacturers of products subject to §§ 1020.30 through 1020.33 shall certify that each of their products meet all applicable requirements when installed into a diagnostic x-ray system according to instructions. This certification shall be made under the format specified in § 1010.2 of this chapter. Manufacturers may certify a combination of two or more components if they obtain prior authorization in writing from the Director of the Office of Compliance of the Center for Devices and Radiological Health. Manufacturers shall not be held responsible for noncompliance of their products if that noncompliance is due solely to the improper installation or assembly of that product by another person; however, manufacturers are responsible for providing assembly instructions adequate to assure compliance of their components with the applicable provisions of §§ 1020.30 through 1020.33.

(d) *Assemblers' responsibility*. An assembler who installs one or more components certified as required by paragraph (c) of this section shall install certified components that are of the type required by § 1020.31, § 1020.32, or § 1020.33 and shall assemble, install, adjust, and test the certified components according to the instructions of their respective manufacturers. Assemblers shall not be liable for noncompliance of a certified component if the assembly of that component was according to the component manufacturer's instruction.

(1) *Reports of assembly*. All assemblers who install certified components shall file a report of assembly, except as specified in paragraph (d)(2) of this section. The report will be construed as the assembler's certification and identification under §§ 1010.2 and 1010.3 of this chapter. The assembler shall affirm in the report that the manufacturer's instructions were followed in the assembly or that the certified components as assembled into the system meet all applicable requirements of §§ 1020.30 through 1020.33. All assembler reports must be on a form prescribed by the Director, Center for Devices and Radiological Health. Completed reports must be submitted to the Director, the purchaser, and, where applicable, to the State agency responsible for radiation protection within 15 days following completion of the assembly.

(2) *Exceptions to reporting requirements*. Reports of assembly need not be submitted for any of the following:

(i) Reloaded or replacement tube housing assemblies that are reinstalled in or newly assembled into an existing x-ray system;

(ii) Certified accessory components that have been identified as such to the Center for Devices and Radiological Health in the report required under § 1002.10 of this chapter;

(iii) Repaired components, whether or not removed from the system and

reinstalled during the course of repair, provided the original installation into the system was reported; or

(iv)(A) Components installed temporarily in an x-ray system in place of components removed temporarily for repair, provided the temporarily installed component is identified by a tag or label bearing the following information:

Temporarily Installed Component
This certified component has been assembled, installed, adjusted, and tested by me according to the instructions provided by the manufacturer.
Signature
Company Name
Street Address, P.O. Box
City, State, Zip Code
Date of Installation

(B) The replacement of the temporarily installed component by a component other than the component originally removed for repair shall be reported as specified in paragraph (d)(1) of this section.

(e) *Identification of x-ray components.* In addition to the identification requirements specified in § 1010.3 of this chapter, manufacturers of components subject to this section and §§ 1020.31, 1020.32, and 1020.33, except high-voltage generators contained within tube housings and beam-limiting devices that are integral parts of tube housings, shall permanently inscribe or affix thereon the model number and serial number of the product so that they are legible and accessible to view. The word ''model'' or ''type'' shall appear as part of the manufacturer's required identification of certified x-ray components. Where the certification of a system or subsystem, consisting of two or more components, has been authorized under paragraph (c) of this section, a single inscription, tag, or label bearing the model number and serial number may be used to identify the product.

(1) *Tube housing assemblies.* In a similar manner, manufacturers of tube housing assemblies shall also inscribe or affix thereon the name of the manufacturer, model number, and serial number of the x-ray tube which the tube housing assembly incorporates.

(2) *Replacement of tubes.* Except as specified in paragraph (e)(3) of this section, the replacement of an x-ray tube in a previously manufactured tube housing assembly certified under paragraph (c) of this section constitutes manufacture of a new tube housing assembly, and the manufacturer is subject to the provisions of paragraph (e)(1) of this section. The manufacturer shall remove, cover, or deface any previously affixed inscriptions, tags, or labels, that are no longer applicable.

(3) *Quick-change x-ray tubes.* The requirements of paragraph (e)(2) of this section shall not apply to tube housing assemblies designed and designated by their original manufacturer to contain quick change x-ray tubes. The manufacturer of quick-change x-ray tubes shall include with each replacement tube a label with the tube manufacturer's name, the model, and serial number of the x-ray tube. The manufacturer of the tube shall instruct the assembler who installs the new tube to attach the label to the tube housing assembly and to remove, cover, or deface the previously affixed inscriptions, tags, or labels that are described by the tube manufacturer as no longer applicable.

(f) [Reserved]

(g) *Information to be provided to assemblers.* Manufacturers of components listed in paragraph (a)(1) of this section shall provide to assemblers subject to paragraph (d) of this section and, upon request, to others at a cost not to exceed the cost of publication and distribution, instructions for assembly, installation, adjustment, and testing of such components adequate to assure that the products will comply with applicable provisions of this section and §§ 1020.31, 1020.32, and 1020.33, when assembled, installed, adjusted, and tested as directed. Such instructions shall include specifications of other components compatible with that to be installed when compliance of the system or subsystem depends on their compatibility. Such specifications may describe pertinent physical characteristics of the components and/or may list by manufacturer model number the components which are compatible. For x-ray controls and generators manufactured after May 3, 1994, manufacturers shall provide:

(1) A statement of the rated line voltage and the range of line-voltage regulation for operation at maximum line current;

(2) A statement of the maximum line current of the x-ray system based on the maximum input voltage and current characteristics of the tube housing assembly compatible with rated output voltage and rated output current characteristics of the x-ray control and associated high-voltage generator. If the rated input voltage and current characteristics of the tube housing assembly are not known by the manufacturer of the x-ray control and associated high-voltage generator, the manufacturer shall provide information necessary to allow the assembler to determine the maximum line current for the particular tube housing assembly(ies);

(3) A statement of the technique factors that constitute the maximum line current condition described in paragraph (g)(2) of this section.

(h) *Information to be provided to users.* Manufacturers of x-ray equipment shall provide to purchasers and, upon request, to others at a cost not to exceed the cost of publication and distribution, manuals or instruction sheets which shall include the following technical and safety information:

(1) *All x-ray equipment.* For x-ray equipment to which this section and §§ 1020.31, 1020.32, and 1020.33 are applicable, there shall be provided:

(i) Adequate instructions concerning any radiological safety procedures and precautions which may be necessary because of unique features of the equipment; and

(ii) A schedule of the maintenance necessary to keep the equipment in compliance with this section and §§ 1020.31, 1020.32, and 1020.33.

(2) *Tube housing assemblies.* For each tube housing assembly, there shall be provided:

(i) Statements of the leakage technique factors for all combinations of tube housing assemblies and beam-limiting devices for which the tube housing assembly manufacturer states compatibility, the minimum filtration permanently in the useful beam expressed as millimeters of aluminum equivalent, and the peak tube potential at which the aluminum equivalent was obtained;

(ii) Cooling curves for the anode and tube housing; and

(iii) *Tube rating charts.* If the tube is designed to operate from different types of x-ray high-voltage generators (such as single-phase self rectified, single-phase half-wave rectified, single-phase full-wave rectified, 3-phase 6-pulse, 3-phase 12-pulse, constant potential, capacitor energy storage) or under modes of operation such as alternate focal spot sizes or speeds of anode rotation which affect its rating, specific identification of the difference in ratings shall be noted.

(3) *X-ray controls and generators.* For the x-ray control and associated x-ray high-voltage generator, there shall be provided:

(i) A statement of the rated line voltage and the range of line-voltage regulation for operation at maximum line current;

(ii) A statement of the maximum line current of the x-ray system based on the maximum input voltage and output current characteristics of the tube housing assembly compatible with rated output voltage and rated current characteristics of the x-ray control and associated high-voltage generator. If the

rated input voltage and current characteristics of the tube housing assembly are not known by the manufacturer of the x-ray control and associated high-voltage generator, the manufacturer shall provide necessary information to allow the purchaser to determine the maximum line current for his particular tube housing assembly(ies);

(iii) A statement of the technique factors that constitute the maximum line current condition described in paragraph (h)(3)(ii) of this section;

(iv) In the case of battery-powered generators, a specification of the minimum state of charge necessary for proper operation;

(v) Generator rating and duty cycle;

(vi) A statement of the maximum deviation from the preindication given by labeled technique factor control settings or indicators during any radiographic or CT exposure where the equipment is connected to a power supply as described in accordance with this paragraph. In the case of fixed technique factors, the maximum deviation from the nominal fixed value of each factor shall be stated;

(vii) A statement of the maximum deviation from the continuous indication of x-ray tube potential and current during any fluoroscopic exposure when the equipment is connected to a power supply as described in accordance with this paragraph; and

(viii) A statement describing the measurement criteria for all technique factors used in paragraphs (h)(3)(iii), (h)(3)(vi), and (h)(3)(vii) of this section; for example, the beginning and endpoints of exposure time measured with respect to a certain percentage of the voltage waveform.

(4) *Beam-limiting device.* For each variable-aperture beam-limiting device, there shall be provided;

(i) Leakage technique factors for all combinations of tube housing assemblies and beam-limiting devices for which the beam-limiting device manufacturer states compatibility; and

(ii) A statement including the minimum aluminum equivalent of that part of the device through which the useful beam passes and including the x-ray tube potential at which the aluminum equivalent was obtained. When two or more filters are provided as part of the device, the statement shall include the aluminum equivalent of each filter.

(5) *Imaging system information.* For x-ray systems manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**], that produce images using the fluoroscopic image receptor, the following information shall be provided in a separate, single section of the user's instruction manual or in a separate manual devoted to this information:

(i) For each mode of operation, a description of the mode and detailed instructions on how the mode is engaged and disengaged. This information shall include how the operator can recognize which mode of operation has been selected prior to initiation of x-ray production.

(ii) For each mode of operation, a description of any specific clinical procedure(s) and clinical imaging task(s) for which the mode is recommended or designed and how each mode should be used.

(6) *Displays of values of AKR and cumulative air kerma.* For fluoroscopic x-ray systems manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**], the following shall be provided:

(i) A statement of the maximum deviations of the AKR and cumulative air kerma from their respective displayed values;

(ii) Instructions, including schedules, for calibrating and maintaining any instrumentation associated with measurement or evaluation of the AKR and cumulative air kerma;

(iii) Identification of the spatial coordinates of the irradiation location to which displayed values of AKR and cumulative air kerma refer according to § 1020.32(k)(5);

(iv) A rationale for specification of a reference irradiation location alternative to 15 centimeters from the isocenter toward the x-ray source along the beam axis when such alternative specification is made according to § 1020.32(k)(5)(ii).

(i) [Reserved]

(j) *Warning label.* The control panel containing the main power switch shall bear the warning statement, legible and accessible to view:

''Warning: This x-ray unit may be dangerous to patient and operator unless safe exposure factors, operating instructions and maintenance schedules are observed.''

(k) *Leakage radiation from the diagnostic source assembly.* The leakage radiation from the diagnostic source assembly measured at a distance of 1 meter in any direction from the source shall not exceed 0.88 milligray (mGy) air kerma (vice 100 milliroentgen (mR) exposure) in 1 hour when the x-ray tube is operated at the leakage technique factors. If the maximum rated peak tube potential of the tube housing assembly is greater than the maximum rated peak tube potential for the diagnostic source assembly, positive means shall be provided to limit the maximum x-ray tube potential to that of the diagnostic source assembly. Compliance shall be determined by measurements averaged over an area of 100 square centimeters with no linear dimension greater than 20 centimeters.

(l) *Radiation from components other than the diagnostic source assembly.* The radiation emitted by a component other than the diagnostic source assembly shall not exceed an air kerma of 18 μGy (vice 2 mR exposure) in 1 hour at 5 centimeters from any accessible surface of the component when it is operated in an assembled x-ray system under any conditions for which it was designed. Compliance shall be determined by measurements averaged over an area of 100 square centimeters with no linear dimension greater than 20 centimeters.

(m) *Beam quality*—(1) *Half-value layer.* The half-value layer (HVL) of the useful beam for a given x-ray tube potential shall not be less than the appropriate value shown in table 1 of this section under ''Specified Dental Systems,'' for any dental x-ray system designed for use with intraoral image receptors and manufactured after December 1, 1980; under ''I—Other X-Ray Systems,'' for any dental x-ray system designed for use with intraoral image receptors and manufactured before December 1, 1980, and all other x-ray systems subject to this section and manufactured before [date 1 year after date of publication of the final rule in the **Federal Register**]; and under ''II—Other X-Ray Systems,'' for all x-ray systems, except dental x-ray systems designed for use with intraoral image receptors, subject to this section and manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**]. If it is necessary to determine such HVL at an x-ray tube potential which is not listed in table 1 of this section, linear interpolation or extrapolation may be made. Positive means[2] shall be provided to insure that at least the minimum filtration needed to achieve the above beam quality requirements is in the useful beam during each exposure. Table 1 follows:

[2]In the case of a system which is to be operated with more than one thickness of filtration, this requirement can be met by a filter interlocked with the kilovoltage selector which will prevent x-ray emissions if the minimum required filtration is not in place.

TABLE 1.

X-Ray Tube Voltage (kilovolt peak)		Minimum HVL (millimeters of aluminum)		
Designed Operating Range	Measured Operating Potential	Specified Dental Systems[1]	I—Other X-Ray Systems[2]	II—Other X-Ray Systems[3]
Below 51	30	1.5	0.3	0.3
	40	1.5	0.4	0.4
	50	1.5	0.5	0.5
51 to 70	51	1.5	1.2	1.3
	60	1.5	1.3	1.5
	70	1.5	1.5	1.8
Above 70	71	2.1	2.1	2.4
	80	2.3	2.3	2.8
	90	2.5	2.5	3.2
	100	2.7	2.7	3.6
	110	3.0	3.0	4.1
	120	3.2	3.2	4.5
	130	3.5	3.5	5.0
	140	3.8	3.8	5.4
	150	4.1	4.1	5.9

[1]Dental x-ray systems designed for use with intraoral image receptors and manufactured after December 1, 1980.
[2]Dental x-ray systems designed for use with intraoral image receptors and manufactured before or on December 1, 1980, and all other x-ray systems subject to this section and manufactured before or on [date 1 year after date of publication of the final rule in the **Federal Register**].
[3]All x-ray systems, except dental x-ray systems designed for use with intraoral image receptors, subject to this section and manufactured after [date 1 year after date of publication of the final rule in the **Federal Register**].

(2) *Optional filtration*. Fluoroscopic systems incorporating an x-ray tube(s) with a continuous output of 1 kilowatt or more and an anode heat storage capacity of 1 million heat units or more shall provide the option of selecting and adding x-ray filtration to the diagnostic source assembly over and above the amount needed to meet the half-value layer provisions of § 1020.30(m)(1). The selection of this additional x-ray filtration shall be at the option of the user.

(3) *Measuring compliance*. For capacitor energy storage equipment, compliance shall be determined with the maximum selectable quantity of charge per exposure.

(n) *Aluminum equivalent of material between patient and image receptor*. Except when used in a CT x-ray system, the aluminum equivalent of each of the items listed in table 2 of this section, which are used between the patient and image receptor, may not exceed the indicated limits. Compliance shall be determined by x-ray measurements made at a potential of 100 kilovolts peak and with an x-ray beam that has a HVL specified in table 1 of this section for the potential. This requirement applies to front panel(s) of cassette holders and film changers provided by the manufacturer for patient support or for prevention of foreign object intrusions. It does not apply to screens and their associated mechanical support panels or grids. Table 2 follows:

TABLE 2.

Item	Aluminum Equivalent (millimeters)
Front panel(s) of cassette holders (total of all)	1.0
Front panel(s) of film changer (total of all)	1.0
Cradle	2.0
Tabletop, stationary, without articulated joints	1.0
Tabletop, movable, without articulated joint(s) (including stationary subtop)	1.5
Tabletop, with radiolucent panel having one articulated joint	1.5
Tabletop, with radiolucent panel having two or more articulated joints	2.0
Tabletop, cantilevered	2.0
Tabletop, radiation therapy simulator	5.0

(o) *Battery charge indicator.* On battery-powered generators, visual means shall be provided on the control panel to indicate whether the battery is in a state of charge adequate for proper operation.

(p) [Reserved]

(q) *Modification of certified diagnostic x-ray components and systems*—(1) Diagnostic x-ray components and systems certified in accordance with § 1010.2 of this chapter shall not be modified such that the component or system fails to comply with any applicable provision of this chapter unless a variance in accordance with § 1010.4 of this chapter or an exemption under section 534(a)(5) or 538(b) of the Federal Food, Drug, and Cosmetic Act has been granted.

(2) The owner of a diagnostic x-ray system who uses the system in a professional or commercial capacity may modify the system, provided the modification does not result in the failure of the system or component to comply with the applicable requirements of this section or of § 1020.31, § 1020.32, or § 1020.33. The owner who causes such modification need not submit the reports required by subpart B of part 1002 of this chapter, provided the owner records the date and the details of the modification, and provided the modification of the x-ray system does not result in a failure to comply with § 1020.31, § 1020.32, or § 1020.33.

3. Revise § 1020.31 to read as follows:

§ 1020.31 Radiographic equipment.

The provisions of this section apply to equipment for the recording of images, except equipment for fluoroscopic imaging and for radiographic imaging when images are recorded from the fluoroscopic image receptor or computed tomography x-ray systems manufactured on or after November 28, 1984.

(a) *Control and indication of technique factors*—(1) *Visual indication.* The technique factors to be used during an exposure shall be indicated before the exposure begins, except when automatic exposure controls are used, in which case the technique factors which are set prior to the exposure shall be indicated. On equipment having fixed technique factors, this requirement may be met by permanent markings. Indication of technique factors shall be visible from the operator's position except in the case of spot films made by the fluoroscopist.

(2) *Timers.* Means shall be provided to terminate the exposure at a preset time interval, a preset product of current and time, a preset number of pulses, or a preset radiation exposure to the image receptor.

(i) Except during serial radiography, the operator shall be able to terminate the exposure at any time during an exposure of greater than one-half second. Except during panoramic dental radiography, termination of exposure shall cause automatic resetting of the timer to its initial setting or to zero. It shall not be possible to make an exposure when the timer is set to a zero or off position if either position is provided.

(ii) During serial radiography, the operator shall be able to terminate the x-ray exposure(s) at any time, but means may be provided to permit completion of any single exposure of the series in process.

(3) *Automatic exposure controls.* When an automatic exposure control is provided:

(i) Indication shall be made on the control panel when this mode of operation is selected;

(ii) When the x-ray tube potential is equal to or greater than 51 kilovolts peak (kVp), the minimum exposure time for field emission equipment rated for pulsed operation shall be equal to or less than a time interval equivalent to two pulses and the minimum exposure time for all other equipment shall be equal to or less than 1/60 second or a time interval required to deliver 5 milliampere-seconds (mAs), whichever is greater;

(iii) Either the product of peak x-ray tube potential, current, and exposure time shall be limited to not more than 60 kilowatt-seconds (kWs) per exposure or the product of x-ray tube current and exposure time shall be limited to not more than 600 mAs per exposure, except when the x-ray tube potential is less than 51 kVp, in which case the product of x-ray tube current and exposure time shall be limited to not more than 2,000 mAs per exposure; and

(iv) A visible signal shall indicate when an exposure has been terminated at the limits described in paragraph (a)(3)(iii) of this section, and manual resetting shall be required before further automatically timed exposures can be made.

(4) *Accuracy.* Deviation of technique factors from indicated values shall not exceed the limits given in the information provided in accordance with § 1020.30(h)(3);

(b) *Reproducibility.* The following requirements shall apply when the equipment is operated on an adequate power supply as specified by the manufacturer in accordance with the requirements of § 1020.30(h)(3);

(1) *Coefficient of variation.* For any specific combination of selected technique factors, the estimated coefficient of variation of the air kerma shall be no greater than 0.05.

(2) *Measuring compliance.* Determination of compliance shall be based on 10 consecutive measurements taken within a time period of 1 hour. Equipment manufactured after September 5, 1978, shall be subject to the additional requirement that all variable controls for technique factors shall be adjusted to alternate settings and reset to the test setting after each measurement. The percent line-voltage regulation shall be determined for each measurement. All values for percent line-voltage regulation shall be within ±1 of the mean value for all measurements. For equipment having automatic exposure controls, compliance shall be determined with a sufficient thickness of attenuating material in the useful beam such that the technique factors can be adjusted to provide individual exposures of a minimum of 12 pulses on field emission equipment rated for pulsed operation or no less than one-tenth second per exposure on all other equipment.

(c) *Linearity.* The following requirements apply when the equipment is operated on a power supply as specified by the manufacturer in accordance with the requirements of § 1020.30(h)(3) for any fixed x-ray tube potential within the range of 40 percent to 100 percent of the maximum rated.

(1) *Equipment having independent selection of x-ray tube current (mA).* The average ratios of air kerma to the indicated milliampere-seconds product (mGy/mAs) obtained at any two consecutive tube current settings shall not differ by more than 0.10 times their sum. This is: $|X_1 - X_2| \leq 0.10(X_1+X_2)$; where X_1 and X_2 are the average mGy/mAs values obtained at each of two consecutive tube current settings or at two settings differing by no more than a factor of 2 where the tube current selection is continuous.

(2) *Equipment having selection of x-ray tube current-exposure time product (mAs).* For equipment manufactured after May 3, 1994, the average ratios of air kerma to the indicated milliampere-seconds product (mGy/mAs) obtained at any two consecutive mAs selector settings shall not differ by more than 0.10 times their sum. This is: $|X_1-X_2| \leq 0.10(X_1+X_2)$; where X_1 and X_2 are the average mGy/mAs values obtained at each of two consecutive mAs selector settings or at two settings differing by no more than a factor of 2 where the mAs selector provides continuous selection.

(3) *Measuring compliance.* Determination of compliance will be based on 10 exposures, made within 1 hour, at each of the two settings. These two settings may include any two focal spot sizes except where one is equal to or less than 0.45 millimeters and the other is greater than 0.45 millimeters. For purposes of this requirement, focal spot size is the focal spot size specified by the x-ray tube manufacturer. The percent line-voltage regulation shall be determined for each measurement. All values for percent line-voltage regulation at any one combination of technique factors shall be within ±1 of the mean value for all measurements at these technique factors.

(d) *Field limitation and alignment for mobile, portable, and stationary general purpose x-ray systems.* Except when spot-film devices are in service, mobile, portable, and stationary general purpose radiographic x-ray systems shall meet the following requirements:

(1) *Variable x-ray field limitation.* A means for stepless adjustment of the size of the x-ray field shall be provided. Each dimension of the minimum field size at an SID of 100 centimeters shall be equal to or less than 5 centimeters.

(2) *Visual definition.* (i) Means for visually defining the perimeter of the x-ray field shall be provided. The total misalignment of the edges of the visually defined field with the respective edges of the x-ray field along either the length or width of the visually defined field shall not exceed 2 percent of the distance from the source to the center of the visually defined field when the surface upon which it appears is perpendicular to the axis of the x-ray beam.

(ii) When a light localizer is used to define the x-ray field, it shall provide an average illuminance of not less than 160 lux (15 footcandles) at 100 centimeters or at the maximum SID, whichever is less. The average illuminance shall be based upon measurements made in the approximate center of each quadrant of the light field. Radiation therapy simulation systems are exempt from this requirement.

(iii) The edge of the light field at 100 centimeters or at the maximum SID, whichever is less, shall have a contrast ratio, corrected for ambient lighting, of not less than 4 in the case of beam-limiting devices designed for use on stationary equipment, and a contrast ratio of not less than 3 in the case of beam-limiting devices designed for use on mobile and portable equipment. The contrast ratio is defined as I_1/I_2, where I_1 is the illuminance 3 millimeters from the edge of the light field toward the center of the field; and I_2 is the illuminance 3 millimeters from the edge of the light field away from the center of the field. Compliance shall be determined with a measuring aperture of 1 millimeter.

(e) *Field indication and alignment on stationary general purpose x-ray equipment.* Except when spot-film devices are in service, stationary general purpose x-ray systems shall meet the following requirements in addition to those prescribed in paragraph (d) of this section:

(1) Means shall be provided to indicate when the axis of the x-ray beam is perpendicular to the plane of the image receptor, to align the center of the x-ray field with respect to the center of the image receptor to within 2 percent of the SID, and to indicate the SID to within 2 percent;

(2) The beam-limiting device shall numerically indicate the field size in the plane of the image receptor to which it is adjusted;

(3) Indication of field size dimensions and SIDs shall be specified in centimeters and/or inches and shall be such that aperture adjustments result in x-ray field dimensions in the plane of the image receptor which correspond to those indicated by the beam-limiting device to within 2 percent of the SID when the beam axis is indicated to be perpendicular to the plane of the image receptor; and

(4) Compliance measurements will be made at discrete SIDs and image receptor dimensions in common clinical use (such as SIDs of 100, 150, and 200 centimeters and/or 36, 40, 48, and 72 inches and nominal image receptor dimensions of 13, 18, 24, 30, 35, 40, and 43 centimeters and/or 5, 7, 8, 9, 10, 11, 12, 14, and 17 inches) or at any other specific dimensions at which the beam-limiting device or its associated diagnostic x-ray system is uniquely designed to operate.

(f) *Field limitation on radiographic x-ray equipment other than general purpose radiographic systems*—(1) *Equipment for use with intraoral image receptors.* Radiographic equipment designed for use with an intraoral image receptor shall be provided with means to limit the x-ray beam such that:

(i) If the minimum source-to-skin distance (SSD) is 18 centimeters or more, the x-ray field at the minimum SSD shall be containable in a circle having a diameter of no more than 7 centimeters; and

(ii) If the minimum SSD is less than 18 centimeters, the x-ray field at the minimum SSD shall be containable in a circle having a diameter of no more than 6 centimeters.

(2) *X-ray systems designed for one image receptor size.* Radiographic equipment designed for only one image receptor size at a fixed SID shall be provided with means to limit the field at the plane of the image receptor to dimensions no greater than those of the image receptor, and to align the center of the x-ray field with the center of the image receptor to within 2 percent of the SID or shall be provided with means to both size and align the x-ray field such that the x-ray field at the plane of the image receptor does not extend beyond any edge of the image receptor.

(3) *Systems designed for mammography*—(i) Radiographic systems designed only for mammography and general purpose radiography systems, when special attachments for mammography are in service, manufactured on or after November 1, 1977, and before September 30, 1999, shall be provided with means to limit the useful beam such that the x-ray field at the plane of the image receptor does not extend beyond any edge of the image receptor at any designated SID except the edge of the image receptor designed to be adjacent to the chest wall where the x-ray field may not extend beyond this edge by more than 2 percent of the SID. This requirement can be met with a system that performs as prescribed in paragraphs (f)(4)(i), (f)(4)(ii), and (f)(4)(iii) of this section. When the beam-limiting device and image receptor support device are designed to be used to immobilize the breast during a mammographic procedure and the SID may vary, the SID indication specified in paragraphs (f)(4)(ii) and (f)(4)(iii) of this section shall be the maximum SID for which the beam-limiting device or aperture is designed.

(ii) Mammographic beam-limiting devices manufactured on or after September 30, 1999, shall be provided with the means to limit the useful beam such that the x-ray field at the plane of the image receptor does not extend beyond any edge of the image receptor by more than 2 percent of the SID. This requirement can be met with a system that performs as prescribed in paragraphs (f)(4)(i), (f)(4)(ii), and (f)(4)(iii) of this section. For systems that allow changes in the SID, the SID indication specified in paragraphs (f)(4)(ii) and (f)(4)(iii) of this section shall be the maximum SID for which the beam-limiting device or aperture is designed.

(iii) Each image receptor support device manufactured on or after November 1, 1977, intended for installation on a system designed for mammography shall have clear and

permanent markings to indicate the maximum image receptor size for which it is designed.

(4) *Other x-ray systems.* Radiographic systems not specifically covered in paragraphs (d), (e), (f)(2), (f)(3), and (h) of this section and systems covered in paragraph (f)(1) of this section, which are also designed for use with extraoral image receptors and when used with an extraoral image receptor, shall be provided with means to limit the x-ray field in the plane of the image receptor so that such field does not exceed each dimension of the image receptor by more than 2 percent of the SID, when the axis of the x-ray beam is perpendicular to the plane of the image receptor. In addition, means shall be provided to align the center of the x-ray field with the center of the image receptor to within 2 percent of the SID, or means shall be provided to both size and align the x-ray field such that the x-ray field at the plane of the image receptor does not extend beyond any edge of the image receptor. These requirements may be met with:

(i) A system which performs in accordance with paragraphs (d) and (e) of this section; or when alignment means are also provided, may be met with either;

(ii) An assortment of removable, fixed-aperture, beam-limiting devices sufficient to meet the requirement for each combination of image receptor size and SID for which the unit is designed. Each such device shall have clear and permanent markings to indicate the image receptor size and SID for which it is designed; or

(iii) A beam-limiting device having multiple fixed apertures sufficient to meet the requirement for each combination of image receptor size and SID for which the unit is designed. Permanent, clearly legible markings shall indicate the image receptor size and SID for which each aperture is designed and shall indicate which aperture is in position for use.

(g) *Positive beam limitation (PBL).* The requirements of this paragraph shall apply to radiographic systems which contain PBL.

(1) *Field size.* When a PBL system is provided, it shall prevent x-ray production when:

(i) Either the length or width of the x-ray field in the plane of the image receptor differs from the corresponding image receptor dimension by more than 3 percent of the SID; or

(ii) The sum of the length and width differences as stated in paragraph (g)(1)(i) of this section without regard to sign exceeds 4 percent of the SID.

(iii) The beam limiting device is at an SID for which PBL is not designed for sizing.

(2) *Conditions for PBL.* When provided, the PBL system shall function as described in paragraph (g)(1) of this section whenever all the following conditions are met:

(i) The image receptor is inserted into a permanently mounted cassette holder;

(ii) The image receptor length and width are less than 50 centimeters;

(iii) The x-ray beam axis is within ±3 degrees of vertical and the SID is 90 centimeters to 130 centimeters inclusive; or the x-ray beam axis is within ±3 degrees of horizontal and the SID is 90 centimeters to 205 centimeters inclusive;

(iv) The x-ray beam axis is perpendicular to the plane of the image receptor to within ±3 degrees; and

(v) Neither tomographic nor stereoscopic radiography is being performed.

(3) *Measuring compliance.* Compliance with the requirements of paragraph (g)(1) of this section shall be determined when the equipment indicates that the beam axis is perpendicular to the plane of the image receptor and the provisions of paragraph (g)(2) of this section are met. Compliance shall be determined no sooner than 5 seconds after insertion of the image receptor.

(4) *Operator initiated undersizing.* The PBL system shall be capable of operation such that, at the discretion of the operator, the size of the field may be made smaller than the size of the image receptor through stepless adjustment of the field size. Each dimension of the minimum field size at an SID of 100 centimeters shall be equal to or less than 5 centimeters. Return to PBL function as described in paragraph (g)(1) of this section shall occur automatically upon any change of image receptor size or SID.

(5) *Override of PBL.* A capability may be provided for overriding PBL in case of system failure and for servicing the system. This override may be for all SIDs and image receptor sizes. A key shall be required for any override capability that is accessible to the operator. It shall not be possible to remove the key while PBL is overridden. Each such key switch or key shall be clearly and durably labeled as follows:

For X-ray Field Limitation System Failure

The override capability is considered accessible to the operator if it is referenced in the operator's manual or in other material intended for the operator or if its location is such that the operator would consider it part of the operational controls.

(h) *Field limitation and alignment for spot-film devices.* The following requirements shall apply to spot-film devices, except when the spot-film device is provided for use with a radiation therapy simulation system:

(1) Means shall be provided between the source and the patient for adjustment of the x-ray field size in the plane of the image receptor to the size of that portion of the image receptor which has been selected on the spot-film selector. Such adjustment shall be accomplished automatically when the x-ray field size in the plane of the image receptor is greater than the selected portion of the image receptor. If the x-ray field size is less than the size of the selected portion of the image receptor, the field size shall not open automatically to the size of the selected portion of the image receptor unless the operator has selected that mode of operation.

(2) Neither the length nor the width of the x-ray field in the plane of the image receptor shall differ from the corresponding dimensions of the selected portion of the image receptor by more than 3 percent of the SID when adjusted for full coverage of the selected portion of the image receptor. The sum, without regard to sign, of the length and width differences shall not exceed 4 percent of the SID. On spot-film devices manufactured after February 25, 1978, if the angle between the plane of the image receptor and beam axis is variable, means shall be provided to indicate when the axis of the x-ray beam is perpendicular to the plane of the image receptor, and compliance shall be determined with the beam axis indicated to be perpendicular to the plane of the image receptor.

(3) The center of the x-ray field in the plane of the image receptor shall be aligned with the center of the selected portion of the image receptor to within 2 percent of the SID.

(4) Means shall be provided to reduce the x-ray field size in the plane of the image receptor to a size smaller than the selected portion of the image receptor such that:

(i) For spot-film devices used on fixed-SID fluoroscopic systems which are not required to, and do not provide stepless adjustment of the x-ray field, the minimum field size, at the greatest SID, does not exceed 125 square centimeters; or

(ii) For spot-film devices used on fluoroscopic systems that have a variable SID and/or stepless adjustment of the field size, the minimum field size, at the greatest SID, shall be containable in a square of 5 centimeters by 5 centimeters.

(5) A capability may be provided for overriding the automatic x-ray field size adjustment in case of system failure. If it is so provided, a signal visible at the fluoroscopist's position shall indicate whenever the automatic x-ray field size adjustment override is engaged. Each such system failure override switch shall be clearly labeled as follows:

For X-ray Field Limitation System Failure

(i) *Source-skin distance*—(1) X-ray systems designed for use with an intraoral image receptor shall be provided with means to limit the source-skin distance to not less than:

(i) Eighteen centimeters if operable above 50 kVp; or

(ii) Ten centimeters if not operable above 50 kVp.

(2) Mobile and portable x-ray systems other than dental shall be provided with means to limit the source-skin distance to not less than 30 centimeters.

(j) *Beam-on indicators.* The x-ray control shall provide visual indication whenever x-rays are produced. In addition, a signal audible to the operator shall indicate that the exposure has terminated.

(k) *Multiple tubes.* Where two or more radiographic tubes are controlled by one exposure switch, the tube or tubes which have been selected shall be clearly indicated before initiation of the exposure. This indication shall be both on the x-ray control and at or near the tube housing assembly which has been selected.

(l) *Radiation from capacitor energy storage equipment.* Radiation emitted from the x-ray tube shall not exceed:

(1) An air kerma of 0.26 mGy (vice 0.03 mR exposure) in 1 minute at 5 centimeters from any accessible surface of the diagnostic source assembly, with the beam-limiting device fully open, the system fully charged, and the exposure switch, timer, or any discharge mechanism not activated. Compliance shall be determined by measurements averaged over an area of 100 square centimeters, with no linear dimension greater than 20 centimeters; and

(2) An air kerma of 0.88 mGy (vice 100 mR exposure) in 1 hour at 100 centimeters from the x-ray source, with the beam-limiting device fully open, when the system is discharged through the x-ray tube either manually or automatically by use of a discharge switch or deactivation of the input power. Compliance shall be determined by measurements of the maximum air kerma per discharge multiplied by the total number of discharges in 1 hour (duty cycle). The measurements shall be averaged over an area of 100 square centimeters with no linear dimension greater than 20 centimeters.

(m) *Primary protective barrier for mammography x-ray systems*—(1) For x-ray systems manufactured after September 5, 1978, and before September 30, 1999, which are designed only for mammography, the transmission of the primary beam through any image receptor support provided with the system shall be limited such that the air kerma 5 centimeters from any accessible surface beyond the plane of the image receptor supporting device does not exceed 0.88 μGy (vice 0.1 mR exposure) for each activation of the tube.

(2) For mammographic x-ray systems manufactured on or after September 30, 1999:

(i) At any SID where exposures can be made, the image receptor support device shall provide a primary protective barrier that intercepts the cross section of the useful beam along every direction except at the chest wall edge.

(ii) The x-ray system shall not permit exposure unless the appropriate barrier is in place to intercept the useful beam as required in paragraph (m)(2)(i) of this section.

(iii) The transmission of the useful beam through the primary protective barrier shall be limited such that the air kerma 5 centimeters from any accessible surface beyond the plane of the primary protective barrier does not exceed 0.88 μGy (vice 0.1 mR exposure) for each activation of the tube.

(3) Compliance with the requirements of paragraphs (m)(1) and (m)(2)(iii) of this section for transmission shall be determined with the x-ray system operated at the minimum SID for which it is designed, at the maximum rated peak tube potential, at the maximum rated product of x-ray tube current and exposure time (mAs) for the maximum rated peak tube potential, and by measurements averaged over an area of 100 square centimeters with no linear dimension greater than 20 centimeters. The sensitive volume of the radiation measuring instrument shall not be positioned beyond the edge of the primary protective barrier along the chest wall side.

4. Revise § 1020.32 to read as follows:

§ 1020.32 Fluoroscopic equipment.

The provisions of this section apply to equipment for fluoroscopic imaging and for radiographic imaging when images are recorded from the fluoroscopic image receptor except computed tomography x-ray systems manufactured on or after November 29, 1984.

(a) *Primary protective barrier*—(1) *Limitation of useful beam.* The fluoroscopic imaging assembly shall be provided with a primary protective barrier which intercepts the entire cross section of the useful beam at any SID. The x-ray tube used for fluoroscopy shall not produce x-rays unless the barrier is in position to intercept the entire useful beam. The AKR due to transmission through the barrier with the attenuation block in the useful beam combined with radiation from the fluoroscopic image receptor shall not exceed 3.34×10^{-3} percent of the entrance AKR, at a distance of 10 centimeters from any accessible surface of the fluoroscopic imaging assembly beyond the plane of the image receptor. Radiation therapy simulation systems shall be exempt from this requirement provided the systems are intended only for remote control operation and the manufacturer sets forth instructions for assemblers with respect to control location as part of the information required in § 1020.30(g). Additionally, the manufacturer shall provide to users, under § 1020.30(h)(1)(i), precautions concerning the importance of remote control operation.

(2) *Measuring compliance.* The AKR shall be measured in accordance with paragraph (d) of this section. The AKR due to transmission through the primary barrier combined with radiation from the fluoroscopic image receptor shall be determined by measurements averaged over an area of 100 square centimeters with no linear dimension greater than 20 centimeters. If the source is below the tabletop, the measurement shall be made with the input surface of the fluoroscopic imaging assembly positioned 30 centimeters above the tabletop. If the source is above the tabletop and the SID is variable, the measurement shall be made with the end of the beam-limiting device or spacer as close to the tabletop as it can be placed, provided that it shall not be closer than 30 centimeters. Movable grids and compression devices shall be removed from the useful beam during the measurement. For all measurements, the attenuation block shall be positioned in the useful beam 10 centimeters from the point of measurement of entrance AKR and between this point and the input surface of the fluoroscopic imaging assembly.

(b) *Field limitation*—(1) *Angulation.* For fluoroscopic equipment manufactured after February 25, 1978, when the angle between the image receptor and the beam axis of the x-ray beam is variable, means shall be provided to indicate when the axis of the x-ray beam is perpendicular to the plane of the image receptor. Compliance with paragraphs (b)(4) and (b)(5) of this section shall be determined with the

beam axis indicated to be perpendicular to the plane of the image receptor.

(2) *Further means for limitation.* Means shall be provided to permit further limitation of the x-ray field to sizes smaller than the limits of paragraphs (b)(4) and (b)(5). Beam-limiting devices manufactured after May 22, 1979, and incorporated in equipment with a variable SID and/or the capability of a visible area of greater than 300 square centimeters shall be provided with means for stepless adjustment of the x-ray field. Equipment with a fixed SID and the capability of a visible area of no greater than 300 square centimeters shall be provided with either stepless adjustment of the x-ray field or with a means to further limit the x-ray field size at the plane of the image receptor to 125 square centimeters or less. Stepless adjustment shall, at the greatest SID, provide continuous field sizes from the maximum obtainable to a field size containable in a square of 5 centimeters by 5 centimeters. This paragraph does not apply to nonimage-intensified fluoroscopy.

(3) *Nonimage-intensified fluoroscopy.* The x-ray field produced by nonimage-intensified fluoroscopic equipment shall not extend beyond the entire visible area of the image receptor. Means shall be provided for stepless adjustment of field size. The minimum field size, at the greatest SID, shall be containable in a square of 5 centimeters by 5 centimeters.

(4) *Fluoroscopy and radiography using the fluoroscopic imaging assembly with inherently circular image receptors.* (i) For fluoroscopic equipment manufactured before [date 1 year after date of publication of the final rule in the **Federal Register**], other than radiation therapy simulation systems, the following applies:

(A) Neither the length nor the width of the x-ray field in the plane of the image receptor shall exceed that of the visible area of the image receptor by more than 3 percent of the SID. The sum of the excess length and the excess width shall be no greater than 4 percent of the SID.

(B) For rectangular x-ray fields used with circular image receptors, the error in alignment shall be determined along the length and width dimensions of the x-ray field which pass through the center of the visible area of the image receptor.

(ii) For fluoroscopic equipment manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**], other than radiation therapy simulation systems, the maximum area of the x-ray field in the plane of the image receptor shall conform with one of the following requirements:

(A) When the visible area of the image receptor is less than or equal to 34 cm in any direction: (1) At least 80 percent of the x-ray field overlaps the visible area of the image receptor, or (2) at least 80 percent of the air kerma integrated over the x-ray field is incident on the area of the image receptor.

(B) When the visible area of the image receptor is greater than 34 cm in any direction, the x-ray field measured along the direction of greatest misalignment with the visible area of the image receptor shall not extend beyond the visible area of the image receptor by more than a total of 2 cm.

(5) *Fluoroscopy and radiography using the fluoroscopic imaging assembly with inherently rectangular image receptors.* For x-ray systems manufactured after [date 1 year after date of publication of the final rule in the **Federal Register**]:

(i) Neither the length nor the width of the x-ray field in the plane of the image receptor shall exceed that of the visible area of the image receptor by more than 3 percent of the SID. The sum of the excess length and the excess width shall be no greater than 4 percent of the SID.

(ii) The error in alignment shall be determined along the length and width dimensions of the x-ray field which pass through the center of the visible area of the image receptor.

(6) *Override capability.* If the fluoroscopic x-ray field size is adjusted automatically as the SID or image receptor size is changed, a capability may be provided for overriding the automatic adjustment in case of system failure. If it is so provided, a signal visible at the fluoroscopist's position shall indicate whenever the automatic field adjustment is overridden. Each such system failure override switch shall be clearly labeled as follows:

For X-ray Field Limitation System Failure

(c) *Activation of tube.* X-ray production in the fluoroscopic mode shall be controlled by a device which requires continuous pressure by the operator for the entire time of any exposure. When recording serial fluoroscopic images, the operator shall be able to terminate the x-ray exposure(s) at any time, but means may be provided to permit completion of any single exposure of the series in process.

(d) *Air kerma rates.* For fluoroscopic equipment, the following requirements apply:

(1) *Fluoroscopic equipment manufactured before May 19, 1995*— (i) Equipment provided with automatic exposure rate control (AERC) shall not be operable at any combination of tube potential and current that will result in an AKR in excess of 88 mGy per minute (vice 10 R/min exposure rate) at the measurement point specified in § 1020.32(d)(3), except as specified in § 1020.32(d)(1)(v) of this section.

(ii) Equipment provided without AERC shall not be operable at any combination of tube potential and current that will result in an AKR in excess of 44 mGy per minute (vice 5 R/min exposure rate) at the measurement point specified in § 1020.32(d)(3), except as specified in § 1020.32(d)(1)(v) of this section.

(iii) Equipment provided with both an AERC mode and a manual mode shall not be operable at any combination of tube potential and current that will result in an AKR in excess of 88 mGy per minute (vice 10 R/min exposure rate) in either mode at the measurement point specified in § 1020.32(d)(3), except as specified in § 1020.32(d)(1)(v) of this section.

(iv) Equipment may be modified in accordance with § 1020.30(q) to comply with § 1020.32(d)(2). When the equipment is modified, it shall bear a label indicating the date of the modification and the statement:

''Modified to comply with 21 CFR 1020.32(d)(2).''

(v) Exceptions:

(A) During recording of fluoroscopic images, or

(B) When a mode of operation has an optional high-level control, in which case that mode shall not be operable at any combination of tube potential and current that will result in an AKR in excess of the rates specified in § 1020.32(d)(1)(i), (d)(1)(ii), or (d)(1)(iii) at the measurement point specified in § 1020.32(d)(3), unless the high-level control is activated. Special means of activation of high-level controls shall be required. The high-level control shall be operable only when continuous manual activation is provided by the operator. A continuous signal audible to the fluoroscopist shall indicate that the high-level control is being employed.

(2) *Fluoroscopic equipment manufactured on or after May 19, 1995*— (i) Shall be equipped with AERC if operable at any combination of tube potential and current that results in an AKR greater than 44 mGy per minute (vice 5 R/min exposure rate) at the measurement point specified in § 1020.32(d)(3). Provision for manual selection of technique factors may be provided.

(ii) Shall not be operable at any combination of tube potential and current that will result in an AKR in excess of 88 mGy per minute (vice 10

R/min exposure rate) at the measurement point specified in § 1020.32(d)(3), except as specified in § 1020.32(d)(2)(iii) of this section:

(iii) Exceptions:

(A) For equipment manufactured prior to [date 1 year after date of publication of the final rule in the **Federal Register**], during the recording of images from a fluoroscopic image receptor using photographic film or a video camera when the x-ray source is operated in a pulsed mode.

(B) For equipment manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**], during the recording of images from the fluoroscopic image receptor for the purpose of providing the user with an image(s) after termination of the exposure. However, the archiving of fluoroscopic or radiographic images through the recording of such images in analog format with a video-tape or video-disc recorder does not qualify as an exception.

(C) When a mode of operation has an optional high-level control and the control is activated, in which case the equipment shall not be operable at any combination of tube potential and current that will result in an AKR in excess of 180 mGy per minute (vice 20 R/min exposure rate) at the measurement point specified in §1020.32(d)(3). Special means of activation of high-level controls shall be required. The high-level control shall be operable only when continuous manual activation is provided by the operator. A continuous signal audible to the fluoroscopist shall indicate that the high-level control is being employed.

(3) *Measuring compliance.* Compliance with paragraph (d) of this section shall be determined as follows:

(i) If the source is below the x-ray table, the AKR shall be measured at 1 centimeter above the tabletop or cradle.

(ii) If the source is above the x-ray table, the AKR shall be measured at 30 centimeters above the tabletop with the end of the beam-limiting device or spacer positioned as closely as possible to the point of measurement.

(iii) In a C-arm type of fluoroscope, the AKR shall be measured at 30 centimeters from the input surface of the fluoroscopic imaging assembly, with the source positioned at any available SID, provided that the end of the beam-limiting device or spacer is no closer than 30 centimeters from the input surface of the fluoroscopic imaging assembly.

(iv) In a C-arm type of fluoroscope having an SID less than 45 cm, the AKR shall be measured at the minimum SSD.

(v) In a lateral type of fluoroscope, the air kerma rate shall be measured at a point 15 centimeters from the centerline of the x-ray table and in the direction of the x-ray source with the end of the beam-limiting device or spacer positioned as closely as possible to the point of measurement. If the tabletop is movable, it shall be positioned as closely as possible to the lateral x-ray source, with the end of the beam-limiting device or spacer no closer than 15 centimeters to the centerline of the x-ray table.

(4) *Exemptions.* Fluoroscopic radiation therapy simulation systems are exempt from the requirements set forth in paragraph (d) of this section.

(e) [Reserved]

(f) *Indication of potential and current.* During fluoroscopy and cinefluorography, x-ray tube potential and current shall be continuously indicated. Deviation of x-ray tube potential and current from the indicated values shall not exceed the maximum deviation as stated by the manufacturer in accordance with § 1020.30(h)(3).

(g) *Source-skin distance.* (1) Means shall be provided to limit the source-skin distance to not less than 38 centimeters on stationary fluoroscopes and to not less than 30 centimeters on mobile and portable fluoroscopes. In addition, for fluoroscopes intended for specific surgical application that would be prohibited at the source-skin distances specified in this paragraph, provisions may be made for operation at shorter source-skin distances but in no case less than 20 centimeters. When provided, the manufacturer must set forth precautions with respect to the optional means of spacing, in addition to other information as required in § 1020.30(h).

(2) For mobile or portable C-arm fluoroscopic systems manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**], having a maximum source-image receptor distance of less than 45 centimeters, means shall be provided to limit the source-skin distance to not less than 19 centimeters. Such systems shall be labeled for extremity use only. In addition, for those systems intended for specific surgical application that would be prohibited at the source-skin distances specified in this paragraph, provisions may be made for operation at shorter source-skin distances but in no case less than 10 centimeters. When provided, the manufacturer must set forth precautions with respect to the optional means of spacing, in addition to other information as required in § 1020.30(h).

(h) *Fluoroscopic irradiation time, display, and signal.* (1)(i) Fluoroscopic equipment manufactured before [date 1 year after date of publication of the final rule in the **Federal Register**], shall be provided with means to preset the cumulative on-time of the fluoroscopic tube. The maximum cumulative time of the timing device shall not exceed 5 minutes without resetting. A signal audible to the fluoroscopist shall indicate the completion of any preset cumulative on-time. Such signal shall continue to sound while x-rays are produced until the timing device is reset. Fluoroscopic equipment may be modified in accordance with § 1020.30(q) to comply with the requirements of § 1020.32(h)(2). When the equipment is modified, it shall bear a label indicating the statement:

''Modified to comply with 21 CFR 1020.32(h)(2).''

(ii) As an alternative to the requirements of this paragraph, radiation therapy simulation systems may be provided with a means to indicate the total cumulative exposure time during which x-rays were produced, and which is capable of being reset between x-ray examinations.

(2) For x-ray controls manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**], there shall be provided for each fluoroscopic tube:

(i) A display of the value and units of the irradiation time from the beginning of a patient examination or procedure. This display shall be visible at the fluoroscopist's working position throughout the examination or procedure and after it ends. The display shall be able to be reset to zero prior to the commencement of a new examination or procedure, and it shall function independently of the audible signal described in § 1020.32(h)(2)(ii).

(ii) A signal audible to the fluoroscopist shall indicate the passage of irradiation time during an examination or procedure. The signal shall sound for at least one second at each interval of 5-minutes duration of irradiation time.

(i) *Mobile and portable fluoroscopes.* In addition to the other requirements of this section, mobile and portable fluoroscopes shall provide an image receptor incorporating more than a simple fluorescent screen.

(j) *Display of last image hold (LIH).* Fluoroscopic equipment manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**], shall be equipped with means to display an LIH radiograph following termination of the fluoroscopic exposure.

(1) For an LIH radiograph obtained by retaining pretermination fluoroscopic images, if the number of images and method of combining images are selectable by the user, the selection shall be indicated prior to initiation of the fluoroscopic exposure.

(2) For an LIH radiograph obtained by initiating a separate radiographic exposure, if the techniques factors for the radiographic exposure are selectable prior to the exposure, the combination selected must be indicated prior to initiation of the fluoroscopic exposure.

(3) Means shall be provided to clearly indicate to the user whether a displayed image is the LIH radiograph or fluoroscopy. Display of the LIH radiograph shall be replaced by the fluoroscopic image concurrently with reinitiation of fluoroscopic exposure, unless separate displays are provided for the LIH radiograph and fluoroscopic images.

(4) The predetermined or selectable options for producing the LIH radiograph shall be described in the information required by § 1020.30(h). The information shall include a description of any applicable technique factors for the selected option and the impact of the selectable options on image characteristics and radiation dose.

(k) *Displays of values of AKR and cumulative air kerma.* Fluoroscopic equipment manufactured on or after [date 1 year after date of publication of the final rule in the **Federal Register**], shall display at the fluoroscopist's working position values of AKR and cumulative air kerma. The following requirements apply for each x-ray tube used during an examination or procedure:

(1) The value displayed for AKR shall be in units of mGy/min and shall represent the air kerma per unit time during fluoroscopy and while recording during fluoroscopy.

(2) The value displayed for cumulative air kerma shall be in units of mGy; shall include all contributions generated from fluoroscopic and radiographic radiation; shall represent the total air kerma accrued from the commencement of an examination or procedure and shall be updated during the examination or procedure each time that fluoroscopic or radiographic x-ray production is deactivated.

(3) During fluoroscopy and while recording during fluoroscopy, the value and units of the AKR shall be displayed. Following fluoroscopy or radiography, the value and units of the cumulative air kerma shall be displayed.

(4) The display of the value of the AKR shall be clearly distinguishable from the display of the value of the cumulative air kerma.

(5) Values displayed for the AKR and cumulative air kerma shall be determined for conditions of free-in-air irradiation at one of the following reference locations specified according to the type of fluoroscope. The reference location shall be identified and described specifically in information provided to users according to § 1020.30(h)(6)(iii).

(i) For fluoroscopes with x-ray source below the table, x-ray source above the table, or of lateral type, the reference locations shall be the respective locations specified in § 1020.32(d)(3)(i), (d)(3)(ii), or (d)(3)(v) for measuring compliance with air-kerma rate limits.

(ii) For C-arm type fluoroscopes, the reference location shall be 15 centimeters from the isocenter toward the x-ray source along the beam axis. Alternatively, the reference location shall be along the beam axis at a point deemed by the manufacturer to represent the intersection of the x-ray beam entrance surface and the patient skin.

(6) Means shall be provided to reset to zero the values of AKR and cumulative air kerma prior to the commencement of a new examination or procedures.

(7) The AKR and the cumulative air kerma shall not deviate from their respective displayed values by more than ±25 percent.

5. Amend § 1020.33 by revising paragraph (h)(2) to read as follows:

§ 1020.33 Computed tomography (CT) equipment.

* * * * *

(h) * * *

(2) For systems that allow high voltage to be applied to the x-ray tube continuously and that control the emission of x-ray with a shutter, the radiation emitted may not exceed 0.88 milligray (vice 100 milliroentgen exposure) in 1 hour at any point 5 centimeters outside the external surface of the housing of the scanning mechanism when the shutter is closed. Compliance shall be determined by measurements average over an area of 100 square centimeters with no linear dimension greater than 20 centimeters.

* * * * *

Dated: July 25, 2002.

Margaret M. Dotzel,

Associate Commissioner for Policy.

[FR Doc. 02–30550 Filed 12–9–02; 8:45 am]

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Part VIII

Department of Housing and Urban Development

24 CFR Part 941
Public Housing Total Development Cost; Final Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Part 941

[Docket No. FR–4489–F–02]

RIN 2577–AC05

Public Housing Total Development Cost

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Final rule.

SUMMARY: This final rule amends HUD's regulations governing the Total Development Cost (TDC) limit for the development of public housing. The amendments implement statutory changes made to the TDC limit previously established by statute. Among other changes, this final rule limits the amount of public housing capital assistance that a public housing agency may use to pay for housing construction costs. The rule also provides that demolition and environmental hazard remediation costs are subject to the TDC limit only to the extent that such costs are associated with the replacement of public housing units on the project site. Further, the final rule provides that other extraordinary site costs, as determined by HUD, are not subject to the TDC limit. This rule follows publication of a January 4, 2001, proposed rule and takes into consideration the public comments received on the proposed rule.

DATES: Effective Date: January 9, 2003.

FOR FURTHER INFORMATION CONTACT: William C. Thorson, Director, Office of Capital Improvements, Office of Public and Indian Housing, Room 4134, U.S. Department of Housing and Urban Development, 451 Seventh St., SW., Washington, DC 20410; telephone (202) 708–1640, extension 4999 (this is not a toll-free telephone number). Hearing- or speech-impaired individuals may access this number via TTY by calling the toll-free Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

The United States Housing Act of 1937 (42 U.S.C. 1437 *et seq.*) (1937 Act) establishes the statutory framework for HUD's public housing and various other assisted housing programs. The 1937 Act authorizes HUD to assist public housing agencies (PHAs) with the development and operation of public housing projects, and sets forth several requirements regarding public housing development. Two such statutory requirements regarding the development of public housing are found in sections 3(c)(1) and 6(b) of the 1937 Act.

Section 3(c)(1) of the 1937 Act (42 U.S.C. 1437a(c)(1)) defines the terms ''development'' and ''development cost.'' Specifically, section 3(c)(1) defines ''development'' to mean any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment, in connection with a low-income housing project. The term ''low-income housing project'' includes public housing assisted under the 1937 Act.

(a) Prior to the enactment of the Quality Housing and Work Responsibility Act of 1998 (QHWRA) (Public Law 105–276, approved October 21, 1998), section 3(c)(1) defined the term ''development cost'' to mean:

The costs incurred by a [PHA] in such [development] undertakings and their necessary financing (including the payment of carrying charges), and in otherwise carrying out the development of such [low income housing] project.

(b) Following the enactment of section 520(a) of QHWRA, the definition of ''development cost'' was amended to exclude:

The costs associated with the demolition of or remediation of environmental hazards associated with public housing units that will not be replaced on the project site, or other extraordinary site costs as determined by the Secretary.

This final rule amends the Department's public housing development regulations at 24 CFR part 941 to implement section 520(a) of QHWRA. Specifically, HUD has listed the excluded development costs referenced above in a newly defined term called ''Additional Project Costs.'' The rule then provides at § 941.306(b)(3) that Additional Project Costs are not subject to the TDC limit.

(a) Under section 6(b)(1) of the 1937 Act (42 U.S.C. 1437d(b)(1)), loans or other contributions provided under the 1937 Act for the development of public housing may not be used to pay a total ''development cost'' in excess of the amount calculated under section 6(b)(2), unless otherwise authorized by HUD. This amount determined under section 6(b)(2) is referred to as the total development cost (TDC) limit.

(b) Section 520(b) of QHWRA added a new section 6(b)(3) to the 1937 Act, which states that in calculating the TDC limit, HUD:

Shall consider only capital assistance provided by the Secretary to a public housing agency that are [sic] authorized for use in connection with the development of public housing, and shall exclude all other amounts, including amounts provided under [the HOME or CDBG programs.]

HUD has implemented the above amendment by adding a definition of the term ''public housing capital assistance'' to distinguish between those funds that are subject to the TDC limit, and other funding sources. HUD has defined the term ''public housing capital assistance'' to mean assistance provided by HUD under the 1937 Act or the HOPE VI program in connection with the development of public housing under 24 CFR part 941, including Capital Funds provided under section 9(d) of the 1937 Act, public housing development funds under section 5 of the 1937 Act, Operating Fund assistance used for capital purposes under section 9(g)(1) or 9(g)(2) of the 1937 Act, and HOPE VI grant funds.

(c) Section 520(b) of QHWRA added a new section 6(b)(4) to the 1937 Act, which provides that HUD may restrict the amount of capital funds that a PHA may use to pay for housing construction costs, including ''the actual hard costs for the construction of units, builders'' overhead and profit, utilities from the street, and finish landscaping.''

In this final rule, HUD has included definitions of the terms ''Housing Construction Cost'' (HCC) and ''Community Renewal Cost'' (CRC) to clarify the relationship between these two separate subcategories of costs that are subject to the TDC limit. The definitions of HCC and CRC should also clarify the relationship between these costs and Additional Project Costs which, as noted earlier, are not subject to the TDC limit. Substantively, the definitions of Housing Construction Cost and Community Renewal Cost are almost identical to those previously subsumed under the definition of ''Total Development Cost'', as set forth in HUD's January 4, 2001, proposed rule (66 FR 1008).

The Department also has included a definition of the term ''Total Development Cost (TDC) limit'' rather than ''Total Development Cost'' as provided in the proposed rule. The TDC limit is defined to mean the maximum amount of public housing capital assistance that can be used to pay for Housing Construction Costs and Community Renewal Costs in connection with the development of a public housing project, as determined under § 941.306(b)(2). The rule also provides that the TDC limit does not apply to Additional Project Costs. These modifications are intended merely to clarify the Department's existing policies with respect to the TDC limit, rather than to establish new policies.

II. This Final Rule

As previously discussed, HUD published a proposed TDC rule on January 4, 2001 (66 FR 1008), that sought to amend the Department's public housing development regulations at 24 CFR part 941 relating to the calculation of TDC limits, in accordance with section 520 of QHWRA. This final rule implements section 520 of QHWRA after giving due consideration to comments received during the 60-day public comment period.

The preamble of the proposed rule summarized the major amendments that would be made to part 941 by this final rule. The most significant changes made by this final rule to the January 4, 2001, proposed rule are discussed above in Section I of this preamble. The Department has also made the following changes in this final rule:

1. *Revision of the definition of Community Renewal Cost (CRC).* This final rule includes on-site street improvements as a Community Renewal Cost, rather than as a Housing Construction Cost (HCC). It was a mistake in the proposed rule because site improvements are in the community renewal part of the TDC limit.

2. *Revision to HCC applicability.* This final rule provides that acquisition with/without rehabilitation of existing homes is not subject to the HCC, although it is subject to the TDC limit. When a unit is acquired it is completely developed. There is no way to breakdown the HCC from the TDC limit.

3. *Revision to example of extraordinary site costs.* This final rule removes construction of extensive street and other public improvements as an example of extraordinary site costs that are not subject to the TDC limit. These costs are included in the Community Renewal part of the TDC limit under site improvements.

4. *Clarification of HUD notification to changes to cost indices.* This final rule also clarifies that any changes HUD makes to the cost indices as listed in § 941.306 will be announced through a notice published in the **Federal Register**.

5. *Exceptions to TDC.* This final rule clarifies that PHAs are eligible to request a TDC exception for public housing and HOPE VI funds awarded to HOPE VI grantees in FY 1996 and prior years. However, there will be no exceptions granted for the HCC component within the TDC limits. Also, HUD will not grant any exceptions to the TDC limits for public housing and HOPE VI funds awarded in FY 1997 and afterwards.

III. Public Comments Generally

The public comment period for the proposed rule closed on March 5, 2001. HUD received five comments. Three of the commenters expressed concern regarding the proposed changes to the TDC limit and that the changes may affect PHAs' ability to meet the supportive service needs of public housing households. All five commenters offered suggestions to further clarify and strengthen the rule in order to better serve the community. Supportive services are not a development cost that would be covered by the TDC in any case. The 15% cap on community and supportive services for the HOPE VI program is mandated by statute, and does not apply to non-HOPE VI programs, *i.e.*, public housing development.

IV. Discussion of Public Comments Received on the January 4, 2001, Proposed Rule

Comment: (a) The TDC cap should only apply to relocation costs associated with a pro-rata share of the units to be developed on site. (b) The rule should define fair housing-related relocation costs as extraordinary costs, subject to exclusion from the TDC under the definition of ''Total Development Cost'' in the proposed 24 CFR 941.103. The commenter stated that the language of section 3(c)(1) gives considerable discretion to HUD to fashion such a rule. Another commenter stated that such a rule is well within the grant of statutory authority.

HUD Response: Relocation costs are covered under the Community Renewal Cost subcategory. This is not a policy change because relocation costs have always been subject to the TDC limit. However, the statute mandates that HUD use a construction cost guideline based on the average of at least two nationally recognized construction cost indices for publicly bid construction of a good and sound quality. These cost guidelines (which take into account local adjustment factors), are then multiplied by a factor of 1.6 or 1.75 for elevator and non-elevator structures, respectively. The Department believes that these statutory multipliers are adequate to cover relocation costs. Therefore, HUD did not change how relocation costs are treated and these costs remain subject to the TDC limit. HUD also did not change the regulation to include fair housing-related relocation costs as extraordinary site costs and thus exclude them from the TDC limit. Unusual site conditions, such as extensive rock removal, are listed as an Additional Project Cost and, thus, are not subject to the TDC limit.

Comment: (a) Although permitted by statute, HUD has decided to prohibit requests to exceed the TDC limits. HUD is using an arbitrary number, the statutory multipliers, to calculate the Community Renewal Cost. (b) HUD should retain provisions of existing rules that allow exceptions to the TDC limit, and use exception authority to approve a higher TDC limit for extraordinary fair housing-related relocation costs on a case-by-case basis. The commenter stated that HUD must be flexible towards housing authorities that have, for example, extraordinary costs for demolition and site remediation as a result of mandatory conversion, or extraordinary relocation costs. Another commenter suggested to review the current 24 CFR 941.306(a) and retain those provisions that allow exceptions to the TDC limit.

HUD Response: In 1997–1998 HUD had undertaken an intensive process of analysis and consultation with construction industry groups. The participating groups consisted of the National Association of Housing and Redevelopment Officials (NAHRO), Public Housing Authorities Director Association (PHADA), and Council of Large Public Housing Authorities (CLPHA), to establish appropriate cost limits. This TDC limit represents true construction costs and, therefore, does not foresee circumstances under which an exception would be warranted.

The rule does implement section 520 of QHWRA by revising the definition of the TDC limit to exclude the costs of demolition, or of remediation of environmental hazards associated with public housing units that will not be replaced on the project site, or other extraordinary site costs as determined by HUD. For example, if a PHA is demolishing a 300-unit public housing project and putting only 100 new public housing units back on site, only one-third of the costs of demolition and site remediation will be used in calculating whether the development costs of the public housing units are within the TDC limit. Extraordinary site costs, such as removal of extensive underground utility systems, which have been verified by an independent engineer, are not included in the TDC. Also, the rule permits exceptions to be granted by the Secretary for HOPE VI grantees in Fiscal Year 1996 and earlier years. However, exceptions to the HCC limit within the TDC will not be granted.

Comment: HUD should establish mechanisms for vigorous oversight of relocation requirements, including civil rights-related requirements, for all

public housing developments, including HOPE VI and non-HOPE VI development. The commenter wrote that the TDC limit might have important consequences in other contexts related to relocation. The commenter additionally stated that the formula potentially masks the actual costs of relocation, and it may result in a loss of hard units where the actual costs of conversion, including relocation, exceed the cost of keeping the public housing.

HUD Response: The oversight of HUD relocation requirements is not part of this rulemaking. HUD does not believe an adjustment is merited for relocation. As noted, the Department believes that the statutory multipliers are adequate to cover relocation costs and, therefore, relocation costs remain subject to the TDC limit.

Comment: (a) The broad wording of the proposed rule may have the unintended effect of subjecting two (if not more) important sources of supportive services and relocation funds to the TDC limit: grants received by PHAs from the Resident Opportunities and Self Sufficiency (ROSS) program, and Section 8 rental assistance. (b) HUD should amend the definition of ''Total Development Cost'' to state that the TDC does not include community and supportive services. The commenter noted that both programs use funds provided by HUD under the Act. Further, such a result conflicts with previous HUD practice. Additionally, if Section 8 allocations and ROSS grants were subject to the TDC, the community renewal portion of the cap would be rapidly expended, leaving PHAs with few tools to adequately accomplish relocation or provide supportive services. Another commenter stated that examples of such services should include (a) job training activities, (b) day care, (c) transportation, (d) educational activities, (e) case management, (f) Section 8 counseling, (g) after school programs, and (f) health programs.

HUD Response: HUD agrees with the commenter. The TDC limit, as stated in the proposed rule and in this final rule, does not include community and supportive services. The Department has clarified in this final rule that only public housing capital assistance (as defined at § 941.103) is subject to the TDC limit. HOPE VI funds used for community and supportive services are capped at a percentage or amount as stated in the NOFA of the HOPE VI grant. This is the result of statutory requirements in the HOPE VI program and not this TDC rulemaking. Section 8 allocations and ROSS funds are not subject to the TDC limit.

*Comment: Section 6(b) of the U.S. Housing Act states that, ''[i]n calculating the total development cost of a project * * * the Secretary shall consider only capital assistance * * *'' 42 U.S.C. 1437d(b)(3). No funds for capital assistance provided by HUD under the Act or the HOPE VI program should be used to pay development costs in excess of the TDC.* The commenter stated that the proposed rule is far broader, stating that any funds provided under the Act may not be expended in excess of the TDC limit. The commenter stated that this provision should be added as an amendment to 24 CFR 941.306(d). The only sources of financial support specifically exempted from the TDC limit involve funds not provided under the Act: Community Development Block Grants (CDBG), HOME funds, low-income housing tax credits, private donations and private funding. *See*, proposed 24 CFR 941.306(d).

HUD Response: HUD agrees with the commenter that section 6(b)(1) of the 1937 Act extends the TDC limit to capital assistance under the Act provided by HUD in connection with the development of public housing. Accordingly, in this final rule, the Department defines the term ''public housing capital assistance'' to mean assistance provided by HUD under the Act or the HOPE VI program in connection with the development of public housing under this part, including Capital Fund assistance provided under section 9(d) of the 1937 Act, public housing development assistance provided under section 5 of the 1937 Act, Operating Fund assistance used for capital purposes under section 9(g)(1) or 9(g)(2) of the 1937 Act, and HOPE VI grant assistance.

The Department has included all HOPE VI grant funds in the definition of ''public housing capital assistance,'' regardless of whether the funds are authorized and appropriated under the 1937 or under annual appropriations acts. Thus, all HOPE VI funds will be subject to the TDC limit. This position is consistent with HUD's policy that public housing units developed with HOPE VI funds—regardless of whether the funds are authorized and appropriated under the 1937 Act or under annual appropriations acts—must be developed in accordance with the requirements of the 1937 Act.

However, in accordance with section 6(b)(3) of the 1937 Act (as added by section 520(b) of QHWRA), all other funds are excluded from the TDC limit, including funds from CDBG, HOME, low-income tax credits, private donations, and private financing. The Department implements this requirement at § 941.306(b)(4) of this final rule.

Comment: A PHA may use funding sources not subject to the TDC limit to cover project costs that exceed the Housing Construction Cost limit or the TDC limit. A commenter suggested this language as a clarifying revision to the proposed 24 CFR 941.306(d).

HUD Response: HUD agrees with the commenter that a PHA may use funding sources not subject to the TDC limit (such as CDBG funds, HOME funds, low-income tax credits, private donations, and private financing) to cover project costs that exceed the Housing Construction Cost limit or the TDC limit. The rule at § 941.306(b)(4) already states this.

Comment: (a) HUD has not updated the current TDC limits in two years. (b) HUD should update its TDC at least annually based on appropriate cost indexes. The commenter stated that without more frequent updates PHAs are forced to comply with outdated TDC construction indices without the benefit of the previous method of adjusting for inflation by ''trending.'' Another commenter noted that the documents published in the **Federal Register** show figures from 1999 or earlier. The commenter stated that agencies need up-to-date, competitive figures to develop projects with other public or private sectors partners. Another commenter wrote that the Department should also make available by advance notice the construction cost guidelines it will use each year to recalculate the TDC limits.

HUD Response: HUD agrees that the schedule of unit TDC limits should be recalculated annually and it intends to do so based on revisions to the national indices. HUD will issue such updates through PIH notice, or other appropriate means.

In a Senate colloquy before passage of the QHWRA Senator Mack noted that HUD ''should interpret (section 6(b)(2) of the 1937 Act) as requiring the use of indices such as the R.S. Means cost index for construction of ''average'' quality and the Marshall & Swift cost index for construction of ''good'' quality'' (Congressional Record of October 8, 1998, S 11840). The rule specifies that HUD will be using these two indices to calculate the TDC limits. HUD expects to rely on these indices but will notify the public in advance through **Federal Register** notice if it changes the cost indices to other such indices that reflect comparable housing construction quality.

Comment: HUD has not included in its policy a provision for acquisition of

units for public housing, with or without rehabilitation. The commenter asked how HUD would fit these activities into its TDC policy, as proposed.

HUD Response: Acquisition of units of public housing is a development method that is covered under this rule (*see* § 941.102) and, accordingly, is subject to the standard TDC limits set forth in this rule. However, as noted earlier, the Department has decided not to extend the Housing Construction Cost limit to such units, since these units have already been developed at the time of acquisition.

Comment: HUD states it will be able to better understand and control the actual costs of the development if the TDC is divided into the Housing Construction Cost limit (HCC) and the Community Renewal Cost (CRC) limit. The commenter wrote that this suggests that HUD will be performing analysis of construction costs in some manner. The commenter further suggested that these studies be made available to housing agencies and other interested parties to ensure that the TDC policy remains a fair and equitable methodology, and that there is an opportunity for input into HUD's decision making.

HUD Response: HUD believes that it will have better control of the actual costs of development by dividing the TDC into two components, i.e., the HCC and the CRC, and that by doing so housing construction costs can be monitored more closely. There is less chance of inflated construction costs if there is a check to limit the construction costs to the average quality of construction. HUD will be able to detect any cost inflation due to extraordinary structure design or amenities. HUD does not plan to do any analysis at this time but if it decides to do so at a later date the results will be made available to PHAs and other interested parties.

Comment: (a) A workable TDC formula must be comprehensive, realistic, and flexible. The TDC must also be constructed to reflect the real context and environment in which capital construction and development occurs. (b) HUD's rule must incorporate the means to respond to the inherent differences and fluctuations that impact construction and development costs. The commenter wrote that in order to accommodate the wide spectrum of activities covered by the rule, the formula has to account for the full range of cost factors that are intrinsic to such activities, whether carried out by PHAs or private development entities. Another commenter wrote that the fluctuations should be considered given the breadth of the rule in terms of the activities covered and the various construction markets it covers.

HUD Response: The TDC limits are developed in accordance with the statute. The statute mandates that HUD use a construction cost guideline based on the average of at least two nationally recognized residential construction cost indices for publicly bid construction of good and sound quality. Then, this construction cost guideline (which already takes into account local market and other adjustment factors) is multiplied by a factor of 1.6 or 1.75 for elevator and non-elevator structures, respectively, to establish the TDC limit. HUD has established 403 market areas nationwide for purposes of calculating the TDC limits. The use of multiple market areas ensures that local market, environment and other adjustment factors are reflected in the TDC limits for the particular area in which the units are to be constructed.

Comment: The TDC calculation must be formulated in a manner that permits PHAs to be fairly compared to other affordable housing producers. The commenter wrote that this factor has been increasingly important, as the criticism of PHA housing costs have escalated over the past several years.

HUD Response: The TDC limit is required by statute to be based on ''not less than two nationally recognized residential construction cost indices, for publicly bid construction of a good and sound quality''. HUD will use the R. S. Means cost index for construction of ''average'' quality and the Marshall & Swift cost index for construction of ''good'' quality to calculate the construction cost guideline. (HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through **Federal Register** notice.) These indices will permit PHAs to be fairly compared to other affordable housing producers.

Comment: The inclusion of planning costs in TDC is not appropriate. The commenter wrote that generally, owners do not include such predevelopment costs in their development costs pro formas. The commenter further noted that if the intent is to manage the cost of planning activities, which in some cases apparently have become exorbitant, then HUD should address this matter more directly.

HUD Response: The Department disagrees with this comment, since it is inconsistent with the statutory definition of ''development'' in section 3(c)(1) of the 1937 Act, which expressly includes ''* * * all undertakings necessary for planning * * * [the public housing] project.'' In this final rule, such costs are covered as part of the Community Renewal Cost subcategory. Community Renewal Costs represent the difference between the Housing Construction Cost limit and the TDC limit.

Comment: (a) The TDC formula does not take into consideration several significant and essential costs of capital improvement and/or redevelopment projects. (b) Dividing the TDC into ''housing construction costs'' and ''community renewal costs'' would restrict the ability to do development with HUD funding. The commenter wrote that the discussion of the elements included in ''housing construction'' or ''community renewal'' costs include design fees, accounting and legal fees, financing fees, or marketing/lease-up costs. Additionally, absent from the list of costs is the reserve generally required due to the appropriation risk of the public housing operating subsidy. Another commenter wrote that its experience has been that the full TDC has not been adequate to cover all of development costs. If only a fraction of the TDC can be used in the future, then new development may not be possible.

HUD Response: The TDC limit is a statutory cap on the amount of public housing capital assistance (as defined in this rule) that can be spent on identified development costs related to a public housing project. It is not intended to address operating costs, reserves, or other line items relating to the management phase of the project. The one exception to this relates to the funding of initial operating deficits incurred while the project is still in the development phase. These costs are considered to be a development cost and, as a result, are subject to the TDC limit (under the CRC subcategory). However, there is no limit on funds such as CDBG, HOME, low-income tax credits, private donations, and private financing to cover project costs that exceed the housing cost cap or the maximum TDC limit, or to fund costs related to the management phase of the project, *e.g.*, funding of operating reserves.

Comment: The language permitting waivers should not be deleted. The commenter wrote that HUD's failure to acknowledge that waivers may be necessary to accommodate the varying facts and circumstances of PHAs is extremely shortsighted.

HUD Response: HUD disagrees with the commenter. HUD will not grant any exceptions to the TDC limits for public housing and HOPE VI funds awarded in FY 1997 and afterwards. By allowing exceptions or waivers, HUD will not

succeed in its mission of providing affordable housing to the maximum number of low-income families. A PHA can (under the circumstances stated in the rule) use non-public housing sources of funding to cover costs that exceed the TDC limit. Further, a PHA will be eligible to request a TDC exception for Public Housing and HOPE VI funds awarded to HOPE VI grantees in Fiscal Year 1996 and prior years. However, no exceptions to the HCC limits within TDC will be granted.

Comment: In the proposed rule, HUD is decreasing the already-insufficient amount of public housing funding that can be used for construction. The commenter wrote that HUD has arbitrarily divided the TDC amount into ''housing construction costs'' allocation and the ''community renewal'' allocation. The costs for housing construction cannot exceed the average R.S. Means and Marshall & Swift estimated construction costs. The commenter noted that the community renewal allocation could not be used for construction.

HUD Response: HUD disagrees with the commenter that it has arbitrarily divided the TDC limit into a HCC subcategory and a CRC subcategory. On the contrary, the Housing Construction Cost subcategory limit is derived by multiplying the construction cost guideline (which itself is determined by averaging two nationally recognized residential construction cost indices, as required by section 6(b)(2) of the 1937 Act) by the number of public housing units for each bedroom size and structure type in the project and adding the resulting figures.

The TDC limit is established by multiplying the Housing Construction Cost limit by the applicable multiplier (*i.e.*, 1.6 or 1.75 depending on whether the project is an elevator or non-elevator structure), as mandated by the statute. As previously noted, the CRC limit represents the difference between the HCC limit and the TDC limit. Community renewal allocations can be used for the construction of maintenance or management facilities for the project.

Comment: The proposed rule removes what little flexibility was in the TDC process, by revoking HUD's authority to approve costs 5–10% above the TDC. The commenter noted that under the old regulations HUD allowed trending to adjust the TDC construction indices to compensate for inflation and allowed the TDCs to be exceeded by 5% at the field office level or exceed by up to 10% at the Secretary's level. The commenter further noted that flexibility is needed to adjust TDCs for inflation between the time of TDC publication and the initial fund reservation and the actual start of construction, and to compensate for unforeseen and unavoidable extra costs.

HUD Response: HUD intends to transmit an updated schedule of unit TDC limits every year, thus there is no need for trending adjustments. A PHA is required to use the TDC limits in effect at the time of closing.

Comment: The proposed rule does not clearly address and may prevent future development through direct acquisition of existing homes. One commenter wrote that the ''housing construction costs'' allocation of the TDC is too low to allow the purchase of existing homes in the Twin Cities housing market. The commenter noted further that even the full TDC is very hard to work with in this market.

HUD Response: HUD agrees with the commenter that the HCC subcategory of the TDC limit should not be applicable to the acquisition of existing homes because items included in the sale of an existing home, like cost of land and other development costs, are included in the CRC subcategory limit. Therefore, HUD has amended the final rule at § 941.306(c)(3) to state that for acquisition with or without rehabilitation of existing homes, only the overall TDC is applicable and not the HCC cost limit.

Comment: The proposed rule would further concentrate low-income housing in impacted areas. The commenter wrote that the low funding levels provided by these TDC regulations would mean that the only vacant sites and existing homes that will be affordable for development would be in lower income census tracts.

HUD Response: HUD disagrees. Based on the Department's experience with the HOPE VI program and other public housing development activity, units have been constructed in mixed-income communities since it first revised the TDC policy in 1999 through a HUD Notice.

Comment: The Housing Construction Cost (HCC) subcategory of the TDC limit includes finish landscaping (trees, grass, fencing, walkways, etc.) in the per-unit cost equation; conversely, the two indices used to derive the HCC (RS Means and Marshall & Swift) exclude finish landscaping from the per unit cost equation. The commenter wrote that there should be categorizations of costs associated with finish landscaping as a Community Renewal Cost.

HUD Response: HUD disagrees with the commenter because national construction cost indices include landscaping around the structure. Additional landscaping is included under the Community Renewal Cost subcategory of the TDC limit.

Comment: The HCC subcategory of the TDC limit includes utilities from the street in the per-unit cost equation; conversely, the two indices used to derive the HCC (RS Means and Marshall & Swift) exclude utility tap fees from the per unit cost equation. The commenter wrote that there should be categorizations of the utility tap fees as a Community Renewal Cost or an extraordinary site cost.

HUD Response: HUD disagrees with the commenter because the Community Renewal Cost subcategory of the TDC limit includes the cost of bringing the utilities from the street to the site, which covers utility tap fees. Therefore, no separate categorization of this item is necessary.

Comment: The two indices used to derive the HCC (RS Means and Marshall & Swift) exclude the cost of on-site streets, driveways, and garages from the per-unit cost equation, yet many local jurisdictions require the provision of off-street parking. The commenter wrote that there should be categorization of any costs associated with the provision of jurisdictional mandated off-street parking as a Community Renewal Cost.

HUD Response: The Community Renewal Cost subcategory of the TDC limit includes site improvements that cover site streets, driveways, curb and gutters, off-street parking and landscaping. Therefore, there is no need for separate categorization of these items as suggested by the commenter.

Comment: The two indices used to derive the HCC (RS Means and Marshall & Swift) exclude any allowances for the extra cost associated with Americans with Disabilities Act (ADA) accessible and ADA adaptable units. The commenter suggested establishing an allowance for the added cost associated with ADA accessible and ADA adaptable units.

HUD Response: Generally, only five percent of public housing units must meet accessibility and adaptable unit standards. Costs to meet these requirements generally fall within the TDC limit. For this reason, the Department has not modified the rule in response to this comment.

Comment: The two indices used to derive the HCC (RS Means and Marshall & Swift) exclude any allowances for energy efficient windows, insulating building materials, and energy efficient mechanical systems. Additionally, the Marshall and Swift moderate climate energy package includes a ''weighting of single and double glazing.'' The use of single glazing and less efficient mechanical systems is in direct

opposition to Energy Conservation Measures outlined in 24 CFR 965.301. The commenter suggested including an allowance of between 5–10% of the HCC for the installation of energy efficient glazing, insulating building materials, and high-efficiency mechanical systems.

HUD Response: HUD disagrees with the commenter because the national construction cost indices consider the National Building Codes, Fire and Safety codes, and Energy Codes in their construction cost determination. For this reason, the Department has not modified the rule in response to this comment.

V. Findings and Certifications

Regulatory Planning and Review

The Office of Management and Budget (OMB) reviewed this rule under Executive Order 12866, *Regulatory Planning and Review.* OMB determined that this rule is a ''significant regulatory action'' as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order). Any changes made to this rule as a result of that review are identified in the docket file, which is available for public inspection in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Environmental Impact

A Finding of No Significant Impact (FONSI) with respect to the environment was made in accordance with HUD regulations in 24 CFR part 50 that implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332) at the proposed rule stage. That Finding remains applicable and is available for public inspection between 7:30 a.m. and 5:30 p.m. weekdays in the Office of the Rules Docket Clerk, Office of General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW., Washington, DC 20410–0500.

Federalism Impact

Executive Order 13132 (entitled ''Federalism'') prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial direct compliance costs on state and local governments and is not required by statute, or the rule preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive Order. This final rule would not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive Order.

Regulatory Flexibility Act

The Secretary, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605(b)) (the RFA), has reviewed and approved this final rule and in so doing certifies that this rule will not have a significant economic impact on a substantial number of small entities. The reasons for HUD's determination are as follows:

(1) *A Substantial Number of Small Entities Will Not be Affected.* The final rule is exclusively concerned with public housing agencies that receive capital assistance provided by HUD for the development of public housing. The final rule would update HUD's public housing development regulations at 24 CFR part 941 to incorporate the statutory amendments made by section 520 of the QHWRA. Under the definition of ''small governmental jurisdiction'' in section 601(5) of the RFA, the provisions of the RFA are applicable only to those few public housing agencies that are part of a political jurisdiction with a population of fewer than 50,000 persons. The number of entities potentially affected by this rule is therefore not substantial.

(2) *No Significant Economic Impact.* The final regulatory amendments will not change the amount of capital funding available to public housing agencies for the development of public housing. Accordingly, the economic impact of this rule will not be significant, and it will not affect a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments, and the private sector. This final rule does not impose any federal mandates on any state, local, or tribal governments or the private sector within the meaning of Unfunded Mandates Reform Act of 1995.

List of Subjects in 24 CFR Part 941

Grant programs—housing and community development, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

Accordingly, for the reasons stated in the preamble, HUD amends 24 CFR part 941 as follows:

PART 941—PUBLIC HOUSING DEVELOPMENT

1. The authority citation for 24 CFR part 941 continues to read as follows:

Authority: 42 U.S.C. 1437b, 1437c, 1437g, and 3535(d).

2. Revise § 941.102(b)(3) to read as follows:

§ 941.102 Development methods and funding.

* * * * *

(b) * * *

(3) Funds available to it from any other source, consistent with § 941.306(e), or as may be otherwise approved by HUD.

* * * * *

3. In § 941.103, add, in alphabetical order, definitions of the terms *''Additional Project Costs (APC)'', ''Community Renewal Cost (CRC)'', ''Housing Construction Cost (HCC)'',* and *''Public housing capital assistance''* and revise the definition of *''Total development cost (TDC)''* to read as follows:

§ 941.103 Definitions.

* * * * *

Additional Project Costs (APC) means the sum of the following HUD-approved costs related to the development of a public housing project, which costs are not subject to the Total Development Cost limit but are included in the maximum project cost, as described in § 941.306:

(1) Demolition of, or remediation of environmental hazards associated with, public housing units that will not be replaced on the site; and

(2) Extraordinary site costs that have been verified by an independent registered engineer (*e.g.*, removal of underground utility systems, and replacement of off-site underground utility systems, extensive rock and/or soil removal and replacement, and amelioration of unusual site conditions such as unusual slopes, terraces, water catchments, lakes, etc.)

* * * * *

Community Renewal Cost (CRC) means the sum of the following HUD-approved costs related to the development of a public housing project: planning (including proposal preparation), administration, site acquisition, relocation, demolition of, and site remediation of environmental hazards associated with, public housing units that will be replaced on the project site, interest and carrying charges, off-site facilities, community buildings and non-dwelling facilities, contingency allowance, insurance premiums, any

initial operating deficit, on-site streets, on-site utilities, and other costs necessary to develop the project that are not covered under APC or Housing Construction Cost.

* * * * *

Housing Construction Cost (HCC) means the sum of the following HUD-approved costs related to the development of a public housing project: dwelling unit hard costs (including construction and equipment); builder's overhead and profit; the cost of extending utilities from the street to the public housing project; finish landscaping; and the payment of Davis-Bacon wage rates.

* * * * *

Public housing capital assistance means assistance provided by HUD under the Act or the HOPE VI program in connection with the development of public housing under this part, including: Capital Fund assistance provided under section 9(d) of the Act, public housing development assistance provided under section 5 of the Act, Operating Fund assistance used for capital purposes under section 9(g)(1) or (g)(2) of the Act, and HOPE VI grant assistance.

* * * * *

Total Development Cost (TDC) limit. The maximum amount of public housing capital assistance that can be used to pay for Housing Construction Costs and Community Renewal Costs in connection with the development of a public housing project, as determined under § 941.306(b)(2). The TDC limit does not apply to Additional Project Costs.

4. Revise § 941.306 to read as follows:

§ 941.306 Maximum project cost.

(a) *Calculation of maximum project cost.* The maximum project cost represents the total amount of public housing capital assistance used in connection with the development of a public housing project, and includes: (1) project costs that are subject to the TDC limit (*i.e.*, Housing Construction Costs and Community Renewal Costs); and (2) project costs that are not subject to the TDC limit (*i.e.*, Additional Project Costs). The total project cost to be funded with public housing capital assistance, as set forth in the proposal and as approved by HUD, becomes the maximum project cost stated in the ACC. Upon completion of the project, the actual project cost is determined based upon the amount of public housing capital assistance expended for the project, and this becomes the maximum project cost for purposes of the ACC.

(b) *TDC limit.* (1) Public housing capital assistance may not be used to pay for Housing Construction Costs and Community Renewal Costs in excess of the TDC limit, as determined under paragraph (b)(2) of this section. However, HOPE VI grantees will be eligible to request a TDC exception for public housing and HOPE VI funds awarded in Fiscal Year 1996 and prior years. No exceptions to HCC limits will be granted within the TDC limit.

(2) *Determination of TDC limit.* HUD will determine the TDC for a public housing project as follows:

(i) *Step 1: Unit construction cost guideline.* HUD will first determine the applicable ''construction cost guideline'' averaging the current construction costs as listed in two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of ''average'' quality and the Marshal & Swift cost index for construction of ''good'' quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the **Federal Register**.

(ii) *Step 2: Bedroom size and structure types.* The construction cost guideline is then multiplied by the number of units for each bedroom size and structure type.

(iii) *Step 3: Elevator and non-elevator type structures.* HUD will then multiply the resulting amounts from step 2 by 1.6 for elevator type structures and by 1.75 for non-elevator type structures.

(iv) *Step 4: TDC limit.* The TDC limit for a project is calculated by adding the resulting amounts from step 3 for all the public housing units in the project.

(3) *Costs not subject to the TDC limit.* Additional Project Costs are not subject to the TDC limit described in paragraph (b)(2) of this section.

(4) *Funds not subject to the TDC limit.* A PHA may use funding sources not subject to the TDC limit (*e.g.*, CDBG funds, HOME funds, low-income tax credits, private donations, private financing, etc.) to cover project costs that exceed the TDC limit or the Housing Construction Cost limit described in paragraph (c) of this section. Such funds, however, may not be used for items that would result in substantially increased operating, maintenance or replacement costs, and must meet the requirements of section 102 of the HUD Reform Act (42 U.S.C. 3545). These funds must be included in the project development cost budget and legally acceptable written commitments for such funds must be provided by the PHA for HUD approval.

(c) *Housing Construction Costs.* (1) *General.* A PHA may not use public housing capital assistance to pay for Housing Construction Costs in excess of the amount determined under paragraph (c)(2) of this section.

(2) *Determination of Housing Construction Cost limit.* HUD will determine the Housing Construction Cost limit as listed in at least two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of ''average'' quality and the Marshal & Swift cost index for construction of ''good'' quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the **Federal Register**. The resulting construction cost guideline is then multiplied by the number of public housing units in the project based upon bedroom size and structure type. The Housing Construction Cost limit for a project is calculated by adding the resulting amounts for all public housing units in the project.

(3) The Housing Construction Cost limit is not applicable to the acquisition of existing housing, whether or not such housing will be rehabilitated. The Total Development Cost limit is applicable to such acquisition.

(d) *Community Renewal Costs.* Public housing capital assistance may be used to pay for Community Renewal Costs in an amount equivalent to the difference between the Housing Construction Costs paid for with public housing capital assistance and the TDC limit.

(e) *Rehabilitation of existing public housing projects.* The HCC limit is not applicable and the TDC limit for modernization of existing public housing is 90% of the TDC limit as determined under § 941.306(b)(2). This limitation does not apply to the rehabilitation of any property acquired pursuant to § 941.102.

Dated: December 3, 2002.

Michael M. Liu,

Assistant Secretary for Public and Indian Housing.

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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 202–741–6043. 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.

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H.R. 2595/P.L. 107–320
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S. 1946/P.L. 107–325
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